

BEFORE THE TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' JOINT RESPONSE TO NUON CHEA AND KHIEU  
SAMPHAN'S SUBMISSIONS CONCERNING PRELIMINARY OBJECTIONS**

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## JOINT RESPONSE

1. On 25 April 2014, the Trial Chamber (“Chamber”) directed the Parties to indicate whether they wish to adhere to certain preliminary objections raised by the former Defence for Ieng Sary.<sup>1</sup> On 20 May 2014, responses were filed by the Defence for Nuon Chea<sup>2</sup> and Khieu Samphan.<sup>3</sup> Both Co-Accused maintain Ieng Sary’s preliminary objection to the applicability of the grave breaches provisions of the Geneva Conventions,<sup>4</sup> and Khieu Samphan further maintains the preliminary objection to the Chamber’s jurisdiction to hear charges of deportation as a crime against humanity.<sup>5</sup>
2. The Co-Prosecutors maintain their prior written and oral submissions before the Trial Chamber on these objections. In this brief Response, the Co-Prosecutors confirm their prior positions that:
  - a. No statute of limitations bars the application of the grave breaches provisions of the Geneva Conventions to the Co-Accused, because, *inter alia*, Article 109 of the 1956 Penal Code does not apply to international crimes over which the ECCC has been granted jurisdiction; and customary international law in 1975 mandated the non-applicability of domestic statutes of limitation to these international crimes, which have the character of *ius cogens*;<sup>6</sup> and
  - b. The Chamber has been duly seised of charges of the crime against humanity of deportation in connection with the forced movement of the population from Prey Veng, Svay Rieng and the Tram Kok cooperatives, because the jurisdiction *in rem* of the Co-Investigating Judges validly encompassed the relevant underlying facts.<sup>7</sup>
3. In support of their prior position on the non-applicability of statutes of limitations to the grave breaches regime, the Co-Prosecutors observe, firstly, that the Defence for Nuon

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<sup>1</sup> **E306** Memorandum to the Parties, “Further information regarding remaining preliminary objections”, 25 April 2014 at para. 5.

<sup>2</sup> **E306/1** Position on Remaining Preliminary Objections raised by the Ieng Sary Defence Team, 20 May 2014 (“Nuon Chea Submissions”).

<sup>3</sup> **E306/2** Conclusions de la Défense de M. Khieu Samphan sur les exceptions préliminaires sur lesquelles la Chamber n’a pas encore statue, 20 May 2014 (“Khieu Samphan Submissions”).

<sup>4</sup> **E306/1** Nuon Chea Submissions, *supra* note 2 at paras. 1-2.

<sup>5</sup> **E306/2** Khieu Samphan Submissions, *supra* note 3 at paras. 14-20.

<sup>6</sup> **E51/5/3/1** Co-Prosecutors’ Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011 at para. 6; **E1/5.1** Transcript (Initial Hearing), 15.27.35-16.10.25.

<sup>7</sup> **E58/1** Co-Prosecutors’ Response to “Ieng Sary’s Motion to strike portions of the Closing Order due to defects”, 16 March 2011 at paras. 28-31.

Chea<sup>8</sup> and Khieu Samphan<sup>9</sup> simply incorporate by reference the preliminary objection as framed by the former Defence for Ieng Sary. The substance of this objection has already been heard and dismissed by the Pre-Trial Chamber in Case 002,<sup>10</sup> and this Chamber in Case 001,<sup>11</sup> in findings undisturbed on appeal. Neither Defence team offers any legal argument that would justify departing from already well-settled jurisprudence.

4. Secondly, it was clear to the Defence for Ieng Sary that the 1956 Penal Code makes no reference to Grave Breaches or the proscription of any international crime, but only to “felonies”.<sup>12</sup> The Co-Prosecutors confirm their prior submissions that the statute of limitations prescribed in Article 109 of the 1956 Penal Code was applicable only to ordinary serious crimes (“felonies”) and not international crimes.<sup>13</sup> Grave Breaches of the Geneva Conventions, while punishable under international law, were not specifically provided for in Cambodia’s 1956 Criminal Code, and were therefore not considered “felonies” for the purposes of that Code.
5. The Co-Prosecutors confirm their prior submissions that the omission of the words “which have no statutes of limitation” in Article 6 of the ECCC law is a drafting error and does not reflect any intent on the part of the legislature to limit (or render ineffective) the Court’s jurisdiction with respect to Grave Breaches. Any ambiguity in Article Article 6 of the ECCC Law, or in Article 109 of the 1956 Penal Code, must be interpreted in line with:
  - a. The clear vesting in the ECCC of the jurisdiction over Grave Breaches of the Geneva Conventions committed in the 1975-1979 period (if the Defence submissions were to be upheld, the ECCC could never prosecute individuals accused of Grave Breaches, a position directly contrary to both the letter and spirit of the ECCC Law. Such a position would render the vesting of jurisdiction in Article 6 completely illusory.)

<sup>8</sup> **E306/1** Nuon Chea Submission at para. 2 [“The Defence has hereby seen fit to present its arguments and respective legal basis [*sic*] in integral compliance to the content submitted [...] for Ieng Sary.”]

<sup>9</sup> **E306/2** Khieu Samphan Submission at paras. 9, 18 [“...M. Khieu Samphan souscrit à l’intégralité des arguments soulevés par la Défense de M. Ieng Sary...” (emphasis in the original); “...M. Khieu Samphan souscrit aux conclusions de la Défense de M. Ieng Sary...”].

<sup>10</sup> **D427/1/30** Decision on the Ieng Sary Appeal against the Closing Order, 11 April 2011, at paras. 73, 212-213.

<sup>11</sup> **CF001-E188** Judgment, 26 July 2010 at paras. 401-408.

<sup>12</sup> **E1/5.1** Transcript (Initial Hearing), 15.10.40.

<sup>13</sup> **E1/5.1** Transcript (Initial Hearing), 15.51.19 [“It is clear, therefore, that this is a statute giving jurisdiction in respect of international crimes, as opposed to a domestic law criminalizing conduct.”]



- b. The presumption that legislative intent is to conform with international law, implicit in Article 31 of the Constitution of the Kingdom of Cambodia;
  - c. The fact of Cambodia's accession, without reservation, to the Geneva Conventions prior to 1975;<sup>14</sup>
  - d. The *pacta sunt servanda* principle, pursuant to which treaty obligations (such as the obligation to prosecute Grave Breaches of the Geneva Conventions) must be performed in good faith;<sup>15</sup> and
6. The prohibition, under international law, on the invocation by a state of its domestic statutes as a justification for a failure to comply with its treaty obligations (such as the obligation to prosecute individuals accused of Grave Breaches of the Geneva Conventions).<sup>16</sup>In support of their prior position that this Chamber has been duly seised of charges of the crime against humanity of deportation, the Co-Prosecutors observe, firstly, that litigation at trial concerning alleged procedural defects in the Closing Order are expressly barred by Internal Rule 76(7). Secondly, during the course of the judicial investigation in Case 002, neither the Co-Prosecutors nor the Co-Investigating Judges considered that the forced movement of persons from Prey Veng, Svay Rieng and the Tram Kok Cooperatives were "new facts" in terms of Internal Rule 55(3) read with Article 125 of the Cambodian Code of Criminal Procedure. The Case File contains no Forwarding Order issued by the Co-Investigating Judges in this regard.

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<sup>14</sup> **E1/5.1** Transcript (Initial Hearing), 15.53.21.

<sup>15</sup> Articles 26, Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331.

<sup>16</sup> Article 27, *Ibid.*.

7. For these reasons, the Co-Prosecutors respectfully request the Trial Chamber to dismiss the preliminary objections maintained by the Defence for Nuon Chea and Khieu Samphan.

Respectfully submitted,

Date	Name	Place	Signature
30 May 2014	CHEA Leang Co-Prosecutor	Phnom Penh	
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