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IENG SARY'S MOTION AGAINST THE APPLICATION OF COMMAND RESPONSIBILITY AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), pursuant to Rule 55(10) of the ECCC Internal Rules ("Rules"), hereby moves against the application of command responsibility at the ECCC. This motion is made necessary because: a.) command responsibility is not a form of liability recognized in Cambodian law; b.) command responsibility was not part of customary international law at the relevant time;[1] and c.) even if the ECCC could apply customary international law and command responsibility liability were part of customary international law at the time, its application would violate the principle of *nullum crimen sine lege*.

I. ADMISSIBILITY OF THIS REQUEST

1. Rule 55(10) allows the parties to request the OCIJ to make such orders or take such investigative action as they consider useful or necessary for the investigation.[2] The OCIJ previously stated that IENG Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise ("JCE Motion")[3] should properly have been considered under Rule 55(10).[4] The present motion is similar to the JCE motion: it requests that a form of liability that does not exist in Cambodian law and did not exist in customary international law at the relevant time not be applied at the ECCC. Unlike JCE, which is not mentioned explicitly in the Establishment Law, command responsibility is provided for by Article 29 of the Establishment Law. However, the present Motion does not request declaratory relief.[5]

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[1] The Defence maintains its previously stated opinion that the ECCC may not directly apply customary international law. This argument will not be restated herein, because of the lack of pages available to make this request. For an explanation of the reasons why the ECCC may not apply customary international law, *see Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 35), IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5, ERN: 00429213-00429253 ("JCE Appeal"), paras. 25-35; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940 ("Genocide Motion"), paras. 17-20, 25-30.

[2] The OCIJ has noted that unlike the English version of the Rule, which requires that the requested order or investigative action be "necessary," the French version merely states that it must be "useful." *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056, fn. 23 ("JCE Order").

[3] *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.

[4] JCE Order, para. 8.

[5] When the Defence requested that the OCIJ issue an order on the applicability of the crime of genocide at the ECCC, the OCIJ stated that the Defence sought declaratory relief concerning the applicable law and the concern of providing due notice to the Charged Persons does not arise with matters such as genocide, as it is expressly articulated in the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Establishment Law"), and the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea ("Agreement"). *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action on the Applicability of

2. Discussing the applicability of genocide at the ECCC, the OCIJ has stated that it is not required to set out final legal characterizations until the Closing Order.[6] The issue of whether the OCIJ may apply command responsibility must be decided at this stage in the proceedings; Mr. IENG Sary must have notice of the forms of liability applicable to him. The Defence is entitled to appeal against orders confirming the jurisdiction of the ECCC. This right of appeal would be meaningless if the Defence were not first allowed to raise jurisdictional issues to the OCIJ.

II. APPLICABLE LAW

3. Article 29 of the Establishment Law provides in part that:

> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

III. ARGUMENT

A. Command Responsibility is not a form of liability recognized in Cambodian law

4. The ECCC, as a Cambodian court, is obliged to follow Cambodian law.[7] The 1956 Penal Code has been officially recognized as the Penal Code in force in Cambodia during 1975-1979, the time the crimes were allegedly committed.[8] Command responsibility is not found in the 1956 Penal Code. The Establishment Law does not create new substantive domestic criminal law.[9] Application of command responsibility would thus violate the principle of *nullum crimen sine lege*.

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the Crime of Genocide at the ECCC, 28 December 2009, D240/3, ERN: 00421137-00421140, para. 3. The OCIJ stated that it was not required to set out final legal characterizations until the Closing Order and that it was therefore not necessary at this stage to conduct a full analysis of the issue. *Id.*, para. 4.

[6] *Id.*, para. 4.

[7] *See* Agreement, Article 12(1). *See also* Preamble of the Rules, Rev.4, 11 September 2009.

[8] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code, 17 August 2009, E91/5, ERN: 00365471-00365472.

[9] The Establishment Law was created "to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia." Establishment Law, Art. 1. The role of the Establishment Law was to put into practice exactly how this would be done, including by specifying the subject matter, temporal and personal jurisdiction of the ECCC. The Establishment Law merely sets out the definition of command responsibility over which the ECCC would have jurisdiction, if it existed in Cambodian law. It cannot create new law applicable to events that happened in 1975-79 without breaching the principle of *nullum crimen sine lege*. *See e.g.*, Genocide Motion, paras. 15-16.

B. Command responsibility was not part of customary international law in 1975-79

5. Customary international law can only be created through (a) general and consistent State practice which is an expression of (b) *opinio juris*.[10] State practice should be "extensive and virtually uniform in the sense of the provision invoked."[11] As for *opinio juris,* the International Court of Justice has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[12] Justice Robertson of the Special Court for Sierra Leone has explained that "[i]t should go without saying that the question of whether and when a particular conduct becomes criminal must be carefully separated from the question of whether it *should* be or have been criminalized."[13]

6. In 1975-79, command responsibility did not have customary international law status: 1) the application of command responsibility in certain post-World War II cases was not enough to create customary status; 2) State practice in 1975-79 was not widespread or uniform enough to have created a norm of customary international law; and 3) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, ("Additional Protocol I") did not codify customary international law in this respect.[14]

1. Post-World War II case law does not clearly define the elements of command responsibility

7. While the idea that a commander must have responsible command of his troops has existed for centuries,[15] the post-World War II tribunals were the first to link the concept

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[10] Professors Fletcher & Ohlin explain that "Customary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them." George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 556 (2005) ("Fletcher & Ohlin"). It must be noted that "[i]t is notoriously difficult to establish sufficient consensus to validate a rule as customary international law." *Id. See* JCE Appeal, Annex A, Section II F for an in-depth discussion of the creation of customary international law.

[11] *North Sea Continental Shelf Cases,* ICJ Reports (1969), para. 74.

[12] *Nicaragua v. United States,* (Merits), ICJ Reports 1986, para. 207.

[13] *Prosecutor v. Fofana & Kondewa,* SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Dissenting Opinion of Justice Robertson, 31 May 2004 ("Justice Robertson Dissent"), para.7.

[14] Additional Protocols I and II may not be relied upon for anything other than their potential to express customary international law. Additional Protocols I and II were only ratified by Cambodia on 14 January 1998.

[15] *See* Jenny S. Martinez, *Understanding* Mens Rea *in Command Responsibility: From Yamashita to Blaškić and Beyond,* 53 J. INT'L CRIM. JUST. 638 (2007) ("Martinez"). "Scholars have traced the notion that a military commander is responsible for the actions of his troops at least as far back as Sun Tzu's writings on military discipline in 500 BC; it was part of European military practice as early as the 1400s; and it had a place in the American Articles of War enacted in 1776."

of command responsibility to criminal liability.[16] Professor Damaska explains, however that

> one vainly leafs through dusty volumes containing these treaties for any trace of the notion that a military commander is primarily liable for war crimes committed by his soldiers. The language of these treaties suggests no more than that a superior whose troops commit a war crime is subject to some form of disciplinary or criminal punishment: its nature remains undetermined. In fact, as late as the immediate post-World War II period, treaty law still limited the scope of command responsibility to those superiors who either personally committed war crimes, were accomplices in them, or ordered those crimes to be committed.[17]

8. Although some post-World War II trials applied command responsibility as a form of liability, none of the statutory texts creating the post-World War II tribunals – the International Military Charter ("IMT Charter"), Control Council Law No. 10, or the Charter of the International Military Tribunal for the Far East ("IMTFE Charter") – actually contained provisions setting out this form of liability. In fact, the United States had proposed that a command responsibility provision be included in the Nuremberg and IMTFE Charters.[18] This proposal did not garner the requisite support for inclusion.

9. The post-World War II trials are of limited value in assessing the existence of command responsibility in customary international law: the verdicts were short and contained limited, if any, legal reasoning. The cases were also inconsistent as to the *mens rea* required to impose liability. In the famous *Yamashita* case, for example, the court appeared to apply a strict liability standard,[19] while in *United States v. Wilhelm List et al.*, the tribunal held that a superior is liable only for acts that he knew about or "ought to have known about."[20]

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[16] *See* Kai Ambos, *Superior Responsibility, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME I 823, 825 (Oxford University Press, 2002) ("Ambos, *Superior Responsibility*"). *But see* Jason Sengheiser, *Command Responsibility for Omissions and Detainee Abuse in the War on Terror*, 30 T. JEFFERSON L. REV. 693, 702-03 (2008). "At the end of World War I, command responsibility for failing to prevent or punish illegal acts was recognized for the first time in an international context in the report of the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. This report recommended the establishment of a tribunal for the prosecution of those who, among other things, 'ordered, or with knowledge thereof and power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.' However, these principles were not applied because there was to be no international tribunal until after World War II."

[17] Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 485 (2001) ("Damaska").

[18] Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89, 105-06 (2000).

[19] *See Trial of General Tomoyuki Yamashita*, as reprinted in Law Reports of Trials of War Criminals, Vol IV, p. 35 (United Nations War Crimes Commission, 1947).

[20] *United States v Wilhelm List et al.*, Vol. XI, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10. "A corps commander must be held responsible for the acts of his

10. The "greatest shortcoming [of these cases] is that they express a variety of inconsistent views on the mental state required for liability – sometimes, unfortunately, within the same decision. In this way, they foreshadowed much of the confusion that has accompanied the doctrine in the ICTY and ICTR."[21] Because of this lack of clarity, the United Nations War Crimes Commission took the position in 1949 that "the principles governing this type of liability … are not yet settled."[22]

11. Besides the inconsistencies as to the applicable *mens rea*, the post-World War II cases that did employ command responsibility cannot be considered to have much precedential value, as many of these cases were criticized for applying "victor's justice."[23] Of *Yamashita*, for example, Professor Ambos writes, "[a]lthough one should not go so far as to negate *any* precedential value of the *Yamashita* decision, it cannot be denied that its mixture of technical-legal flaws, as particularly criticized in Judge Rutledge's dissent, and ideological-racial prejudice, as recently demonstrated by Prévost's study, severely hampers its legal and, above all, moral value."[24]

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subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about."

[21] Martinez. *See also* Curt Hessler, *Command Responsibility for War Crimes*, 82 Yale L.J. 1274, 1281 (1972-1973) ("Hessler"). "The post-war tribunals reached no consensus in specifying the mental elements of command responsibility." *See* Annex to IENG Sary's Alternative Motion to the Limits of theApplicability of Command Responsibility at the ECCC, 15 February 2010 for a discussion of how the *mens rea* required by the ICTY, ICTR and SCSL Statutes has been applied at the *ad hoc* tribunals.

[22] As quoted in Ambos, *Superior Responsibility*, at 831.

[23] *See* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 16 (1971). "[W]here the present state of international law was unclear or unsatisfactory - as, for example, in regard to individual responsibility for acts of state - then the Big Four would codify international law in such a way that German and Japanese acts became criminal and individual enemy leaders became accountable." *See also* Damaska, at 486-87. "It does not require deep immersion into the study of decisions rendered by post World War II military courts to realize that they are not the most obvious wellspring from which one would expect the demiurges of modern international law to drink for inspiration. That these courts faced unsavory individuals charged with horrendous crimes should not blind us to the fact that the legal standards they crafted (especially in the Far East) were deficient in terms of our current understanding of criminal law with humanitarian aspirations. As a well-known international scholar remarked long ago, these standards were frequently such as 'to make a lawyer wish to forget all about them at the earliest possible moment.' Their general characteristic, most relevant for present purposes, was an unabashed severity that can rightly be regarded as the principal source of the escalations of culpability inherent in imputed command responsibility." *See also* Hessler, at 1275. "Most 'decisions' were attempts by a trial forum to marshal *all* the possible legal, moral, and evidentiary support for its verdict."

[24] Ambos, *Superior Responsibility*, at 827. *See also* Justice Murphy's dissent in *Yamashita*, as quoted in Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 35 (1973) (emphasis added). "He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge."

2. State practice does not show that command responsibility existed in customary international law in 1975-79

12. Most States, like Cambodia,[25] did not have specific command responsibility provisions in their penal codes in 1975-79.[26] Where national legal regimes did contain such provisions, these provisions were not uniform enough to be the basis of the general and consistent State practice required to find customary international law.[27] According to Professor Bantekas, after World War II there was a "decline in the use of the doctrine of superior responsibility for a period of over thirty years. During this time national forums, conscious of the political implications of such charges, were reluctant to convict any officer for the crimes of their subordinates. ... Additionally, no consensus concerning the appropriate *mens rea* could be reached by the international community."[28]

13. Following World War II, command responsibility was added to the military handbooks of certain States. For example, the U.S. Army Field Manual on the Law of Warfare of 1956 stated that "military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control... The commander is ... responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to

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[25] *See* discussion of 1956 Penal Code, *supra*.

[26] Professor Damaska explains that "[the command responsibility provision of the ICTY Statute] extends the boundaries of liability in international criminal law substantially beyond limits established by national legal systems. A superior who does not take 'necessary and reasonable' steps to prevent a crime of his underlings, or does not punish them after they have committed it, may be made personally liable for that crime, even if he did not 'plan, instigate, order, commit, or otherwise aid and abet' the criminal activity. The basis of liability under this paragraph is hence not participation in terms of conventional categories of municipal law: rather, the superior is held accountable for the criminal acts of his underlings on stricter, more exotic grounds - the failure to prevent and the failure to punish. Both have ramifications that are difficult to reconcile with principles that inform municipal criminal law." Damaska, at 461 (emphasis added). *See also* the National Implementing Legislation Database on the ICC website, which lists the small number of countries that currently have command responsibility implementing legislation. *Available at* http://iccdb.webfactional.com/data/keyword/569/.

[27] "[N]ational definitions of international crimes are often underinclusive, overinclusinve or both. ... Such discrepancies are also found abundantly in national definitions of ... ancillary issues like command responsibility." WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 118-19 (T.M.C. Asser Press 2006).

[28] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 574-75 (1999) ("Bantekas").

take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."[29]

14. Notwithstanding the command responsibility standard in its Army Field Manual, the US military courts did not apply this standard when dealing with the trial of Captain Ernest Medina for the My Lai massacre that occurred during the Vietnam War. During the 1971 trial of Captain Medina, the military judge instructed the panel that for a conviction through command responsibility, the law required actual knowledge:

> [A] commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act.[30]

15. Further evidence that the standard was unclear is found in a Military Law Review article written by US Army Colonel William Eckhardt in 1982 entitled "Command Criminal Responsibility: A Plea for a Workable Standard."[31] Colonel Eckhardt explains that the standard for command responsibility is not clear and that the knowledge expected of an officer must be precisely defined.[32] He states that "[a]n examination of the current and proposed new standards reveal an alarmingly unsettled and dangerously inarticulated expression of the most basic social contract between a soldier and the citizenry he serves."[33]

16. The fact that there is little evidence that most States included command responsibility provisions in their national legislation in 1975-79 and that there is evidence that the constituent elements for command responsibility were not consistently applied within and between different States – when applied at all – demonstrates that command responsibility was not clearly established in customary international law.

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[29] *As quoted in Prosecutor v. Hadžihasanović et al.*, IT-47-01-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 79 (emphasis added). Other States, however, only included provisions which would punish commanders for their positive acts, rather than omissions. The British Manual of Military Law of 1958 copied the American Field Manual, but removed the section that held superiors responsible when they had "actual knowledge, should have knowledge..." *Id.*, para. 80. It therefore restricted liability to situations in which subordinates committed crimes pursuant to a superior's orders.

[30] As quoted in Major James D. Levine II, *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?*, 193 MIL. L. REV. 52, 66-67 (2007) (emphasis added).

[31] Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1 (1982).

[32] *Id. See* especially p. 18-21.

[33] *Id.*, at 1.

3. Additional Protocol I did not codify customary international law related to command responsibility

17. Despite the use of command responsibility as a form of liability in certain post-World War II trials, this concept was not codified in the 1949 Geneva Conventions. Additional Protocol I came into effect on 8 June, 1977. Articles 86 and 87,[34] which deal with command responsibility in international armed conflicts, mark the first time that command responsibility has been codified in international law.

18. Additional Protocol I cannot be considered to codify then existing customary international law related to command responsibility; the imputed knowledge element found in Article 86 was redrafted five times before being further amended.[35] This demonstrates that what ultimately was agreed upon was based on negotiations and compromise between States and does not necessarily reflect the state of customary international law. Furthermore, by the end of 1978, while 54 States had signed on to Additional Protocol I,[36] only 3 States had ratified it: El Salvador, Ghana, and Libya.[37] Most States did not ratify Additional Protocol I until much later, if at all.[38] Consider the five permanent members of the UN Security Council: Russia ratified it in 1989, the

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[34] Article 86 states, "Failure to act 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
Article 87 states, "Duty of commanders 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

[35] *See* Bantekas, at 591.

[36] *See* ICRC list of States Parties, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.

[37] In contrast, in 2001, the *Čelebići* Appeals Chamber considered Article 87 of Additional Protocol I to reflect customary international law since by the end of 1992, 119 States had ratified it. *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), fn. 251.

[38] A review of the dates of accession or ratification shows that most States ratified Additional Protocol I between 1985-1995. Between 1985-1990, there were 45 new ratifications/accessions and between 1990-1995, there were 44 new ratifications/accessions. *See* ICRC list of States Parties, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.

United Kingdom in 1998, and France in 2001.[39] China and the United States have not yet ratified it.[40] This does not show the widespread, consistent State practice necessary to form customary international law. "There are good reasons to be suspicious of promises that do not blossom into full-fledged conduct. Either the alleged rule is an empty piety because it is too general or, worse still, the statements are disingenuous."[41]

19. According to Professor Martinez, "Additional Protocol I obfuscated rather than clarified the *mens rea* requirement" of command responsibility in international law.[42] Even Article 86 of Additional Protocol I cannot give a consistent definition of command responsibility. The commentary to Additional Protocol I notes that within the final English and French versions of Article 86 there seems to be a divergence in the requisite *mens rea* for command responsibility.

> In the first place, it should be noted that there is a significant discrepancy between the English version, 'information which should have enabled them to conclude', and the French version, 'des informations leur permettant de conclure', which means 'information enabling them to conclude'. In such a case the rule is to adopt the meaning which best reconciles the divergent texts, having regard to the object and purpose of the treaty, and therefore the French version should be given priority since it covers both cases.[43]

20. Furthermore, although Additional Protocol I is now considered to form a basis for the command responsibility of individuals, when it was drafted in 1977, it was meant to impose obligations on States, not on individuals.[44] It "refrained from determining the character of responsibility entailed... [I]ts provisions only stipulated that superiors who fail to prevent or repress the crimes of their subordinates shall not be absolved from responsibility for these crimes. The more specific determination of this responsibility – penal or disciplinary, primary or vicarious – was left to the domestic law of the ratifying

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[39] *Id.*
[40] *Id.*
[41] Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 Am. J. Int'l L. 747, 752 (2005). *See also* Fletcher & Ohlin, at 557: "It is understandable that the pious leaders of the West ... would declare ... peremptory rules of CIL. Unfortunately, the piety of the West cannot coherently be considered a source of law."
[42] Martinez.
[43] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Commentary, para. 3545.
[44] *See* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5(1) J. INT'L CRIM. JUST. 1, 9 (2007). "Although these rules were initially addressed only to State Parties, they are now considered the basis of rules of responsibility for an individual's failure to act since the doctrine of superior responsibility and the major part of the offences established by the Geneva law (including AP I) have been 'individualized' by the ICC Statute and by national implementation laws." (emphasis added).

states."[45] As explained by Justice Robertson, to impose liability a criminal tribunal must first: identify whether the prohibition of certain conduct has become a rule of international law binding on States, before second: identifying whether the norm of international law has metamorphosed into a criminal law, for the breach of which individuals might be punished if convicted by the court.[46] During the time period at issue, Additional Protocol I was only meant to be binding on States. Thus, these criteria are not fulfilled.

C. Even if the ECCC could apply customary international law and command responsibility liability was part of customary international law at the time, the principle of legality does not allow its application at the ECCC

21. The principle of *nullum crimen, nulla poena sine lege*[47] dictates that no one may be prosecuted unless, at the time of the offense, the act was specified in law to be a crime and unless a punishment was provided by law. This principle is enshrined in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights ("ICCPR"), whose standards the ECCC must fully respect.[48] This principle is "the very basis of the rule of law, because it compels governments (in the case of national law) and the international community (in the case of international criminal law) to take positive action against abhorrent behaviour, or else that behaviour will go unpunished. It thus provides rationale for legislation and for treaties and Conventions... It is the reason we are ruled by law and not by police."[49] It may be "highly inconvenient [but] it is precisely when the acts are abhorrent and deeply shocking that the principle of

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[45] Damaska, at 486.
[46] Justice Robertson Dissent, para. 12.
[47] In particular, the principle of *nullum crimen sine lege* in civil law countries articulates four notions: i) criminal offenses may only be provided in written law (*"nullum crimen sine lege scripta"*); ii) criminal offenses must be provided for through specific legislation (*"nullum crimen sine lege stricta"*); iii) criminal offenses must be provided for in prior law (*"nullum crimen sine proevia lege"*); and iv) criminal offenses shall not be construed by analogy. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 141-42 (Oxford University Press 2003).
[48] According to Article 31 of the 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999, "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." (Emphasis added). According to Article 33 new of the Establishment Law, "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights." According to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, "[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."
[49] Justice Robertson Dissent, para. 14 (emphasis added).

legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime."[50]

22. The principle of legality is stricter in Cambodian law than that found in the Universal Declaration of Human Rights and the ICCPR. Cambodian law requires that command responsibility liability must have existed in Cambodian law at the time of the alleged offenses in order for it to be applicable at the ECCC. This is because according to Article 6 of the 1956 Penal Code, no crime can be punished by the application of penalties which were not pronounced by the law before it was committed. The International Covenant on Civil and Political Rights may only require that a crime (or form of liability) exist in international law at the time of the alleged offense, but "[o]ne has to distinguish between the prerequisites of the principle of legality as it is defined on the international level and the principle of legality of national legal orders. ... [M]any national legal systems ... require compliance with a stricter principle of legality."[51] As provided in Article 5(2) of the ICCPR, when the protection of a right is broader at the national level than at the international level, the national provision is to prevail and to be applied.[52]

23. Criminal liability must also be sufficiently foreseeable and accessible at the time the alleged criminal acts are committed in order to satisfy the principle of legality. According to the ICTY *Vasiljević* Trial Chamber,

> Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law. The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context. If customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice

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[50] *Id.*, para. 2.
[51] Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective*, 5 INT'L CRIM. L. REV. 313, 320 (2005) (emphasis added).
[52] Article 5(2) of the ICCPR provides that "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." This provision essentially preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than those set out in the ICCPR. *See* MANFRED NOVAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 118 (N.P. Engel Publisher, 2005).

but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law.[53]

24. The Trial Chamber further explained that

> [f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[54]

25. Even if command responsibility could truly be considered part of customary international law in 1975-79, it was not defined with sufficient clarity for liability to be foreseeable to the Charged Persons. This is evident from the discussion *supra* concerning the lack of clarity with regard to the requisite *mens rea* or its applicability to internal conflicts and civilian superiors.[55] Professor Martinez summarizes the inconsistencies that demonstrate that this form of liability was not established with sufficient consistency and clarity to form a norm of customary international law:

> At various times, international courts and tribunals have convicted superiors based on mental states that might be described as knowledge, recklessness, negligence and even, perhaps, based on strict liability. In some cases, they have applied a subjective standard for mental state, while in others they have used a seemingly objective standard. They have struggled, without great success, to situate 'wilful blindness' somewhere between knowledge and negligence. They have not always been clear in specifying whether the same mental state is

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[53] *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002, paras. 201-02 (emphasis added).

[54] *Id.*, para. 193 (emphasis added). *See also Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, Interlocutory Appeal on Joint Challenge to Jurisdiction, 27 November 2002, para. 15. "It is well-established under international criminal law that the principle of legality requires that the crime charged be set out in a law that is accessible and that it be foreseeable that the conduct in question may be criminally sanctioned at the time when the crime was allegedly committed."

[55] Writing in 2002, Professor Ambos notes that, "In sum, the UNWCC's criticisms in 1949 that 'the principles governing this type of liability ... are not yet settled' has not completely lost its validity, in particular with regard to the criminal law problems inherent with this doctrine. Despite the increasing application of the doctrine since World War II its elements have not been defined precisely enough to be indubitably in accordance with the *nullum crimen* principle as laid down in the Rome Statute (Articles 22, 24), especially with its requirement of legal exactness and strictness." Ambos, *Superior Responsibility*, at 847. *See also* van Schaak, at 166. ""It is ... difficult to accept that the precise elements of crimes can be gleaned from the (at times) divergent conduct of the multiplicity of states coupled with their subjective psychological attitudes toward a particular practice."

> required in relation to each material element of the crime committed by the subordinates. And they have done so in multiple languages, using terms that do not translate exactly from one language and legal system to another. The net result is that, despite half a century's worth of case law, it is difficult to describe with precision the mental element of command responsibility.[56]

26. It is also quite unlikely that the case law concerning this form of liability would have been accessible to the Charged Persons at the relevant time. An article written in 1972 and published in the Yale Law Journal explains that because the IMTFE Judgement, including its dissents, and concurrences "are rarely available even to major [US] university libraries," the article would instead refer to secondary materials which quote or paraphrase portions of the Judgement.[57] If this Judgement is rarely available to US academics, how can it and the other judgements of the post-World War II tribunals have been accessible to the Charged Persons in Cambodia?

27. The ECCC may not apply command responsibility as customary international law simply because it has been done at the *ad hoc* tribunals. These tribunals have not always respected the principle of *nullum crimen sine lege*.

> In the post-Cold War renaissance of [international criminal law], international and domestic criminal courts have stepped in to develop and modernize the law born of the WWII era. In this process, courts are actively engaged in applying new [international criminal law] norms to past conduct. This is not the demure application of a judicial gloss to established doctrine. Rather, these tribunals are engaging in a full-scale refashioning of [international criminal law] through jurisprudence addressed to their own jurisdiction, the elements of international crimes, and applicable forms of responsibility. Along the way, courts are updating and expanding historical treaties and customary prohibitions, upsetting arrangements carefully negotiated between states, rejecting political compromises made by states during multilateral drafting conferences, and adding content to vaguely worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement.[58]

The ECCC must not fall into the same trap and must instead respect the principle of *nullem crimen sine lege* in accordance with Cambodian law.

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[56] Martinez. *See also id.*: "Neither international treaty law nor international customary law provides comprehensive, universally accepted definitions of culpable mental states for international crimes, and any attempt to ascertain the general principles of law common to national legal systems is complicated by the varied approaches such systems take. Unfortunately, international decisions are not always self-conscious about the differences in national terminology, nor are they precise about the concepts that terminology attempts to capture."

[57] Hessler, fn. 10.

[58] Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 123-24 (2008). (emphasis added).

IV. CONCLUSION AND RELIEF REQUESTED

28. Applying command responsibility would violate the principle of *nullum crimen sine lege*. Command responsibility is not a part of Cambodian law and did not exist in customary international law in 1975-79.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to REJECT the applicability of command responsibility liability before the ECCC.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **15th** day of February, 2010