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

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**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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MEMO: D 9/19/15

I.

PROCEDURAL HISTORY

1. The Defense filed its opposition to the application of joint criminal enterprise liability (“JCE”) before the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) on 28 July 2008.¹ A response to this opposition was filed by the Office of the Co-Prosecutors (“Prosecutors”) on 11 August 2008.² The Office of the Co-Investigating Judges (“OCIJ”) then requested supplementary submissions on this issue from all parties to Case File 002 to be filed by 31 November 2008.³ The Defense filed its supplementary observation on 24 November 2008. Subsequently, the Prosecutors filed its supplementary observation on 31 December 2008.^{4,5} The Defense filed most recently a request for sanctions on 29 June 2009, to which this submission is a direct response. Pursuant to Internal Rule 39(1), and the OCIJ’s Decision on the Prosecutor’s Request for Extension of Page Limit on 06 April 2009, a time limit does not apply to further responses. Therefore, the Civil Party Co-Lawyers’ response is timely.^{6,7}

II.

SUMMARY OF ARGUMENT

2. The Civil Party Co-Lawyers, hereby join the Prosecutor’s Response and request the Co-Investigating Judges to reject Mr. IENG Sary and his Co-Lawyers’ (“Defense”) application (“Application”) to sanction the Prosecutors on two grounds: 1) the Defense inaccurately quoted the law at issue; and 2) the evidence provided by the Defense actually supports the

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008. D97/ ERN 00208225

² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Response to IENG Sary’s Motion on Joint Criminal Enterprise, 11 August 2008. D97/II ERN 00211956

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008. D97/III ERN 00224208

⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008. D97/7 ERN 00244390

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise, 31 December 2008. D 97/8 ERN 00268566

⁶ *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 [*hereafter* Application]. D97/9 ERN 00345986

⁷ Internal Rules, Revision 3, 6 March 2009; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges’ Decision on Request for Extension of Page Limit, 06 April 2009, para. 7. D130/3 ERN 00295983

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Prosecutors' position that *common plan liability* (now known as joint criminal enterprise, JCE) was part of customary international law since at least the late 1940s.^{8,9}

III.

DEFENDANT MISQUOTED THE ILC REPORT WHICH, WHEN ACCURATELY STATED, ESTABLISHED THAT THE NÜRNBERG PRINCIPLES CONCERNING JCE WERE CONSIDERED AND ADOPTED BY THE INTERNATIONAL LAW COMMISSION

A. The ILC Report recognizes *common plan liability* as part of the Nürnberg Principles

3. The Defense hinged its entire argument on the fact that *common plan liability* was not one of the recognized principles of the International Law Commission Report ("ILC Report").¹⁰ When the ILC Report is quoted accurately, it emasculates the Defense's argument and ironically supports the Prosecutors' position. Part III of the actual ILC Report formulated seven principles recognized as customary international law:

- "(1) Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment [...];
- (2) The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law [...];
- (3) The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law [...];
- (4) The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him [...];
- (5) Any person charged with a crime under international law has the right to a fair trial on the facts and law [...];
- (6) The crimes hereinafter set out are punishable as crimes under international law:
 - a. Crimes against peace [...]
 - b. War crimes [...]
 - c. Crimes against humanity: [...]

⁸ Previously, some Civil Parties had filed a Response against the application of JCE. The undersigned Co-Lawyers noted that submissions from a few Co-Lawyers do not represent the position of the all Co-Lawyers before this Court. The undersigned Co-Lawyers wish to distance themselves from such position.

⁹ *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 [*hereafter* Application]. D97/9 ERN 00345986

¹⁰ *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) [*hereafter* ICL Report].

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(7) 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 [...]. (Emphasis added)

4. As obviously stated in Principle (7) of the ILC Report, *common plan liability* has been part of international jurisprudence since at least 1950.

B. The Defense quoted the Spiropoulos Report as though it was the ILC Report.

5. The Defense, instead of quoting the principles formulated in the ILC Report, quoted in its entirety, the formulation from the Spiropoulos Report as principles recognized by customary international law in footnote 30 of its Application. The Spiropoulos Report states:

“(1) Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor 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 [...].”^{11,12} (Emphasis added)

6. Under the incorrect assumption that the formulations of the ILC Report and the Spiropoulos Report were identical, the Defense based the crux of its allegation on this egregious mistake. Specifically, the Defense completely missed Principle (7), which would dismiss the allegation that JCE was not supported by the ILC formulation of the Nürnberg Principles. Contrary to the Defense’s claim that no-where in the ILC Report is *common plan liability* recognized, Principle (7) explicitly acknowledged the concept as customary international law.

¹¹ IENG Sary’s Application, Footnote 30.

¹² Spiropoulos Report, para. 43

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C. Contrary to the Defense’s position, the Spiropoulos Report also recognizes that *common plan liability* was a widely known concept of international law as early as 1950

7. Even though the Spiropoulos Report did not formulate JCE as one of its Principles, it recognized that *common plan liability* was supported by major powers during the drafting history of the Nürnberg Charter. The Spiropoulos Report also provided extensive details regarding *common plan liability* in its comment section clarifying its first principle. Therefore, the Spiropoulos Report recognized that even prior to 1950, *common plan liability* was a concept known in international legal jurisprudence.¹³

i. Historical analysis of the Spiropoulos Report

8. In Part I “Historical Survey” of his Report, Mr. Spiropoulos noted many different accounts of “common criminal plan” were raised by representatives of the Government of France, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States during the drafting process of the Nürnberg Charter.¹⁴
9. During the first meeting, the United States’ draft contained a number of legal principles to which the proposed International Military Tribunal would have to follow. One section provides that International Military Tribunal “appl[ies] the general rule of liability that those who participate in the formulation or execution of a criminal plan involving multiple crimes are liable for each of the offences committed and responsible for the acts of each other”¹⁵
10. The Soviet’s draft Article 30 echoed the above passage, providing that “[o]rganizers, instigators and accomplices bear responsibility for the crimes set out in Article 2 of this Statute along with the perpetrators of those crimes.”¹⁶
11. The British’s draft of 20 July 1945 stated that “the Tribunal shall have power to try, convict and sentence any person who has, in any capacity whatever, directed or participated in the planning, furtherance, or conduct of any of all of the following acts, designs or attempts, namely: [...] 2. systematic atrocities against or systematic terrorism or ill-treatment or murder of civilians; 3. launching or waging war in a manner contrary to the laws, usages and customs of warfare.”¹⁷

¹³ Spiropoulos Report, para. 43

¹⁴ Id., at para. 1.

¹⁵ Id., at paras. 3 and 5.

¹⁶ Id., at para. 6.

¹⁷ Id., at para. 14.

12. Notably, the British's draft incorporated the objections raised in opposition to the French draft. The French version of 19 July 1945 provided that "the Tribunal will have jurisdiction to try any person who has, in any capacity whatsoever, *directed* the preparation and conduct of" the different crimes (emphasis added). According to Spiropoulos, objections were raised against the French's limiting criminal liability to those who "*directed*." The French's use of the sole term "*directed*" was criticized for being too narrow and thus would permit "major war criminals to escape punishment."¹⁸ The Session of 19 July 1945 suggested that, in addition to those who "*directed*," those who *took part in a plan* to further the preparation and commission of the crimes should also be subjected to trial.¹⁹ This incorporation and objection demonstrated that *common plan liability* was a crucial ingredient recognized by the international community and was acknowledged by Spiropoulos himself. The Report also acknowledged that each of the drafts above imposed liability for those who took part in a plan to further a criminal goal.

ii. Comment Section under Principle (1) of the Spiropoulos Report

13. The Spiropoulos Report also recognized, in its comment section under Principle (1), that the Nürnberg principles included some form of *common plan liability*, which was later incorporated into the comment section of Principle (7) of the final ILC Report.²⁰ Mr. Spiropoulos noted that Article 6 of the London Charter (the Statute of the Nürnberg Tribunal) provides 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."²¹ Furthermore, *common plan liability* was applied in practice at the at the Nürnberg Tribunal, Mr. Spiropoulos suggested that the Tribunal applied some complicity rule to war crimes and crimes against humanity because several defendants were convicted for giving orders resulting in atrocious and criminal acts committed by someone else.²²

¹⁸ Spiropoulos Report, para.13.

¹⁹ Id.

²⁰ ICL Report, paras. 125-127.

²¹ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945, available at: <http://www.unhcr.org/refworld/docid/3ae6b39614.html> [accessed 29 July 2009] (emphasis added).

²² Spiropoulos Report para. 43.

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D. The formulation of the Principles sets out in the Spiropolous Report has no legal authority

14. The Spiropolous Report had only an advisory role in the formulation of the Nürnberg Principles. According the Report, “it was understood that the Rapporteur should submit to the Commission a report on the Nürnberg Principles *to be discussed* at the next session of the Commission” (emphasis added).²³ Therefore, the principles presented in the Report are not the final formulation.
15. In the Second Session, the International Law Commission adopted a formulation of principles of international law of the Nürnberg Tribunal and its judgment that included Principle (7), which explicitly stated that complicity in war crimes and crimes against humanity is a crime against international law. The Commission reached such formulation despite having considered the Spiropolous Report which seemed to exclude complicity as a crime against international law, at its 44th to 49th and 54th meetings.²⁴ Therefore, the International Law Commission in reality accepted the concept that complicity in the commission of war crimes or crimes against humanity is an important principle of international jurisprudence.
16. As set forth in paragraph 36 of the Spiropolous Report and paragraph 96 of the ILC Report, it was not the task of the Commission to decide whether these principles were or were not principles of international law. The Commission merely needed to formulate them.²⁵ Therefore, by retaining Principle (7) in its Report, the ILC reaffirmed that complicity was one of the crimes originally recognized in the Nürnberg Principles.

²³ Spiropolous Report, para. 42.


²⁴ ILC Report, para. 97.

²⁵ Paragraph 36 of the Spiropolous Report provides: “The Commission began its work by discussing its task in this matter. One of the main questions in this connexion was whether or not the Commission had to ascertain to what extent the principles contained in the Charter and judgment constitute principles of international law. The conclusion of the Commission was that, since the Nurnberg principles had been affirmed by the General Assembly in its resolution 95(I) of 11 December 1946, it was not the task of the Commission to examine whether these principles were or were not principles of international law. The Commission had merely to formulate them.” Paragraph 96 of the International Law Commission Report provides: “IN the course of this consideration the question arose as to whether or not the Commission should ascertain to what extent the principles contained in the Charter and constituted principles of international law. The conclusion was that since the Nurnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission by paragraph (a) of resolution 177 (II) was not to express any appreciation of these principles as principles of international law but merely to formulate them. This conclusion was set forth in paragraph 26 of the report of the Commission on its first session, which report was approved by the General Assembly⁶ in 1949. Mr. Jean Spiropolous was appointed special Rapporteur to continue the work of the Commission on the subject and to present a report at its second session.”

IV.
CONCLUSION

17. The Civil Party Co-Lawyers request the OCIJ to reject the Defense's Application to sanction the Prosecutors. The Defense knowingly or negligently failed to quote principle (7) set out in the ILC Report which confirms that complicity in crimes against humanity and war crimes was a principle of customary international law since at least 1950. Even though *common plan liability* was not included specifically in the Spiropoulos Report as one of the principles recognized in the Nürnberg Charter, it was explained extensively in Mr. Spiropoulos' analysis that there was general consensus by the states in attendance that some form of JCE applies to war crimes and crimes against humanity.
18. WHEREFORE, the undersigned Co-Lawyers for the Civil Parties wish to join the Prosecutors' Response to IENG Sary's Application in requesting the OCIJ to reject the Defense's application and confirm our support for the Prosecutors' position on the application of JCE.

Respectfully submitted by Co-Lawyers for the Civil Parties.

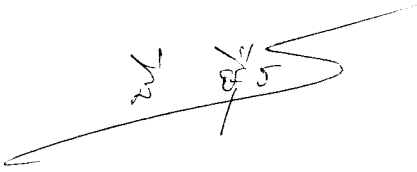

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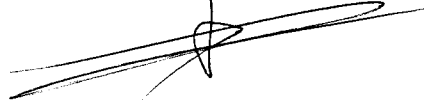
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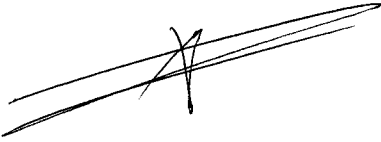


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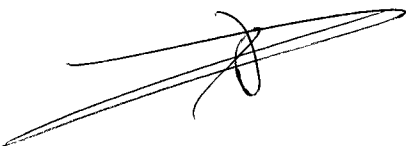
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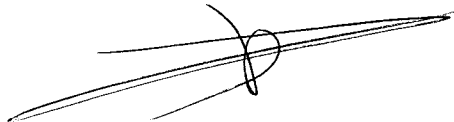
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Signed in Phnom Penh, Kingdom of Cambodia, on this 6th day of August 2009.