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

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CO-LAWYERS OF CIVIL PARTIES' INVESTIGATIVE REQUEST CONCERNING
THE CRIMES OF ENFORCED DISAPPEARANCE

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I. INTRODUCTION

1. Pursuant to ECCC Internal Rule 55 (10) stating that “At any time during an investigation, the Co-Prosecutors, a Charged Person or a Civil Party may request the Co-Investigating Judges to make such orders or undertake such investigative action as they consider necessary for the conduct of the investigation,” the Co Lawyers for Civil Parties hereby submit a request for investigative action to the Office of the Co-Investigating Judges (the “OCIJ”) against **NUON Chea, IENG Sary, KHIEU Samphan, IENG Thirith and KAING Guek Eav (DUCH)**. In particular, the Co Lawyers for Civil Parties request further investigation on the facts specified in various witness statements submitted by the OCIJ in connection with the specific requests for investigation, under the scope of **Enforced Disappearances**.

II. ARGUMENT

A. THE ENFORCED DISAPPEARANCE OF PERSONS CONSTITUTES A CRIME AGAINST HUMANITY

2. Under international law, enforced disappearance of persons is defined as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”¹
3. Enforced disappearance of persons is an extremely serious crime employed by perpetrators to silence opponents and instill a sense of uncertainty and fear among the wider community.² The practice has been widely condemned as “an affront to the

¹ The Rome Statute of the International Criminal Court art. 7.2, Jul. 17, 1998, U.N. Doc. 2187 (hereinafter the “Rome Statute”).

² See e.g. *The Prosecutor v. Nikolic*, Sentencing Judgment, IT-02-60/1-S, Trial Chamber, 2 December 2003, at ¶ 113, illustrating the gravity of enforced disappearance: “The impact of the events of Srebrenica upon the lives of the families affected has created what is known as the ‘Srebrenica syndrome.’ The greatest and most stressful traumatic event for Srebrenica survivors is the disappearance of a large number of men, such that every woman suffered the loss of a husband, a father, brothers or uncles. In addition to the loss of numerous relatives, many of the families do not know the truth regarding the fate of their family members and are still waiting for news. Children who witnessed separations suffer from a range of problems years after the events.”; *The Prosecutor v. Dragan Obrenovic*, Sentencing Judgment, IT-02-60/2-S, Trial Chamber, 10 December 2003, ¶ 76; *The Prosecutor v. Blagojevic and Jokic*, Judgment, Trial Chamber, January 17, 2005, ¶ 845.

conscience of the hemisphere"³ and "cruel and inhuman."⁴ Enforced disappearances cause flagrant violations of fundamental human rights.⁵ In particular, the crime deprives victims of their rights to liberty, security and humane treatment, a fair trial, and legal counsel. In addition, enforced disappearances often violate the right to life and the prohibition on torture and cruel, inhuman, and degrading treatment.⁶

4. The consequences of enforced disappearances are not limited to the disappeared persons themselves. Instead, they are equally suffered by the families and friends of the disappeared. "Often, the disappeared persons are killed immediately, but their children, parents or spouses remain suspended in a state of extreme uncertainty and anguish, torn between hope and despair."⁷ The acquaintances of the disappeared must also be considered victims of enforced disappearance.⁸
5. Consequently, it is a well-established principle of international law that the widespread and systematic commission of enforced disappearances of persons constitutes a crime against humanity.⁹ In 1992, the UN General Assembly adopted by resolution the "Declaration on the Protection of All Persons from Enforced Disappearances," which underscores the gravity of the crime by providing that:

*[E]nforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.*¹⁰

The legal classification of enforced disappearance as a crime against humanity is also codified in the following international instruments: the Rome Statute,¹¹ the International Convention for the Protection of All Persons from Enforced Disappearances,¹² and the

³ Annual Report of the Inter-American Commission on Human Rights, OAS General Assembly, November 18, 1983, AG/Res.666 (XIII-0/83), at ¶ 4.

⁴ Annual Report of the Inter-American Commission on Human Rights, OAS General Assembly, November 17, 1984, AG/RES.742 (XIV-0/84).

⁵ "Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission Resolution 2001/46", United Nations Commission on Human Rights, E/CN.4/2002/71, ¶ 75.

⁶ *Id.*

⁷ *Id.* at ¶ 95.

⁸ *Id.*

⁹ See Rome Statute at art. 7(1)(h), which classifies enforced disappearance of persons as a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

¹⁰ Declaration on the Protection of All Persons from Enforced Disappearance at Preamble, December 18, 1992, GA res. 47/133, 47 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/47/49.

¹¹ Rome Statute art. 7(1)(h).

¹² International Convention for the Protection of All Persons from Enforced Disappearances, adopted December 20, 2006, Doc.A/61/488. The preamble recognizes "the extreme seriousness of enforced disappearance" and

Inter-American Convention on Forced Disappearance of Persons.¹³ The proposition that the widespread or systematic enforced disappearance of persons constitutes a crime against humanity has been repeatedly affirmed by international jurisprudence and scholarship.¹⁴

B. THE COURT HAS A DUTY TO INVESTIGATE WHETHER THE CHARGED PERSONS ARE RESPONSIBLE FOR COMMITTING WIDESPREAD OR CONSISTENT ENFORCED DISAPPEARANCES

6. According to the international criminal law scholar M. Cherif Bassiouni, existing international criminal law and relevant scholarship indicate that crimes against humanity have risen to the level of *jus cogens*.¹⁵ Essentially, *jus cogens* norms are ‘peremptory’ and ‘non-derogable’ sources of legal obligations in international law.¹⁶ A *jus cogens* norm creates obligations *erga omnes* “when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most

Article 5 identifies the practice as a crime against humanity. Article 5 provides: “The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.” At present, there are 81 signatories and 10 states parties to the Enforced Disappearances Convention.

¹³Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), *entered into force* March 28, 1996. The preamble reaffirms “that the systematic practice of the forced disappearance of persons constitutes a crime against humanity.”

¹⁴ See e.g. *Velásquez Rodríguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), 29 July 1988 at ¶ 153, recognizing that “international practice and doctrine have often categorized disappearances as a crime against humanity.”; Christine A.E. Bakker, “Full Stop to Amnesty in Argentina, the Simon Case” *Journal of International Criminal Justice*, November, 2005 citing Simón, Julio Héctor y otros s/privación ilegítima de la libertad. Supreme Court, causa No. 17.768, Opinions of Justice Maqueda, at §§ 86-88 (14 June 2005) where reference is made to international declarations and resolutions condemning the forced disappearance of persons and to an IACHR decision stating that this crime already constituted a crime against humanity in the 1970s; UN Transitional Administration in East Timor Regulation No. 2000/15 “On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences,” § 5.1; Law of the Iraqi Higher Criminal Court, Law No. 10 (2005), art. 12(I), *available at* http://law.case.edu/saddamtrial/documents/IST_statute_official_english.pdf; *Prosecutor v. Miroslav Kvočka et al.*, *Judgment, IT-98-30/1-T ICTY, Trial Chamber, 2 November 2001*, ¶ 208 (finding that “forced disappearance [is] listed in the jurisprudence of the Tribunal as falling under this category [other inhumane acts],” of crimes against humanity).

¹⁵ M. Cherif Bassiouni, “International Crimes: *Jus cogens* and *Obligatio Erga Omnes*,” 59 *Law & Contemp. Probs* 63, 68 (Fall, 1996). The term *jus cogens* means “the compelling law,” whereas the term *erga omnes* means “flowing to all.” *Id.* at 72, 67. “*Jus cogens* refers to the legal status that certain international crimes reach, and *obligation erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens*. *Id.* at 65. That is, “*erga omnes*...is a consequence of a given international crime having risen to the level of *jus cogens*. It is not, therefore, a cause or condition for a crime’s inclusion in the category of *jus cogens*.” According to Bassiouni: “[t]he legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.” *Id.* at 68. See also, Francisco Forrest Martin, “Delineating a Hierarchical Outline of International Law Sources and Norms.” 65(2) *Sask. L. Rev.* 333, 341-352 (2002) (explicitly finding that “forced disappearances, a violation of the right to life, are considered crimes against humanity” and the prohibition of crimes against humanity reflects a *jus cogens* norm.)

¹⁶ See also, Francisco Forrest Martin, “Delineating a Hierarchical Outline of International Law Sources and Norms.” 65(2) *Sask. L. Rev.* 333, 341-352 (2002).

states.¹⁷ The widely supported establishment of the permanent International Criminal Court having inherent jurisdiction over genocide, crimes against humanity, and war crimes indicates that such crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.¹⁸ The preamble to the Rome Statute clearly provides: “that the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.”¹⁹

7. In summary: the enforced disappearance of persons constitutes a crime against humanity when committed in a widespread or consistent manner and the prohibition against crimes against humanity constitutes a *jus cogens* norm from which an obligation *erga omnes* to prosecute is derived. Therefore, this Court, through its Office of Co-Investigating Judges, has the duty under international law to investigate the occurrence of enforced disappearances during Democratic Kampuchea.²⁰ The preamble to 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” (hereinafter the “Agreement”) emphasizes that the need to prosecute those most responsible for crimes and serious violations of “international humanitarian law and custom.”²¹ This provision mandates that any violation of *jus cogens* norms must be addressed.
8. The investigation of the commission of enforced disappearances as crimes against humanity fully comports with the principle of legality²² because the international

¹⁷ *Id.* at 73. See also, *Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain)*, International Court of Justice, 5 February 1970, ¶ 33- 34 (finding “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*...Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.”).

¹⁸ Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*,” at 74. As of June 17, 2009, there were 108 states parties to the ICC and an additional 31 signatories. See <http://www.iccnw.org/> (last visited June 22, 2009).

¹⁹ Rome Statute Preamble ¶ 4.

²⁰ See *Prosecutor v. Augustine Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, SCSL-2004-15-PT, Appeals Chamber, 25 May 2004, ¶10 stating that “under international law, states are under a duty to prosecute crimes whose prohibition has attained the status of *jus cogen*.”

²¹ Preamble to the Agreement.

²² See, e.g., Universal Declaration of Human Rights, GA Res. 217 A (III), December 10, 1948, art. 11, (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal

recognition of crimes against humanity pre-dated Democratic Kampuchea.²³ Although the actual codification of forced disappearance as a crime against humanity occurred in treaties drafted after Democratic Kampuchea, such instruments adopted neither new nor *ex post facto* laws. Rather, the agreements reflected longstanding customary international law.²⁴ While the elements and scope of crimes against humanity have evolved, the criminality of enforced disappearance was foreseeable during Democratic Kampuchea and the principle of legality does not require the definition to remain rigid.²⁵ Indeed, the International Military Tribunal characterized enforced disappearance as a crime under international law in 1946.²⁶

offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”).

²³ Although international recognition of the laws of humanity emerged during the turn of the twentieth century, the codification of crimes against humanity first occurred in the Charter of International Military Tribunal of Nuremberg (“Nuremberg Charter”), which was annexed to the London Agreement of 8 August 1945. The prohibition of crimes against humanity was included in Article 6(c) of the Nuremberg Charter. As the German Supreme Court in the British Occupied Zone stated, on the basis of Control Council Law No. 10, in a judgment of 15 November 1949: “*There exist in the circle of civilized peoples certain principles connected with the value and dignity of human persons which are so essentials for the social life of human being and for the existence of each person that no State belonging to this circle is entitled to break with such principle. Hence, the infringement of these principles of humanity remains a punishable crime [...].*”

²⁴ The International Covenant on Civil and Political Rights (“ICCPR”), adopted in 1966, GA Res. 2200A (XXI) of 16 December 1966, art. 9., recognized, *inter alia*, the fundamental right to life and provided that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” See also, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2d Revised Edition), Kluwer Law International (1999) at p. 154, 155 discussing the Judgment of International Military Tribunal at Nuremberg concerning the alleged retroactivity in the provisions of the Nuremberg Charter, Bassiouni observed that the IMT appeared to endorse the statement of Hartley Shawcross, the British chief prosecutor who noted that “there is no ..substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators. It fills a gap in international criminal procedure.” In the *Justice*, case, the tribunal, after citing the *Goering* case stated that “no German could assert that he did not know that acts shocking to the moral sense of the mankind would be punished by the Allies. ”

²⁵ See e.g., *Chaupy v. France*, App. No. 64915/01, Eur. Ct. H.R. 295, ¶. 43 (2004) (“Those consequences need not be foreseeable with absolute certainty.”); *S.W. v. United Kingdom*, No. 47/1994/494/576, Eur. Ct. H.R. 52, ¶ 43 (1995) (holding that a foreseeable “evolution” of criminal law did not violate the principle of legality); Judge Antonio Cassese observed: “Immediately after WWII, the *nullum crimen sine lege* principle could be regarded as a moral maxim destined to yield to superior exigencies whenever it would have been contrary to justice not to hold persons accountable for appalling atrocities.” Antonio Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (Oxford University Press), p. 354-355.

²⁶ *The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Hermann Wilhelm Goering, Rudolf Hess, Joachim von Ribbentrop et. al.*, Judgment, Nuremberg International Military Tribunal (reproduced 1947 in 41 AJIL, p. 172 at 230; available online at <http://www.derechos.org/nizkor/nuremberg/judgment/cap7.html>); See also Cryer et al. *An Introduction to International Criminal Law and Procedure* (2007), p. 216, finding that: “Enforced disappearance has ... been previously recognized as an international crime and indeed as a crime against humanity. It was exemplified in the Night and Fog Decree issued by the Nazis, to execute people and to provide no information to the families as to the families as to their whereabouts or fate (Fn. 201 citing IMT)”; Amnesty International- Report- EUR 45/01/99, “United Kingdom: The Pinochet Case-Universal Jurisdiction and the Absence of Immunity for Crimes Against Humanity (January 1999), p. 7 (citing Judgment of the International Military Tribunal for the Trial of German Major War Criminals (with the dissenting opinion of the Soviet Member)- Nuremberg 30th September and 1st October 1946, Cmd. 6964, Misc. No. 12 (London: H.M.S.O.

9. Accordingly, it cannot be reasonably argued that the illegality of widespread abductions and disappearances was not foreseeable during Democratic Kampuchea. As such, the crime of enforced disappearance can be considered a crime against humanity, if conducted as an attack against population in either a widespread or systematic manner. Therefore, the defendants in this case could be charged with the crimes of enforced disappearance as a form of crimes against humanity.

C. ENFORCED DISAPPEARANCE IS WITHIN THE SUBJECT MATTER JURISDICTION OF THE ECCC GOVERNED BY THE AGREEMENT BETWEEN THE UN AND THE RGC

10. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC Law") does not enumerate the enforced disappearance of persons as a crime against humanity.²⁷ However, the Agreement between the United Nations and the Royal Government of Cambodia ("RGC") concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea (the "Agreement")²⁸ adopts the definition of crimes against humanity set forth in the Rome Statute. As aforementioned, the Rome Statute explicitly establishes subject matter jurisdiction over a more extensive list of crimes, including enforced disappearance.²⁹ Unlike the ECCC Law, which defines crimes against humanity as: "any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds,"³⁰ the definition adopted by the Rome Statute does not include a discriminatory intent requirement.

- a. If an inconsistency arises between the two instruments, the Agreement prevails over the ECCC Law.**

11. In this case, the issue arises of which instrument defining crimes against humanity governs the investigation of enforced disappearances: the Rome Statute or the ECCC

1946), pp. 48-49)) available at << www.amnesty.org/ailib/aipub/1999/EUR/44500199.htm >> (visited 6/16/2009) (finding: While the crime of enforced disappearance was not enumerated by the Nuremberg Charter, Field Marshall Wilhelm Keitel was convicted of the crime by the IMT.)

²⁷ 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, amended pursuant to the Agreement on 27 October 2004, NS/RKM/1004/006, art. 3 (*hereinafter* "ECCC Law").

²⁸ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of the Crimes Committed Under the Period of Democratic Kampuchea, 6 June 2003, art. 9 (*hereinafter* "Agreement").

²⁹ Rome Statute arts. 7 (1)(i) and 7(2).

³⁰ ECCC Law art. 5.

Law. To resolve this issue, it is necessary to examine the relationship between the ECCC Law and the Agreement. The ECCC Law was created to implement the provisions set forth in the Agreement.³¹ Therefore, if an inconsistency arises between the two instruments, deference should be given to the Agreement, which predated and set forth the terms for the ECCC Law. Such deference is in accordance with the principle of *lex prior*, which prioritizes the first agreement as the prevailing law by making an analogy to a general principle of domestic contract law (“illegality of a contract to break a contract”).³² The International Court of Justice (“ICJ”) recognized in the *Reservations* opinion (1951) that:

...[it is a] generally recognized principle that a [...] convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention.³³

12. Article 18 of the Vienna Convention on the Law of Treaties provides that a state assumes certain obligations solely by signing a treaty.³⁴ The acceptance of the Agreement bound the UN and the RGC to set terms. Therefore, any interpretation of ECCC Law which is contrary to the Agreement between the UN and the RGC is impermissible. In the 1988 *Belilos* case, the European Court of Human Rights found that a declaration made by Switzerland in its instrument of ratification was incompatible with the object and purpose of the Convention, and held that Switzerland was bound by the Convention “irrespective of the validity of the declaration”.³⁵ It went further by stating that States are allowed to make reservations, but such reservations shall not be against the object and purpose of the treaty. Hence, the ECCC law cannot be invoked as a means to circumvent the obligations under the initial treaty, the Agreement.

³¹ Agreement art. 2 (2)

³² “Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law” Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi on Fifty-eighth session Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/L.682, 13 April 2006 (quoting C. Wilfried Jenks, “The Conflict of Law-Making Treaties”, BYBIL vol. 30, (1953), p. 442); See e.g., *Costa Rica v. Nicaragua*, Central American Court of Justice, AJIL vol. 11 (1917) No. 1, p. 228.

³³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide case, Advisory Opinion, *I.C.J. Reports 1951* p. 21 (“*Reservations* case”).

³⁴ Vienna Convention on the Law of Treaties art. 18, UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969) (“VCLT”), this article provides that A State is obliged to refrain from acts which would defeat the object and purpose of a treaty

³⁵ *Belilos v. Switzerland*, Judgment of 29 April 1988, ECHR Series A (1988) No. 132, p. 28, ¶ 60.

13. In this case, the Agreement must be interpreted in light of its object and purpose,³⁶ by examining the Agreement in its entirety to discern the will of the contracting parties.³⁷ The object and purpose of the Agreement is to prosecute those who are responsible for serious violations of human rights conducted during the Khmer Rouge Regime. Therefore, if the ECCC Law is interpreted to limit the court's subject matter jurisdiction to those crimes that are enumerated in Article 5, it would defeat the object and purpose of the Agreement, which provided for the prosecution of a wider scope of international crimes. As such, reliance on a literal reading of the ECCC Law would provide an unintended loophole that would enable serious crimes to go unpunished.

14. Moreover, the discussion at the National Assembly pursuant to the drafting of ECCC Law did not specifically refer to any specific definition of crimes against humanity.³⁸ As such, because a State must give full consideration to the relevant practice under international law when interpreting a treaty,³⁹ the ECCC Law must fully adhere to the definition set forth by the Agreement which refers to relevant practice under International Law embodied in the Rome Statute.

b. The discriminatory intent requirement in Art. 5 of the ECCC Law does not comport with customary international law.

15. This discriminatory intent requirement for crimes against humanity, which clearly limits the subject matter jurisdiction of the Court, is not incorporated in the Agreement. The Rome Statute does not require evidence of discriminatory intent to establish the commission of crimes against humanity. Under the Rome Statute, the national, political, ethnical, racial or religious grounds requirement must only be met to prove the persecution-type crimes.⁴⁰ Customary international law, as first codified in Charter of the

³⁶ VCLT art. 31.

³⁷ See the Draft Articles on the Law of Treaties with commentaries, 1966, Text adopted by the International Law Commission at its eighteenth session, in 1966, *Yearbook of the International Law Commission, 1966*, vol. II; *Interpretation of Peace Treaties* Advisory Opinion, *I.C.J. Reports 1950*, p. 229 it stated: "The principle of effectiveness, expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which...would be contrary to their letter and spirit.";

³⁸ Minute on the Session of National Assembly of Kingdom of Cambodia, a Draft Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

³⁹ See VCLT, art. 31(3)(c), As such, ECCC Law as a way to implement the Agreement may not deviate from the rule of treaty interpretation under international law.

⁴⁰ See Darryl Robinson, "Defining Crimes Against Humanity at the Rome Conference," *Am. J. Intl. L.* (1999) at n. 17, When the 1954 ILC draft Code of Crimes suggested that discriminatory motive was required for all

International Military Tribunal at Nuremberg, clearly differentiated between the crimes of murder, extermination, enslavement, deportation and other inhumane acts committed against a civilian population and persecution on political, racial or religious grounds.⁴¹ Only the latter required the establishment of discriminatory intent. Any interpretation of the IMT Charter requiring a show of discriminatory grounds for non-persecution type crimes was strongly rejected.⁴² A similar approach was also taken in Tokyo Charter, and affirmed by the Secretary General.⁴³

16. In addition, the ICTY Trial Chamber II has expressly observed that the discriminatory intent requirement for crimes against humanity does not appear to be supported by applicable international instruments.⁴⁴ The negotiations leading to the adoption of the Rome Statute further reflect the consensus that a discriminatory motive is not an element required for all crimes against humanity. This approach avoids the imposition of an onerous and unnecessary burden on the prosecution. As such, the requirement of discriminatory intent in the ECCC Law defeats the object and purpose of the Agreement to prosecute pursuant to the relevant practice of international law.
17. Therefore, the Agreement, which requires no discriminatory intent to establish crimes against humanity, must be followed. The discriminatory intent requirement of the ECCC Law violates the object and purpose of the Agreement by preventing prosecution of certain crimes and contradicts customary international law. As stated above, the status of crimes against humanity as *jus cogens*, render it impossible to simply ignore such crimes. Hence, discrimination on national political, ethnical racial or religious grounds should not be an element required to establish the commission of enforced disappearances.
18. However, even if the court shall apply the ECCC Law to require proof of the existence of discriminatory motive, this motive could be supported by certain evidence that will be further mentioned below. There are many facts showing that the disappearance conducted by Khmer Rouge authorities was intended to attack certain elements or groups.

crimes against humanity, it was strongly criticized for misconstruing the Nuremberg Charter in D. H. N. Johnson, *Draft Code of Offenses against the Peace and Security of Mankind*, 4 *INT'L & COMP. L.Q.* 445 (1955). Johnson's article was widely received as expressing the correct interpretation, and the subsequent ILC draft codes have reflected Johnson's approach.

⁴¹ See Martin, Schnably, Wilson, Simon and Tushnet, *International Humanitarian Rights & Humanitarian Law, Treaties, Cases and Analysis* (Cambridge University Press, 2006) p.486..

⁴² *Id.*

⁴³ *Id.* (quoting Memorandum of the Secretary General on the Charter and Judgment of the Nurnberg Tribunal, 67).

⁴⁴ See *Prosecutor v. Tadic*, Opinion and Judgment, IT-94-1-T, Trial Chamber, 7 May 1997, ¶ 652 (referring to the Nuremberg and Tokyo Charters, the Allied Control Council Law No. 10, the Genocide Convention, the Apartheid Convention and the ILC draft Code of Crimes.)

c. In the alternative, enforced disappearance of persons falls within the scope of ‘other inhumane acts’

19. Alternatively, the ECCC still has subject matter jurisdiction over enforced disappearances pursuant to the ECCC Law, as it falls under the category “other inhumane acts” of Article 5 of the ECCC Law. The classification of enforced disappearance as an “other inhumane act,” is supported by purpose of the prohibition of "Other Inhumane Acts" in international criminal law. First introduced under Article 6(c) of the Nuremberg Charter, the inclusion of "Other Inhumane Acts" in the list of crimes against humanity was intended as a residual provision to punish criminal acts, which in context, are of a comparable gravity to the listed crimes against humanity.⁴⁵

20. As noted above, the category of “other inhumane acts” serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions; (i) inflict great suffering, or serious injury to body or to mental or physical health; (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the ICC Statute; and (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.⁴⁶

21. Therefore, the definition of other inhumane act has a broad scope and should not be limited.⁴⁷ International jurisprudence recognizes that enforced disappearances are among the crimes defined as other inhumane acts.⁴⁸ ICTY Trial Chamber has also recognized that the more specific crimes are defined, the more restrictive it becomes, as “one would

⁴⁵ *Prosecutor v. Zoran Kupreskic*, Judgment, IT-95-16-T, Trial Chamber, 14 January 2000 ¶ 563; See also the jurisprudence of the Rwanda Tribunal in relation to sexual offences charged as other inhumane acts. *Prosecutor v. Eliezer Niyitegeka*, Judgment, ICTR-96-14-T, Trial Chamber, 16 May 2003, ¶ 460 and *Prosecutor v. Kajelijeli*, Judgment and Sentence, ICTR-98-44A-T, Trial Chamber, 1 December 2003, ¶ 931.

⁴⁶ *Prosecutor v. Alex Tamba Brima et al.*, Judgment, SCSL-04-16-A, Appeals Chamber, 22 February 2008, ¶ 184.

⁴⁷ *Prosecutor v. Jean-Paul Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, ¶ 585 (“Although the category of acts that constitute crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.”).

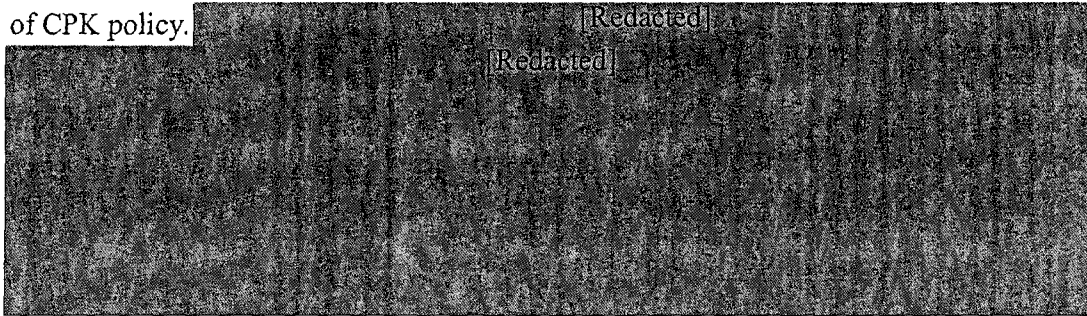
⁴⁸ *Prosecutor v. Miroslav Kvočka et al.*, Judgment, IT-98-30/1-T ICTY, Trial Chamber, 2 November 2001, ¶ 208: “Mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, forcible transfer, inhumane and degrading treatment, forced prostitution, and forced disappearance are listed in the jurisprudence of the Tribunal as falling under this category [other inhumane acts].”

never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts.”⁴⁹

22. In effect, the determination of whether an alleged act qualifies as an "other inhumane act" must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator's conduct upon the victims. In this case, there are many indications that the crimes of enforced disappearances committed during the Khmer Rouge regime were of similar gravity to other crimes against humanity and that such crimes inflicted significant mental harm upon the victims.

D. EVIDENCE OF THE WIDESPREAD OR SYSTEMATIC COMMISSION OF ENFORCED DISAPPEARANCES DURING THE KHMER ROUGE REGIME

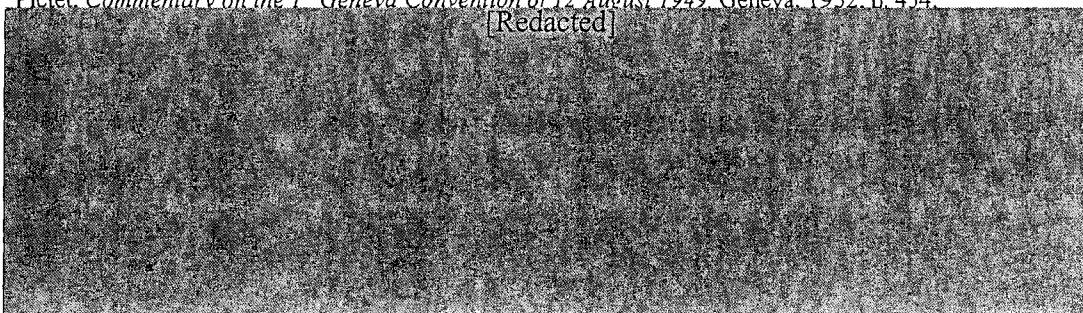
23. In the present case, there is significant evidence of widespread enforced disappearances throughout the territory of Democratic Kampuchea, presumably committed as a matter of of CPK policy.



24. [Redacted]

25. Witnesses testify that the bases for such arrests and disappearances varied. One of which was religion.⁵⁸ Other reasons were ethnicity, mistakes made by the victims at the

⁴⁹*Prosecutor v. Blaskic*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000 ¶ 237 citing with approval J. Pictet, *Commentary on the 1st Geneva Convention of 12 August 1949*, Geneva, 1952, p. 454.



worksite,⁵⁹ political,⁶⁰ and other background that were deemed as enemy.⁶¹ Many officials who were sent for re-education also disappeared.⁶² Moreover, alleged treason was also one of the reasons for many arrests and disappearances occurred.⁶³

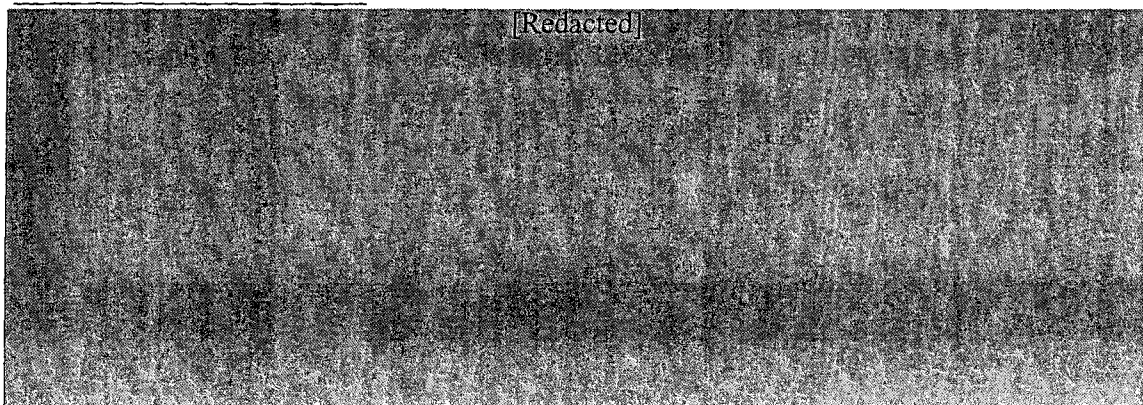
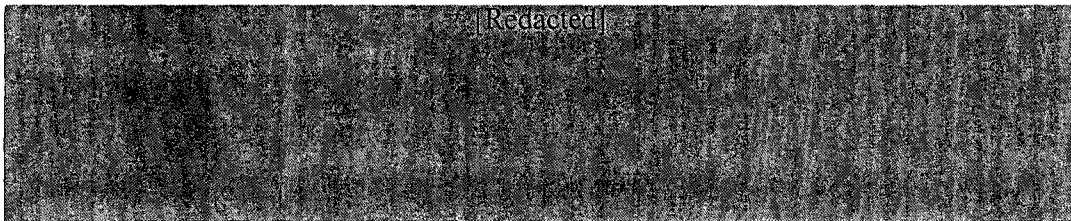
INVESTIGATIVE ACTION REQUESTED

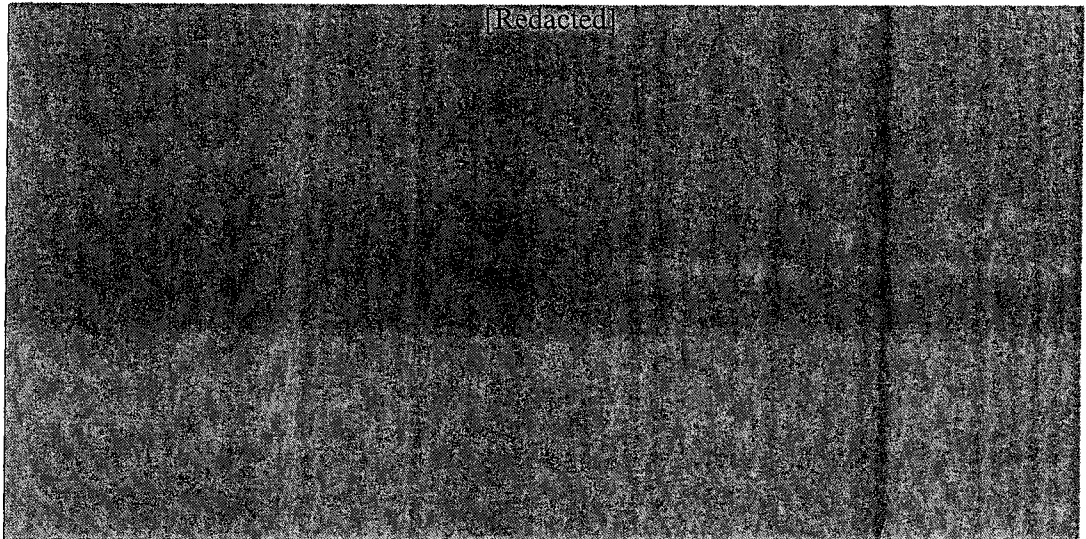
26. The ECCC must not turn a blind eye upon the commission of enforced disappearances.

As discussed above, there are indications that the crimes of enforced disappearance had occurred in a widespread and presumably systematic manner as part of CPK policy. These acts constitute a grave violation of human rights and a crime against humanity, which is internationally recognized as a *jus cogens* norm with an *erga omnes* obligation to prosecute. By adopting the subject matter jurisdiction set forth by the Rome Statute, as required by the Agreement, the ECCC will ensure there will be no impunity for such crimes. Therefore, justice will not only be done, but also seen to be done.⁶⁴

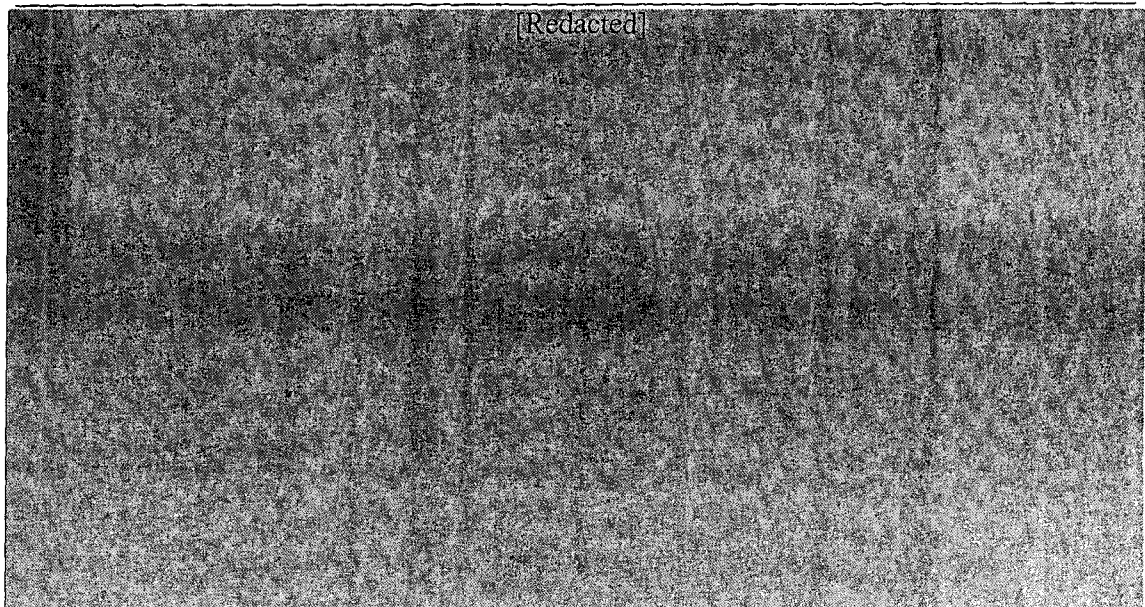
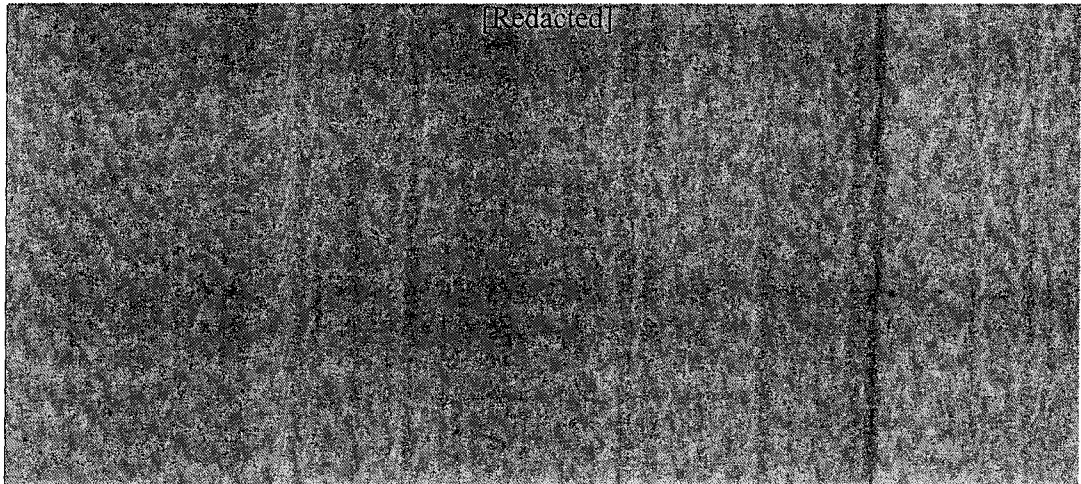
27. It is hereby requested that the OCIJ:

- (a) CONDUCT a full investigation concerning the existence of crimes of forced disappearance
- (b) Identify and interview former Khmer Rouge cadres that were involved or know information regarding the arrest of victims that were disappeared, including:





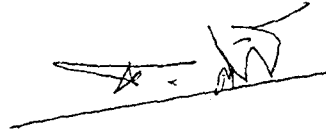
(c) Identify and interview persons whose relatives were missing including:



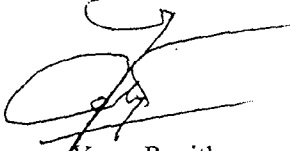
Respectfully submitted,



Hong Kimsuon
Co-Lawyer



Kong Pisey
Co-Lawyer

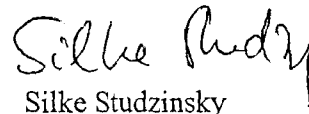


Yung Panith
Co-Lawyer

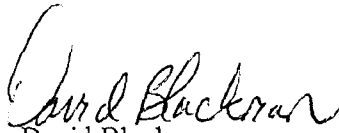


Lor Chuntay
Co-Lawyer

Ny Chandy
Co-Lawyer



Silke Studzinsky
Co-Lawyer



David Blackman
Co-Lawyer

Signed in Phnom Penh, Kingdom of Cambodia, on this 2nd day of July 2009.