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BEFORE THE PRE-TRIAL CHAMBER

THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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RESPONSE TO THE SUBMISSIONS OF AMICUS CURIAE

**Submitted by:**

Co-lawyers of Civil Parties

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**REMINDING PROCEDURE**

1. The Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia, by decision dated on 28 October 2008, was invited the parties to formulate any useful comments regarding to the notion of Joint Criminal Enterprise (JCE),  
  
after submitted of the submission of *amicus curiae* consecutive to the appeal of the co-prosecutors against the closing order, and gave them an order to make it at the latest on 17 November 2008 at 4 pm.
  2. A first submission was presented on behalf and for the co-lawyers of the civil parties
  3. The signatory Lawyers of the present submission intend to subject to the appreciation of the Pre-Trial Chamber another examination of the notion of JCE based essentially on the reminder and the analysis of case law elements, allowing a wider debate.
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**DISCUSSION**

4. It was exactly reminded in the appeal of the co-prosecutors that the usage of the form of responsibility of the Joint Criminal Enterprise is subjected to the combination of four conditions:
  - (1) it must be provided in texts concerning the ECCC, in an explicit or implicit way
  - (2) it had to exist in customary international law at the relevant time
  - (3) the law provided this form of responsibility had to be accessible enough to the accused persons
  - (4) Accused persons must have been capable of providing this possible responsibility.
5. Thus, it will be reminded here:
  - That the article 29 of the law relative to the creation of the ECCC provide that an individual responsibility for "*any suspect who planned, incited, ordered to*

*commit, who made complice or who was committed*" the crimes repressed by this jurisdiction.

- Be deficient in using the word " Joint Criminal Enterprise " the concepts of joint enterprise in the realization of crimes or illegal schemes, active participation to a project or a criminal plot, were widely used before even the commission of the crimes having given place to accusation of the leaders of the Democratic Kampuchea.

In the same way, the notions of the arranged plan (see International Military Tribunal of Nüremberg) or still politics of ideological hegemony were developed at the conclusion of the Second World War.

The notion of the above competition, with knowledge of the origin, to the arrest, the detention and the deportation of persons [in the case in point, in the period of the Jewish community] was set up as notion of participation to an arranged plan. (Crim. 23 January 1997: Bull. Crim. N 32; D 1997.147. Note Pradel)

- It appears evident that DUCH knew the assigned goal in the detention center S 21 and could not ignore the nature of the practiced of ill-treatment and the pursued extermination.
- The profoundly of amoral character, illegal and reprehensible character of the politic of torture and systematic execution of 12.000 persons cannot have escaped of one of its main responsible, that they could be only aware by their possible responsibility.

6. The co-prosecutors have still reminded (page 27 of his appeal) **the effective participation of DUCH in every stage of the operations of S 21.**

7. The advocators here intend to mention in their rotation that:

**I. The analysis of the case law of the Court of Nuremberg, to reclaim the notion of joint criminal enterprise, established the division in three categories:**

- The affairs in which all participants act according to a common plan and possess the same criminal intention ;
- The affaires where the accused persons have personally knowledge of the existence of enterprise of ill-treatment and intend to promote it;

- Those where there is a common plan to follow a certain conduct but during which an act is committed, even though it was not mentioned by the common plan, it is a natural and predictable consequence.
8. If we approach to this definition in three columns of DUCH's case, it is not questionable that the accused person enters into the first two fields of the scope of application.

**II. The more recent case law in crime against humanity, trying to define notably the notions of assistance and encouragement to a joint criminal enterprise, considered that:**

9. The proof of the existence of a joint criminal enterprise requires:
- a material element demonstrating the plurality of persons, the existence of a plan, the project or the common design which establishes or implies the commission of a crime expressed in the Statute, and the participation of the accused person in the common project;
  - a moral element which requires the intention to participate in, or to promote, the act or the common criminal objective, while the question of the responsibility outside of the common plan is raised only if the commission of a crime by a member of a group was predictable and if the accused person voluntarily took this risk.

(Appeal chamber, prosecutor/Dusko Tadic IT-94-1 Appeal Chamber's decision on 15 July 1999)

**III. We know besides that, in the case Prosecutor / Radoslav Brdjanin and Momir Tali (Case N° IT-99-36-PT 26 June, 2000 Trial Chamber II)**

10. It was considered that " the criminal objective of enterprise must be clearly identified... in the cases where a joint criminal enterprise could pursue several different criminal objectives, it is not necessary that the Accusation proves that *every* participant agreed on each of the crimes which were committed.

It is however necessary for the Accusation to prove that between the person who personally committed the blamed consecutive crime and the person accused of the aforementioned crime, there is an agreement (or common but) to commit at least *a* specific

crime; We could then determine if the blamed consecutive crime was a natural and predictable consequence of this initial crime... without such a proof, nobody can conclude that the accused person was participated in a joint criminal enterprise in reunion with the author of the blamed consecutive crime ... "

11. In DUCH's case, the co-prosecutors were clearly demonstrated that the **conception** also the effort of the extermination had been common between the responsible person and all the participants of this enterprise.
12. The submission of the Accusation was well clarified the intended form of the joint criminal enterprise.
13. The co-prosecutors were showed that the perpetrator had well intention to commit reprehensible acts and that this intention was shared by all other individuals involved in the committed crimes.
14. In all hypothesis,

As regards the **moral element** requires:

The intention can at least deduct comments and actions of the agent or the circumstances surrounding the commission of the crime.

The accused person was perfectly informed about systematic ill-treatment and was animated by the intention to compete to it, using manifestly its position of authority and implementing the total planning of the alleged crimes.

As regards the notion of **dol élargi** traditionally held by the international case law:

DUCH had well intention to participate in a common criminal design, of which he was conscious, knowing that the commission of the crimes was a possible consequence of the execution of this enterprise and by having decided to participate in perfect knowledge of the cause.

**IV. The Appeal Chamber, in Tadic's decision, identified three necessary elements to establish the culpability in concentration camps:**

- the existence of an organized system to mistreat the prisoners and commit the alleged crimes
- the knowledge of the accused person of the nature of the system

- the active participation in the instauration of the system, by help, encouragement or participation in the realization of the common criminal project

15. This case law was put as principle that:

The knowledge of the existence of the enterprise and a substantial participation in the realization of the common plan are enough to condemn the one who helps or encourages the joint criminal enterprise.

16. We know that the level of participation is variable by nature (direct and significant role?)
17. The one who helps or encourages pass the status of accomplice of the enterprise with the co-perpetrator, even if he does not commit physically the crime,

If his participation is long-term or if he involves more directly in the functioning of the enterprise.

18. Certainly, this notion is a notion difficult to estimate:

It should that the participation has been, somehow, intended to serve the plan or common purpose.

19. *Factors classically reserved are:*

- *the size of the criminal enterprise*
- *performed functions*
- *the position of the accused person*
- *the duration of the participation after the awareness of the criminal character of the enterprise*
- *the efforts supplied to prevent the criminal activity or hinder the good functioning of the system*
- *the gravity and the area of the committed crimes*
- *the efficiency, the zeal or the free cruelty put in the execution of the functions*
- *the continuous or repeated important participation*
- *the possible verbal declarations*
- *the commission of a crime.*

(Extracted Current events and International Law - Review of legal analysis of the international current events. Article Céline RENAUT, PhD student at the University of Paris Sud XI)

20. In DUCH's case, the size of the enterprise was considerable, the performed functions were the ones of a senior official, the position was a position hierarchically superior, the participation joined durably in the time, the efficiency and the cruelty of the methods of extermination are not to be demonstrated regrettably any more and we know that no effort was ever begun to try to make the joint plan stop.
21. The responsibility must be appreciated *in concreto* in function:
- of the knowledge of cause of the functioning,
  - the hierarchical position in the organization of the enterprise,
  - the degree of the participation,
  - the notion of performance, different from a simple obedience an order.

**V. In infinitely supplementary title, and even if we wanted to consider that the joint criminal enterprise can be reduced - at the level of the concept - in " one of the manners to commit one of the malpractices prohibited by articles 2 - 5 of the Statute"**

And that DUCH would not have directly participated in the commission of the crimes,

The fact remains that the another mode of responsibility can be bind, by whom the accused person can be considered severally liable without being the direct author of the crime as far as he is satisfied the condition which characterizes the 3rd category of joint criminal enterprise ( natural and reasonably predictable consequence).

22. DUCH could again see here his involved responsibility.

**FOR THESE REASONS**

The undersigned Lawyers, for the interests of the Civil Parties,

and within the framework of a submission of *amicus curiae*,

conclude the application of joint criminal enterprise (ECC III) in the ECCC within the framework of the instruction in the Appeal of the co-prosecutors against the closing order of the co-investigating judges.

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Respectfully submitted

**Lawyers of Civil Parties**

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