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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S ALTERNATIVE MOTION ON THE LIMITS OF THE APPLICABILITY 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 submits this motion on the limits of command responsibility, should it apply at the ECCC. The Defence submits that command responsibility is not applicable at the ECCC.[1] However, should the ECCC decide that it has jurisdiction to apply command responsibility, despite all arguments to the contrary, 1) command responsibility may not be applied to crimes listed in Article 3 new of the Establishment Law; 2) command responsibility may only be applied to international armed conflicts; 3) command responsibility may only be applied to military superiors; 4) command responsibility may only apply where there was a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a preexisting legal duty to prevent or punish; and 5) command responsibility may not be applied to specific intent crimes, such as genocide. An Annex is attached which generally sets out the law concerning command responsibility as it has evolved through the jurisprudence of the *ad hoc* tribunals and as it has been codified at the ICC.

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 be applied at the ECCC in a very limited fashion, if it is determined that it applies at all. Unlike JCE, which is not mentioned explicitly in the Establishment Law, command responsibility is provided for

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[1] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 15 February 2010.
[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.

by Article 29 of the Establishment Law. However, the present Motion does not request declaratory relief.[5]

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 may not be applied to crimes listed in Article 3 new of the Establishment Law

4. Article 29 of the Establishment Law states that "[t]he 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..."[7] Article 3 new,[8] however,

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[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 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] Emphasis added.

[8] Article 3 new states in relevant part:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

applies to domestic Cambodian crimes set forth in the 1956 Penal Code. Because command responsibility did not exist in domestic Cambodian law, it cannot be applied to domestic Cambodian crimes. The OCIJ recognized this, when it limited the applicability of JCE to international crimes, since JCE liability is not found in domestic Cambodian law.[9] Liability through command responsibility must be similarly limited.

B. Command Responsibility liability may only be applied to international armed conflicts

5. The post-World War II tribunals which applied command responsibility solely dealt with cases set in the context of an international armed conflict; hence they could only develop jurisprudence for cases set in an international armed conflict. Likewise, Additional Protocol I, which has been relied upon in support of the existence of command responsibility in customary international law[10] is applicable only to international armed conflicts. Additional Protocol II, which is applicable to internal armed conflicts, does not contain a similar provision. There is no conventional basis for applying command responsibility to internal conflicts that occurred in 1975-79. In 1993, the International Committee of the Red Cross confirmed that, in its belief, command responsibility for war crimes applied only in international armed conflicts.[11]

6. Despite the lack of jurisprudence which would demonstrate that command responsibility could apply to internal armed conflicts, in 2003 the ICTY *Hadžihasanović* Appeals Chamber held that command responsibility is applicable to war crimes that occurred in internal armed conflicts.[12] Although the ECCC is not bound by such a determination

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- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)...

[9] JCE Order, paras. 22-23.

[10] *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement ("*Čelebići* Trial Judgement"), 16 November 1998,, para. 340. "[T]here can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 of the Protocol gives expression to the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol."

[11] *See* Christopher Greenwood, *International Humanitarian Law and the* Tadić *Case*, 7 EUR. J. INT'L L. 265, 280 (1996), *quoting* the unpublished Preliminary Remarks of the ICRC on a Draft Statute for the ICTY, 25 March 1993.

[12] *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 31.

made by an ICTY Chamber, it is useful to consider the Appeals Chamber's reasoning and to determine whether it is flawed.

7. The Appeals Chamber stated that the matter rests on the principle of responsible command, which it determined (by considering Article 1 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907, Article 43(1) of Additional Protocol I, Article 3 common to the 1949 Geneva Conventions and its ICRC Commentary, and Article 1(1) of Additional Protocol II) is the same for international and internal armed conflicts.[13] The *Hadžihasanović* Appeals Chamber did not consider the fact the command responsibility can be found in Additional Protocol I but not Additional Protocol II to affect its conclusion. It stated that "the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber considers that, at the time relevant to this indictment, it was, and that this conclusion is not overthrown by the play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument."[14]

8. According to Professor van Schaack, the Appeals Chamber's conclusion is flawed. She explains that:

> In this analysis, the ICTY largely overlooked obvious reasons why states may have chosen not to apply the doctrine to non-international armed conflicts when they were drafting Protocol II. Besides the fact that states have historically been more reluctant to develop binding rules addressing internal conflicts, they may have considered the doctrine inapplicable in such conflicts where armed forces may be disorganized and spontaneous, and lines of authority may be self-proclaimed, de facto, and decentralized. Indeed, the principle of unity of command--which states that there is only one commander at any given level of the military hierarchy with command authority over subordinates--may be undercut or entirely absent in the context of a non-international armed conflict.[15]

9. Sir Christopher Greenwood, a current member of the International Court of Justice, is also critical of the Appeals Chamber's reasoning:

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[13] *Id.*, paras. 14-15.
[14] *Id.*, para. 29.
[15] Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 145 (2008).

> Despite what it said about the need to be satisfied that state practice recognised the principle, the decision cites almost no state practice and concedes that 'domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict'. It does not explain why the concept of responsible command, which imposes duties on the belligerents, automatically entails criminal responsibility for individuals. Nor does it explain why it is illogical for one concept of customary international humanitarian law to be applicable in international but not internal conflicts, while, nevertheless, conceding that not all of the principles of that law extend to both types of conflict. Indeed, one might argue that a different approach to command responsibility might be appropriate in a non-international armed conflict, because the armed forces involved in such conflicts are often less structured and well organised (particularly on the non-governmental side) than in international hostilities. It is also worth remembering that, only 10 years earlier, the International Committee of the Red Cross had taken the view that international law imposed no criminal responsibility at all for violations of the law of internal armed conflict.[16]

10. Customary international law is created through State practice and *opinio juris*.[17] The *Hadžihasanović* Appeals Chamber admitted that "[i]t is true that, domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict."[18] The lack of State practice and *opinio juris* to create command responsibility in internal armed conflicts cannot simply be ignored. If the ECCC could apply customary international law and if command responsibility is considered to be customary international law during this period, it could only be considered customary international law in relation to international armed conflicts.

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[16] Christopher Greenwood, CMG, QC, *Notes and Comments: Command Responsibility and the Hadžihasanović Decision*, 2.2 J. INT'L CRIM. JUST. 598, 601 (2004). Major Michael L. Smidt explains that "While Protocol I codifies command responsibility in international armed conflicts, Protocol II, which relates to non-international armed conflict, is completely silent on the issue. The drafters may have recognized the difficulty in determining chains of command in irregular forces. There may have been a reluctance to even recognize the concept of command in insurgent forces because to do so arguably grants some legitimacy to the insurgents and represents a step toward some sort of status for such a group. In terms of the government forces, in an internal armed conflict, criminal culpability decisions may have been intended to be left to the state. The traditional reluctance of the international community to involve itself in internal armed conflict stems from the notion that international law flows from the 'fundamental concept of sovereign equality.' Unless collective security issues are involved, the United Nations, for example, is prohibited from intervening in matters that are essentially domestic." Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 205 (2000).

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

[18] *Prosecutor v. Hadžihasanović et al.*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 17.

C. Command Responsibility may only be applied to military commanders

11. Although command responsibility was sometimes applied to non-military superiors by the post-World War II tribunals,[19] there was no widespread, consistent State practice to hold non-military superiors accountable for the acts of their subordinates at that time or in 1975-79. The origin of the concept of command responsibility is found in "the peculiar culture of military organizations and is intertwined with other central concepts in the laws of war."[20] Professor Bassiouni notes,

> In assessing the international norms and standards that have been received in national military laws, in comparison to the norms and standards of civilian 'command responsibility' in the world's major criminal justice systems, it appears that the former are more homogenous than the latter. ... The essential reason for this situation is the lack of cohesive legislative policy in almost every country in the world, which allows the compartmentalization of different aspects of the law.[21]

12. Further, Article 87 makes specific reference to "military commanders"[22] and states that "commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol."[23]

D. Command responsibility may only be applied where there was a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a pre-existing legal duty to prevent and punish

1. Command responsibility requires causation

13. If the post-World War II cases are evidence of customary international law, they demonstrate that customary international law requires that a superior may only be held liable through command responsibility where the underlying crimes occurred as a result

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[19] *See, e.g.*, IMTFE Judgement; *Trial of Friedrich Flick et al.*, Vol. VI, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, (U.S. Govt. Printing Office: Washington 1950); *Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others*, Indictment and Judgement of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, Vol. XIV, TWC, Appendix B, 1061, *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-XIV.pdf.

[20] Jenny S. Martinez, *Understanding* Mens Rea *in Command Responsibility: From Yamashita to Blaškić and Beyond*, 53 J. INT'L CRIM. JUST. 638 (2007).

[21] CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 318 (Transnational Publishers, 2003). *See also* p. 320. "[N]on-military perpetrators would be judged in accordance with national norms and standards of civilian criminal laws, and that, of course, does not provide a uniform international legal basis of accountability. To try to develop international civilian norms and standards on the basis of general principles would almost be impossible because of the diversity in norms of responsibility and imputability in the world's major criminal justice systems, as discussed above."

[22] Additional Protocol I, Art. 87(1).

[23] *Id.*, Art. 87(2).

of the superior's omission. The *United States v. Wilhelm List* case, for example, required "proof of a causative, overt act or omission from which a guilty intent can be inferred."[24] In the IMTFE Judgement, Judge Bernard of France stated that "[r]esponsibility for omission supposes, of course, an ultimate commission following the omission, and emanating either from the individual to whom the omission is imputed, or from one or several others. The responsibility for the result of the omission is only imputable to the author of the omission if the commission is the certain result of the latter."[25] In the *Schonfeld et al.* case, the Judge Advocate stated that the crimes must be "the natural result of the negligence of the accused; in other words, that a direction from [the accused], given at the correct time, would have prevented any unjustifiable killing taking place."[26]

14. The ICTY, however, taking a "position [that] appears to fall short of the requirements of customary international law,"[27] has held that a causation requirement is not necessary. The *Čelebići* Trial Chamber stated that customary international law did not require proof of a causal relationship between the conduct of the accused and the crimes of his subordinates.[28] The *Blaškić* Appeals Chamber noted that the *Čelebići* Trial Chamber did not cite any authority for this statement;[29] however, subsequent judgments at the ICTY adopted this view without independent analysis.[30]

15. Although the Establishment Law frames command responsibility in a similar manner to Article 7(3) of the ICTY Statute, concerning the issue of causation, the ICC Statute may more clearly reflect the development of customary international law. Unlike the ICTY, Article 28 of the ICC Statute does require causation. It states that "a superior shall be criminally responsible for crimes ... committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates..."

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[24] *United States v Wilhelm List et al.*, Vol. XI, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10, p. 1261.
[25] As quoted in GUÉNAËL METTRAUX, THE LAW OF COMMAND RESPONSIBILITY 84 (Oxford University Press, 2009).
[26] *Id.*
[27] *Id.*, at 83.
[28] *Čelebići* Trial Judgement, para. 398.
[29] *Prosecutor v. Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, para. 76.
[30] *See, e.g., Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Appeal Judgement, 17 December 2004, paras. 830-32; *Prosecutor v. Halilović*, IT-01-48-T, Judgement, 16 November 2005, para. 78; *Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006, para. 338; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, para. 280.

2. Command responsibility, if it is found to apply to civilian superiors, only requires them to prevent or punish crimes when they had a pre-existing duty to do so

16. Civilian superiors can only be held liable for an omission to prevent or punish when they first had a duty to prevent or punish. According to professors Zahar and Sluiter, although the requirement of a duty is not listed as a separate element of command responsibility in the Statutes of the *ad hoc* tribunals, "it remains implicit in the provision."[31] This is because "[a] general legal principle is that an omission will give rise to liability only if it is possible to establish a duty to act."[32]

17. Unlike the Statutes of the *ad hoc* tribunals, Article 28 of the ICC Statute states that for civilian superiors, "a superior shall be criminally responsible ... where: (ii) The crimes concerned activities that were within the effective responsibility and control of the superior..." This highlighted language creates a nexus between the crimes and the activities within the responsibility and control of the civilian superior.

18. The requirement of a nexus between the crimes and the civilian superior's authority would fit with the *Čelebići* Trial Chamber's statement that "[w]hile the criminal liability of a superior for positive acts follows from general principles of accomplice liability, ... the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act."[33]

19. This requirement helps to protect against situations where a civilian superior is held liable for crimes committed by his subordinates despite the fact that these crimes had nothing to do with the nature of the superior-subordinate relationship. This situation occurred in the ICTR *Musema* case. In *Musema*, the Trial Chamber held that Musema, a tea factory manager, was guilty of genocide because workers at his tea factory had committed genocide and he failed to prevent this or to punish them.[34] The flaw in the ICTR's reasoning is that Musema, as the tea factory manager, likely had the ability to punish his employees for failing in their duties at work, but this does not mean that he had the

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[31] ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 259 (Oxford University Press 2008).
[32] *Id.*, at 259.
[33] *Čelebići* Trial Judgement, para. 334 (emphasis added).
[34] *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January 2000, paras. 894-95.

responsibility or authority to punish them for committing acts of genocide, which obviously had nothing to do with their work. Professor Zahar explains that the Trial Chamber's

> reasoning is misguided. It does not distinguish Musema from any ordinary factory director. Yet it cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the reason only that they were linked to them through commonplace ties of labour. The commander envisaged [in the command responsibility provision of the ICTR Statute], in its classical (martial) form, was connected to his or her troops not by a mere supervisory link; he or she was at the core of a combat unit with powers of life and death...[35]

E. Command responsibility may not be applied to specific intent crimes such as genocide

20. Command responsibility liability is inconsistent with specific intent crimes.[36] This is because a commander may be held liable under command responsibility when he did not intend a crime to take place and may not have even learned of its occurrence until after the fact. However, specific intent crimes, like genocide, require that liability only attach to a crime when it was carried out with the requisite specific intent.

> Command responsibility for genocide is inconsistent in several respects with the understanding of the crime of genocide as a narrow offense of specific intent. There are multiple issues warranting critique, as the theoretical inconsistencies extend across: (i) the fault requirements warranting conviction; (ii) the scope of the offender's pre-existing duty; (iii) inherent notions of personal responsibility and a general hostility in the criminal law to vicarious liability; and (iv) the proper labeling of the criminal conduct at issue.[37]

21. The ICTY and ICTR have allowed commanders to be held liable for genocide, despite the fact that they themselves lacked the specific intent to commit genocide. However, as Professor Schabas notes, these judgments "indicate a profound judicial malaise with the

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[35] Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 Leiden J. Int'l L. 591, 603 (2001).

[36] As is liability via JCE III, for the same reasons.

[37] David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 92-93 (2006). Nersessian further explains that "Genocide via command responsibility is constructed from completely different conduct (not preventing or punishing genocide by others) and vastly lower personal fault (criminal negligence). Genocide can be attributed vicariously to commanders simply because the commander was grossly misinformed, misguided, or unaware. This makes little sense. Although gross negligence is blameworthy and certainly deserves criminal sanction, there is an unmistakable difference between intentional conduct and culpable inadvertence. Yet command responsibility stigmatizes direct perpetrators and negligent commanders equally and allows them to be convicted of the identical crime. Constructing liability in this manner is incongruous with genocide as a narrow offense predicated upon the specific intent to destroy a protected group." *Id.*, at 94.

entire concept."[38] Schabas explains that "[i]n the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of specific intent."[39]

IV. CONCLUSION AND RELIEF REQUESTED

22. Should the ECCC determine that it may apply command responsibility, despite all arguments to the contrary, 1) command responsibility may not apply to crimes listed in Article 3 of the Establishment Law; 2) it may only apply during international armed conflicts; 3) it may only apply to military superiors; 4) it may only apply where there was a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a preexisting legal duty to prevent or punish; and 5) it may not apply to specific intent crimes, such as genocide.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that should the Co-Investigating Judges find, despite all Defence arguments to the contrary, that command responsibility may be applied at the ECCC, they should:

a. REJECT the application of command responsibility to crimes listed in Article 3 new of the Establishment Law;
b. APPLY command responsibility only to situations involving an international armed conflict;
c. APPLY command responsibility only where there was a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a preexisting legal duty to prevent or punish; and
d. REJECT the application of command responsibility to specific intent crimes, such as genocide.

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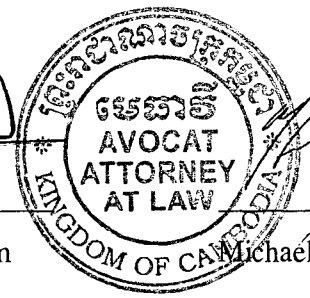
[38] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 309 (Cambridge University Press, 2000).
[39] William A. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 Y.B. INT'L HUMANITARIAN L. 337, 342 (2000).

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