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BEFORE THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S MOTION ON JOINT CRIMINAL ENTERPRISE

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I. INTRODUCTION & SUMMARY OF ARGUMENT

1. IENG Sary's counsel have asked the Co-Investigating Judges not to apply Joint Criminal Enterprise ("JCE") as a mode of liability before this Court lest it casts "a wide shadow of liability" over almost all the senior-most political and military figures of Cambodia,

[names redacted]

Motion was filed days before the Co-Investigating Judges were to select a mode of liability in a separate case file.

2. Aside from seeking to alarm the public opinion and to politicize the judicial process, the Motion (1) is procedurally defective, (2) seeks relief not permitted under the Rules, and (3) questions a mode of criminal liability that, since Nuremberg, has been applied by almost all the major international tribunals – similar to this Court – that have been mandated to prosecute persons in political and military leadership responsible for mass and systematic violations of international humanitarian law. Contrary to the Defence assertion that the application at the ECCC of JCE as a theory of criminal liability will "*imply* criminal liability"[2] to all the above persons, this doctrine only assigns liability to individuals who, while sharing (as against merely knowing) a common criminal purpose with others, significantly contribute to the furtherance of that purpose with the direct intent to commit some crime(s) falling within that purpose.[3]

3. The Co-Prosecutors submit that JCE is a permissible mode of liability under the ECCC Law as it was customary international law during the entire temporal jurisdiction of this Court. Therefore, its application before this Court does not violate the principle of *nullum crimen sine lege* (literally, no crime without law).

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[1] *Case of Ieng Sary*, Ieng Sary's Motion Against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 28 July 2008, ERN 00208225–00208240, D97, p. 1 [*hereinafter* Motion].
[2] Motion, para. 30.
[3] *Prosecutor v. Brdjanin*, Judgment, IT-99-36-A, ICTY Appeals Chamber, 3 April 2007, para. 430.

II. PRELIMINARY OBJECTIONS

Motion Is Driven By Extra-Legal Considerations

4. By publicly naming the entire political leadership as likely to be *stained* by criminal liability, the Motion seeks to alarm public opinion that may prejudice the perception of the judicial proceedings of this Court. Second, the Motion, at least on its face, seeks to influence a judicial decision of the Co-Investigating Judges by asserting that should they choose JCE as a mode of liability, they may likely *spread the stain* on such senior figures. Third, like its extra-legal purpose, the Motion's timing was also seemingly aimed to influence the judicial decision-making of the Co-Investigating Judges who were imminently expected to decide on this issue in a separate case file but with a common defendant. It is otherwise unclear why the Defence chose to wait for several months to file this Motion, when according to it, what triggered the Motion was the Co-Prosecutors' press release of 18 July 2007.[4]

Rule Cited in the Motion Does Not Permit Such Motions

5. Internal Rule 53(1) ("Rules"), under which the Motion has been filed, does not permit such motions. That Rule pertains to the filing of an Introductory Submission by the Co-Prosecutors. It does not grant an actual or implied right to a Charged Person to move the Co-Investigating Judges on any ground. The Motion is, therefore, improperly filed.

Motion Seeks Inappropriate Relief

6. The Rules do not permit the Co-Investigating Judges, as the Motion has sought, to provide declaratory relief regarding the applicable law or any mode of liability. Whenever the Rules intend a judicial body to rule on the applicable law, they expressly provide this power. For example, Rule 101(5) provides the Trial Chamber the power to "set out [...] the applicable law". Rule 67(2) only requires the Co-Investigating Judges to provide a "legal characterization" of the material facts in their Closing Order. This task is limited to charging the accused with crimes and identifying modes of liability contained in the ECCC Law. It does not grant them the power to grant declaratory relief. The Motion should, therefore, be dismissed for seeking an inappropriate remedy.

[4] Motion, p. 1.

III. ARGUMENT

7. The Motion should be dismissed on the above preliminary objections alone. However, if the Motion is deemed admissible, the Co-Prosecutors request the Co-Investigating Judges to dismiss it on merits as JCE is applicable in the proceedings before the ECCC.

8. For a mode of liability to come within this Court's jurisdiction, it must satisfy the following conditions: (1) it must be provided for in this Court's basic instruments, explicitly or implicitly; (2) it must have existed under customary international law at the relevant time; (3) the law providing for the mode of liability must have been sufficiently accessible to the defendants at the relevant time; and (4) the defendants must have been able to foresee that they could be criminally liable for their actions.[5] The Co-Prosecutors shall now establish that each of these conditions is satisfied to qualify JCE as an applicable mode of liability before this Court.

ECCC Law Provides for JCE as a Valid Mode of Liability

9. The Motion contends that by explicitly excluding the JCE in the ECCC Law – a document adopted after the ICC Statute that expressly included it – this Court's founding documents rejected JCE as a mode of liability.[6] The Co-Prosecutors request the Co-Investigating Judges to reject this argument. Similar arguments before similar tribunals have been rejected.[7]

10. Article 29 of the ECCC Law provides for individual criminal responsibility of any "suspect who planned, instigated, ordered, aided and abetted, or *committed*" the crimes punishable by this Court. These five forms of direct criminal responsibility are identical to those found in the statutes of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). Each of those tribunals has held that an individual may be found to have "committed" a crime through his or her

[5] *Prosecutor v. Milutinović, et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT-99-37-AR72, ICTY Appeal Chamber, 21 May 2003, para. 21 [*hereinafter* Milutinović Decision].
[6] Motion, p. 6; Rome Statute of the International Criminal Court, art. 25(3).
[7] Milutinović Decision, paras. 13, 18.

participation in the realization of a common design or purpose.[8] An express reference to the JCE in the statute is not required for a tribunal to apply that mode of liability.[9] Given that the ECCC Law was initially adopted in August 2001 – two years after the ICTY judgment in *Tadić* that established that an individual may be found to have "committed" a crime through his or her "participation in the realization of a common design or purpose"[10] – the drafters of the ECCC Law clearly intended to include JCE within the scope of Article 29.

11. In reaching its conclusions, *Tadić* read the ICTY Statute in light of its object and purpose and noted two key contextual elements: (a) most international crimes "do not result from the criminal propensity of single individuals but constitute collective criminality" and (b) although some members of the group may physically perpetrate the criminal act, "the participation and contribution of other members of the group is often vital in facilitating the commission of the offence" and, therefore, the "moral gravity is often no less or indeed no different from that of those actually carrying out the acts".[11]

12. The notion that Article 29 of the ECCC Law encompasses JCE cannot only be inferred from the terms of that provision, but it is also supported by the object and purpose of the ECCC Law. Its Article 1 states that the "purpose" of the Law is to bring to trial "senior leaders of Democratic Kampuchea and those who were most responsible" for the crimes under that regime. This language supports the application of JCE before this Court in two ways.

13. First, it makes clear that this Court is created to prosecute *only* the "senior leaders" and those "most responsible" for the crimes committed during the Democratic Kampuchea period. This is significant because the crimes committed from 1975 to 1979 were generally not the isolated acts of individual cadres, but the result of deliberate criminal policies designed and enforced by the *Khmer Rouge*.[12] Therefore, to successfully realize its mandate to prosecute

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[8] *Prosecutor v. Gacumbitsi*, Judgment, ICTR-2001-64-A, 7 July 2006, para.158; *Prosecutor v. Fofana & Kondewa*, Judgment, Case No. SCSL-04-14-T, 2 August 2007, para.208.
[9] Milutinović Decision, para. 20.
[10] *Prosecutor v. Dusko Tadić*, Judgment, ICTY Appeals Chamber, 15 July 1999, IT-94-1-A, para. 188 [*hereinafter* Tadić Judgment].
[11] Milutinović Decision, paras. 40-41.
[12] Report of the Group of Experts for Cambodia Established Persuant to General Assembly Resolution 52/135, paras. 6, 15 [*hereinafter* UN Group of Experts Report].

the "senior leaders" and those "most responsible" for those crimes, it is critical that this Court is able to assign criminal responsibility to the individuals who created and oversaw the implementation of the *Khmer Rouge*'s criminal policies, as opposed to the individuals who simply physically perpetrated the crimes carried out pursuant to those policies.[13]

14. Second, interpreting Article 29 as including JCE is essential to effectively prosecuting the large scale international crimes falling within the jurisdiction of this Court. As explained in *Tadić*, most international crimes are carried out by groups of individuals acting in pursuance of a common criminal design. Therefore, although only some members of the group may physically perpetrate the criminal act, the participation and contribution of others is often vital in facilitating the commission of the offence, meaning that the moral gravity of such participation is no different from that of those actually perpetrating the acts in question.

15. The ECCC Law – like the statutes of similar other *ad hoc* tribunals, sets only the framework within which this Court may exercise its jurisdiction.[14] A reference to a form of liability, therefore, does not have to be expressly provided in it for it to fall in this Court's jurisdiction.[15] The ECCC Law, just as the ICTY Statute, is not and does not purport to be, unlike the Rome Statute, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto.[16] In addition, and on its face, Article 29 of the ECCC Law is non-exhaustive in nature, as suggested by the use of the phrase "or committed the crimes".[17] The Motion has not argued that it is exhaustive of all the possible modes of liability.

16. Based on an erroneous characterization of the JCE, the Motion argues that "anyone [like the political personalities named in the Motion] who exercised or exerted influence during the relevant time" can be viewed as an "un-indicted co-perpetrator".[18] This contention should be rejected. JCE is different from membership in a criminal enterprise (even when a member

[13] Tadić Judgment, para. 190.
[14] Milutinović Decision, para. 18.
[15] Milutinović Decision, para. 18.
[16] Milutinović Decision, para. 18.
[17] Milutinović Decision, para. 19.
[18] Motion, para. 32.

exercises or exerts influence in the group).[19] Membership in a criminal enterprise was criminalized as a separate offence in Nuremberg and in subsequent trials.[20] The ECCC Law does not include any such offence. Criminal liability pursuant to a JCE is not a liability for mere membership or for conspiring to commit crimes, but is concerned with the *participation* in the commission of the crime as part of a JCE.[21]

17. The Motion submits that the JCE is not applicable before this Court as it is not part of Cambodian law.[22] The Co-Prosecutors submit that once it is established that the JCE was provided under the ECCC Statute, it is inconsequential if it existed under the Cambodian law. As a special internationalized tribunal, bound by international law and custom, a domestic mode of liability shall not apply in respect of prosecution of an international crime before this Court. This Court is a unique hybrid institution, which is subject to specific rules and procedures and is not part of the hierarchy of the Cambodian courts.[23] In *Duch*, the Pre-Trial Chamber cited a number of indicia of an international court—including that it be an "expression of the will of the international community", part of "the machinery of international justice" and having a jurisdiction that "involves trying the most serious international crimes".[24] This Court satisfies those criteria. Therefore, existence of JCE under the Cambodian law is immaterial to its applicability before this Court.

JCE Existed in Customary International Law During 1975-1979

18. The Motion submits that (1) the JCE is not recognized in customary international law and (2) even if it were today it was not customary international law during 1975-1979 and (3) nor is customary international law directly applicable in Cambodian courts.[25] The Co-Prosecutors request the Co-Investigating Judges to reject these arguments.

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[19] Milutinović Decision, para. 25.
[20] Milutinović Decision, para. 25.
[21] Milutinović Decision, para. 26.
[22] Motion, p. 1.
[23] *Case of Kaing Guek Eav*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "DUCH", Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 01), 3 December 2007, paras. 18 – 20 [*hereinafter* Duch Appeals Decision].
[24] Duch Appeals Decision, paras. 18 – 20.
[25] Motion, p. 1.

19. *Tadić* concluded that the notion of acting in pursuance of a common purpose or participating in a JCE was firmly established as a mode of criminal liability in customary international law[26] and, as stated above, in the statute of the ICTY.[27] It reached this conclusion by relying on the object and purpose of the statute,[28] "the very nature of the many international crimes that are committed most commonly in wartime situations",[29] an extensive review of the post-Second World War case law,[30] some international instruments,[31] and a comparative study of the legislation of Australia, Canada, England and Wales, France, Germany, Italy, Netherlands, United States and Zambia.[32]

20. *Tadić* found that while the legislation and jurisprudence in the aftermath of the Second World War do not specifically refer to "joint criminal enterprise", the concepts of "common purpose", "common plan" used there were synonymous with JCE.[33]

21. The Co-Prosecutors submit that the finding made in *Tadić* that JCE was rooted in customary international law in 1992 applies to crimes committed during 1975-1979 also. This is evident from a review of forms of JCE-type liability employed in the prosecution of serious international crimes since the Second World War.

22. The notion that an individual member of a common plan may be held responsible for criminal acts committed by fellow participants in execution of that plan is codified in three of the foundational legal documents from the post-War period: the London Charter of the International Military Tribunal ("IMT Charter" and "IMT" respectively),[34] Control Council Law Number 10 ("Control Council Law"),[35] and the Charter of the International Military

[26] Tadić Judgment, paras. 220, 226.
[27] Tadić Judgment, paras. 190-194, 220, 226-228.
[28] Tadić Judgment, paras. 189, 191.
[29] Tadić Judgment, para. 191.
[30] Tadić Judgment, paras. 221-222.
[31] Tadić Judgment, paras. 221-222.
[32] Tadić Judgment, paras. 223-224.
[33] Milutinović Decision, Separate Opinion of Judge David Hunt, para. 5; Milutinović Decision, para. 36.
[34] London Charter of the International Military Tribunal, art. 6 [*hereinafter* IMT Charter].
[35] Control Council Law No. 10, in *Official Gazette of the Control Council for Germany* (1946), vol. 3, p. 50 [*hereinafter* Control Council Law].

Tribunal for the Far East.[36] The IMT Charter did not use the phrase "joint criminal enterprise," but referred to a defendant's participation in a "common plan or conspiracy." It criminalized participation in a "common plan or conspiracy" to commit crimes against peace.[37] It provided that a person who participated in a common plan or conspiracy to commit *any* crime under that IMT Charter could be liable for *all acts* resulting from the execution of that common plan or conspiracy.

23. Since the IMT only tried twenty-four senior Nazis, the occupying powers enacted the Control Council Law that empowered them to try additional war crimes suspects in their occupation zones. Article II(2) of the Control Council Law provided that "[a]ny person without regard to [...] the capacity in which he acted, is deemed to have committed a crime [...] if he was [...] connected with plans or enterprises involving its commission".

24. The IMT trial and those conducted pursuant to Control Council Law represent only a portion of the cases brought in the wake of the Second World War. Indeed, thousands of national prosecutions were also held.[38] This category of cases is particularly relevant to establishing the status of JCE during the period of Democratic Kampuchea because they pre-date the temporal jurisdiction of this Court and *Tadić* relied heavily on these cases in establishing that JCE was part of customary international law.[39]

25. All cases tried in the British zone of occupied Germany were tried by the British Military Court.[40] It is evident from that Court's judgments that it applied a form of JCE. In the *Essen Lynching Case,*[41] it found three civilians "guilty because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims," even though "against none of the accused was it proved that they had individually shot or

[36] Charter of the International Military Tribunal for the Far East, art. 5.
[37] IMT Charter, art. 6.
[38] *Paust et al*, International Criminal Law: Cases and Materials, 2000, pp. 633-4.
[39] Danner & Martinez, *p.* 17 (cited in Motion, para. 5).
[40] Royal Warrant – Regulations for the Trial of War Criminals, 0160/2498, 14 June 1945, available at http://www.yale.edu/lawweb/avalon/imt/imtroyal.htm.
[41] *In re Erich Heyer et al*, British Military Court for the Trial of War Criminals, Essen, (discussed at 1 United Nations Commission Law Reports for the Trials of War Criminals, United Nations War Crimes Commission 88 (1947)) [*hereinafter* Essen Lynching Case].

given the blows which caused the death."[42] The *Almelo Trial* further illustrates the concept of "criminal enterprise" liability applied by that Court.[43] In that case, the Judge Advocate explained: "If people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law."[44] In *Jespen*, the Court applied a form of JCE to assign responsibility for the murder of POWs.[45] In his summing-up, the Judge Advocate observed: "[i]f Jespen actively associated himself with and assisted other guards in a wholesale slaughter, the act of every one of those persons became the act of all.[46]

26. The American Military Tribunal at Dachau was established pursuant to a directive that specified that the term "criminal [...] includes [...] all persons who [...] have been connected with plans or enterprises involving their commission".[47] The *Borkum Island C*ase was one of the trials held by that Tribunal.[48] Although no judgment was published, the facts of the case suggest that the defendants were convicted as they were found to be "connected with plans or enterprises" involving the murder of the POWs.[49] In the *Dachau Concentration Camp Trial*, the Tribunal concluded that "there was in the camp a general system of cruelties and murders of the inmates," that "this system was practiced with the knowledge of the accused, who were members of the staff, and with their active participation," and that such a course of conduct constituted "acting in pursuance of a common design to violate the laws and usages of war."[50] In a similar vein in the *Mauthausen Camp Case*,[51] the United States General

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[42] Essen Lynching Case, p. 91.
[43] *Almelo Trial*, Trial of Otto Sandrock and Three Others, British Military Court for the Trial of War Criminals (discussed in the Law Reports for the Trials of War Criminals, United Nations War Crimes Commission (1949)) [*hereinafter* Almelo Trial].
[44] Almelo Trial, p. 40.
[45] *Gustav Alfred Jespen*, British Military Court, Luneburg, Judgment, 24 August 1946, 5 Journal of International Criminal Justice, March 2007, p. 228 [*hereinafter* Jespen Judgment].
[46] Jespen Judgment, p. 229.
[47] Directive on the Identification and Apprehension of Persons Suspected of War Crimes or Other Offenses and Trial of Certain Offenders, 8 July 1945, Copy No. 26, JCS. 1023/10, art. 3, available at http://www.yale.edu/lawweb/avalon/imt/imtjcs.htm [*hereinafter* Directive].
[48] Tadić Judgment, para. 210.
[49] Directive, art. 3.
[50] *Dachau Concentration Camp Trial*, Trial of Martin Gottfried Weiss and Thirty-Nine Others, General Military Government Court of the United States Zone, *reprinted in* Law Reports of Trials of War Criminals, United Nations War Crimes Commission, 1947, p. 14 [*hereinafter* Dachau Concentration Camp Trial].
[51] General Military Government Court of the U.S. Zone, Dachau, Germany, 29 March-l3 May 1946 (discussed in Dachau Concentration Camp Trial, p. 15-16).

Military Government Court made three "special findings": (i) that the running of the camp was a criminal enterprise; (ii) that every official who was employed or merely present in the camp at any time must have been aware of the common design, *i.e.* of the criminality of the enterprise; and (iii) that every official who was engaged in the operation of this criminal enterprise "in any manner whatsoever" was guilty of a violation of the laws and usages of war.[52]

27. In discussing the foundations of JCE, *Tadić* also analyzed a series of cases decided by Italian municipal courts, applying Italian law. In *D'Ottavio,*[53] for example, the Italian Court of Cassation applied Article 116 of the Italian Criminal Code that provided that: "[w]henever the crime committed is different from that willed by one of the participants, that participant also answers for the crime, if the fact is a consequence of his action or omission."[54]

28. *Tadić* highlighted that many nations – including both common law and civil law jurisdictions – embrace forms of liability similar to the JCE. For example, France has, at least since 1947, applied the notion of "co-perpetration," which holds that if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all liable for that offence.[55] However, in its review of domestic systems that apply some form of "common purpose" liability, *Tadić* emphasized that "reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems," not to support the holding that the doctrine exists in customary international law.[56] *Milutinović* later held that the recognition of JCE-type liability in domestic legislation helps support a finding that an accused had sufficient notice that he or she could be convicted under such a form of liability.[57]

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[52] Dachau Concentration Camp Trial, p. 15.
[53] *D'Ottavio*, Italian Court of Cassation, Criminal Section I, Judgment of 12 March 1947, No. 270, *reprinted in* 5 Journal of International Criminal Justice 232, March 2007 [*hereinafter* D'Ottavio Decision].
[54] D'Ottavio Decision, p. 233.
[55] Tadić Judgment, paras. 224.
[56] Tadić Judgment, para. 225.
[57] Milutinović Decision, para. 41.

29. *Tadić* established that not only the notion of JCE *per se* but also its objective and subjective elements were part of customary international law during the Yugoslav conflict in the early 1990s. It cited no significant jurisprudential development between the period of Democratic Kampuchea and the early 1990s. The only two instruments it cited that post-date the Democratic Kampuchea period are the International Convention for the Suppression of Terrorist Bombings and the Rome Statute of the International Criminal Court ("ICC"). Each of these instruments contains a form of "common purpose" liability.[58] Since *Tadić,* JCE has been applied in numerous cases, among others, before the ICTY, ICTR, SCSL and Special Panels for Serious Crimes of East Timor.

30. JCE, therefore, was firmly entrenched in customary international law before 1975 and it remains so to this day. In addition, since Article 29 of the statute of this *sui generis* Court provides its own modes of liability that emanate from customary international law, it is inconsequential, contrary to what the Motion contends, whether or not customary international law is directly applicable in municipal courts of Cambodia.[59]

Application of JCE Does Not Violate Principle of Legality

31. The Motion contends that JCE was not applicable in Cambodia during the temporal jurisdiction of this Court and, therefore, its application now would violate the principle of *nullum crimen sine lege* or the principle of legality.[60] The Co-Prosecutors request the Co-Investigating Judges to reject this argument.

32. The ECCC Law incorporates Article 15(1) of the International Covenant on Civil and Political Rights ("ICCPR") that provides that no one shall be held guilty of any act that did not constitute a criminal offence, under national or international law, at the time when it was committed. Article 15(2), however, ensures that Article 15(1) is not interpreted as a barrier to international criminal liability: "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by the community of nations."

[58] Tadić Judgment, paras. 221-3.
[59] Motion, p. 1.
[60] Motion, p. 1.

33. The principle of legality is essentially a "principle of justice".[61] It requires that both the crime and the form of liability with which a defendant is charged existed and were foreseeable at the time of the alleged crimes. Therefore, it must be established (i) that the JCE existed under Cambodian law or was part of customary international law as of 1975; and (ii) that this Court's defendants had sufficient notice that their participation in a JCE would entail criminal responsibility for acts committed pursuant to it.

34. In considering the principle of legality a tribunal must be satisfied that the applicable criminal liability was sufficiently foreseeable and that the law providing for it was sufficiently accessible at the relevant time.[62] This, however, does not prevent the tribunal from "interpreting or clarifying the elements of a particular crime", nor does it preclude a progressive development of the law.[63]

35. An individual may be deemed to have sufficient notice that the acts committed by him or her would attract criminal responsibility under JCE on the following considerations: (i) the nature and gravity of the atrocities committed; and (ii) the existence of judicial decisions, international instruments and domestic legislation recognizing a form of liability similar to JCE.[64] These factors were present in respect of the crimes of the Democratic Kampuchea regime. First, these crimes currently under investigation in this case can be considered the most egregious violations of international humanitarian law seen in the world since the Second World War.[65] Second, the series of instruments and judgments emanating from the post-Second World War efforts to prosecute war criminals, coupled with the broad use of JCE-type liability in both common law and civil law systems, are sufficient to support a finding that defendants before this Court had notice that participation in a JCE would entail criminal liability for the crimes committed pursuant to, or as a reasonably foreseeable consequence of, that enterprise during 1975-1979.

[61] Milutinović Decision, para. 37.
[62] Milutinović Decision, para. 37.
[63] Milutinović Decision, para. 38.
[64] Milutinović Decision, paras. 39-42.
[65] UN Group of Experts Report, para. 1.

36. Contrary to what the Motion argues, it is not relevant for the present determination whether JCE existed in the (Cambodian) national jurisdiction at the time the crimes were committed.[66] Regardless, the foreseeability and accessibility of the JCE to the defendants during Democratic Kampuchea can be inferred from the fact that the Penal Code of 1956 ("Penal Code") generally supports the concepts underlying JCE.

37. The Penal Code, which was applicable during 1975-1979, has several articles that deal with the requirements of group liability: (1) co-action; (2) complicity; and (3) co-authorship.[67] It divides crimes involving more than one perpetrator into two categories: "co-action" and "complicity."[68] To qualify as a co-actor, an accused must voluntarily and directly participate in the commission of a crime. The Penal Code provides a definition of criminal "co-authorship". It states that there exists a plurality of authors when two or more persons "confer or consult" regarding the commission of a crime.[69] When the actions of a second person amount only to aiding or assisting, such person is considered an accomplice rather than a co-author.

38. JCE as a mode of criminal liability was, therefore, sufficiently foreseeable and accessible to the Charged Persons when the charged crimes were committed.

IV. CONCLUSION & REQUEST

39. The Co-Prosecutors submit that the Motion is inadmissible as it has identified no basis in the Rules and, indeed, there is none. Further, its objections are based solely on speculation about the Co-Prosecutors' prosecution strategy. It also attempts to politicize the judicial process by seeking to create a factually and legally unjustified fear of prosecution of named current political personalities in order seemingly to discourage the Co-Investigating Judges from using an internationally recognized mode of criminal liability before this Court. Such action has the potential of destabilizing the judicial proceedings for which the Cambodian people

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[66] Milutinović Decision, para. 39.
[67] Penal Code of 1956, arts. 82, 145. [*hereinafter* Penal Code].
[68] Penal Code, art. 82.
[69] Penal Code, art. 145.

and the international community have waited for a long time. Therefore, the Motion should be dismissed on these grounds alone.

40. In the alternative, if the Motion is considered to be admissible, then the Co-Prosecutors request the Co-Investigating Judges to dismiss it on its merits as JCE in all its forms is a valid mode of liability applicable before this Court.

CHEA Leang
Co-Prosecutor

William SMITH
Deputy Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this eleventh day of August 2008.