

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

FILING DETAILS

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**MEAS MUTH'S MOTION AGAINST THE APPLICATION OF CRIMES LISTED IN
ARTICLE 3 NEW OF THE ESTABLISHMENT LAW (NATIONAL CRIMES)**

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Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant Rule 21 of the ECCC Internal Rules (“Rules”), hereby moves against Article 3 new of the Establishment Law’s application against him. This motion is made necessary because the application of Article 3 new would violate Mr. MEAS Muth’s fundamental right to equal treatment before the ECCC; an issue not previously considered by any ECCC Chamber. No other issues concerning the application of Article 3 new (whether it violates the principle of non-retroactivity¹ or the right of Accused at the ECCC to be treated equally to accused persons in other Cambodian courts²) will be addressed herein. Although the Defence considers that the Pre-Trial Chamber erred concerning these issues,³ it recognizes that the OCIJ is bound by the decisions of the Pre-Trial Chamber.⁴ However, should the OCIJ consider that it is *not* bound by Pre-Trial Chamber jurisprudence, the Defence respectfully requests to make submissions on all issues raised by the application of Article 3 new. This Request is admissible pursuant to Rule 21, which requires that “[t]he applicable ECCC Law ... shall be interpreted so as to always safeguard the interests of Suspects... In this respect: a) ECCC proceedings shall be fair...” The Defence requests to file this Request in English with the Khmer translation to follow because the Interpretation and Translation Unit cannot timely complete the translation.⁵

¹ Article 6 of the 1956 Penal Code forbids the retroactive application of law, as do the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which Cambodia must respect pursuant to its Constitution. In 1975-79, the 1956 Penal Code had a statute of limitation of 10 years for murder, torture, and religious persecution. This 10-year period expired prior to Article 3 new’s attempt to extend it. This extension thus violates the principle of non-retroactivity.

² Article 3 new extends the statute of limitations for the crimes contained in the 1956 Penal Code only when those crimes are charged at the ECCC. This results in Accused at the ECCC being treated differently from Accused in other Cambodian courts who are alleged to have committed crimes set out in the 1956 Penal Code. This is not a matter of the ECCC being established as an extraordinary court, as the Pre-Trial Chamber has suggested. In a similar case in Italy, for example, a law concerning the extension of a statute of limitations could not be applied because it treated different Italian citizens differently. “In June of 2003, legislation known as the Schifani Law, or Lodo Schifani in Italian vernacular, was pushed swiftly through Italian Parliament. The result was legislation providing a grant of immunity from criminal prosecution for the sitting Prime Minister, as well as four other lead government officials, until their term in office expires. However, on January 13, 2004, the Supreme Italian Constitutional Court found the Schifani Law unconstitutional *because it violated the principal of equal treatment for all citizens of Italy.*” Brianne Biggiani, *Designs for Immunity: A Comparison of the Criminal Prosecution of United States Presidents & Italian Prime Ministers*, 14 CARDOZO J. INT’L & COMP. L. 209, 210 (2006) (emphasis added).

³ In support of its position that the Pre-Trial Chamber erred, the Defence incorporates and adopts by reference the submissions made by the IENG Sary Defence in: *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382; IENG Sary’s Appeal against the Closing Order, 25 October 2010, D427/1/6, paras. 154-73; Joint Response of IENG Sary, IENG Thirith and NUON Chea to Co-Prosecutors’ Submission on Statute of Limitations for National Crimes, 17 June 2011, E51/7/3.

⁴ See MEAS Muth’s Request for Clarification of Whether the OCIJ Considers itself bound by Pre-Trial Chamber Jurisprudence that Crimes Against Humanity Requires a Nexus with Armed Conflict, 17 October 2013, no document number yet assigned, paras. 17-19.

⁵ See Email from Interpretation and Translation Unit to Defence, “RE: translation request,” 24 October 2013.

I. REQUEST TO EXCEED PAGE LIMIT

1. According to Article 5.1 of the Practice Direction on the Filing of Documents before the ECCC, “[a] document filed to the Investigating Judges ... shall not exceed 15 pages in English or French or 30 pages in Khmer, unless otherwise provided in the Internal Rules or this Practice Direction or ordered by the ECCC.” According to Article 5.4, “[t]he Co-Investigating Judges or the relevant Chamber may, at the request of a participant, extend the page limit in exceptional circumstances.”
2. The Defence respectfully requests the OCIJ to extend the applicable page limit by two pages pursuant to Article 5.4. This Request is made due to the extensive background required to properly address this issue, which has been extensively litigated in Cases 001 and 002. Every effort has been made to restrict the length of this Request to the minimum possible in these exceptional circumstances.

II. BACKGROUND

A. Article 3 and Article 3 new

3. The 1956 Penal Code has been recognized as the Penal Code in effect during the time period over which the ECCC has temporal jurisdiction.⁶ This Penal Code contains provisions criminalizing homicide, torture, and religious persecution.⁷ The 1956 Penal Code also contains a statute of limitations, which prohibits prosecution of these crimes after ten years have passed since their commission.⁸
4. On 2 January 2001, the National Assembly approved the Draft Law on Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (“2001 Establishment Law”).⁹ Article 3 of the 2001 Establishment Law gave the ECCC jurisdiction over the 1956 Penal code crimes of homicide, torture, and religious persecution and extended the applicable statute of limitations by an additional 20 years. On 15 January 2001, this law was approved by the Senate.¹⁰

⁶ 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.

⁷ Articles 501, 503, 504, 505, 506, 507, and 508 of the 1956 Penal Code pertain to homicide, Article 500 pertains to torture, and Articles 209 and 210 pertain to religious persecution.

⁸ See 1956 Penal Code, Art. 109.

⁹ See ECCC website, chronology, available at <http://www.eccc.gov.kh/english/backgroundECCC.aspx>.

¹⁰ See Constitutional Council Decision No. 040/002/2001 KBTh Ch, 12 February 2001.

5. On 12 February 2001, the Constitutional Council pronounced that the 2001 Establishment Law was in accordance with the Constitution, except for the fact that the 1956 Penal Code – incorporated through Article 3 of the 2001 Establishment Law – allows for the death penalty, while the death penalty is forbidden by the Cambodian Constitution.¹¹
6. In assessing the constitutionality of the 2001 Establishment Law, the Constitutional Council considered whether the extension of the statute of limitations in Article 3 would violate the Constitution. The Constitutional Council was “of the opinion” that the extension of the statute of limitations “unquestionably affects a fundamental principle, ‘the nonretroactivity of any new law over offences committed in the past,’ which Cambodia, as other civilised countries, recognised both before 1975 and after 1978, including the transitional period of the Supreme National Council.”¹² It found, however, that this did not affect the constitutionality of Article 3, since the principle of non-retroactivity is not found in the Constitution and so the Constitutional Council was not bound by it.¹³
7. The Constitutional Council further found that “whatever value this principle may have, and whether or not it has been inscribed, [the Constitutional Council] had also to respect another principle, namely ‘every principle has its counterweight: every rule has its exception.’”¹⁴ The Constitutional Council explained that the 1956 Penal Code bars retroactive application of law, but contains a stipulation that “if a new law annuls any offence or reduces the penalty for any offence, offences committed prior to such law shall not be prosecuted, or the reduced penalty shall be applied, unless the sentence has been completely served.”¹⁵ In this case, since the new law (Article 3) would lower the applicable penalty from death to life imprisonment, the Constitutional Council found that this would fit the lower penalty exception to the principle of non-retroactivity and so would not be a violation of the principle.

¹¹ See Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999 (“Cambodian Constitution”), Art. 32.

¹² See Constitutional Council Decision No. 040/002/2001 KBTh Ch, 12 February 2001.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

8. On 22 June 2001, the Royal Government of Cambodia issued a Statement of Motivation regarding its letter issued the same date¹⁶ which proposed an amendment to the 2001 Establishment Law in order to bring it into conformity with the Constitution's prohibition on the death penalty.¹⁷ On 11 July 2001, the National Assembly adopted this proposed amendment.¹⁸ On 23 July 2001, the Senate approved the amended version.¹⁹ On 7 August 2001, the Constitutional Council pronounced the amended version of the 2001 Establishment Law as being fully in accordance with the Constitution.²⁰ On 10 August 2001, King Norodom Sihanouk promulgated the 2001 Establishment Law.²¹
9. On 6 August 2004, the Council of Ministers approved certain amendments to the 2001 Establishment Law for the purpose of harmonizing it with the recently concluded 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"). Apparently realizing that a 20 year extension of the statute of limitations would expire before all expected cases could begin at the ECCC, the extension of the statute of limitations under Article 3 was proposed to be changed from 20 to 30 years.²²

¹⁶ Letter No. 104.LS.KBC, 22 June 2001.

¹⁷ Statement of Motivation, No. 26 SCN.KBC, 22 June 2001. The Statement proposed that Article 3 be amended to read as follows:

- 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 of Cambodia, and which were committed during the period from 17 April 1975 to 6 January 1979:
 - o Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
 - o Torture (Article 500)
 - o Religious persecution (Article 209 and 210)
- The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 20 years for crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.
- The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this law.

¹⁸ See ECCC website, chronology, available at <http://www.eccc.gov.kh/english/backgroundECCC.aspx>.

¹⁹ *Id.*

²⁰ Constitutional Council Decision No. 043/005/2001 KBT.DH, 7 August 2001.

²¹ See ECCC website, chronology, available at <http://www.eccc.gov.kh/english/backgroundECCC.aspx>.

²² *Id.* With no publicly available records of debates or *travaux préparatoires*, one can only speculate as to the exact meaning and purpose of the extension.

10. On 5 October 2004, the National Assembly approved these amendments.²³ On 22 October 2004, the Constitutional Council pronounced the amended law in conformity with the Constitution.²⁴
11. On 27 October 2004, the Law on the Amendments to the Establishment Law was promulgated.²⁵ Unlike Article 3 of the 2001 Establishment Law, Article 3 new provides that “[t]he statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.”²⁶
- B. The application of Article 3 new in Case 001**
12. On 18 July 2007, the OCP opened the judicial investigation in Case 001 by filing its Introductory Submission. The Introductory Submission requested that Duch be investigated for, *inter alia*, national crimes.²⁷
13. On 2 June 2008, after the OCIJ notified the parties of the conclusion of the judicial investigation, the OCP filed a request to charge Duch for national crimes.²⁸
14. On 18 July 2008, the OCP filed its Final Submission, again requesting that Duch be prosecuted for national crimes.²⁹
15. On 8 August 2008, the OCIJ issued the Case 001 Closing Order.³⁰ The OCIJ *did not* indict Duch for national crimes, stating that even though certain acts of the Accused do constitute the national crimes of homicide and torture, “these acts must be accorded the

²³ *Id.*

²⁴ *Id.*

²⁵ Reach Kram, NS/RKM/1004/006, 27 October 2004.

²⁶ Emphasis added.

²⁷ The Introductory Submission is classified as confidential. However, the fact that included national crimes was referred to in *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ(PTC), Co-Prosecutors’ Appeal of the Closing Order against KAING Guek Eav “Duch” dated 8 August 2008 (“OCP Appeal of the Case 001 Closing Order”), D99/3/3, 5 September 2008, para. 4.

²⁸ This request appears to be classified as confidential. However, it was referred to in OCP Appeal of the Case 001 Closing Order, n. 11.

²⁹ This final submission appears to be classified as confidential. However, it was referred to in OCP Appeal of the Case 001 Closing Order, n. 13.

³⁰ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order Indicting KAING Guek Eav alias Duch, 8 August 2008, D99.

highest available legal classification, in this case: Crimes against Humanity or Grave Breaches of the Geneva Conventions of 1949.”³¹

16. On 5 September 2008, the OCP appealed the Closing Order, asserting that there is no hierarchy between any of the crimes in the jurisdiction of the ECCC, and as such, domestic crimes cannot be subsumed by international crimes.³² The OCP argued that the elements of the national crimes and international crimes differ because each of the international crimes contains an element that is not present in the national crimes, and vice versa.³³
17. On 5 December 2008, the Pre-Trial Chamber issued a decision on the OCP’s appeal, finding that the elements of the national crimes charged differed from the elements of the alleged international crimes, and that the Introductory Submission included facts that supported distinct national crime charges.³⁴ The Pre-Trial Chamber thus ordered that the national crimes of torture and premeditated murder be added to the Closing Order.³⁵
18. On 28 January 2009, the Duch Defence filed a preliminary objection against the application of national crimes.³⁶
19. On 20 April 2009, the Trial Chamber found the preliminary objection admissible and directed the parties to respond to the following questions:
 1. Have any legal acts such as prosecution or investigative action or factual circumstances such temporary non-functioning of the judicial system interrupted or suspended the Statute of Limitations governing the domestic crimes contained in the Indictment against the Accused?
 2. Had the Statute of Limitations governing the offences mentioned above expired against the accused before the promulgation of the 10th August 2001 and 27th October 2004, Article 3 and 3 (new) of the Laws on the establishment of the ECCC, and if so, do those provisions amount to an express reactivation or reinstatement of the right to prosecute?

³¹ *Id.*, para. 152.

³² OCP Appeal of the Case 001 Closing Order, paras. 30-31.

³³ *Id.*, paras. 32-33.

³⁴ *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ(PTC), Decision on Appeal Against Closing Order Indicting KAING Guek Eav Alias “Duch”, 5 December 2008, D99/3/42, paras. 72, 84, 99, 103.

³⁵ *Id.*, para. 41. *See also* para. 106 in which the Pre-Trial Chamber reasoned that adding the charges at this state did not infringe the right of the Accused to be informed of the charges against him.

³⁶ This preliminary objection is confidential, but was referred to in *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 (“Trial Chamber Case 001 Decision on National Crimes”), para. 1.

3. Is the extension of the Statute of Limitations as described by Article 3 and Article 3 (new) of the Laws on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea ("ECCC Law") a substantive or procedural provision? What legal consequences follow from the respective qualification?

4. If this provision is considered procedural, does the ECCC Law envisage reference to international standards to effectively invalidate one of its own provisions?; and if so, can you identify any relevant international standard which should apply?

5. What if any are the legal effects on the ECCC of the Constitutional Council decision of 12 February 2001?³⁷

20. On 18 May 2009, the Duch Defence responded that:

Article 109 of the 1956 Penal Code established a prescriptive period of 10 years in relation to domestic crimes, which expired on 6 January 1989. This period was not interrupted or suspended. A trial of persons who committed crimes during the period of Democratic Kampuchea took place in 1979 and numerous laws promulgated from 1979 onwards show a functioning judicial system. Article 33 (new), paragraphs 1 and 2, obligate the ECCC to exercise its jurisdiction in accordance with international standards as expressed in Articles 14 and 15 of the International Covenant on Civil and Political Rights ('ICCPR'). Article 3 (new) cannot reactivate a right to prosecute domestic crimes once the limitation period has already expired without violating the fundamental principle of non-retroactivity. Article 3 (new) of the ECCC Law accordingly contravenes international standards and is therefore invalid.³⁸

On the same date, the OCP and Civil Parties responded that:

the applicable statute of limitations did not start to run before 1993. During the Democratic Kampuchea period and between 1979 and 1993, the Cambodian judicial system was incapacitated and the prosecution of such crimes impossible. The key suspects were in the area controlled by the Khmer Rouge and outside the jurisdiction of the People's Republic of Kampuchea and subsequently, of the Kingdom of Cambodia. The statute of limitations should therefore be considered suspended or interrupted prior to 1993, and this period not counted when calculating the date beyond which prosecution is barred. Accordingly, the prescriptive period of 10 years was still running when the ECCC Law was promulgated on 10 August 2001 and amended on 27 October 2004 to extend the statute of limitations. The statute of limitations is procedural in nature and its extension by Article 3 (new) of the ECCC Law is not prohibited by the principle of non-retroactivity of criminal law. Further, Article 3 (new) of the ECCC Law does not contravene Articles 14 and 15 of the ICCPR. The fair trial rights embodied in Article 14 of the ICCPR are aimed at preventing undue delays during actual trial proceedings, but do not prescribe the time period between the crime's

³⁷ These directions to the parties appear to be confidential, but were reproduced in Trial Chamber Case 001 Decision on National Crimes, para. 2.

³⁸ The Duch Defence's response appears to be confidential. This quote is taken from the Trial Chamber's summary of the Duch Defence's arguments, in Trial Chamber Case 001 Decision on National Crimes, para. 4.

actual commission and the filing of an indictment, whereas the purpose of Article 15 of the ICCPR is to prevent prosecution and sentencing for acts not recognized as criminal at the time of commission. The crimes in question (homicide and torture) were in 1975, and remain, universally criminalized. The principle of legality cannot be violated by the prosecution of these crimes. Accordingly, an individual should not be able to invoke a statute of limitations to prevent prosecution for their commission.³⁹

21. On 26 July 2010, the Trial Chamber issued a decision on the applicability of Article 3 new.⁴⁰ The Trial Chamber unanimously decided that between 1975-79 no criminal investigations or prosecutions were possible and that the limitation period did not commence between these dates. The Trial Chamber was unable to reach agreement as to whether the applicable limitation period was interrupted or suspended between 1979 and 1993 and thus whether the limitation period had extinguished by the time Article 3 and Article 3 new were promulgated. The National Judges found that “the limitation period with respect to the domestic crimes allegedly committed by the Accused and falling within the jurisdiction of the ECCC started to run, at the earliest, on 24 September 1993 when the Kingdom of Cambodia was created, and did not run before that date.”⁴¹ According to the National Judges, it therefore had not expired before being extended by the Establishment Law. The International Judges, in contrast, were “unable to conclude that the Cambodian legal system was objectively incapable of launching investigations or prosecutions prior to 1993 and that the applicable limitation period should thus be considered to have been suspended or interrupted until that date.”⁴² They thus considered that the statute of limitations had expired prior the promulgation of the Establishment Law. As a consequence of the Trial Chamber’s failure to reach an affirmative majority on the question of the applicability of Article 3 new, the Chamber was unable to consider the guilt or innocence of Duch with respect to national crimes, creating “a barrier to the continuation of the prosecution against the Accused for domestic crimes before the Trial Chamber of the ECCC.”⁴³ The Trial Chamber’s decision was not appealed.

C. The application of Article 3 new in Case 002

³⁹ The OCP and Civil Party responses appear to be confidential. This quote is taken from the Trial Chamber’s summary of the arguments, in Trial Chamber Case 001 Decision on National Crimes, para. 5.

⁴⁰ Trial Chamber Case 001 Decision on National Crimes.

⁴¹ *Id.*, para. 25.

⁴² *Id.*, para. 35.

⁴³ *Id.*, para. 56.

22. On 10 June 2010, prior to the Trial Chamber's Decision on the Preliminary Objection in Case 001, the IENG Sary Defence filed a motion challenging the ECCC's jurisdiction to apply Article 3 new.⁴⁴ The IENG Sary Defence submitted that Article 3 new violates the principle of non-retroactivity. The IENG Sary Defence also set forth an argument not discussed in Case 001: that applying Article 3 new would violate Mr. IENG Sary's right to be treated equally before the law. The IENG Sary Defence asserted that the statute of limitations for national crimes was not been extended generally, violating IENG Sary's right to equal treatment because he could be charged with a crime that a similarly situated Accused/Charged Person in any other court in Cambodia could not.
23. On 15 September 2010, the OCIJ issued the Case 002 Closing Order. The Co-Investigating Judges stated that they attempted "to issue a common text on the questions of being tried twice for the same facts, the limitation period for the relevant national crimes, and on the effect of the Constitutional Council decision of 12 February 2001, but have not been able to."⁴⁵ They did not elaborate upon their respective positions on these issues. They stated that they found themselves in a "procedural stalemate, which is partly due to the hybrid structure of the ECCC."⁴⁶ The Co-Investigating Judges chose not to employ the procedural mechanism in the Rules for resolving disputes, believing that this would "put into peril the entire legal process," and that due to their obligation to issue a ruling within a reasonable time, they would "leav[e] it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956."⁴⁷ They thus included the charges of murder, torture and religious persecution, crimes defined and punishable by the Penal Code 1956 in the Closing Order.⁴⁸ They did not, however, set out the facts they considered to support the charges under Article 3 new of murder, torture, or religious persecution, as they did for each of the other crimes alleged. They further failed to set out the form of liability applicable against each of the Accused for the crimes of murder, torture, and religious persecution.

⁴⁴ See *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382.

⁴⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, paras. 1571-72.

⁴⁶ *Id.*, para. 1574.

⁴⁷ *Id.*

⁴⁸ *Id.*, para. 1576.

24. On 18 October 2010, the IENG Thirith Defence submitted an appeal against the Closing Order, arguing that application of Article 3 new would violate the principle of *nullum crimen sine lege* and would violate the Accused's right to be treated equally since the statute of limitations was extended only at the ECCC and not in other Cambodian courts.⁴⁹
25. On 25 October 2010, the IENG Sary Defence submitted an appeal against the Closing Order, arguing, *inter alia*, that Article 3 new violates the right to be treated equally before the law, as well as the principle of non-retroactivity.⁵⁰
26. On 19 November 2010, the OCP filed a joint response to the appeals,⁵¹ asserting that Article 3 new meets the principle of legality enshrined in Article 15(1) of the ICCPR,⁵² that the 1956 Penal Code was tolled until 1993 due to a broken judicial system,⁵³ that the Constitutional Council Decision is binding and final,⁵⁴ and that there is no violation of the right to equality.⁵⁵
27. On 15 February 2011,⁵⁶ the Pre-Trial Chamber issued its Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order. The Pre-Trial Chamber found "that the brevity and lack of development of the [IENG Thirith Defence's] jurisdictional challenge to the Impugned Order for charging national crimes prevent it from being able properly to consider the merits of this ground of appeal."⁵⁷
28. On 11 April 2011, the Pre-Trial Chamber issued its Decision on the IENG Sary Defence's Appeal of the Closing Order. The Pre-Trial Chamber decided that the ECCC had subject-

⁴⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), IENG Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, paras. 77-78.

⁵⁰ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), IENG Sary's Appeal against the Closing Order, 25 October 2010, D427/1/6, paras. 154-73.

⁵¹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, 19 November 2010, D427/1/17.

⁵² *Id.*, para. 90.

⁵³ *Id.*, paras. 107-14.

⁵⁴ *Id.*, paras. 100-01.

⁵⁵ *Id.*, para. 127. The IENG Sary Defence then contested the OCP arguments in *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), IENG Sary's Reply to the Co-Prosecutors' Joint Response to NUON Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 6 December 2010, D427/1/23.

⁵⁶ On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary's Appeal Against the Closing Order (D427/1/26) and its Decision on IENG Thirith's and NUON Chea's Appeals Against the Closing Order (D427/2/12) with reasons to "follow in due course."

⁵⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC 145 & 146), Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, 15 February 2011, D427/3/15, paras. 179.

matter jurisdiction over domestic crimes.⁵⁸ The Pre-Trial Chamber held, *inter alia*, that:

a. the application of Article 3 new does not violate the principle of non-retroactivity,⁵⁹ reasoning that the ten-year statute of limitations had been tolled due to a poorly functioning judiciary and had not expired when Article 3 new was enacted;⁶⁰ **b.** Article 3 new does not violate an Accused's right to be treated equally before the law,⁶¹ and complies with the fair trial requirements of Article 14 of the ICCPR;⁶² and **c.** although the Co-Investigating Judges did not explicitly state the facts and modes of liability for the charges of domestic crimes, the Pre-Trial Chamber would not address issues related to defects in the Closing Order, but would only address whether this lack of specification prevented the Accused from being sent to trial for domestic crimes.⁶³ The Pre-Trial Chamber held: "[w]hether the facts stated in the indictment can actually be characterised as murder, torture and religious persecution under the 1956 Penal Code is ultimately a question of legal characterisation that is to be determined by the Trial Chamber, and bears no effect, at this stage, on the ECCC's jurisdiction to send the accused for trial for domestic crimes."⁶⁴

29. On 14 February 2011, the IENG Thirith and KHIEU Samphan Defence teams filed preliminary objections against the application of Article 3 new.⁶⁵

30. On 25 February 2011, the NUON Chea and IENG Sary Defence teams filed preliminary objections to the application of Article 3 new.⁶⁶

31. On 24 February 2011, the IENG Sary Defence filed a Motion to Strike Portions of the Closing Order due to Defects.⁶⁷ The IENG Sary Defence argued, *inter alia*, that the

⁵⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ(PTC), Decision on IENG Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 76.

⁵⁹ *Id.*, para. 285.

⁶⁰ *Id.*, para. 286-87.

⁶¹ *Id.*, para. 288.

⁶² *Id.*, paras. 291-92.

⁶³ *Id.*, para. 293.

⁶⁴ *Id.*, para. 296.

⁶⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, IENG Thirith Defence's Preliminary Objections, 14 February 2011, E44, paras. 9, 20-24; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Preliminary Objections Concerning Termination of Prosecution (Domestic Crimes) 14 February 2011, E47, paras. 10, 23.

⁶⁶ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Consolidated Preliminary Objections, 25 February 2011, E51/3, para. 41.

⁶⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, IENG Sary's Motion to Strike Portions of the Closing Order due to Defects, 24 February 2011, E58.

Closing Order does not set out facts to support the charges under Article 3 new of the domestic crimes, nor does it set out the forms of liability that are to apply to these crimes.⁶⁸ The IENG Sary Defence argued that the Trial Chamber should strike all Article 3 new references.

32. On 16 March 2011, the OCP responded to the motion to strike, arguing that the ECCC legal framework does not envisage motions to amend or strike portions of the Closing Order at the trial stage,⁶⁹ and that the pleadings related to domestic crimes were sufficient.⁷⁰

33. On 5 April 2011, the Trial Chamber issued directions to the parties concerning preliminary objections. Concerning national crimes, the Trial Chamber stated:

The Chamber recalls its decision of 26 July 2010 on a preliminary objection in relation to the national crimes of premeditated murder and torture in Case 001. In that decision, the Chamber disagreed as to whether the statute of limitations precluded action against the accused. In its joint response to Defence Rule 89 Preliminary Objections of 21 March 2011 (E51/5/3/1), the Co Prosecutors submit that the statute of limitations had not expired against all accused in Case 002. They further indicate their intention to present evidence at trial to show that there was no reasonable possibility to prosecute all four accused until their surrender to the Cambodian government in 1996 and 1998 respectively, and that the statute of limitations was thus tolled until that time. They accordingly request the Trial Chamber to defer its decision on this matter until the judgement on the merits. The Trial Chamber agrees with the Defence that this preliminary objection is best determined as soon as possible. It accordingly invites the Co-Prosecutors, no later than Friday 27 May 2011 to indicate the basis of its contention that national crimes are not statute-barred in relation to all accused in Case 002. Its submission is to be no greater than 15 pages in length (appending by way of annex all documentary or other evidence in support, or case file reference numbers). The deadline for any Defence response to this submission is Friday 17 June 2011. Each Defence team is allocated 5 pages in response individually (or 15 pages should Defence teams choose to consolidate these responses).⁷¹

34. On 27 May 2011, pursuant to the Trial Chamber's directions, the OCP filed a submission on the statute of limitations for national crimes. The OCP submitted that the applicable 10 year statute of limitations for Establishment Law Article 3 new national crimes was

⁶⁸ *Id.*, paras. 3-6.

⁶⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Co-Prosecutors' Response to IENG Sary's Motion to Strike Portions of the Closing Order due to Defects, 16 March 2011, E58/1, paras. 1-7, 13, 18-19.

⁷⁰ *Id.*

⁷¹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Directions to Parties Concerning Preliminary Objections and Related Issues, 5 April 2011, E51/7.

suspended until at least 23 October 1991,⁷² and thus was extended prior to its expiry, because:

- a. “there was no functional judicial system in Cambodia that could conduct a fair trial of the Accused until at least the mid-1990s”;⁷³
- b. “the ongoing civil war made it practically impossible to prosecute the Accused until their surrender to the Cambodian government in 1996 and 1998;”⁷⁴ and
- c. “the Accused were directly responsible for the conditions that prevented their prosecution during this time period.”⁷⁵

35. On 17 June 2011, the NUON Chea, IENG Sary, and IENG Thirith Defence teams filed a joint response to the OCP’s submission on the statute of limitations for national crimes.⁷⁶ The Defence teams argued that the judicial system functioned during the entire period after the crimes allegedly occurred, the civil war did not toll the statute of limitations, and since there were no conditions which prevented prosecution of the Accused, the statute of limitations was not tolled and expired prior to its extension. The KHIEU Samphan Defence filed a separate response, arguing that **a.** the 1956 Penal code provides that prosecution may be interrupted by an investigative or prosecutorial step, but it does not provide for suspension of prosecution; **b.** the OCP failed to objectively show that it was impossible to open an investigation or commence proceedings against KHIEU Samphan between 1979 and 2007; and **c.** application of Article 3 of the ECCC Law should be disallowed by the Chamber, pursuant to the principles of legality and equality before the law.⁷⁷

36. On 29 June 2011, during the Initial Hearing, the Trial Chamber heard oral arguments from the IENG Sary Defence, OCP, and Civil Parties concerning the applicability of Article 3 new.⁷⁸

⁷² *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Submission on Statute of Limitation for National Crimes, 27 May 2011, E51/7/1, para. 21.

⁷³ *Id.*, para. 3.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Joint Response of IENG Sary, IENG Thirith and NUON Chea to Co-Prosecutors’ Submission on statute of limitations for National Crimes, 17 June 2011, E51/7/3.

⁷⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Response to Co-Prosecutors’ Submission on Statute of Limitations for National Crimes, 17 June 2011, E51/7/2.

⁷⁸ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Transcript, 29 June 2011, E1/6.1.

37. On 22 September 2011, the Trial Chamber rendered its decision on national crimes.⁷⁹

The Trial Chamber: (i) held that the Closing Order's insufficiency in setting out the facts and modes of liability to support domestic crimes charges resulted in its inability to try national crimes in Case 002,⁸⁰ and (ii) granted the IENG Sary Motion to Strike insofar as it pertains to national crimes.⁸¹ The Trial Chamber found that the Closing Order does not specify the material facts or the modes of liability which relate to national crimes and that there is no way to remedy these defects.⁸² The Trial Chamber decided it was unnecessary to determine the merits of the Defence teams' preliminary objections related to the applicability of Article 3 new because of the defective Closing Order.⁸³ The Trial Chamber's decision was not appealed.

III. LAW AND ARGUMENT

38. Mr. MEAS Muth has the fundamental right to be treated equally before the law. This right is guaranteed to him by Article 31 of the Cambodian Constitution, which provides in part that "[e]very Khmer citizen shall be equal before the law..."⁸⁴ This right is also enshrined in the Universal Declaration of Human Rights⁸⁵ and the International Covenant on Civil and Political Rights ("ICCPR"),⁸⁶ both of which the ECCC must respect pursuant to the Cambodian Constitution,⁸⁷ the Agreement,⁸⁸ and the Establishment Law.⁸⁹

⁷⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/TC, Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011.

⁸⁰ *Id.*, paras. 15, 22.

⁸¹ *Id.*, para. 23.

⁸² *Id.*, paras. 21-22.

⁸³ *Id.*, p. 11.

⁸⁴ This right is further set out in the Cambodian Code of Criminal Procedure which states in Article 3 that "Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other status."

⁸⁵ Article 7 of the Universal Declaration of Human Rights states: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

⁸⁶ International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49, Arts. 14(1), 26. Article 14(1) states in part that "[a]ll persons shall be equal before the courts and tribunals." Article 26 states in part that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

⁸⁷ Cambodian Constitution, Art. 31.

⁸⁸ Article 12(2) 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 ("Agreement") states: "The Extraordinary Chambers 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, to which Cambodia is a party"; Article 13(1) states: "The 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."

This right is also set out in the statute of the International Criminal Tribunal for the former Yugoslavia⁹⁰ and features prominently in a number of regional instruments⁹¹ and in the Constitutions of many States.⁹² Mr. MEAS Muth's right to equal treatment before the ECCC would be violated by the application of Article 3 new against him.

39. The obligation to respect rights set out in the ICCPR has been affirmed by a 2007 Constitutional Council Decision in which the Constitutional Council instructed:

a judge shall not only rely on [the law at issue], but also relies on law. The term law here refers to the national law including the Constitution which is the supreme law and other applicable laws as well as the international conventions that Cambodia has recognized....⁹³

40. The United Nations Office of the High Commissioner for Human Rights issued a public statement after this Constitutional Council Decision was issued, stating:

The Constitutional Council's ruling ... decisively affirms the position of the international human rights treaties as part of Cambodian law, protected by the Constitution, and makes the important point that trial judges should take basic human rights concerns into account when considering cases.⁹⁴

41. The right to equal treatment before the law requires that objectively equal cases be treated equally. The Human Rights Committee, a body of independent experts that monitors the implementation of the ICCPR by State parties (such as Cambodia),⁹⁵ has stated that "[t]he right to equality before the courts and tribunals and to a fair trial is a key element of

⁸⁹ Article 33 new of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("Establishment Law") states: "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."

⁹⁰ ICTY Statute, Art. 21(1).

⁹¹ See Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Inter-American Convention on Human Rights, Art. 24.

⁹² See, e.g., United States Constitution, 14th amendment; French Constitution, adopted 1958, Art. 1; Constitution of the Federal Republic of Austria, Art. 7; New Zealand Bill of Rights Act of 1990, Part 2, para. 27; Constitution of the Republic of Poland, 2 April 1997, Art. 32; Constitution of the Democratic Socialist Republic of Sri Lanka, Art. 12; First Draft Constitution of the Republic of Zambia, 30 April 2012, Art. 45.

⁹³ Constitutional Council Decision No. 092/003/2007, 10 July 2007 (unofficial English translation provided by OHCHR Cambodia).

⁹⁴ UNOHCHR, Public Statement: Decision of the Constitutional Council regarding the Law on Aggravating Circumstances for Felonies and the Convention on the Rights of the Child, 25 July 2007.

⁹⁵ See Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, website, available at <http://www2.ohchr.org/english/bodies/hrc/>. Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. See United Nations Treaty Collection, website, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#3.

human rights protection and serves as a procedural means to safeguard the rule of law.”⁹⁶

The Human Rights Committee has further stated that any differential treatment must be “based on reasonable and objective criteria.”⁹⁷

42. Mr. MEAS Muth’s case is objectively equal to Cases 001 and 002 as regards the applicability of Article 3 new. The OCP sought to have Article 3 new applied against Duch, NUON Chea, IENG Sary, IENG Thirith, KHIEU Samphan, and Mr. MEAS Muth. Article 3 new ultimately was *not* applied against Duch, NUON Chea, IENG Sary, IENG Thirith, or KHIEU Samphan. This was not due to a matter of prosecutorial or investigatorial discretion; in other words, no decision was made that Mr. MEAS Muth could be prosecuted under Article 3 new while the others could not because of any factual distinction between the three cases.⁹⁸ The application of Article 3 new was rejected in Cases 001 and 002 purely as a matter of law. There is no reasonable or objective criteria which would permit applying Article 3 new against Mr. MEAS Muth when it could not be applied against Duch, NUON Chea, IENG Sary, IENG Thirith, or KHIEU Samphan.
43. Case 002 cannot be distinguished from Case 003 on the basis of its defective indictment. The reason that the indictment was defective was because the Co-Investigating Judges could not agree as to the applicability of Article 3 new. They therefore were unable to set out the facts they found to support the crimes of murder, torture, or religious persecution or to agree as to the form of liability applicable for those crimes. Case 002 is thus like Case 001, in which Article 3 new could not be applied because no agreement was reached as to its applicability.
44. Mr. MEAS Muth’s right to a fair trial by an independent and impartial tribunal⁹⁹ supports the conclusion that Mr. MEAS Muth may not be treated differently from Duch, NUON Chea, IENG Sary, IENG Thirith, and KHIEU Samphan. This right requires not only that

⁹⁶ Human Rights Committee, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, U.N. Doc. CCPR/C/GC/32, available at <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>.

⁹⁷ *Rita Hiro Balani v. Spain*, Communication No. 1021/2001, U.N. Doc. CCPR/C/77/D/1021/2001 (1998), para. 4.3, available at <http://www1.umn.edu/humanrts/undocs/1021-2001.html>. See also *Waldman v. Canada* (Views adopted on 3 November 1999), in UN doc. GAOR, A/55/40 (vol. II), para. 10.6, available at http://www.worldcourts.com/hrc/eng/decisions/1999.11.03_Waldman_v_Canada.htm.

⁹⁸ Even in the exercise of prosecutorial discretion, however, the right to equality before the law must be respected. See *Prosecutor v. Delalić et al.*, IT-96-21-A, Appeal Judgement, 20 February 2001, paras. 604-05.


⁹⁹ See Cambodian Constitution, Art. 31; Agreement, Arts. 12(2), 13(1); Establishment Law, Art. 33 new; ICCPR, Art. 14(1).


proceedings be fair, but that they be perceived to be fair by a reasonable observer with knowledge of all relevant circumstances.¹⁰⁰ No reasonable observer would understand why Article 3 new should be applied to Mr. MEAS Muth alone, when it was not applied to any of the Accused in Cases 001 or 002, not because of any factual difference between the cases, but because of disagreements between the judges as to applicability.

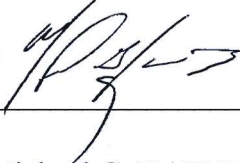
IV. RELIEF SOUGHT

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to **DECLINE** to apply the national crimes listed in Article 3 new to Mr. MEAS Muth.

Respectfully submitted,


ANG Udom




Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth

Signed in Phnom Penh, Kingdom of Cambodia on this 24th day of **October, 2013**

¹⁰⁰ *Prosecutor v. Furundžija*, IT-95-17/1-A, Judgement, 21 July 2000, para. 190.