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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S APPEAL AGAINST THE CLOSING ORDER

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rules 74(3)(a) and 21(1) of the ECCC Internal Rules ("Rules"), this Appeal against the Closing Order.[1] This Appeal addresses not only the jurisdictional issues which would terminate prosecution if the Defence prevails, but also the jurisdictional issues which affect the manner in which charges are applied against Mr. IENG Sary, and matters relating to the requisite specificity of the Closing Order. Mr. IENG Sary has the right to adequate time and facilities to prepare his Defence and this requires that he first have due notice of the parameters of the crimes and forms of liability that may be applied against him. The Pre-Trial Chamber has recognized that international standards require specificity in the Closing Order and that an Accused has a right to be informed in detail of the nature and cause of the charges.[2] The Pre-Trial Chamber is not bound by the legal characterization of the facts set out by the OCIJ and may correct errors made by the OCIJ and decide on the appropriate legal characterization independently.[3] The legal characterization of facts in a Closing Order[4] is a question of applied law.[5] It constitutes a jurisdictional issue which affects the manner in which charges

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[1] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246 ("Closing Order").

[2] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ(PTC02), Decision on Appeal against Closing Order Indicting KAING Guek Eav Alias "Duch", 5 December 2008, D99/3/42, ERN: 00249846-00249887 ("PTC Decision on *Duch* Closing Order"), para. 50.

[3] *Id.*, paras. 43-44.

[4] The term "indictment" and "Closing Order" are used interchangeably in the Rules. *See, e.g.*, Rule 67. This is because the Closing Order may act as an indictment. *See* Rules, Glossary.

[5] *See* Mark C. Fleming, *Appellate Review in the International Criminal Tribunals*, 37 TEX. INT'L L.J. 111, 124-26 (2002): "A finding of fact is an inference that a certain event occurred or did not occur in a certain way. A factual inference may occasionally be drawn without recourse to evidence, as in the case of facts established through the process of judicial notice, but in most cases findings of fact are inferential conclusions drawn from a body of evidence examined by the fact-finder. A question of law, on the other hand, is a determination of the legal effect of the facts as found. The determination of a question of law involves two steps.... The first, which could be called a question of 'pure law,' is one where the court determines an abstract principle of general application that is independent of the facts of the case under consideration. The second, a question of 'applied law,' is the concrete determination of the consequences of a specific set of facts under a specific principle of pure law. Questions of applied law are often referred to in domestic systems as questions of 'mixed law and fact,' a label that is potentially misleading because it suggests that the court must evaluate the evidence in order to determine what actually happened. Rather, a question of applied law assumes that the factual predicate is established, whether by stipulation of the parties or by conclusive finding of the court. In deciding a question of applied law, the court is not concerned with issues such as the credibility or relative persuasiveness of witnesses or documents; the underlying facts have been established, and the question of applied law is what legal consequences follow from those facts.... The first question the [*Tadić*] Appeals Chamber faced in the prosecution's appeal regarding the Geneva Conventions was a question of pure law: whether the Nicaragua standard of 'effective control' by a foreign power was the correct threshold for characterizing a seemingly internal military conflict as 'international' for purposes of the Geneva Conventions. The second was a question of applied law (or mixed fact and law): whether the facts, as found by the Trial Chamber, sufficed to meet that standard. (Judge Shahabuddeen, in a separate opinion, encapsulated this thought in a section entitled 'The Test of Appellate Intervention': 'The Appeals Chamber is intervening in this part of the case because it holds that the Trial Chamber applied the wrong legal criterion.' *Tadić* Appeals Judgement, Separate Opinion of Judge Shahabuddeen, para. 28.[)]... The goals of consistency of verdicts and orderly development of law, which justify review of questions of pure law, are equally applicable to questions of applied law... This is all the more

are applied against Mr. IENG Sary and relates to the requisite specificity of the Closing Order.[6] The Defence reserves its right to raise challenges to all factual and legal issues before the Trial Chamber. Nothing in this Appeal should be taken as acceptance of the OCIJ's legal or factual findings or their legal characterization.

I. GROUNDS OF APPEAL

A. **GROUND ONE:** The OCIJ erred in law by holding that the principle of *ne bis in idem* does not bar Mr. IENG Sary's current prosecution;

B. **GROUND TWO:** The OCIJ erred in law by holding that Mr. IENG Sary's validly granted Royal Pardon and Amnesty ("RPA") do not bar the current prosecution;

C. **GROUND THREE:** The OCIJ erred in law by holding that the ECCC has jurisdiction to apply international crimes and forms of liability as doing so would violate the principle of *nullum crimen sine lege*;

D. **GROUND FOUR:** The OCIJ erred in law by holding that the ECCC has jurisdiction to apply grave breaches of the Geneva Conventions ("grave breaches") despite the statute of limitations;

E. **GROUND FIVE:** The OCIJ erred in law by holding that the ECCC has jurisdiction to apply Article 3 new (National Crimes);

F. **GROUND SIX:** The OCIJ erred in law in its application of genocide, should it be found to be applicable at the ECCC;

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true in the context of an international *ad hoc* tribunal, where the legal principles called upon, though perhaps settled as a matter of legal theory, may have been applied only rarely in the past.... Indeed, the [*Tadić*] Appeals Chamber's discussion of the ICJ's Nicaragua precedent focused just as much on the ICJ's application of the law to the facts as it did on the ICJ's abstract statements of legal norms." *See Prosecutor v. Tadić*, IT-94-1-A, Judgement – Separate Opinion of Judge Shahabuddeen, 15 July 1999, paras. 8-32. *See also Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986 ("*Nicaragua v. United States*"), I.C.J Reports 1986, p. 14, paras. 15(c), 110, 217-20, 228, 255, 292(3), 292(4), 238.

[6] These issues are addressed herein pursuant to the Defence's due diligence obligation. *See Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para. 631, where the Appeals Chamber held that "[f]ailure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto." *See also Prosecutor v. Ntakirutimana & Ntakirutimana*, ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 ("*Ntakirutimana* Appeal Judgement"), para. 52: "Normally, the Defence's silence would constitute a waiver of the argument [as to indictment defects]: 'a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party.'"

G. **GROUND SEVEN:** The OCIJ erred in law in its application of crimes against humanity, should they be found to be applicable at the ECCC;

H. **GROUND EIGHT:** The OCIJ erred in law in its application of grave breaches, should they be found to be applicable at the ECCC;

I. **GROUND NINE:** The OCIJ erred in law in its application of joint criminal enterprise ("JCE");

J. **GROUND TEN:** The OCIJ erred in law in its application of planning, instigating, ordering, and aiding and abetting;

K. **GROUND ELEVEN:** The OCIJ erred in law by holding that the ECCC has jurisdiction to apply command responsibility and in its application of command responsibility should it be found to be applicable at the ECCC.

II. PRELIMINARY ISSUES

A. ADMISSIBILITY OF THE APPEAL

1. Rule 74(3)(a) explicitly states that a Charged Person may appeal against orders or decisions of the OCIJ confirming the jurisdiction of the ECCC. Rule 67(5) states that "[t]he Co-Prosecutors, the Accused and Civil Parties must be immediately notified upon issue of a Closing Order, and receive a copy thereof. The order is subject to appeal as provided in Rule 74." The Closing Order confirmed the jurisdiction of the ECCC: **a.** to continue proceedings against Mr. IENG Sary, despite the prohibition imposed by Cambodian and international law due to the principle of *ne bis in idem* and despite his validly granted Royal Amnesty and Pardon; **b.** to indict Mr. IENG Sary for genocide, crimes against humanity, grave breaches of the Geneva Conventions, and national crimes; and **c.** to apply command responsibility and other forms of liability which did not exist in Cambodian law in 1975-79. Thus, the Closing Order is clearly an "order or decision of the OCIJ confirming the jurisdiction of the ECCC" and is thus appealable pursuant to Rule 74(3)(a). The Defence notes that the Pre-Trial Chamber has previously confirmed such an interpretation. In relation to command responsibility, the Pre-Trial Chamber held:

> The Pre-Trial Chamber notes that the Co-Investigating Judges stated that 'they will give due consideration to the legal issues related to command responsibility, as they may be necessary, in the drafting of the Closing Order.' In this respect, the Pre-Trial Chamber observes that the Internal Rules do not oblige the Co-Investigating Judges to decide on this matter before the Closing Order. However, at this stage of the proceedings a Closing Order is imminent, and if the Closing Order confirms the jurisdiction of ECCC over Command Responsibility, the

Charged Person may consider the effect of Internal Rule 67(5) when read in conjunction with Internal Rule 74(3)(a).[7]

2. This Appeal is also admissible pursuant to Rule 21(1). Rule 21(1) states that "[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings..." The Pre-Trial Chamber has previously held that with respect to its jurisdiction, "Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded...."[8] Rule 21 thus confers an inherent jurisdiction on the Pre-Trial Chamber to decide requests relating to the Charged Persons' fundamental fair trial rights. The Pre-Trial Chamber has previously accepted jurisdiction solely under Rule 21.[9]
3. Rule 21 requires the Pre-Trial Chamber to accept this Appeal, because: **a.** a balance would not be preserved between the rights of the Parties if the OCP were allowed to appeal issues raised in the Closing Order[10] while the Defence were prohibited from doing so;[11] **b.** Mr. IENG Sary's fundamental right to adequate time and facilities to prepare his defence will be violated if the Closing Order lacks the necessary specificity to inform him in detail of the nature of the charges he faces; and **c.** it would not be in the interests of

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[7] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 60), Decision on IENG Sary's Appeal against Co-Investigating Judges' Order on IENG Sary's Motion against the Application of Command Responsibility, 9 June 2010, D345/5/11, ERN: 00528364-00528370, para. 11 (emphasis added).

[8] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 71), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4, ERN: 00601705-00601717, para. 13. *See also Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC 11), Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, ERN: 00283249-00283262, para. 36; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 64), Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, A371/2/12, ERN: 00531173-00531191, paras. 13-14.

[9] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 71), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4, ERN: 00601705-00601717, paras. 10-13.

[10] Rule 74(2) allows the OCP to appeal all orders of the OCIJ. Whether the OCP chooses to exercise this right of appeal should not influence whether the Defence is afforded the same rights.

[11] The present matter is similar to the issue of whether the Defence was permitted to respond to the OCP's Final Submission. The Pre-Trial Chamber held that the principle of equality of arms entitled the Defence to respond. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 71), Decision on IENG Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4, ERN: 00601705-00601717.

justice to delay a decision on such jurisdictional issues or to narrow their scope. As explained by the *Tadić* Appeals Chamber:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? ... Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected.[12]

It is in the interests of justice for the Pre-Trial Chamber to accept this Appeal: Mr. IENG Sary's fundamental fair trial rights will not be respected if he is not permitted to challenge the jurisdiction of the ECCC through this Appeal.

B. REQUEST FOR A PUBLIC ORAL HEARING

4. A public, oral hearing is necessary to address the issues raised in this Appeal in a full and transparent manner. This Appeal deals with questions of law, none of which must be kept confidential. The Pre-Trial Chamber and the public-at-large will benefit from an open discussion of these jurisdictional issues which directly impact Mr. IENG Sary's fair trial rights. In fact, the OCIJ recognized that certain of these issues would benefit from an oral hearing, although it envisioned a hearing before the Trial Chamber. It held, "the Co-Investigating Judges hold the view that the question as to whether the 1979 judgement still applies and prevents further prosecution of **Ieng Sary** for genocide warrants a public adversarial hearing before the Trial Chamber, this being the only way for the Charged Person, the Co-Prosecutors and the Civil Parties to each make their case in a comprehensive fashion."[13]

C. OBSERVATION CONCERNING THE OCIJ'S FAILURE TO DECIDE CERTAIN ISSUES

5. The Co-Investigating Judges have failed to properly perform their duties concerning certain aspects of the Closing Order. For example, they state that they cannot determine whether the principle of *ne bis in idem* prohibits the current prosecution because "a great

[12] *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadić* Decision on Jurisdiction Appeal"), para. 6.
[13] Closing Order, para. 1333.

deal still remains unclear" concerning the 1979 trial of Mr. IENG Sary.[14] The Co-Investigating Judges thus decided to leave the matter to the Trial Chamber.[15] They further state that they disagreed about the effect 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."[16] Although they disagreed, "they have decided by mutual agreement to grant the Co-Prosecutors' requests, leaving it to the Trial Chamber to decide..."[17] While these issues will be dealt with more fully herein, the Defence highlights that it is a dereliction of judicial duty for the Co-Investigating Judges to deliberately decline to perform their decision-making functions and to simply indict and leave these matters to be resolved by the Trial Chamber. Had the Co-Investigating Judges performed their duties, it is possible that the matter would never even reach the Trial Chamber, as the Co-Investigating Judges might have concluded that it did not have jurisdiction to indict Mr. IENG Sary. This cavalier display of judicial abdication of duty calls into question the actual capacity and competence of the Co-Investigating Judges.

D. OBSERVATION CONCERNING THE USE OF CONFESSIONS AND MATERIAL WHICH IS SUBJECT TO A PENDING ANNULMENT APPEAL

6. Although the Defence has not yet been able to review each of the sources relied upon by the OCIJ, the OCIJ has plainly relied upon confessions for an impermissible purpose.[18] For instance, paragraph 1188 of the Closing Order cites a confession by Penh Thuok, alias Von Vet, to support an assertion that it "appears that Khieu Samphan witnessed the arrest of Vorn Vet on 2 November 1978." Furthermore, it is clear that the OCIJ relies

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[14] *Id.*, para. 1332.
[15] *Id.*, para. 1333.
[16] *Id.*, para. 1574.
[17] *Id.*
[18] This is an issue which the Defence has repeatedly sought assurance from the OCIJ. On 17 July 2009 the Defence submitted a letter to the OCIJ, requesting, *inter alia*, the extent to which the OCIJ has identified, concretely, any material contained in the Introductory Submission or otherwise which constitutes material obtained under torture. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 17 July 2009, D130/7, ERN: 00352184-00352185 ("First Defence Request"). On 7 August 2009 the Defence submitted a second letter. It stated the Defence position that evidence obtained under torture must not be used in any circumstances. It also reiterated the First Defence Request, explaining that the requested information was necessary because "[d]eciding whether such confessions are reliable merely on a 'case-by-case' basis, without any indication of the protocol or system by which you make these determinations, deprives the parties of the means to challenge and verify these determinations." It further explained that "[t]he information sought in [the First Defence Request] was vital for us to verify whether a fair, diligent and thorough judicial investigation was being conducted and whether the OCIJ was impartially collecting and evaluating the evidence relating to the allegations contained in the Introductory Submission, as required by the Internal Rules." *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter Concerning the OCIJ's Identification of, and Reliance on, Evidence Obtained through Torture, 7 August 2009, D/130/7/21, ERN: 00360855-00360856.

upon several secondary sources such as books by David Chandler and Steve Heder which rely on confessions for the truth of their contents.[19] The Pre-Trial Chamber has previously stated:

> Notwithstanding any observations to the contrary by the Co-Investigating Judges in the Order, Article 15 of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")] is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture.[20]

7. The Defence further notes that the OCIJ has relied upon material which is subject to a pending annulment appeal before the Pre-Trial Chamber.[21] The Defence requests the Pre-Trial Chamber to consider whether the entire Closing Order is invalid due to reliance upon these improper sources, or whether portions of the Closing Order must be struck due to this defect.

E. THE ECCC IS A DOMESTIC CAMBODIAN COURT

8. The issue of the ECCC's status as a domestic court is fundamental to several of the arguments made herein, including the arguments raised concerning *ne bis in idem*, the RPA, and the applicability of international crimes and forms of liability at the ECCC. The OCIJ thus erred in deciding that "[t]he question of whether the ECCC are Cambodian or international 'in nature' has no bearing on the ECCC's jurisdiction to prosecute such crimes..."[22]
9. The ECCC was established as a domestic Cambodian court. During negotiations between the Cambodian government and the UN, the international community suggested the establishment of an international tribunal. This option, however, was explicitly rejected

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[19] Footnotes 37-39 of the Closing Order, for example, rely upon DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 63-64, 67-69, 191, 201-02 (1999). These pages of BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT rely upon confessions from Siet Chhae, Chou Chet, Chhim Samauk, Kheang Sim Hon, Im Naen, Som Chea, Vorn Vet, Keo Moni, Kol Thai, and Keo Meas. As another example, footnotes 41 and 42 of the Closing Order cite STEVE HEDER, CAMBODIAN COMMUNISM AND THE VIETNAMESE MODEL 88, 92, 109-10 (White Lotus Press 2004). These pages of Heder's book rely on confessions by Saom Chea, Bou Phat, Suo Keum An, Tauch Chaem, Meah Chhuon, Kae San, and Kung Sophal.

[20] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC31), Decision on Admissibility of IENG Sary's Appeal against the OCIJ's Constructive Denial of IENG Sary's Requests Concerning the OCIJ's Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5, ERN: 00512912-00512924, para. 38 (emphasis added).

[21] *See, e.g.*, Closing Order, fns. 302, 725, 731, 3211. *See also Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC72), IENG Sary's Appeal against the OCIJ's Order Rejecting IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of all Investigative Acts Performed by or with the Assistance of Stephen Heder & David Boyle and IENG Sary's Application to Seize the Pre-Trial Chamber with a Request for Annulment of All Evidence Collected from the Documentation Ceter of Cambodia & Expedited Appeal against the OCIJ Rejection of a Stay of the Proceedings, 15 September 2010, D402/1/2, ERN: 00603546-00603561.

[22] Closing Order, para. 1301.

by the Cambodian government.[23] Prime Minister Samdech Akka Moha Sena Padei Techo Hun Sen insisted that the extent of the UN's participation be limited "to provid[ing] experts to assist Cambodia in drafting legislation that would provide for a special national Cambodian court to try Khmer Rouge leaders and that would provide for foreign judges and prosecutors to participate in its proceedings."[24] Thus, unquestionably, the Cambodian government and the UN negotiated and reached an agreement establishing the ECCC as a national court within the existing court structure.[25] Knut Rosandhaug, the ECCC Deputy Director of Administration and the Coordinator of the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT"), recently confirmed this. He is paraphrased as stating that the ECCC is "a national court with UN backing, whereas other war crimes courts are run by the UN, such as the Yugoslavia tribunal in The Hague."[26]

10. Reflecting the intent and results of the negotiations, 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") reads:

> **WHEREAS** prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations ... and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia
>
> ...
>
> **WHEREAS** by its resolution 57/228, the General Assembly ... requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations...[27]

The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

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[23] *See* Report of the Secretary-General on Khmer Rouge trials, UN Doc. No. A/57/769, 31 March 2003, para. 6.
[24] *Id.*, para. 7.
[25] *Id.*, para. 10. The Secretary-General stated, "In paragraph 1 of resolution 57/228, the General Assembly specifically mandated me to negotiate to conclude an agreement which would be consistent with the provisions of that resolution. It was my understanding that, to be consistent with the terms of the resolution, any agreement between the United Nations and the Government of Cambodia would have to satisfy the following conditions: (a) The agreement would have to respect and give concrete effect to the principle that the Extraordinary Chambers are to be national courts, within the existing court structure of Cambodia, established and operated with international assistance..." *See also id.*, para. 31, where he discussed the nature of the ECCC under the draft agreement: "The legal nature of the Extraordinary Chambers, like that of any legal entity, would be determined by the instrument that created them. In accordance with the draft agreement, the Extraordinary Chambers would be created by the national law of Cambodia. The Extraordinary Chambers would therefore be national Cambodian courts, established within the court structure of that country." (emphasis added).
[26] Clancy McGilligan, *KRT Administrator Talks War Crimes Courts at Royal School*, CAMBODIA DAILY, 15 September 2010, at 28.
[27] Agreement, preamble.

("Establishment Law"), which is domestic Cambodian legislation, also confirms that the "Extraordinary Chambers shall be established in the existing court structure..."[28]

11. In deciding whether the Establishment Law was in accordance with the Cambodian Constitution, the Cambodian Constitutional Council's concern with the status of the ECCC is clear. It noted that "[i]n order to serve in the Extraordinary Chambers all the Cambodian and United Nations components shall be appointed by the Supreme Council of the Magistracy, which is a supreme Cambodian national institution, while the Director and Deputy Director of the Office of Administration are also to be appointed by Cambodian authorities. In this regard the United Nations only provides a list of candidates, and has no decision-making rights."[29] It further stated that "[u]tilising the existing Cambodian court system, and selecting Phnom Penh as the location for the proceedings again protect the sovereignty of the Kingdom of Cambodia."[30]
12. The ECCC and the UNAKRT websites also explain to the public that the ECCC is a national Cambodian court. The ECCC website states that "[t]he government of Cambodia insisted that, for the sake of the Cambodian people, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice."[31] The UNAKRT website states that "UNAKRT provides technical assistance to the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC is a domestic court supported with international staff, established in accordance with Cambodian law."[32]
13. The ECCC is not a hybrid court, such as the Special Court for Sierra Leone ("SCSL"). These courts differ substantially. International elements were effectively "grafted onto" the domestic legal system in Cambodia, unlike in Sierra Leone, where "the hybrid court exists as an institution external to the domestic system."[33] According to a UN Security Council Report, "[u]nlike the other United Nations and United Nations-assisted tribunals,

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[28] Establishment Law, Art. 2 new (emphasis added).
[29] Constitutional Council Decision No. 040/002/2001, 12 February 2001, at 3 (unofficial translation, emphasis added).
[30] *Id.*, at 4 (unofficial translation, emphasis added).
[31] *Available at* http://www.eccc.gov.kh/english/about_eccc.aspx.
[32] *Available at* http://www.unakrt-online.org/01_home.htm (emphasis added).
[33] Parinaz Kermani Mendez, *The New Wave of Hybrid Tribunals: A Sophisticated Approach to Enforcing International Humanitarian Law or an Idealistic Solution with Empty Promises?*, 20 CRIM. L. F. 53, 62 (2009) ("Kermani Mendez").

the Extraordinary Chambers in the Courts of Cambodia forms part of the national court structure. It is a Cambodian national court, based on the French civil law system, with special jurisdiction, and with United Nations participation. It is an example of a special chamber within a national jurisdiction... [It] is a national court of Cambodia."[34] Hence, according to one scholar, "care must be taken when lumping the various hybrid tribunals into one category. The [SCSL], 'Regulation-64 Panels' of Kosovo, Special Panel for Serious Crimes in East Timor and Cambodia's Extraordinary Chambers are each distinct in their legal bases and their particular mix of international and domestic personnel and law."[35]

14. In 2000, Sierra Leone's President Kabbah sought UN assistance in setting up a tribunal similar to the ICTY and ICTR, established by the Security Council.[36] In fact, he also proposed that the Appeals Chamber could be shared with the ICTY/ICTR and that the judges could be international, though he did propose a co-prosecutor system with a national and an international co-prosecutor.[37]

15. The UN Security Council requested the Secretary General to negotiate an agreement with the Sierra Leonean government "to create an independent special court...."[38] Due to cost, the international community was reluctant to establish another *ad hoc* tribunal.[39] Instead, the Agreement reached provided for an "international special court" established by treaty "to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law."[40] The Secretary General explained:

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[34] Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chambers Possibly with International Components, A Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Resources Necessary to Achieve and Sustain Substantive Results, UN Doc. No. S/2010/394, 26 July 2010, p. 42-43 ("Security Council Piracy Report").

[35] Kermani Mendez, at 63. *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC03), IENG Sary's Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, C/22/I/26, ERN: 00177265-00177280 ("Submissions on *Ne Bis in Idem* and Amnesty"), Annex A, which compares the ECCC to international, "internationalized", and domestic courts.

[36] Letter dated 9 August 2000 from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, UN Doc. No. S/2000/786, 10 August 2000, at 4.

[37] *Id.*, at 5.

[38] UN Security Council Resolution 1315, UN Doc. No. S/RES/1315, 14 August 2000, at 2.

[39] Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185, 232 (2001).

[40] Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone ("SCSL Agreement"), preamble (emphasis added).

> [the] guarantee of developing a coherent body of law ... may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals... Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable *mutatis mutandis* to the proceedings before the Special Court.[41]

16. Those convicted by the SCSL may be imprisoned in any of the States which have concluded agreements with the ICTY or ICTR on the enforcement of sentences.[42] In determining the terms of imprisonment, the SCSL's Statute states that the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences at the ICTR and in the national courts of Sierra Leone.[43]
17. Each Trial Chamber at the SCSL consists of three judges: two appointed by the UN Secretary General, with particular focus on member States of the Economic Community of West African States and the Commonwealth, and one appointed by the Sierra Leonean government, though he or she need not be a national of Sierra Leone.[44] The Appeals Chamber is comprised of five judges, three appointed by the UN and two by Sierra Leone.[45] The UN Secretary General appoints an international prosecutor to lead investigations, with a Sierra Leonean deputy.[46] There is a possibility for the SCSL seat to be moved outside of Sierra Leone,[47] as was done in the Charles Taylor case.[48] The SCSL Agreement "shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court."[49] Thus, for all intents and purposes, the SCSL is controlled by the UN.
18. In contrast, the negotiations for the establishment of the ECCC resulted in the creation of national chambers within the Cambodian court system assisted by international funding and resources. "Uniquely for a United Nations or United Nations-assisted tribunal,

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[41] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. No. S/2000/915, 4 October 2000, para. 41
[42] SCSL Agreement, Art. 22(1).
[43] Statute of the Special Court for Sierra Leone ("SCSL Statute"), Art. 19(1).
[44] *Id.*, Art. 12; SCSL Agreement, Art. 2.
[45] SCSL Statute, Art. 12; SCSL Agreement, Art. 2.
[46] Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc. No. S/2000/915, 4 October 2000, para. 47.
[47] SCSL Agreement, Art. 10.
[48] *See Prosecutor v. Taylor*, SCSL-2003-01-PT, Decision of the President on Defence Motion for Reconsideration of Order Changing Venue of Proceedings, 12 March 2007. *See also* UN Security Council Resolution 1688, UN Doc. No. S/RES/1688 (2006), 16 June 2006.
[49] SCSL Agreement, Art. 23.

participation in the Extraordinary Chambers is run as a technical assistance project..."[50] Neither the Cambodian Government nor the UN intended to establish the ECCC as an international court; nothing in the ECCC's founding documents bears this out – explicitly or implicitly. As the ECCC is a domestic, Cambodian court, it cannot be equated with the *ad hoc* international tribunals or a hybrid court such as the SCSL, which may apply customary international law directly.

19. Other notable differences distinguishing the SCSL as an "internationalized" court from the ECCC as a national court include:
    - The international and domestic composition of the judges and prosecutors differs: Cambodia, rather than the UN, is responsible for the international appointments.
    - At the ECCC, Defence Counsel must "act in accordance with the ... Cambodian Law on the Statutes of the Bar..."[51] There is no such requirement at the SCSL.
    - The Establishment Law does not state that the judges shall be guided by the ICTY/ICTR Appeals Chamber decisions *or* its rules of procedure *or* sentencing practices.
    - Those convicted by the ECCC do not have the possibility of serving out their sentences in States that have concluded agreements with the ICTY or ICTR.
    - There is no provision for the seat of the ECCC to move outside of Cambodia.
    - The termination of the ECCC differs as well. Article 28 of the Agreement provides, "Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement."[52] The ECCC would not necessarily cease to function, should the Agreement be terminated.
20. If the ECCC were truly an international tribunal (or "internationalized,"[53] assuming this OCP-designated moniker is of any worth), then how is it that its judges are not competent to deal with issues of corruption at the ECCC? The ECCC Judges' decision to defer to

[50] Security Council Piracy Report, p. 43 (emphasis added).
[51] Agreement, Art. 21(3).
[52] Emphasis added.
[53] *See Case of IENG Sary*, 002-19-09-2007-ECCC/(PTC03), Transcript, 2 July 2008, p. 35, where Deputy Co-Prosecutor Bill Smith stated, "As a special internationalised tribunal or court a domestic pardon, even if it was validly granted, shall not apply in respect and prosecution of an international *jus cogens* crime before Your Honours."

the Cambodian government by declining to deal with the issue[54] suggests that they do view the ECCC as being a Cambodian court. Certainly, any of the *ad hoc* international tribunals or "internationalized" tribunals would not have deliberately opted to ignore, if not condone (a resulting perception due to inaction), the sort of corrupt practices purported to have existed at the ECCC.[55]

III. ARGUMENT

A. GROUND ONE: THE OCIJ ERRED IN LAW BY HOLDING THAT THE PRINCIPLE OF *NE BIS IN IDEM* DOES NOT BAR MR. IENG SARY'S CURRENT PROSECUTION

1. The issue of whether the principle of *ne bis in idem* is a bar to prosecution is a jurisdictional issue which must be resolved now

21. The OCIJ erred in holding that "the question as to whether the 1979 judgement still applies and prevents further prosecution of **Ieng Sary** for genocide warrants a public adversarial hearing before the Trial Chamber, this being the only way for the Charged Person, the Co-Prosecutors and the Civil Parties to each make their case in a comprehensive fashion."[56] The parties may have an adversarial hearing on this jurisdictional matter now before the Pre-Trial Chamber, as a hearing has been requested on the matters addressed in this Appeal. There is no reason to leave this matter to the Trial Chamber.

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[54] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC20), Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on NUON Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, ERN: 00366747-00366761, para. 29.

[55] *See Case of NUON Chea* 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, 27 March 2009, D158, ERN: 002294816-00294830; *Case of NUON Chea* 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009, D158/5, ERN: 00294885-00294888; *Case of IENG Sary* 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion to Join and Adopt Nuon Chea's Eleventh Request for Investigative Action, 27 March 2009, D258/2, ERN: 00294872-00294873; *Case of NUON Chea* 002/19-09-2007-ECCC/OCIJ(PTC21), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, D158/5/1/1, ERN: 00323238-00323255; *Case of IENG Sary* 002/19-09-2007-ECCC/OCIJ(PTC20), Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegation of Corruption and Request for an Expedited Oral Hearing, 4 May 2009, D158/5/3/1, ERN: 00323171-00323193; *Case of NUON Chea* 002/19-09-2007-ECCC/OCIJ(PTC21), Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, ERN: 00364033-00364046; *Case of IENG Sary* 002/19-09-2007-ECCC/OCIJ(PTC20), Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, ERN: 00366747-00366761; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-TC, Group 1-Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 11 May 2009, E65, ERN: 00327910-00327919; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-TC, Decision on Group 1-Civil Parties' Co-lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 23 September 2009, E65/9, ERN: 00378404-00378411.

[56] Closing Order, para. 1333.

22. It is a violation of Mr. IENG Sary's fundamental right to be presumed innocent[57] to fail to address this matter and to leave him in custody pending its resolution when he might otherwise be released. Such a fundamental issue as whether the ECCC has jurisdiction to try Mr. IENG Sary may not be left for resolution at some later date when it can be decided now. At the ICTY it has been held that "jurisdictional challenges raise fundamental issues of fairness and that one of their underlying purposes is to avert the possibility of an accused being tried and convicted on charges that are not properly brought before the Tribunal."[58]

2. Background

23. The issue of whether prosecution may proceed against Mr. IENG Sary or whether it would be barred by the principle of *ne bis in idem* arises because in August 1979, Mr. IENG Sary was tried and convicted, *in absentia*, for having committed genocide in addition to:

> I. Implementation of a plan of systematic massacre of many strata of the population on an increasingly ferocious scale; indiscriminate extermination of nearly all the officers, and soldiers of the former regime, liquidation of the intelligentsia, massacre of all persons and destruction of all organizations assumed to be opposing their regime;
> II. Massacre of religious priests and believers, eradication of religions; systematical extermination of national minorities without distinction between opponents and non-opponents, for the purpose of assimilation; extermination of foreign residents.
> III. Forcible evacuation of the population from Phnom Penh and other liberated towns and villages; breaking or upsetting of a family and social structures; mass killing and creation of lethal conditions.
> IV. Herding of people into 'communes' i.e. disguised concentration camps where they were forced to work and live in the conditions of physical and moral destruction, were massacred or died in large numbers.
> V. Massacre of small children, persecution and moral poisoning of the youth, transforming them into cruel thugs devoid of all human feeling.
> VI. Undermining the structures of the national economy; abolition of culture, education, and health service.
> VII. After their overthrow by the genuine revolutionary forces, the Pol Pot – Ieng Sary clique still persisted in opposing the revolution and committed new crimes in massacring those who refused to follow them. During their

[57] Article 35 new of the Establishment Law provides, "The accused shall be presumed innocent as long as the court has not given its definitive judgment."
[58] *Prosecutor v. Prlić et al.*, IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, para. 20.

> four years in power the Pol Pot – Ieng Sary clique have used the most barbarous methods of torture and killing.[59]

24. The Revolutionary Judgement was not invalidated by Mr. IENG Sary's later pardon. As noted by the OCIJ, "it is important to note that [pardons] are limited to annulment of the sentence, as well as its execution, without having any effect on the conviction decision as such."[60] The Revolutionary Judgement sentenced Mr. IENG Sary to death and confiscated all of his property. Mr. IENG Sary was not in custody before, during or after the trial and so the sentence was not carried out.
25. On 14 November 2007, the OCIJ issued a Provisional Detention Order[61] for Mr. IENG Sary in which it addressed *proprio motu* the jurisdictional issue of *ne bis in idem* without first giving the parties a chance to be heard on the matter. The OCIJ determined that the current prosecution of Mr. IENG Sary is not barred by the principle of *ne bis in idem*.[62] It based this determination on the fact that Mr. IENG Sary was not charged with genocide,[63] and further noted that cumulative convictions are allowed under international law[64] and the 1979 trial did not cover all of the offenses coming within the jurisdiction of the ECCC.[65]
26. On 7 April 2008, the Defence appealed the Provisional Detention Order and addressed the issue of *ne bis in idem*.[66] The Defence argued *inter alia* that: **a.** the fact that Mr. IENG Sary had not been charged with genocide in Case 002 does not nullify the applicability of the principle of *ne bis in idem*. The principle of *ne bis in idem* applies to bar new trials based on the same conduct as was at issue in the previous trial. It does not matter that the crimes charged have different legal qualifications; **b.** this principle is without exception in Cambodian law, but even if it were determined that the ECCC may entertain exceptions to the principle, the exceptions mentioned (but not relied upon) by the OCIJ are not applicable in the present case; **c.** cumulative convictions are inapplicable as an exception to this principle; and **d.** the 1979 trial did in fact cover all of the offenses coming within the jurisdiction of the ECCC.

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[59] *See* Judgement of the Revolutionary People's Revolutionary Court, U.N. A/34/491, 19 August 1979, ("Revolutionary Judgement"), p. 3-21.
[60] *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 14 November 2007, C22, ERN: 00153253-00153260 ("Provisional Detention Order"), para. 12.
[61] *Id.*.
[62] *Id.*, paras. 7-14.
[63] *Id.*, para. 8.
[64] *Id.*, para. 9.
[65] *Id.*, para. 10.
[66] Submissions on *Ne Bis in Idem* and Amnesty.

27. On 17 October 2008, the Pre-Trial Chamber issued a Decision[67] in which it found that "the characterisation given by the Co-Investigating Judges, although sufficient to inform the Charged Person of the charges against him, [was] too vague to allow proper consideration of whether the current prosecution is for the same 'acts' as those 'acts' upon which the charges brought in 1979 were based."[68] The Pre-Trial Chamber also noted that at the time Mr. IENG Sary was not "charged specifically with genocide" and "the current prosecution might be for different 'offences.'"[69] The Pre-Trial Chamber, at that time, determined that it only had to consider whether *ne bis in idem*, in the context of a provisional detention appeal, would "manifestly or evidently prevent a conviction" by the ECCC[70] and found that "it is not, at this stage of the proceedings, manifest or evident that the 1979 trial and conviction would prevent a conviction by the ECCC. The point may crystallise upon the indictment of the Charged Person, at which stage the precise charges and material facts relied upon will be known."[71]

28. On 15 September 2010, the OCIJ issued the Closing Order – the subject of the present Appeal. Now that this Closing Order indicts Mr. IENG Sary for genocide,[72] it is clear that the current prosecution arises out of the same acts as those upon which the charges brought in 1979 were based. The OCIJ has not indicated the existence of any new acts which were not the basis for any charges in 1979. Instead, it noted:

> At this stage of the proceedings, after a thorough analysis of the available material relating to the 1979 trial, in particular, the indictment, Decree-Law No.1 and the Judgement, the Co-Investigating Judges note, owing in particular to the serious shortcomings in the trial proceedings having regard to fair trial principles, that a great deal still remains unclear as to the crimes charged in 1979, the legal elements of the offence entitled 'genocide' and the modes of responsibility underpinning the conviction of the 'Pol Pot-Ieng Sary Clique'. Furthermore, it is noteworthy that in the Decision on the Defence Preliminary Objection handed down on 26 July 2010 in the Duch case, the Trial Chamber judges emphasised that there was *'a severely weakened and compromised judicial system'* between 1979 and 1993 and, in fact, that *'from* 1979 *until* 1982 *... the judicial system did not function at all'*. Therefore, it cannot be argued that the ongoing judicial proceedings bear any similarity with the 1979 prosecution.[73]

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[67] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, ERN: 00232830-00232861 ("PTC Provisional Detention Decision").
[68] *Id.*, para. 52.
[69] *Id.*, para. 51.
[70] *Id.*, para. 16.
[71] *Id.*, para. 53.
[72] Closing Order, para. 1613.
[73] *Id.*, para. 1332.

3. Definition and scope of the principle

29. The principle of *ne bis in idem* prevents prosecution by a subsequent court of an individual for the same conduct, facts or cause of action for which that individual was already convicted or acquitted. Article 7 of the Criminal Procedure Code of the Kingdom of Cambodia ("CPC") states:

> Extinction of Criminal Actions
> The reasons for extinguishing a charge in a criminal action are as follows:
> 1. The death of the offender;
> 2. The expiration of the statute of limitations;
> 3. A grant of general amnesty;
> 4. Abrogation of the criminal law;
> 5. The *res judicata.*
> When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated.

30. Article 12 of the CPC states:

> In applying the principle of *res judicata*, any person who has been finally acquitted by a court order cannot be accused once again for the same causes of action, including the case where such action is subject to different legal qualification.[74]

31. As is quite clear from the wording of Article 12 of the CPC, the principle of *ne bis in idem* in Cambodian law does not apply only when a person is charged with the same crime for which he was previously tried. Rather, it applies as a bar to prosecution when he has previously been tried for the same conduct. Thus, Cambodian law provides greater protection than the International Covenant on Civil and Political Rights ("ICCPR"), which states that "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[75]

32. Any conflict between the two provisions is irrelevant and does not create a lacuna in the law, as the Civil Parties have previously argued.[76] Even if the Civil Parties were correct that there was somehow a lacuna in the CPC, Article 33 new of the Establishment Law only requires the ECCC to look to Articles 14 and 15 of the ICCPR to determine whether

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[74] Emphasis added.
[75] International Covenant on Civil and Political Rights, adopted and open for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 ("ICCPR"), Art. 14(7) (emphasis added).
[76] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 03), Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 19 May 2008, C22/I/35, ERN: 00189513-00189534, para. 13 ("Civil Parties' Joint Response to Ne Bis in Idem and Amnesty Appeal").

international standards are respected. Articles 14 and 15 of the ICCPR deal with fair trial principles and would not require a different reading of the CPC.

33. The ICCPR was never intended to lessen fundamental human rights protections below those which are recognized at the national level, and it may not be interpreted as doing so. Article 5(2) of the ICCPR states, "There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." Furthermore, Cambodia's Constitution states that cases of doubt shall be resolved in favor of the accused.[77] In any event, the ICCPR is exceptional in limiting *ne bis in idem* protection to situations where an accused was charged with the same offense. Most other instruments refer to the same acts.[78]

4. Exceptions to the principle, including the issue of cumulative convictions, are inapplicable

34. In the Closing Order, the OCIJ did not determine whether exceptions apply to the principle of *ne bis in idem.* The Pre-Trial Chamber has not considered this issue, since at the time it was previously seized with the matter, it could not ascertain whether Mr. IENG Sary would be charged for crimes arising from the same acts as those at issue in his 1979 trial. No exceptions are identified in the CPC. The OCIJ, however, has previously noted that exceptions may exist where the prior proceedings:

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[77] The Cambodian Constitution requires that any case of doubt must be resolved in favor of the accused. *See* Cambodian Constitution, Art. 38. This principle of *in dubio pro reo* is considered an international standard of justice. At the ICTY, the principle *in dubio pro reo* is widely accepted by as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt. *See Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement"), para. 601. There, it has been recognized in relation to the findings required for conviction, such as those that make up the elements of the charged crime. *See Prosecutor v. Limaj et al.*, IT-33-66-A, Judgement, 27 September 2007 ("*Limaj* Appeal Judgement"), para. 21. The principle of *in dubio pro reo* must be respected according to the Agreement and the Establishment Law, which each require the ECCC to abide by international standards of justice. Article 12(2) of the Agreement requires, "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" (emphasis added). Article 33 new of the Establishment Law requires, "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" (emphasis added)..

[78] *See e.g.*, ICC Statute, Art. 20(1): "Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court"; ICTY Statute, Art. 10(1): "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal"; ICTR Statute, Art. 9(1): "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda."

> (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
> (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[79]

35. The right not to be tried again for the same offense is protected without exception under Cambodian law. If the exceptions outlined by the OCIJ are held to constitute valid law before the ECCC however,[80] the Pre-Trial Chamber must make a detailed finding as to how these exceptions apply to permit Mr. IENG Sary's prosecution to proceed. The Defence submits that no exception is applicable in the present case.
36. The first exception noted by the OCIJ does not apply, as it allows re-prosecution only when the prior proceedings were conducted "for the purpose of shielding the person concerned from criminal responsibility."[81] Since the 1979 trial resulted in Mr. IENG Sary being sentenced to death and all his property being ordered confiscated,[82] it is obvious that the 1979 trial was not meant to shield Mr. IENG Sary from criminal responsibility.
37. The second exception noted by the OCIJ likewise does not apply. This exception applies where the prior proceedings "[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[83] Whether the proceedings were independent or impartial alone is not enough for this exception to apply. It must be found that the proceedings were not independent or impartial and that they were conducted in a manner inconsistent with an intent to bring Mr. IENG Sary to justice in order for the exception to apply. The 1979 trial was obviously not intended to help Mr. IENG Sary escape justice since he was sentenced to death and all his property was ordered to be confiscated.[84]

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[79] Provisional Detention Order, para. 8.
[80] Should the Pre-Trial Chamber determine that exceptions may apply to the principle of *ne bis in idem*, the Defence submits that these exceptions outlined by the OCIJ, which mirror the exceptions to the principle set out in the ICC Statute, are the exceptions to the principle recognized in customary international law today, rather than the exceptions set out in the ICTY Statute. *See* ICC Statute, Art. 20(3); ICTY Statute, Art. 10(2).
[81] *Id.*
[82] Revolutionary Judgement, p. 4.
[83] Provisional Detention Order, para. 8 (emphasis added).
[84] Revolutionary Judgement, p. 4.

38. The OCIJ has previously decided that "there seems to be no impediment to the prosecution of IENG Sary for the acts covered by the 1979 Judgement under an international legal characterisation other than genocide," because international tribunals have allowed cumulative convictions since the time of the Nuremburg trials.[85] Even without regard to the fact that the ECCC is a domestic Cambodian court which must apply Cambodian law, and is not an international tribunal, the concept of cumulative convictions is not applicable; cumulative convictions have only been used by international tribunals where the accused was charged cumulatively in the same trial.[86] The 1979 trial is separated from this case by almost 30 years. Furthermore, the 1979 Judgement did not only convict Mr. IENG Sary for genocide,[87] so it is not enough to simply determine whether grave breaches, crimes against humanity, and national crimes can be charged cumulatively with genocide, but whether they could be charged cumulatively with all the crimes for which Mr. IENG Sary was already convicted.

5. The OCIJ erred in indicting Mr. IENG Sary in violation of the principle of *ne bis in idem*

39. The ECCC does not have jurisdiction over Mr. IENG Sary for genocide or any other crime charged. All of the crimes which are the subject of the current prosecution were at issue in the 1979 trial. It does not matter whether the characterization of the crimes in 1979 is the same as the characterization of the crimes today. It is not necessary to determine whether, for example, genocide as charged in 1979 equates with the definition of genocide at the ECCC.[88] The conduct at issue is the same[89] and the conduct at issue in 1979 clearly includes conduct which would qualify as crimes under the Establishment Law.[90] The OCIJ never determined that this was not the case, preferring instead to claim that "a great deal still remains unclear" concerning the 1979 trial.[91] There is not a great deal that is unclear about the 1979 trial. A detailed judgement exists, as well as an entire

[85] Provisional Detention Order, para. 9.
[86] *See* Hong S. Wills, *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR*, 17 EMORY INT'L L. REV. 341, 376 (2003) "the focus [of double jeopardy protection] is on the permissibility of subsequent prosecution for the same offense, rather than cumulative convictions in a single proceeding." *See also* Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595 (2006), which discusses (in US case law) the problem of confusing the principle of double jeopardy with the issue of cumulative convictions.
[87] *See supra* para. 23.
[88] In any event, the 1979 Judgement does refer to genocide as defined in the Genocide Convention and if a wider definition of genocide was actually applied in 1979 than that found in the Convention, the definition applied would have encompassed the definition found in the Genocide Convention.
[89] *See* CPC, Art. 12.
[90] *See* Submissions on *Ne Bis in Idem* and Amnesty, Annex C, which compares the Revolutionary Judgement with the Introductory Submission.
[91] Closing Order, para. 1332.

book containing the documents relating to this trial – witness statements, investigative reports, etc.[92] In a foreword to this book, Helen Jarvis, former head of the Victim Support Section, writes that she was "astonished that [she] had heard so little of the depth and range of testimony that had been made ten years previously at a court proceeding that had been dismissed by most foreigners as a 'show trial.'"[93]

40. The reason this matter was not decided by the Pre-Trial Chamber when it was first seized with the matter was not because the 1979 trial was unclear. It was because the acts at issue in the present case were still too vague at that time to make an assessment.[94] As the investigation is now complete and the Closing Order has been issued, this is no longer the case. The failure of the OCIJ to decide on this issue is indicative of the fact that it has not conducted a thorough investigation. More importantly, the OCIJ's decision to send Mr. IENG Sary to trial despite the fact that it did not conclude that the principle of *ne bis in idem* was inapplicable is a violation of Mr. IENG Sary's fundamental right to be presumed innocent. If the OCIJ could not determine whether the principle of *ne bis in idem* applied, in accordance with the Cambodian Constitution it was required to take the position most favorable to the Accused.

41. Due to the OCIJ's failure, it is now incumbent upon the Pre-Trial Chamber to analyze the Closing Order in detail and note which of Mr. IENG Sary's acts included in the Closing Order were also considered to form the basis for his conviction in 1979. If the Pre-Trial Chamber finds that they overlap, the ECCC's jurisdiction to prosecute Mr. IENG Sary for those acts is barred. The OCIJ's assertion that the ongoing judicial proceedings bear no similarity to the 1979 trial is irrelevant, so long as the 1979 trial was for the same causes of action as the current proceedings. There is no requirement that the proceedings share other characteristics.

B. GROUND TWO: THE OCIJ ERRED IN LAW BY HOLDING MR. IENG SARY'S VALIDLY GRANTED RPA DOES NOT BAR THE CURRENT PROSECUTION

1. The RPA is a jurisdictional issue which is appealable pursuant to Rule 74(3)(a)

[92] GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY (Howard J. De Nike, John Quigley, & Kenneth J. Robinson eds., University of Pennsylvania Press, 2000) ("DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY").
[93] *Id.*, at xiii.
[94] PTC Provisional Detention Decision, para. 52.

42. In the Closing Order, the OCIJ determined that the ECCC had jurisdiction over Mr. IENG Sary despite the RPA. The Closing Order is therefore an order confirming the jurisdiction of the ECCC, and is thus appealable pursuant to Rule 74(3)(a).
43. The applicability and scope of the RPA, though first raised by the Defence during the investigative stage of the proceedings, was never fully decided upon by the Pre-Trial Chamber. After being provided with written and oral submissions by the Parties,[95] the Pre-Trial Chamber issued its Decision on Provisional Detention wherein in it found that in the context of a provisional detention appeal, it had *only* to determine whether the RPA would "manifestly or evidently prevent a conviction" by the ECCC.[96] The Pre-Trial Chamber noted – without making a legal finding – that the validity or application of the RPA in prosecuting Mr. IENG Sary before the ECCC was "uncertain" and that it is not "manifest or evident" that the RPA would prevent a conviction for genocide.[97]
44. When the Pre-Trial Chamber decided that "[t]he offences mentioned in [the 1994] Law are not within the jurisdiction of the ECCC,"[98] the Closing Order had not been issued and the offenses for which Mr. IENG Sary would eventually be indicted were not known with any specificity. It is only now that the Closing Order has been issued that the Pre-Trial Chamber can determine whether these offenses were covered by the 1994 Law.
45. Mr. IENG Sary has additionally been charged with genocide and national crimes since the submission of the Introductory Submission and the initial challenges before the Pre-Trial Chamber on the applicability of the RPA before the ECCC.[99] The application of the RPA to these additional charges has not been fully considered and decided upon by the Pre-Trial Chamber.
46. The RPA is an unresolved jurisdictional issue, ripe for resolution by the Pre-Trial Chamber now that the Closing Order has been issued. The Pre-Trial Chamber, having jurisdiction over this issue, must now determine whether the Closing Order was validly issued in light of the RPA or whether the RPA is a bar to the ECCC's jurisdiction over Mr. IENG Sary.

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[95] *See* Submissions on *Ne Bis in Idem* and Amnesty; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC03), Prosecution's Response to IENG Sary's Submission on Jurisdiction, 16 May 2008, C22/I/32, ERN 00189207-00189221 ("OCP Response to Submission on Jurisdiction"); Civil Parties' Joint Response to Ne Bis in Idem and Amnesty Appeal; *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC03), Transcript, 30 June -3 July 2008.
[96] PTC Provisional Detention Decision, para. 16.
[97] *Id.*, paras. 58, 61.
[98] *Id.*, para. 61.
[99] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Written Record of Interview of Charged Person, 21 December 2009, D282, ERN: 00417104-00417108, paras. 12-13.

2. Summary of the OCIJ's position on the RPA

47. The OCIJ effectively embraced its initial conclusions in its first provisional detention order, adding little, if any, fresh legal analysis as to why or how the RPA is not applicable before the ECCC. In the Closing Order, the OCIJ first took note of its previous position:

> When ordering the provisional detention of **Ieng Sary** on 14 November 2007, the Co-Investigating Judges noted that the Royal Decree concerning him does not prevent prosecution by the ECCC for crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949. They noted that the purported amnesty accorded to **Ieng Sary** by the Decree only covered prosecution under the 15 July 1994 Law and that the effects of the Royal Pardon were limited to the annulment of the sentence handed down after the conviction of the 'Pol Pot-Ieng Sary Clique' in 1979, without having any effect on the Judgement convicting him, as such. The Co-Investigating Judges thus concluded that *'neither the pardon nor the amnesty currently establish any obstacles to prosecution before the ECCC for the international crimes with which IENG Sary stands charged'*.[100]

48. The OCIJ then noted the position previously taken by the Pre-Trial Chamber:

> In response to the appeal against this decision, the ECCC Pre-Trial Chamber noted that the part of the Royal Decree relating to the 1994 Law does not prevent conviction by the ECCC. As regards the Royal Pardon, the Chamber noted that *'the validity ... is uncertain. The Pre-Trial Chamber finds that it is therefore not manifest or evident that this part of the Royal Decree will prevent a conviction for genocide before the ECCC'*.[101]

49. The OCIJ then concluded:

> The Co-Investigating Judges can only reaffirm their initial assessment. Accordingly, the amnesty has no effect, since it is limited to prosecution under the 15 July 1994 Law. Likewise, even if the Royal Pardon were applicable before the ECCC, it would have no effect on the proceedings as it only relates to the annulment of the sectence [sic] imposed by the 1979 Trial.[102]

3. Summary of the argument

50. The OCIJ erred in deciding that the RPA does not bar Mr. IENG Sary's current prosecution because:

- **a.** the RPA is legally valid in Cambodia;
- **b.** the RPA is applicable at the ECCC;
- **c.** the scope of the Amnesty protects Mr. IENG Sary from prosecution at the ECCC; and
- **d.** the Pardon ensures Mr. IENG Sary cannot serve any sentence for a conviction based upon the acts at issue in the 1979 trial.

4. Background

[100] Closing Order, para. 1329.
[101] *Id.*, para. 1330.
[102] *Id.*, para. 1331.

51. As discussed *supra*, in August 1979 Mr. IENG Sary was tried and convicted, *in absentia*, for having committed genocide, as well as many other crimes.[103] The Judgement condemned Mr. IENG Sary to death and confiscated all of his property.[104] Mr. IENG Sary was not in custody before, during or after the trial and so the sentence was not carried out.

52. On 15 July 1994, the Cambodian National Assembly promulgated the "Law on the Outlawing of the 'Democratic Kampuchea' Group" ("1994 Law").[105] The 1994 Law declared, *inter alia*, that the "Democratic Kampuchea" group and its armed forces were outlaws and that membership in the group was illegal.[106] The 1994 Law came about as a comprehensive attempt to end the war[107] and begin the process of national reconciliation. It combined the threat of prosecution for membership in the outlawed Democratic Kampuchea group with the incentive of a stay in the enforcement of the 1994 Law for a period of 6 months, "to permit people who are members of the political organization or military forces of the 'Democratic Kampuchea' group to return to live under the control of the Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed."[108]

53. The 1994 Law states in pertinent part:

> Seeing that throughout the period since the election in 1993 to the present the 'Democratic Kampuchea' group has continually committed criminal, terrorist and genocidal acts which has [sic] been a characteristic of the group since it captured power in April 1975...
>
> ...
>
> Realizing that the leadership of the 'Democratic Kampuchea' group cannot take the Paris Peace Agreement as a legal shield to conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78. The crime of genocide has no statute of limitations.
>
> *The National Assembly of the Kingdom of Cambodia hereby approves the following law:*

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[103] *See supra* para 23.
[104] *Id.*, p. 39.
[105] Law on the Outlawing of the "Democratic Kampuchea" Group, Reach Kram No. 1, NS 94, 15 July 1994.
[106] *Id.*, Arts. 1-2.
[107] "The National Assembly passed a Law on the Outlawing of the Democratic Kampuchea Group with a view to ending the war and punishing the insurgents who continue to commit crimes against the population." Human Rights Committee, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, Initial reports of States parties due in 1993: Cambodia. 23/09/98. CCPR/C/81/Add.12. (State Party Report), para. 105 (emphasis added).
[108] *See* 1994 Law, Art. 5.

Article 1: To declare the 'Democratic Kampuchea' group and its armed forces as outlaws.

Article 2: From the time this Law comes into effect, all people who are members of the political organization or military forces of the 'Democratic Kampuchea' group shall be considered as offenders against the Constitution and offenders against the laws of the Kingdom of Cambodia.

Article 3: Members of the political organization or the military forces of the 'Democratic Kampuchea' group or any persons who commit crimes of murder, rape, robbery of people's property, the destruction of public and private property, etc. shall be sentenced according to existing criminal law.

Article 4: Members of the political organization or the military forces of the 'Democratic Kampuchea' group or any persons who commit
• secession,
• destruction against the Royal Government,
• destruction against organs of public authority, or
• incitement or forcing the taking up of arms against public authority shall be charged as criminals against the internal security of the country and sentenced to jail for 20 to 30 years or for life.

Article 5: This Law shall grant a stay of six months after coming into effect to permit people who are members of the political organization of military forces of the 'Democratic Kampuchea' group to return to live under the control of the Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed.

Article 6: For leaders of the 'Democratic Kampuchea' group the stay described above does not apply.

Article 7: The King shall have the right to give partial or complete amnesty or pardon as stated in Article 27 in the Constitution....

54. On 15 August 1996, Mr. IENG Sary issued a declaration denouncing Pol Pot, Ta Mok, and Son Sen and announcing that he and his followers would "reunite the whole nation toward a genuine national reconciliation, which is the opposite to the irrational thoughts of bloodthirsty Pol Pot, Ta Mok, and Son Sen, who wage wars until death."[109]

55. In early September 1996, Mr. IENG Sary met with Tea Banh and Tea Chamras, Cambodia's two co-Defence Ministers, in Bangkok to request an amnesty in exchange for surrendering to the Cambodian government.[110] General Tea Banh "praised Ieng Sary for his sincerity toward national reconcilation, saying his decision to end the decades-long

[109] Ieng Sary, *Ieng Sary's 1996 Declaration*, SEARCHING FOR THE TRUTH, DC-CAM, 15 August 1996.
[110] *See Ieng Sary Bargains for Amnesty: Army Brokers Secret Talks with Ministers*, BANGKOK POST, 7 September 1996.

armed struggle would eventually unite the country."[111] He stated, "His decision is immeasurable as it helps end the fighting, saves the budget and avoids casualties" and stressed that it was only a matter of time before Mr. IENG Sary and his followers would be granted amnesty.[112]

56. On 8 September 1996, Mr. IENG Sary provided a document to the government entitled "The True Fact about Pol Pot's Dictatorial Regime" which detailed: the roles of the party and the government, who wielded power, the economic regime, the educational system, the foreign policy, and some noteworthy events which occurred during Pol Pot's regime.[113]

57. Further to the negotiations for surrender, the co-Prime Ministers, Samdech Hun Sen and Prince Norodom Ranariddh, approached King Norodom Sihanouk, requesting a pardon and amnesty be granted to Mr. IENG Sary. The King agreed to grant a pardon and amnesty as long as two-thirds of the National Assembly would support it. His Majesty said at the time: "As a Constitutional King, who reign[s] but do[es] not govern, I will have to give satisfaction to the 2 Prime Ministers of the Royal Government of Cambodia regarding this issue of the amnesty to grant to Mister Ieng Sary and to his 'ex'-Khmer Rouge supporters. But I will require the 2/3rd of the National Assembly members to support, in this serious 'Ieng Sary issue', our 2 Prime ministers before royal amnesty is formally granted to him."[114] The National Assembly supported the RPA proposed by the two Co-Prime Ministers.[115]

58. On 14 September 1996, the King exercised his lawful authority under the Cambodian Constitution[116] and granted Mr. IENG Sary a pardon for his 1979 sentence of death and confiscation of all his property ("Pardon") and an amnesty for prosecution under the 1994 Law ("Amnesty").[117] The RPA states that the King granted the RPA "having taken into

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[111] *Id.*
[112] *Id.*
[113] The True Fact about Pol Pot's Dictatorial Regime, 1975-1978, 8 September 1996, ERN: 00081213-00081222.
[114] Fax from H.R.H. Norodom Sihanouk, King of Cambodia, to Mr. Pierre Sané, Secretary-General of Amnesty International, 13 September 1996.
[115] Clarification from H.R.H. Norodom Sihanouk, King of Cambodia, 17 September 1996. *See also Sihanouk Pardons Ieng Sary*, BANGKOK POST, 15 September 1996: "His majesty the king signed the amnesty ... with the support of two thirds of (the members of) parliament,' Second Prime Minister Hun Sen told Reuters.... Hun Sen said it had been easy to collect the signatures from MPs in the 120-member national assembly as he and First Prime Minister Prince Norodom Ranariddh were leaders of the two main parties."
[116] Cambodian Constitution, Art. 27 provides: "The King shall have the right to grant partial or complete amnesty."
[117] Royal Decree, NS/RKT/0996/72, 14 Sept 1996.

account" the 15 August Declaration by Mr. IENG Sary and the document he provided to the government in September.[118] The RPA states in pertinent part:

> **Article 1:** a pardon to Mr Ieng Sary, former Deputy Prime Minister in charge of Foreign Affairs in the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994;
> **Article 2:** this Royal Decree will take effect on the day of its signature;
> **Article 3:** the Council of Ministers, the Ministry of Interior and the Ministry of Justice shall fully implement this Royal Decree.

59. In return for the RPA, Mr. IENG Sary defected to the side of the Cambodian Government, which in turn brought an end to the conflict between Government forces and those forces which had been under his control. Prime Minister Hun Sen explained that "**without Ieng Sary leading 70 percent of the [Khmer Rouge] forces to integrate into government forces we could not have ended the war.**"[119] Until this point, the international community, and in particular the UN, had been unable to convince the Khmer Rouge to put down their arms and reintegrate into Cambodian society.[120] The RPA achieved this result. Mr. IENG Sary's "defection helped ignite political realignments everywhere. Ranariddh and Hun Sen saw the chance to break up the Khmer Rouge entirely and began separate negotiations with several top leaders around Pol Pot, including Son Sen, who had been Pol Pot's target in 1978 just before the Vietnamese invasion."[121]

60. On 25 October 1996, just over a month after the RPA was granted, Asiaweek reported that:

> Hun Sen told Asiaweek that Ieng Sary's departure would spark widespread defections and reduce the Khmer Rouge's numbers by as much as 80%. But the unraveling seems to be occurring even faster than Hun Sen's most optimistic

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[118] Although the RPA lists that document as being dated 9 September 2010, rather than 8 September 2010, which is the actual date listed on the document.
[119] *Khmer Rouge Trial Law on Track for December Approval: Cambodian PM*, AGENCE FRANCE-PRESSE, 30 November 2000 (emphasis added).
[120] This had been attempted, for example, through the Paris Peace Accords, which provided the possibility that the Khmer Rouge could participate in the elections. *See* Paris Peace Accords, 23 October 1991, Annex 3(3): "All Cambodians, including those who at the time of signature of this Agreement are Cambodian refugees and displaced persons, will have the same rights, freedoms and opportunities to take part in the electoral process."
[121] ELIZABETH BECKER, WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION 515 (Public Affairs, 1998). *See also* PHILIP SHORT, POL POT: ANATOMY OF A NIGHTMARE 437 (Henry Holt and Company, 2004): "Ieng Sary's defection was a body-blow from which the Khmers Rouges never recovered."

> estimate. Last week, eight divisions, totaling nearly 2,500 fighters by some counts, went over to the government side.[122]

61. Because of these results, the King's decision to grant the RPA was supported by a majority of the Cambodian public:

> The public has not only acquiesced, but it even supports the government's amnesties. A survey by a local nongovernmental organization, the Solidarity and Community Development Association (SODECO), published in the January 28, 1997 Cambodia Daily, reported two-thirds of the 1,120 respondents 'satisfied' with the deal made with Ieng Sary, and a Phnom Penh Post street poll published in the August 23–September 5, 1996 edition had similar results. (SODECO is close to opposition leader Sam Rainsy.)[123]

62. In August 1998, following the arrest of Nuon Paet, a former Khmer Rouge member, for crimes committed when part of the Khmer Rouge, Prime Minister Hun Sen sent the Cambodian Defense Minister, Tea Banh, to the former Khmer Rouge stronghold of Pailin to reassure Mr. IENG Sary that the immunity given to him was not in jeopardy.[124]

5. Applicable law

63. In Cambodia, amnesties and pardons may be lawfully granted pursuant to the Cambodian Constitution. Article 27 of the Constitution provides that "The King shall have the right to grant partial or complete amnesty." Article 90 provides that "The National Assembly shall adopt the law on the general amnesty." The Cambodian term used in each of these articles is "loekaentoh" which may refer to both amnesties and pardons. It is common for national amnesty laws not to recognize the distinction between amnesties and pardons and to use the terms interchangeably for grants of both pre and post-conviction immunity.[125] The Pre-Trial Chamber has decided that the RPA included both meanings.[126]

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[122] Dominick Faulder, *Bleeding the Khmer Rouge*, ASIA WEEK, Oct. 25, 1996.

[123] Kassie Neou & Jeffrey C. Gallup in *Human Rights and the Cambodian Past: In Defense of Peace Before Justice*, HUM. RTS. DIALOGUE 1.8 (1997). *See also* Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208 (2007); Neou Vannarin & Julia Wallace, *Ieng Sary Support High in Malai as Trial Looms*, CAMBODIA DAILY, 15 September 2010.

[124] John A. Hall, *In the Shadow of the Khmer Rouge Tribunal: The Domestic Trials of Nuon Paet, Chhouk Rin and Sam Bith, and the Search for Judicial Legitimacy in Cambodia*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 425 (2006).

[125] *Claudia Angermaier, The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?*, 1 EYES ON THE ICC 1, 131 (2004).

[126] "In the context of the inconsistent use of the word 'amnesty', the Pre-Trial Chamber finds that the second 'amnesty' in the Royal Decree can be interpreted as meaning that the Charged Person 'will not be proceeded against' in respect of the sentence given or breaches of [the 1994 Law]. The Pre-Trial Chamber will address the issue from this perspective as this explanation is the most in favour of the Charged Person." PTC Provisional Detention Decision, para. 59.

64. The King has repeatedly exercised his right to grant pardons, most notably on his birthday, around Khmer New Year in April and on the King's Coronation Day.[127] Under Cambodian law there is no limitation on the subject-matter of the crime that may be pardoned or amnestied by the King. For example, the King granted a pardon to Prince Norodom Ranariddh for plotting to overthrow the Government.[128]

65. The validity of laws promulgated by the King may be reviewed for constitutionality by the Constitutional Council.[129] Other acts of the King may not be challenged by State organs. This flows from Article 7 of the Cambodian Constitution, which states that the King shall be inviolable. The Agreement and Establishment Law authorize the ECCC to determine the scope of the Amnesty, but are silent as to jurisdiction to determine validity.[130]

6. Argument

a. The RPA is legally valid in Cambodia

66. It has not been claimed or argued by the OCIJ that the RPA was not granted legally or in conformity with the Cambodian Constitution. The starting point for the ECCC's analysis of the Amnesty is that it is valid and applicable. To the best knowledge of the Defence, the United Nations raised no opposition to the RPA when it was granted in 1996, despite its significant presence in Cambodia at the time. The RPA was legally granted by the King in accordance with the Cambodian Constitution. Article 27 of the Cambodian Constitution places no limits on the authority of the King to grant amnesties or pardons. Nor does it place any limits on the scope of any amnesty or pardon granted. It simply states: "The King shall have the right to grant partial or complete amnesty."[131]

67. Article 90 (and Article 90 New) of the Cambodian Constitution states in pertinent part: "The National Assembly shall adopt the law on the general amnesty." The National Assembly therefore may legislate and adopt a law on amnesty when it is a general law

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[127] *See, e.g., Cambodia's New King to Pardon 88 Prisoners Fri*, ASIAN POL. NEWS, Nov. 1, 2004.
[128] *Cambodian King Grants Pardon for Deposed Prince*, AGENCE FRANCE PRESSE, 22 March 1998.
[129] *See* Cambodian Constitution, Arts. 136 New – 144 New.
[130] *See* Agreement, Art. 11(2): "The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers"; Establishment Law, Art. 40 new: "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."
[131] The Civil Parties have previously argued that this Article actually only gives the King the power to grant pardons, rather than amnesties. "Following the meaning for loeklaengtoh, 'to lift guilt', and regarding the provision in the Constitution [Article 38 is cited] that only a court can state the guilt of a person, the power of the King is limited to grant a *pardon* to a person who is already convicted." *See* Civil Parties' Joint Response to Ne Bis in Idem and Amnesty Appeal, para. 32. This interpretation goes against the plain wording of Articles 27 and 90 of the Cambodian Constitution. It furthermore does not follow from Article 38, which simply states: "The accused shall be considered innocent until the court has judged finally on the case." This does not prohibit the King or the National Assembly from granting amnesties.

(i.e. not granted to a specific individual). However, when an amnesty refers specifically to an individual, such as the amnesty granted to IENG Sary, the power to grant that amnesty solely rests with the King. Therefore, even without a formal vote on the RPA by the National Assembly (although it was approved by two thirds of the members), the RPA was validly granted pursuant to the Cambodian Constitution.

68. The King issued the RPA as a Royal Decree which stated that it would take effect on the day of its signature[132] and that it shall be fully implemented by the Council of Ministers, the Ministry of the Interior, and the Ministry of Justice.[133] The RPA was signed by the King on 14 September 1996 and at that time became valid law in Cambodia.[134] The King has never indicated that he exceeded his Constitutional authority in granting the Amnesty. If His Majesty held the belief that the RPA was invalid, he had the opportunity to clarify this when he was requested to participate in the OCIJ's investigation,[135] an opportunity of which he declined to avail himself.[136]

b. The Amnesty prevents the prosecution of Mr. IENG Sary at the ECCC as the ECCC is a domestic court

69. The RPA is applicable at the ECCC. The validity of a domestic amnesty in the State where granted is purely a matter of that State's domestic law. As the Appeals Chamber of the SCSL has explained, "The grant of an amnesty or pardon is undoubtedly an exercise of sovereign power, which essentially is closely linked, as far as a crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power."[137] The ECCC is a domestic Cambodian court and must uphold and abide by valid and binding Cambodian law.

1. Domestic amnesties may apply to *jus cogens* crimes

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[132] RPA, Art. 2.
[133] *Id.*, Art. 3.
[134] The RPA was issued as Royal Decree No. NS/RKT/0996/72.
[135] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from International Co-Investigating Judge Lemonde to Samdech Chauvea Veang Kong Sam Ol, Vice Prime Minister of the Royal Palace, requesting to interview His Majesty the King-Father Norodom Sihanouk of Cambodia as a witness, 15 July 2009, D122/5, ERN: 00350280; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from Samdech Chauvea Veang Kong Sam Ol, Vice Prime Minister of the Royal Palace, to The Co-Investigating Judge refusing the receipt of the request to interview His Majesty the King-Father Norodom Sihanouk of Cambodia as a witness, 17 July 2009, D122/5/1, ERN: 00351389-00351392.
[136] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Second Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, ERN: 006000748-00600774.
[137] *Prosecutor v. Kallon*, SCSL-04-15-AR72(E), *and Kamara,* SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, para. 67. *See also* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1023 (2006).

70. The OCP has argued that the ECCC must not recognize the RPA, since it asserts that pardons and amnesties are invalid for *jus cogens* crimes.[138] This argument must fail. As already explained, the ECCC is a domestic court. National jurisdictions have authority to grant amnesties and pardons for *jus cogens* crimes, as such a grant of amnesty or pardon would be purely a matter of domestic law. The Abidjan Agreement, for example, was an agreement granted within the national jurisdiction of Sierra Leone which provided a blanket amnesty for all crimes committed by the Revolutionary United Front of Sierra Leone ("RUF"). The negotiations which led to this Agreement were assisted by the Special Envoy of the United Nations Secretary-General for Sierra Leone, Berhanu Dinka,[139] who, along with a representative of Organization of African Unity and a representative of the Commonwealth, signed the Agreement as a moral guarantor.[140] Therefore, the international community accepted that the Sierra Leonean government had the authority to grant an amnesty for purportedly *jus cogens* crimes.
71. The Establishment Law appears to require the ECCC to exercise its jurisdiction in accordance with "international standards" flowing from Cambodia's obligations under the ICCPR. It may be argued that such standards necessarily flow from the law and procedure developed through international and "internationalized" tribunals dealing with crimes of mass atrocity such as the ICC, ICTY, ICTR, and the SCSL. It may therefore appear that the Establishment Law requires the ECCC to take into account the *jus cogens* nature of certain international crimes in the context of the RPA.
72. Such arguments have been artfully put,[141] may be viscerally appealing, but are intellectually unpersuasive. They rely on an incorrect interpretation of the Establishment Law. The Establishment Law requires the ECCC to exercise jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in

[138] OCP Response to Submission on Jurisdiction, paras. 38-40.
[139] *See* United Nations Mission in Sierra Leone ("UNAMSIL")'s website, background section, *available at* http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html.
[140] Abidjan Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996, Art. 28, *available at* http://www.sierra-leone.org/abidjanaccord.html. "The Government of Cote d'Ivoire, the United Nations, the OAU and the Commonwealth shall stand as moral guarantors that this Peace Agreement is implemented with integrity and in good faith by both parties."
[141] *See* Anees Ahmed & Merryn Quayle, *Can Genocide, Crimes Against Humanity and War Crimes be Pardoned or Amnestied?*, 79 AMICUS CURIAE 15, 19 (2009), *available at* http://sas-space.sas.ac.uk/dspace/bitstream/10065/2563/1/Amicus79_Ahmed%26Quayle.pdf.

Articles 14 and 15 of the ICCPR.[142] These Articles relate to fundamental fair trial rights. The Establishment Law does not require the ECCC to comport with any other supposed "international standards of justice" or to look to ICTY, ICTR, SCSL, or ICC jurisprudence for guidance as to what these standards might be. It certainly does not require the ECCC to hold the RPA is invalid because it prevents the prosecution of allegedly *jus cogens* crimes.[143]

2. There is no international standard of justice prohibitng the application of amnesties to *jus cogens* crimes

73. Even if the ECCC were to consider international standards of justice, there is no international standard of justice which requires the ECCC to set aside the RPA.. As Professor John Dugard has explained:

> [S]uccessor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.... The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija* which held that amnesties for torture are null and void and will not receive foreign recognition. It is, however, doubtful, whether international law has reached this stage. State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution. The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of South Africa and El Salvador, expressing the view that international law not only fails prohibit amnesty but rather encourages it.[144]

74. Amnesties for *jus cogens* crimes are acceptable and fulfill a necessary function in State practice, in order to satisfy efforts directed towards conflict resolution, peace making and national reconciliation. Such amnesties have been endorsed by the UN. National courts

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[142] "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." Establishment Law, Art. 33 new (emphasis added).

[143] The Cambodian Constitution does require courts to recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women's and children's rights, but this does not require Cambodian courts to look to supposed "international standards" as determined by the ICC, ICTY, ICTR, or SCSL. It requires Cambodian courts to look to specific declarations and conventions to which Cambodia is a party.

[144] John Dugard, *Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1002-04 (1999) ("Dugard, *Dealing with Crimes of a Past Regime*") (emphasis added). *See also infra* paras. 127-30 for further discussion on the relevance of a crime's *jus cogens* status to whether it may be punished at the ECCC.

have upheld amnesties, clearly indicating that there is no international standard of justice which requires the ECCC to prosecute crimes because they have obtained *jus cogens* status.

3. The example of the SCSL does not demonstrate that amnesties for *jus cogens* crimes are inapplicable

75. The OCP's reliance on the fact that the SCSL did not uphold an amnesty granted by the Sierra Leonean government in the Lomé Agreement[145] does not support the position that the ECCC should not uphold the RPA. First, the SCSL, as discussed *supra*, was set up as an independent, autonomous court separated from the domestic Sierra-Leonean court system. It was specifically envisioned that it would be able to apply international law directly under the principle of universal jurisdiction.[146] This differs completely from the situation at the ECCC. The ECCC is not employing the principle of universal jurisdiction to prosecute Cambodian citizens in a Cambodian court for crimes committed in Cambodia. It was established for "the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea."[147]

76. Second, even though the SCSL did not uphold the amnesty, it did not declare the amnesty invalid in Sierra Leone's domestic legal system,[148] and furthermore, it appears from the fact that the amnesty was granted in the first place for supposedly *jus cogens* crimes that the international community accepts that amnesties may be granted for such crimes.

77. When the government of Sierra Leone signed the Lomé Agreement with the RUF in July 1999 to attempt to end the war in Sierra Leone, the UN signed as a moral guarantor to this agreement,[149] as it had done previously with the Abidjan Agreement.[150] The Lomé Agreement ensured "that no official or judicial action is taken against any member of [the parties in the civil war, including the RUF] in respect of anything done by them in pursuit

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[145] OCP Response to Submission on Jurisdiction, para. 28.

[146] *Prosecutor v. Kallon*, SCSL-04-15-AR72(E), *and Kamara,* SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 ("SCSL Decision on Lomé Accord"), para. 88. It was set up in this manner because following the Lomé Agreement, there were violations of the Agreement by those who had benefited from the amnesty contained within it: the fighting continued. *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009 ("*Sesay* Trial Judgement"), paras. 908-14. Due to the continuation of the fighting, the Sierra Leonean government decided to lobby for the creation of an international tribunal. *See* UN Security Council Resolution 1315, UN Doc. No. S/RES/1315 (2000), 14 August 2000, preamble. An international tribunal would create a way around the amnesty granted in the Lomé Agreement due to the UN's caveat that it did not accept that the amnesty would apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. *See* SCSL Decision on Lomé Accord, para. 89.

[147] Agreement, title.

[148] *See* SCSL Decision on Lomé Accord, para. 50.

[149] Lomé Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999, XXXIV, *available at* http://www.sierra-leone.org/lomeaccord.html.

[150] Abidjan Agreement, Art. 28.

of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement."[151] This was a blanket amnesty for all crimes committed by the RUF, both national and international. It was only after this Agreement was reached that a handwritten *caveat* was appended to the signature of the Special Representative of the Secretary-General of the UN. This *caveat* was "a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law."[152]

78. After the Lomé Agreement was signed, the Secretary-General reported to the UN Security Council (in paragraph 54 of his report):

> As in other peace accords, many compromises were necessary in the Lomé Peace Agreement. As a result, some of the terms under which this peace has been obtained, in particular the provisions on amnesty, are difficult to reconcile with the goal of ending the culture of impunity, which inspired the creation of the United Nations Tribunals for Rwanda and the Former Yugoslavia, and the future International Criminal Court. Hence the instruction to my Special Representative to enter a reservation when he signed the peace agreement.... At the same time, the Government and people of Sierra Leone should be allowed this opportunity to realize their best and only hope of ending their long and brutal conflict.[153]

79. On 20 August 1999, the UN Security Council adopted a Resolution welcoming the Lomé Agreement.[154] The only mention it made of the amnesty was that it:

> Stresses the urgent need to promote peace and national reconciliation and to foster accountability and respect for human rights in Sierra Leone and, in this context, takes note of the views contained in paragraph 54 of the report of the Secretary-General, welcomes the provisions in the Peace Agreement on the establishment of the Truth and Reconciliation Commission and the Human Rights Commission in Sierra Leone, and calls upon the Government of Sierra Leone and the RUF to ensure these Commissions will be established promptly within the time-frame provided for in the Peace Agreement.[155]

The UN Security Council did not oppose the amnesty granted in the Lomé Agreement because it seemed to acknowledge that the amnesty presented "the best and only hope"[156] of ending the conflict in Sierra Leone. This view is supported by Professor Schabas who

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[151] Lomé Agreement, Art. XI(3).
[152] UN Security Council Resolution 1315, UN Doc. No. S/RES/1315 (2000), 14 August 2000, preamble.
[153] Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, S.C. Res. 836, U.N. Doc. No. S/1999/836, 30 July 1999, para. 54.
[154] UN Security Council Resolution 1260, adopted by the Security Council at its 4035th meeting, U.N. Doc. No. S/RES/1260 (1999), 20 August 1999.
[155] *Id.*, para. 10 (emphasis added).
[156] Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone, S.C. Res. 836, U.N. Doc. No. S/1999/836, 30 July 1999, para. 54.

opines, "The language in the Resolution seemed to suggest that the Security Council accepted the compromise in the Lomé Agreement. Its reference to the Secretary-General's comments on amnesty was little more than a perfunctory note that criticized the amnesty 'for the record' but went no further."[157]

80. The UN has also encouraged countries to grant amnesties on several other occasions. For example, in 1993 the UN helped negotiate a blanket amnesty agreement in order to resolve the internal conflict in Haiti.[158] The agreement consisted of an amnesty for the military junta in exchange for the reinstatement of President Aristide.[159] In 1994, the UN supported the South African amnesty.[160] Under the proposed amnesty plan, members of the apartheid government security forces and apartheid activists would receive blanket immunity. In exchange, the government would free the remaining political prisoners.[161]

81. It is clear that the UN does not view all amnesties as unacceptable. In any event, the UN's view on the validity or applicability of the RPA is not of concern to the ECCC, as a domestic court interpreting domestic law. The UN may not require the ECCC, a Cambodian court, to invalidate the Amnesty. This would be a violation of the principle of state sovereignty as enshrined in Article 2(7) the United Nations Charter:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[162]

82. The ECCC was not created pursuant to Chapter VII, unlike the *ad hoc* tribunals.[163] Therefore a violation of Cambodia's sovereignty is not authorized by the UN Charter. The King,[164] the co-Prime Ministers, and at least two-thirds of the National Assembly

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[157] William A. Schabas, *Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U. C. DAVIS J. INT'L L. & POL'Y, 145, 150 (2004) ("Schabas, *The Sierra Leone TRC and the SCSL*") (emphasis added).
[158] Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 293-94 (2008) ("Trumbull").
[159] *Id.*
[160] *Id.*, at 293.
[161] *Id.*
[162] Charter of the United Nations, 26 June 1945, Art. 2(7).
[163] *See* UN Security Council Resolution 827, UN Doc. No. S/RES/827 (1993), 25 May 1993; UN Security Council Resolution 955, UN Doc. No. S/RES/955 (1994), 8 November 1994.
[164] The King may have expressed the view to Amnesty International that, "if one day, an International Tribunal meets somewhere to try ... Ieng Sary ... I will support this tribunal and its sentence, as a Cambodian citizen." Fax from H.R.H. Norodom Sihanouk, King of Cambodia, to Mr. Pierre Sané, Secretary-General of Amnesty International, 13 September 1996 (emphasis added). However, this statement does not imply that the King did not intend the Amnesty to be valid. If the King did not intend to grant the Amnesty or intend for it to be valid and enforceable in Cambodian courts, he would not have granted it.

specifically intended for Mr. IENG Sary not to be prosecuted for any alleged crimes when he was with the Khmer Rouge specifically because this contributed towards peace in Cambodia. Any attempt to circumvent the Amnesty would usurp the constitutional power of the King. Amnesties which contribute towards peace or indeed prevent the slide into conflict have beneficial consequences for the country involved and may not simply be dispensed with by outsiders who have suffered none of the problems and receive none of the benefits of such amnesties.

c. The scope of the Amnesty prevents prosecution of Mr. IENG Sary at the ECCC

83. The OCIJ erred in reaffirming its previous finding that:

> apart from an allusion to genocidal acts in its preamble, [the 1994 Law] only refers to a number of domestic law offences subject to prosecution in accordance with national legislation applicable at the time, as well as a series of crimes against State security. Therefore, it does not cover the offences coming within the jurisdiction of the ECCC.[165]

84. The crimes included in the 1994 Law are the same crimes over which the ECCC now purportedly has jurisdiction. Mr. IENG Sary has been indicted for crimes against humanity, genocide, grave breaches, and national crimes under the 1956 Penal Code.[166] These crimes are included in the scope of the 1994 Law, as can be seen from the preamble to this Law, as well as its specific Articles and relevant jurisprudence.

85. The preamble to the 1994 Law does not merely allude to genocidal acts but specifically states that the Law was enacted "[r]ealizing that the leadership of the 'Democratic Kampuchea' group can not ... conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78. The crime of genocide has no statute of limitations."[167]

86. The preamble to the 1994 Law also explains that members of the Khmer Rouge have continually committed "criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in April 1975 – forcible movement, abduction, killing and subsequently also robbery and banditry, laying mines indiscriminately throughout the plains and forests, destroying public and private property, leading the killing of civilians, forcibly taking and illegally occupying national territory, and selling natural resources by violating the sovereignty of the Kingdom of

[165] Provisional Detention Order, para. 13.
[166] Closing Order, para. 1613.
[167] 1994 Law, preamble (emphasis added).

Cambodia."[168] The crimes referred to in the 1994 Law are thus very wide and include many of the underlying acts of genocide, crimes against humanity, and grave breaches. The drafters of the 1994 Law do not appear to have intended to exclude the crimes of genocide, grave breaches, or crimes against humanity from its scope.

87. In France, whose legal system Cambodia's was modeled after, the preamble would be considered in interpreting the 1994 Law if the Law were considered unclear. The general rule is that "[w]hen a text is ambiguous or obscure, courts look for the will of the legislature. For that, a judge first examines the text itself with care, and considers commentaries written about the text. This is not limited to the provision to be applied but includes the chapter or the entire law. Often a provision is obscure only if separated from its context."[169] This is similar to the customary method for the interpretation of treaties. Article 31 of the Vienna Convention on the Law of Treaties states: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise ... its preamble and annexes...." Similarly, at the ICC, it has been held:

> The rule governing the interpretation of a section of the law is the wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular subsection of the law read as a whole in conjunction with the section of an enactment in its entirety. Its object may be gathered from the chapter of the law in which the particular section is included, and its purpose for the wider aims of the law as may be gathered from the preamble.[170]

The Pre-Trial Chamber should follow this general principle that preambles should be considered when interpreting a Law, especially if the Law is unclear in scope.

88. Articles 1 and 2 demonstrate that the 1994 Law was meant to cover *all* crimes committed by members of the "Democratic Kampuchea group." Article 1 states that members of the "Democratic Kampuchea" group are declared outlaws and Article 2 states that "[f]rom the time this Law comes into effect, all people who are members of the political organization or military forces of the 'Democratic Kampuchea' group shall be considered as offenders

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[168] *Id.*

[169] Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195, 201-02 (2003).

[170] *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, p. 13-14 (emphasis added).

against the Constitution and offenders against the laws of the Kingdom of Cambodia."[171] It does not state that members of the "Democtratic Kampuchea group" shall be considered to be offenders of the 1994 Law alone, but generally shall be offenders under "the laws of the Kingdom of Cambodia.".

89. Articles 3 and 4 of the 1994 Law illustrate some of the crimes that this Law is intended to cover, including: murder, rape, robbery, destruction of property, and the taking up of arms against the public authority. This list is clearly not exhaustive, as Article 3 ends its list of crimes with the term, "etc."[172] It can hardly be claimed that the 1994 Law "only refers to a number of domestic law offences ... as well as a series of crimes against State security."[173] Nothing in the 1994 Law supports such a narrow definition. These Articles and the preamble clearly demonstrate that this Law was meant to apply to all criminal acts allegedly undertaken by the "Democratic Kampuchea" group. The 1994 Law, for example, specifically refers to genocide, and yet genocide was not a domestic offense in Cambodia at that time. This law, therefore, must have been intended to include at least the crime of genocide.
90. The 1994 Law clearly includes at least certain of the national crimes listed in Article 3 new of the Establishment Law within its scope, and yet the OCIJ failed to recognize that this prevents the ECCC from exercising jurisdiction over Mr. IENG Sary for these national crimes. Article 3 of the 1994 Law states: "Members of the political organization or the military forces of the "Democratic Kampuchea" group or any persons who commit crimes of murder, rape, robbery of people's property, the destruction of public and private property, etc. shall be sentenced according to existing criminal law."[174] The 1956 Penal Code was the existing criminal law at that time. Only when the 2009 Penal Code entered into force was the 1956 Penal Code repealed.[175] Therefore, the Amnesty prevents the ECCC from sentencing Mr. IENG Sary for offenses under the 1956 Penal Code (including the offenses enumerated in Article 3 new of the Establishment Law).
91. The 1994 Law was intended to be the *lex specialis* for the prosecution of crimes committed by the Khmer Rouge – the sole basis for prosecution of Khmer Rouge

[171] Emphasis added.
[172] 1994 Law, Art. 3.
[173] Provisional Detention Order, para. 13.
[174] Emphasis added.
[175] *See* Cambodian Constitution, Art. 158 New: "Laws and standard documents in Cambodia that safeguard State properties, rights, freedom and legitimate private properties and in conformity with the national interests, shall continue to be effective until altered or abrogated by new texts, except those provisions that are contrary to the spirit of this Constitution." *See also* 2009 Cambodian Penal Code, Art. 671.

members. A contrary interpretation would mean that the amnesty provision under Article 5 would have defeated the purpose of encouraging Khmer Rouge members to defect. When discussing the amnesty offered by the 1994 Law, Professor Stan Starygin states, "the 1994 Law offers a broad subject matter clemency by providing that the latter will be extended to include 'crimes which [members of the Democratic Kampuchea group] have committed' without limiting this clause temporally or restricting it to any substantive conditions... Although there is no question that 'genocidal acts' and other crimes against humanity listed in the Preamble to the 1994 Law are classified as jus cogens and are punishable under customary international law, they cannot be punished in this jurisdiction [due to the amnesty given in Article 5]."[176]

92. The trial of Chhouk Rin is important jurisprudence in terms of the interpretation of the 1994 Law.[177] Facing prosecution for the murder of three backpackers in September 1994, as well as a host of other crimes including terrorism under Article 2 of the Law on Terrorism, Chhouk Rin attempted to rely upon the amnesty provision in Article 5 of the 1994 Law to prevent prosecution.[178] In reference to Article 5 of the 1994 Law, the Appellate Court held "these provisions only refer to any crime which has been committed before this law came into force."[179] The Appellate Court did not limit Chhouk Rin's amnesty only to crimes specifically enumerated under the 1994 Law, but found that it would cover all crimes committed prior to the enactment of the 1994 Law. Mr IENG Sary's Amnesty likewise must be considered to cover all crimes committed prior to the 1994 Law coming into force.

93. Regarding the temporal scope of the 1994 Law, the preamble specifically states that the Law was enacted "[r]ealizing that the leadership of the 'Democratic Kampuchea' group can not ... conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78."[180] The preamble also explains that the Khmer Rouge continually committed "criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in

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[176] Stan Starygin, *Should the Rudolph Höss of Cambodia be Entitled to the Minimum Procedural Guarantees?*, CAMBODIAN L. REV. (7 July 2007), p. 5-6.
[177] *See* John A. Hall, *In the Shadow of the Khmer Rouge Tribunal: The Domestic Trials of Nuon Paet, Chhouk Rin and Sam Bith, and the Search for Judicial Legitimacy in Cambodia,* 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 409 (2006) ("Hall").
[178] *Id.*, at 448-49.
[179] Appeals Court of Phnom Penh, Criminal Case No. 463/17.10.2000 [Chhouk Rin], Judgment of the Appeals Court, 6 September 2002, p. 23 (Unofficial translation) (emphasis added). This was upheld by a later Appeals Court Judgement in Case No. 81/2, 5 November 2003.
[180] 1994 Law, preamble (emphasis added).

April 1975."[181] The 1994 Law covers acts which occurred between 1975 and 1979, not just from the date of its promulgation.[182]

94. Chhouk Rin relied on the amnesty provision in Article 5 of the 1994 Law to prevent prosecution as he had defected to the Government within six months of the Law coming into effect in July 1994.[183] The Municipal Court Judge ruled that Chhouk Rin should be released immediately because his defection to the government gave him immunity from prosecution under the amnesty provision in Article 5.[184] The issue was addressed at an Appellate Court hearing on 28 August 2002.[185] The Appellate Court held that the six month amnesty provision "refers only to offences which have been committed before this law comes into force."[186] Such a decision appears to have been based on both a logical interpretation of the effect of the provision and the intention of the legislators who passed it:

    a. First, to allow any Khmer Rouge member to commit a crime within the six months following the 1994 Law and then defect to the government within that same period would amount to a "carte blanche for the KR to kill, rob and murder as long as they defected before the end of the amnesty period."[187] It would effectively create an amnesty-in-advance for crimes not yet committed.
    b. Second, legislators who were involved in debating the 1994 Law expressly offered a different interpretation than that put forward by the Municipal Court. Sam Rainsy, who had been Finance Minister in 1994 and had participated in the National Assembly debate on the 1994 DK Law, argued that the law was intended to grant amnesty only for those crimes committed *before* the law was promulgated, and that the National Assembly had specifically had in mind crimes that had taken place during the period of Khmer Rouge rule from 1975 to 1979.[188]

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[181] *Id.* (emphasis added).
[182] The 1994 Law was promulgated by Reachkram No. 01.NS.94 on 15 July 1994.
[183] Hall, at 448-49.
[184] *Id.*, at 452.
[185] *Id.*, at 457, *citing* Appellate Court of Phnom Penh, Criminal Case No. 463/17.10.2000 [Chhouk Rin], Judgment of the Appellate Court, 6 September 2002, transcript.
[186] *Id.*, at 460, *citing* Appellate Court of Phnom Penh, Criminal Case No. 463/17.10.2000 [Chhouk Rin], Judgment of the Appellate Court, 6 September 2002, transcript, p. 14.
[187] *Id.*, at 454, *citing* Annette Marcher, *US Lawyer Praises Chhouk Rin Judgement*, PHNOM PENH POST, issue 9/17, 18-31 August 2000.
[188] Gina Chon & Van Roeun, *Chhouk Rin Verdict Sets Uncertain Precedent for Other KR*, CAMBODIA DAILY, 20 July 2000.

95. This Judgement, by a Cambodian Appellate Court – the only one to the knowledge of the Defence which directly addresses the scope of the 1994 Law – establishes that the 1994 Law was intended to apply solely to crimes committed before its entry into force on 15 July 1994.

d. The Pardon ensures Mr. IENG Sary cannot serve any sentence for a conviction based upon the acts at issue in the 1979 trial

96. As discussed *supra*, all acts for which Mr. IENG Sary has been indicted at the ECCC were at issue in the 1979 trial. Mr. IENG Sary was pardoned for all of these acts and therefore should not serve a sentence for these acts. By the time the Pardon was granted, the death penalty had already been abolished in Cambodia.[189] Thus, it is clear that the King did not intend to issue the Pardon simply to ensure that Mr. IENG Sary's death sentence would not be carried out. The King would have known that it would be unnecessary to issue a pardon for something that the Constitution already prohibited. Yet, the King issued the Pardon. This must be because he intended to ensure that Mr. IENG Sary would not serve any sentence related to a conviction based on the acts at issue in the 1979 trial. The King's Royal Decrees should not be interpreted in a way that would make them redundant.

97. The OCIJ followed the finding of the Pre-Trial Chamber that "the validity of the [Pardon] is uncertain."[190] If there is any uncertainty regarding the King's intentions, the interpretation which would provide the most protection to Mr. IENG Sary, i.e. the widest validity and scope of the Pardon, is to be preferred. This is guaranteed by Article 38 of the Cambodian Constitution, which provides that "Any case of doubt shall be resolved in favor of the accused."

98. The Pardon is still valid even though none of the sentence was served.[191] Mr. IENG Sary was sentenced to death.[192] First, there is no death penalty in Cambodia today. Second, even if there were a death penalty, it is impossible to serve a proportion of a death penalty. Any interpretation of Cambodian law forcing a proportion of a death penalty to be served prior to the Pardon being given would give both Cambodian law and the Pardon an absurd reading.

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[189] PTC Provisional Detention Decision, para. 57.
[190] Closing Order, para. 1330, *citing* PTC Provisional Detention Decision, para. 58.
[191] Despite what has been argued by the OCP and Civil Parties. *See Case of IENG Sary*, 002-19-09-2007-ECCC/OCIJ (PTC03), Transcript, 2 July 2008, p. 26, 42.
[192] Revolutionary Judgement, p. 39.

99. Alternatively, the Closing Order indicts Mr. IENG Sary for genocide. The 1979 trial tried Mr. IENG Sary for genocide as well as other crimes. Any trial of Mr. IENG Sary at the ECCC will be based upon the same alleged facts. Therefore, due to the Pardon, Mr. IENG Sary should not serve any sentence for any acts of genocide or other crimes for which he was convicted in 1979 which fall under the jurisdiction of the ECCC.

7. Conclusion

100. The ECCC does not have the competence to determine whether the RPA is valid, but only to determine its scope. The RPA is valid, and is applicable at the ECCC. Its scope includes all the crimes which the OCIJ, through the Closing Order, alleges that Mr. IENG Sary committed.

101. The ECCC is required by Cambodian law to hold that the RPA bars Mr. IENG Sary's current prosecution, but if the ECCC chooses to ignore the RPA, this may have a severely detrimental impact on attempts to end future conflicts all over the globe.[193] Those taking part in hostilities who are willing to negotiate for peace will be unlikely to trust that any amnesty offered would later be judged valid. The importance of amnesties is evident from their inclusion in Additional Protocol II,[194] nowadays an important international humanitarian law convention. Article 6(5) of Additional Protocol II states that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." Failure to uphold validly granted amnesties would remove a major bargaining tool in peace negotiations and render Article 6(5) of Additional Protocol II worthless.[195] The Pre-Trial Chamber must consider this effect when it decides on the RPA's applicability and scope. As Professor William Schabas has explained: "[p]eace and reconciliation are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded."[196]

102. It should not be forgotten that "[i]nternational opinion, often driven by NGO's and western activists who are strangers to repression, fails to pay sufficient attention to the circumstances of the society which chooses amnesty above prosecution; and to the

[193] "President Clinton, for example, commented that the Haitian amnesty deal was necessary to avert 'massive bloodshed' and 'extended occupation' by the military regime." Trumbull, at 315.
[194] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ("Additional Protocol II").
[195] "If the perpetrators know that the UN or the ICC will refuse to recognize any such amnesty, negotiators may lose an important tool for brokering peace." Trumbull, at 315.
[196] Schabas, *The Sierra Leone TRC and the SCSL*, at 165-68.

argument that wounds are best healed at home, by national courts and truth commissions, rather than by foreign courts and international tribunals."[197]

C. GROUND THREE: THE OCIJ ERRED IN LAW BY HOLDING THAT THE ECCC HAS JURISDICTION TO APPLY INTERNATIONAL CRIMES AND FORMS OF LIABILITY AS DOING SO WOULD VIOLATE THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE*

103. The OCIJ erred in determining that the status of the ECCC as a domestic court or international court is irrelevant and in holding that the ECCC may apply international crimes and forms of liability simply because the Establishment Law provides for their application.[198] It would be a violation of the principle of *nullum crimen sine lege* for the Establishment Law – which was first promulgated in 2001 – to criminalize conduct retroactively which was not criminal in Cambodia in 1975-79.[199]

1. The principle of *nullum crimen sine lege* in domestic and international law

104. The principle of *nullum crimen, nulla poena sine lege*[200] dictates that no individual may be prosecuted unless, at the time of the offense, the act was specified in law to be a crime and unless a punishment was provided by law. This principle is enshrined in the Universal Declaration of Human Rights ("UDHR")[201] and in the ICCPR, whose standards the ECCC must fully respect.[202] This principle is "the very basis of the rule of law,

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[197] Dugard, *Dealing with Crimes of a Past Regime*, at 1006.

[198] *See* Closing Order, para. 1304. "As to whether international law is directly applicable in Cambodia, it must be recalled that Articles 1, 2 and 29 (new) of the ECCC Law set out as Cambodian law the violations of international law within its subject matter jurisdiction (genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, the destruction of cultural property during armed conflict and crimes against internationally protected persons), as well as the applicable modes of criminal responsibility (supplementing them with a sentencing regime in accordance with the principle of *nulla poena sine lege).* By virtue of these provisions, the issue whether international law is directly applicable in Cambodian domestic law has no bearing on ECCC jurisdiction."

[199] *See, e.g.*, Senegal, Cour de Cassation, Souleymane Guengueng et autres Contre Hissène Habré, Arrêt no. 14, 20 March 2001. *See also* East Timor, Court of Appeal, Armando dos Santos, Applicable Subsidiary Law decision, 15 July 2003, p. 14, where the Court held that "even though the acts committed by the defendant in 1999 include the crime against humanity provided for under Section 5.1 (a) of UNTAET Regulation 200/15, the defendant may not be tried under and convicted based on this criminal law, which did not exist upon the date on which these acts were committed and, as such, may not be applied retroactively."

[200] In particular, the principle of *nullum crimen sine lege* in civil law countries articulates four notions: i) criminal offenses may only be provided in written law (*"nullum crimen sine lege scripta"*); ii) criminal offenses must be provided for through specific legislation (*"nullum crimen sine lege stricta"*); iii) criminal offenses must be provided for in prior law (*"nullum crimen sine proevia lege"*); and iv) criminal offenses shall not be construed by analogy. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 141-42 (Oxford University Press 2003) ("CASSESE, INTERNATIONAL CRIMINAL LAW").

[201] Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948).

[202] According to Article 31 of the Cambodian Constitution, "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." (Emphasis added).

because it compels governments (in the case of national law) and the international community (in the case of international criminal law) to take positive action against abhorrent behaviour, or else that behaviour will go unpunished. It thus provides rationale for legislation and for treaties and Conventions. ... It is the reason we are ruled by law and not by police."[203] It may be "highly inconvenient [but] it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime."[204]

105. The purpose of the principle of *nullum crimen sine lege* is "to safeguard citizens as far as possible against both the arbitrary power of government and possibly excessive judicial discretion. In short, the basic underpinning of this doctrine lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis* or in favour of society)."[205]

106. "One has to distinguish between the prerequisites of the principle of legality as it is defined on the international level and the principle of legality of national legal orders.... [M]any national legal systems ... require compliance with a stricter principle of legality."[206] This is true of Cambodia. In Cambodia, the *nullum crimen sine lege* principle is set out in Article 6 of the 1956 Penal Code, which reads:

> Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.
> Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place.[207]

According to Article 33 new of the Establishment Law, "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." According to Article 13(1) of the Agreement, "[t]he 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."

[203] *Prosecutor v. Fofana & Kondewa*, SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Dissenting Opinion of Justice Robertson, 31 May 2004 ("Justice Robertson Dissent"), para. 14 (emphasis added).

[204] *Id.*, para. 2.

[205] CASSESE, INTERNATIONAL CRIMINAL LAW, at 142.

[206] Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective*, 5 INT'L CRIM. L. REV. 313, 320 (2005) ("Kreicker") (emphasis added).

[207] Unofficial translation from the French version (emphasis added).

This strict prohibition of retroactive criminal legislation found in the 1956 Penal Code was also established by the Paris Peace Accords that led to the adoption of the 1993 Cambodian Constitution.[208]

107. Article 15 of the ICCPR, in contrast, simply requires:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal 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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[209]

108. Cambodian law requires that the crime or form of liability existed in Cambodian law at the relevant time, while international standards require that it existed in either Cambodian or international law at the relevant time. The extent of protection which Cambodian legislation affords against the retroactivity of criminal legislation thus extends further than that afforded by the ICCPR, which merely lays down minimum guarantees. As stated previously, Article 5(2) of the ICCPR provides that when the protection of a right is broader at the national level than at the international level, the national provision is to prevail and to be applied.[210] This is especially true in the present case where the ICCPR has been signed and ratified by Cambodia after the alleged crimes occurred.[211]

> [T]here may be cases in which the accused can be held responsible pursuant to international law but not pursuant to domestic law. The most likely example of such a situation probably is the one in which, at the time of conduct, domestic law did not yet have adequate criminal legislation with regard to crimes under general international law. Domestic principles with regard to *nullum crimen* might then make it inevitable for an internationalized court to acquit the accused, even though Article 15(2) of the International Covenant would perhaps not forbid

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[208] *See* Principles for a New Constitution for Cambodia, to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, Annex 5, Principle 2.
[209] ICCPR, Art. 15 (emphasis added).
[210] Article 5(2) of the ICCPR provides that "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." This provision essentially preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than those set out in the ICCPR. *See* MANFRED NOVAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 118 (N.P. Engel Publisher, 2005).
[211] Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992. *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

> retroactive application of domestic legislation incriminating 'any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'[212]

109. As the ECCC is a domestic Cambodian court, it must apply Cambodian law including the Cambodian *nullum crimen sine lege* principle. The OCIJ thus erred when it held that "[t]he question of whether the ECCC are Cambodian or international 'in nature' has no bearing on the ECCC's jurisdiction to prosecute such crimes...."[213] The OCIJ further erred in holding that the principle of *nullum crimen sine lege* is "set out in Article 33(2) (new) of the ECCC Law, which references Article 15 of the International Covenant on Civil and Political Rights...."[214] Article 33 new of the Establishment Law does refer to the ICCPR, but does not state that the definition of *nullum crimen sine lege* is that set out in the ICCPR. Article 33 new simply states, in relevant part: "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." Article 33 new certainly does not relax the applicable principle of *nullum crimen sine lege*, and would in fact require compliance with the stricter standard, in accordance with the Constitutional principle and international standard of *in dubio pro reo*, as well as Article 5(2) of the ICCPR itself.

110. In accordance with Article 6 of the 1956 Penal Code and international standards of justice, genocide, crimes against humanity, grave breaches of the Geneva Conventions, and the forms of liability set out in the Establishment Law must have existed in Cambodian law in 1975-79 to be applicable. Since they were not set out in applicable domestic legislation at the time, it becomes necessary to determine whether international conventions or customary international law could be directly applied as Cambodian law in 1975-79.

2. International law is not directly applicable in Cambodia

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[212] *See* Bert Swart, *Internationalized Courts and Substantive Criminal Law*, *in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 291, 310 (Cesare P.R. Romano, ed., 2004) (emphasis added).

[213] Closing Order, para. 1301. The OCIJ was technically correct when it stated that "[t]he question of whether the ECCC are Cambodian or international 'in nature' has no bearing on the ECCC's jurisdiction to prosecute such crimes, provided that the principle of *nullum crimen sine lege* is respected." (Emphasis added). As explained herein, however, the principle is not respected by the OCIJ because the OCIJ does not appear to consider that the principle may apply differently in domestic than in international courts.

[214] *Id.*, para. 1302.

111. Substantive international criminal law, whether based on international convention or customary international law, cannot be directly applied in Cambodian courts. This is because Cambodia adheres to a dualist – as opposed to a monist – system in its approach to implementing international law in its domestic legal order.[215]

112. "Monists assert that there is but one system of law, with international law as an element 'alongside all the various branches of domestic law.' For the monist, international law is simply a part of the law of the land, together with the more familiar areas of national law. Dualists, on the other hand, assert that there are two essentially different legal systems. They exist 'side by side within different spheres of action – the international plane and the domestic plane."[216] In dualist systems, "[w]hen the legislature and the executive have failed to take adequate implementing measures, national courts often refrain from upholding international law through direct application, finding that they cannot substitute for the political organs in choosing the mode of compliance with international obligations. In such cases, the freedom to choose *how* to implement in practice extends to a freedom to choose *whether* to implement at all."[217]

113. Adherence to either the monist or the dualist system determines the mechanism that a state employs in order to give effect to its international obligations. A State that adheres to a dualist system considers international law to be separate from domestic law.

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[215] *See* UN Doc. CERD/C/292/Add.2, 5 May 1997, para. 19, where the Committee on the Elimination of Racial Discrimination referred to eight conventions ratified by Cambodia and stated that they were not to be directly invoked before Cambodian courts or administrative authorities. *See also* Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, 11 SING. Y.B. INT'L L.195, 203-204 (2007) ("Linton, *ECCC in Context*"), where Linton states that the Cambodian government has a preference for dualism.

[216] Michael Kirby, *The Growing* Rapprochement *between International Law and National Law, in* LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER 333 (Antony Anghie & Garry Sturgess eds. 1998), *quoting* ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT 205 (Oxford, 1994). Although France, on whose justice system the Cambodian system is modeled, is a monist system, at least with respect to international conventions, it is clear from a comparison of the French and the Cambodian Constitutions that Cambodia does not follow a similar approach. *See* Title VI of the French Constitution, *available at*: http://www.assemblee-nationale.fr/english/8ab.asp; as compared to the Cambodian Constitution. The distinction between the French and Cambodian systems in this regard is not relevant with regard to conventions, because even France would not directly apply a convention that was not self-executing. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 146-47 (Cambridge University Press, 2000); TREATY MAKING – EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY 89, 93-94 (Kluwer Law International 2001).

[217] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 142 (T.M.C. Asser Press 2006) ("FERDINANDUSSE"). *See also id.*, at 132: "As a general rule, international law leaves States free to implement and fulfill their international obligations in any way they see fit." An example of this can be seen in the UK, where it has been held that "The obligation ... assumed by ratifying UNCAT is not directly enforceable in the English courts because 'international treaties do not form part of English law and English courts have no jurisdiction to interpret or apply them." Rosemary Pattenden, *Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT*, 10 INT'L J. EVIDENCE & PROOF 1, 29 (2006).

International law is only applied in such systems if: **a.** direct application is explicitly authorized by the Constitution; or **b.** national implementing legislation has incorporated the international law into that State's domestic legal system.[218] In the case of conventions, if there is no national implementing legislation, a convention must be self-executing to be directly applicable.[219]

114. An example of what occurs when a dualist State[220] is asked to apply international law without any constitutional or legislative authority to do so can be found in the *Nulyarimma v. Thompson* case.[221] In this case, the Federal Court of Australia heard together two joined cases where the appellants, aboriginal Australians, argued that the Prime Minister and other members of government were guilty of genocide for conduct contributing to the destruction of the Aboriginal people as an ethnic or racial group. Australia had ratified the Genocide Convention, but had not enacted implementing legislation. The court held that the crime of genocide did not exist in domestic Australian law and so the government officials could not be tried for genocide. Justice Wilcox stated:

> it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court. If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention. Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. This seems to be the position even where the ratification has received Parliamentary approval, as in the case of the Genocide Convention.[222]

The appellants argued that genocide was a class of crime that could be punished under international law even if the domestic law of a State does not declare it to be punishable.

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[218] Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 86-87 (2006) ("Olivi").

[219] A legal instrument is self-executing if it becomes "effective immediately without the need of any type of implementing action." BLACK'S LAW DICTIONARY 1364 (West Publishing Co., 7th ed. 1999). *See also* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,'* 1 J. INT'L CRIM. JUST. 39, 62 (2003) ("Schabas, *National Courts Finally Begin to Prosecute Genocide*"); MALCOLM N. SHAW QC, INTERNATIONAL LAW 263 (5th ed. 2003) ("SHAW"), both of which note that the Genocide Convention is not self-executing.

[220] Australia follows a dualist system. *See* DAVID SLOSS, TREATY ENFORCEMENT IN DOMESTIC COURTS: A COMPARATIVE ANALYSIS 13 (Cambridge University Press 2009).

[221] *Nulyarimma v. Thompson* [1999] FCA 1192 (Federal Court of Australia).

[222] *Id.*, para. 20 (opinion of Wilcox J.).

Justice Wilcox stated, however, that "it is not enough to say that, *under international law*, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that *Australian law* permits that result."[223] In Cambodia, it is also not enough to argue that international crimes are punishable in a domestic tribunal in the absence of domestic law declaring conduct to be punishable as such.

a. The Genocide Convention

115. The Genocide Convention is not directly applicable in Cambodian courts.[224] The Genocide Convention is not self-executing,[225] and Cambodia did not enact any implementing legislation which would make it applicable in 1975-79. Even if Cambodia were to follow a monist system, where the State envisages international law to be part of its domestic legal order:

> ratification of or accession to an international treaty introduces the norms of the treaty into national law and makes them directly applicable before domestic courts ... Nevertheless, a treaty can only be implemented on this basis within the domestic law to the extent that it is 'self-executing.' ... The Genocide Convention provisions cannot easily be applied within domestic law without some additional legislation and are therefore, in a general sense, not self-executing.[226]

116. Article 5 of the Genocide Convention requires States to implement national legislation in order to give effect to the provisions of the Convention.[227] Cambodia, however, has neither enacted any national legislation to incorporate the Genocide Convention,[228] nor does any provision in the Cambodian Constitutions that were in force at the time when the acts of genocide were allegedly committed refer to the incorporation

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[223] *Id.*, paras 21-22 (emphasis added).

[224] "[I]t is commonly accepted that human rights treaties, like international law in general, are not directly applicable *per se*." FERDINANDUSSE, at 132.

[225] Schabas, *National Courts Finally Begin to Prosecute Genocide*, at 62. *See also* SHAW, at 263.

[226] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 341 (Cambridge University Press 2003) ("SCHABAS, GENOCIDE IN INTERNATIONAL LAW").

[227] Article 5 provides that: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."

[228] *See* SCHABAS, GENOCIDE IN INTERNATIONAL LAW, at 352 fn. 34, where as of 2003 Cambodia was listed as one of the States that had no domestic implementing legislation for the Genocide Convention. Cambodia has passed a new Penal Code which includes provisions on genocide. However, the passage of implementing legislation in 2009 cannot allow for the retroactive application of the Genocide Convention to crimes which allegedly occurred between 1975-79.

of the Genocide Convention.[229] A significant number of States have yet to incorporate the terms of the Genocide Convention into their Penal Codes. A recent record of national prosecutions reveals that the lack of criminal legislation in these States has resulted in genocide not being recognized under domestic laws.[230]

117. Although the territory that was to become Cambodia acceded to the Genocide Convention on 14 October 1950,[231] it was still a French protectorate at this time. Cambodia, as a State with legal personality, was not a party to the Convention during the time period at issue, and therefore the Convention could not apply. Cambodia gained its independence from France in 1953.[232] "The Convention says nothing about rules applicable to State succession."[233] The general rule in such situations, referred to as the "clean slate" principle, is that newly independent States do not become a party to a convention merely by reason of the fact that the convention had been in force before the date of succession.[234] It has been argued that this principle should not apply to human rights conventions, but this matter has not been determined.[235] Although Cambodian laws (outside the temporal jurisdiction of the ECCC)[236] have referred to the Convention subsequent to the Democratic Kampuchea period, which tends to show that the Cambodian government considers itself bound by the Convention, such reference did not

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[229] It should be noted that between 17 April 1975 and 6 January 1979, two Constitutions came into force. During the period of the Khmer Republic (1970-75), a Constitution was promulgated on 10 May 1972. A new Constitution was not promulgated until 5 January 1976, during the period of Democratic Kampuchea (1975-1979). *See* RAOUL M. JENNAR, THE CAMBODIAN CONSTITUTIONS (1953-1993) 57-68, 81 (White Lotus, 1995).

[230] *See* Schabas, *National Courts Finally Begin to Prosecute Genocide*, at 62. The story of U.S. Senator William Proxmire (deceased) illustrates this point well: although the United States signed the Genocide Convention 11 December 1948, it did not ratify the Convention or create any implementing legislation so that the crime of genocide could be punished in the United States until 25 November 1988. Starting in 1967, William Proxmire made a speech every day Congress convened – a total of 3,211 speeches – over a 21 year period until the United States government ratified the Convention and passed Proxmire's own Genocide Convention Implementation Act. *See* the Wisconsin Historical Society website available at: http://www.wisconsinhistory.org/turningpoints/search.asp?id=1512.

[231] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants.

[232] Closing Order, para. 19.

[233] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, at 508.

[234] SHAW, at 308-09. This general rule has been codified in Article 16 of the Vienna Convention on Succession of States in respect to Treaties, which entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946.

[235] Serbia questioned whether Bosnia was a party to the Genocide Convention in a case before the International Court of Justice ("ICJ"), but the ICJ declined to take a formal position on the matter. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, at 509 "Accordingly, the question of continued application of human rights treaties within the territory of a predecessor state irrespective of a succession is clearly under consideration. Whether such a principle has been clearly established is at the present moment unclear." SHAW, at 889.

[236] For example, the Genocide Convention was referred to in Decree Law on Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, Decree No.1, 15 July 1979, Art. 8. This law, however, was enacted after the end of the period over which the ECCC has jurisdiction. *See* DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY, at 47.

occur until after the time period at issue. The fact that the Cambodian government did not refer to the Convention between independence and 1979, and that it did not enact any implementing legislation to give effect to the Convention, demonstrates that it did not consider itself bound in 1975-79. This should be the interpretation taken by the Pre-Trial Chamber in accordance with the principle of *in dubio pro reo.*[237] If Cambodia was not bound by the Genocide Convention during 1975-79, the crimes that allegedly occurred during that time cannot be punished by reference to the Convention.

118. The Genocide Convention cannot serve as the basis for domestic prosecution in Cambodia, since Cambodia did not have any implementing legislation in place at the time of the alleged crimes and nothing in Cambodia's Constitution allows for its direct applicability. Likewise, the Genocide Convention cannot be the basis for domestic prosecution if it was not in force at the time the crimes were allegedly committed.

b. The Geneva Conventions

119. Though the Geneva Conventions were ratified by Cambodia on 8 December 1958,[238] they are not directly applicable in Cambodian courts. The Constitutions that were in force at the time the alleged crimes were committed do not provide for a procedure of incorporation of the Geneva Conventions into domestic law. The National Assembly has not passed any legislation which by explicit reference incorporates the Geneva Conventions into the domestic legal system. The Geneva Conventions could not have been incorporated through the 1956 Penal Code or the 1954 Code of Military Justice as Cambodia only ratified the Geneva Conventions after these Codes entered into force. Thus any punishment of Mr. IENG Sary for a violation of the Geneva Conventions would violate the principle of *nullum crimen sine lege* as such a violation was not considered a criminal offense in Cambodia in 1975-79.

120. Each of the four Geneva Conventions has an article requiring States to implement national legislation in order to provide for penal sanctions for persons who have committed grave breaches of the Geneva Conventions,[239] demonstrating that the Geneva Conventions were never intended to be self-executing. Cambodia has not implemented any such legislation. Without any penal legislation, no individual can be held criminally

[237] *See* Cambodian Constitution, Art. 38.

[238] Signatories and ratifications of the Geneva Conventions can be found at the website of the International Committee of the Red Cross, *available at*: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P.

[239] Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; and Geneva Convention IV, Art. 146 each provide that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

liable for a violation of grave breaches in a national court. As the ECCC is a domestic court, punishing Mr. IENG Sary for committing a grave breach would violate the principle of *nullum crimen sine lege* as grave breaches were not considered criminal offenses over which Cambodian courts had jurisdiction in 1975-79.

c. Customary international law

121. Customary international law is not directly applicable in Cambodian courts. "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law."[240] According to a Max-Planck Institute comparative study concerning national prosecution for international crimes,[241] there are two prerequisites to applying customary international law in domestic courts:

> First, customary international law has to be applicable by the national courts of the respective State. The State that wants to punish somebody ... by directly applying customary international law has in general to accept customary international law as binding and applicable in the State.[242]
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> ...
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> Secondly, national law has to allow for applying unwritten criminal law provisions. In many countries a strict principle of legality prohibits a criminal prosecution by applying unwritten criminal law provisions.[243]

122. Cambodia adheres to a dualist system rather than a monist system, and will therefore not directly apply customary international law in the absence of specific directives in its Constitution, legislation or national jurisprudence which incorporate it into domestic law. Neither the Constitutions that were in force at the time when the alleged crimes were committed, nor Cambodia's current Constitution, provide a procedure for the direct incorporation of customary international law into domestic law. The Cambodian National Assembly has not passed any legislation which incorporates any of the customary international crimes or forms of liability at issue into the domestic legal system.

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[240] CASSESE, INTERNATIONAL CRIMINAL LAW, at 303.

[241] For a description of the study entitled *National Prosecution for International Crimes*, carried out by the Max-Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany, *see* http://www.mpicc.de/ww/en/pub/forschung/forschungsarbeit/strafrecht/nationale_strafverfolgung.htm.

[242] Dr. Kreicker, Head of the Section "International Criminal Law" at the Max-Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, gives the example of Germany: "the German Constitution determines in art. 25, that customary international law is part of the German Federal Law and therefore binding for everybody." Note that Cambodia's Constitution does not contain such a provision.

[243] Kreicker, at 319-20. Dr. Kreicker goes on to explain that "even in those States that [d]o not require written criminal law provisions but accept the validity of customary international law on the national level ... the model of direct application of customary international criminal law is not taken as an option. In no country under examination in the MPI-project it is an option to punish a perpetrator of genocide simply by applying customary international criminal law. In one way or another a national criminal law provision is required as a basis for national prosecution." *Id.*, at 320 (emphasis added).

123. Cambodian law does not allow for the application of unwritten criminal law provisions.[244] Similarly, the courts of France, whose legal system the Cambodian system is modelled after,[245] have held that customary international law may not be applied directly in French courts due to the lack of written provisions in the French jurisdiction criminalizing the relevant conduct.[246] In the *Aussaresses* case,[247] for example, the *Cour de Cassation* upheld a Paris Court of Appeals decision that prosecution of General Aussaresses for crimes against humanity committed during the Algerian war was barred. It came to this decision because *inter alia* the penal code in force at the time did not contain provisions criminalizing crimes against humanity, although crimes against humanity were criminalized under customary international law.[248] "[I]nternational customary rules cannot make up for the absence of a provision which criminalizes the acts denounced by the civil petitioner (*partie civile*) as crimes against humanity."[249] In another French case, *Rapporteurs sans Frontières v. Mille Collines*, the Paris Court of Appeals held that it lacked jurisdiction for various international crimes perpetrated abroad by foreigners because "in the absence of domestic law international custom cannot have effect of extending the extraterritorial jurisdiction of the French courts."[250]

124. The Dutch Supreme Court in the *Bouterse* case[251] followed a similar approach in rejecting the direct application of customary international law when it ruled against the direct application of custom as a basis for international criminal prosecutions in its national courts. In this judgment it was held that direct applicability would pose a threat to the principle of *nullum crimen sine lege*.[252] In his advisory opinion to the Amsterdam Court of Appeal, the court-appointed expert, Professor John Dugard, also states that Dutch law "appears to require a national statute which translates international law

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[244] This is due to Article 6 of the 1956 Penal Code, which provides that "No crime can be punished by the application of penalties which were not pronounced by the law before it was committed." (Unofficial translation).
[245] *See* Closing Order, para. 1321. The OCIJ states that "Cambodian law is derived directly from French law."
[246] This is common in many jurisdictions. "[M]any national legal orders do not accept custom as a source of criminal law in the consideration that custom does not fulfil the requirements of specificity and foreseeability, which are essential to the legality principle and to the effectiveness of the preventive function of criminal law." Héctor Olásolo, *A Note on the Evolution of the Principle of Legality in International Criminal Law*, 18 CRIM. L. F. 301, 316-17 (2007) ("Olásolo, *Principle of Legality*").
[247] Cour de Cassation, Chambre Criminelle, 17 June 2003, *Bull. crim.* 2003 n° 122.
[248] *Id.*
[249] *Id.* (unofficial translation).
[250] Olivi, at 87, *quoting Reportiers sans Frontières v. Mille Collines*, Paris Court of Appeals, Judgment, 6 November 1995, at 48-51.
[251] *In re Bouterse*, HR, Sept. 18, 2001, NJ 559.
[252] FERDINANDUSSE, at 69.

obligations into municipal law where the criminalization of human conduct is concerned."[253] Similar conclusions have been reached by courts of many other States.[254] The Max Planck Institute study referenced above found that:

> in no country under examination [35 States] in the MPI-project is it an option to punish a perpetrator of genocide simply by applying customary international criminal law. In one way or another a national criminal law provision is required as a basis for national prosecution.[255]

125. It is improbable that customary international law could ever be directly applied to criminal law in a domestic system in the absence of a Constitutional provision or implementing legislation as it would violate the principle of *nullum crimen sine lege*.[256] Susan Lamb, a former prosecutor at the ICTY and the current Senior Judicial Coordinator at the ECCC, explains that "the *nullum crimen* principle, which relies on expressed prohibitions and is based explicitly upon the value of legal certainty, sits uneasily with the very nature of customary international law, which is unwritten and frequently difficult to define with precision."[257] She also states, "The principle of legality assumes a rational, autonomous legal subject and a known or knowable law: it is frequently presumed, as a corollary, that the *nullum crimen* principle is thus compatible only with written law."[258] As Professors Fletcher and Ohlin note:

> To use custom to enhance the prospects of conviction is to violate the fundamental assumptions of modern criminal law. 'Customary law' is anathema in the criminal courts of every civilized society. The reason for legislation is to drive custom from the system and to create a regime based on rules and standards declared publicly, in advance, by a competent authority.[259]

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[253] *In re Bouterse*, Amsterdam Court of Appeal, LJN: AA8427, 7 July 2000, para. 8.2.2, *citing* BERT SWART & ANDRE KLIP (EDS), INTERNATIONAL CRIMINAL LAW IN THE NETHERLANDS 27-38 (1997).
[254] *See* Kreicker, at 320. *See also* FERDINANDUSSE, at 40-41.
[255] *Id.*
[256] "In the context of national legal orders, the substantive dimension of the legality principle in criminal law, and in particular its manifestations encapsulated in the maxims *nullum crimen sine lege* and *nulla poena sine lege*, includes an additional formal safeguard whereby the prohibited acts and the penalties must be pre-established by norms that can be considered ''laws'' in formal terms and that can be issued only by a legislative power. Therefore, the possibility of criminalising certain behaviour or establishing penalties on the basis of non-written sources of law – such as custom or the general principles of law – which offer lesser safeguards from the perspective of specificity and forseeability, is excluded." Olásolo, *Principle of Legality*, at 302 (emphasis added).
[257] Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. 1 743 (Oxford University Press, 2002) ("Lamb").
[258] *Id.*, at 749 (emphasis added).
[259] George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 559 (2005) ("Fletcher & Ohlin, *Reclaiming Fundamental Principles*"). *See also* p. 555-56, where it is argued that using customary international law as a means of increasing exposure to criminal liability is illegitimate under the principle of legality.

d. The *jus cogens* status of international crimes does not alter this analysis

126. *Jus cogens* norms have been defined as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of the contrary."[260] Nevertheless, the *jus cogens* nature of a crime does not alter the fact that customary international law cannot be directly applied in Cambodian courts.

> [N]ational and international practice regarding the domestic legal consequences of peremptory norms of international law is divided at best, and often unclear and poorly reasoned. The lack of analysis and obvious mistakes in many judgments, especially of national courts, notably undercut their authoritative value. A cautious tendency can be discerned to accept a privileged position for *jus cogens* norms in the national legal order, but in the absence of firm State practice, a corresponding rule of customary international law currently appears to be only in the (early) formative stages.[261]

127. To say that, for example, genocide is *jus cogens* means that a State has an obligation not to participate in genocide. The peremptory status of a corresponding duty to punish is not settled.[262] The status of genocide as *jus cogens* may affect a State's ability to exercise extraterritorial jurisdiction over the crime in question by allowing the State to exercise extraterritorial jurisdiction if it chooses to do so, but will not allow the State to exercise subject matter jurisdiction if it is otherwise lacking.[263]

128. An example of this can be found in the ICTR *Bagaragaza* case.[264] In this case, where the accused was charged with genocide, the Trial Chamber rejected the Prosecution's request for referral of the indictment to the Kingdom of Norway, stating that even though Norway had ratified the Genocide Convention on 22 July 1994, its domestic criminal law

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[260] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510 (Oxford University Press, 7th ed, 2008).
[261] FERDINANDUSSE, at 169.
[262] *Id.* at 182-85. *See also* Michael Scharf, *From the Exile Files: an Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 364-367 (2006), discussing the *jus cogens* nature of crimes against humanity and a State's duty: "Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary."
[263] This situation arose, for example, in the Netherlands. "A domestic statute is ... necessary to 'transform' international law obligations into Dutch criminal law. A Dutch criminal court cannot directly apply international law in the absence of this transformation. Moreover, the relevant international crimes must already have been transformed in this way at the time they were committed. This rule also applies to treaty obligations, even where they represent *jus cogens* norms." Pita Schimmelpennick van der Oije & Steven Freeland, *Universal Jurisdiction in the Netherlands – the Right Approach but the Wrong Case? Bouterse and the 'December Murders'*, 20 AUSTL. J. HUM. RTS. (2001) available at: http://www.austlii.edu.au/au/journals/AJHR/2001/20.html (internal citations omitted) (emphasis added).
[264] *Prosecutor v. Bagaragaza*, ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11*bis* of the Rules of Procedure and Evidence, 19 May 2006 ("*Bagaragaza* Decision").

did not contain any provision criminalizing genocide.[265] The question was whether Norway had jurisdiction *ratione materiae*. The Chamber stated that in order for it to be able determine that Norway could exercise jurisdiction *ratione materiae*, it must be satisfied that "an adequate legal framework exists which would criminalize the alleged behaviour of the Accused, and that if found guilty, an appropriate punishment could be applied based on the offences currently charged before the Tribunal."[266] Both the parties and Norway invoked the principle of universal jurisdiction to establish jurisdiction. The Chamber noted in this regard that the notion of universal jurisdiction only applies to the establishment of jurisdiction *ratione loci*[267] (i.e. by reason of place)[268] and not to jurisdiction *ratione materiae* (i.e. by reason of the matter involved).[269] The Chamber considered that the fact that Norwegian criminal law did not penalize the crime of genocide meant that the Convention had not been incorporated into its domestic law, thereby making it impossible to use the Convention as a basis for prosecution.[270] Consequently, the Accused's alleged acts could not be given their full legal qualification under Norwegian criminal law and the requirements for jurisdiction were not considered fulfilled.[271]

129. Therefore, even though a crime has been referred to as enjoying *jus cogens* status, this status requires States not to engage in it, but does not necessarily require States to punish its commission.[272] In democratic societies, "criminal offences are clearly established by the executive. The judiciary cannot itself determine the existence of an offence *de novo* that is not prescribed in the statutes promulgated by the executive."[273] States cannot invoke the *jus cogens* nature of the crime to exercise subject matter jurisdiction, if their

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[265] *Id.*, para. 16.
[266] *Id.*, para. 12. *See also Prosecutor v. Stanković*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *BIS*, 17 May 2005, para. 32, "If this case would be referred to Bosnia and Herzegovina, there would exist an adequate legal framework which criminalizes the alleged behavior of the Accused so that the allegations can be duly tried and determined and which provides for punishment. The Referral Bench must consider, therefore, whether the laws applicable in proceedings before the State Court would permit the prosecution and trial of the Accused, and if found guilty, the appropriate punishment of the Accused, for offences of the type with which he is currently charged before the Tribunal."
[267] *Bagaragaza* Decision, para. 13, fn. 11.
[268] BLACK'S LAW DICTIONARY 1269 (West Publishing Co., 7th ed. 1999).
[269] *Id.*
[270] *Bagaragaza* Decision, para. 13, fn. 11.
[271] *Id.*, para. 16.
[272] "Besides there being no customary rule with a general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community." CASSESE, INTERNATIONAL CRIMINAL LAW, at 302.
[273] Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L CRIM. L. REV. 121, 125 (2006).

domestic legal systems do not otherwise provide for this jurisdiction. In 1975-79, Cambodia's legal system did not provide such jurisdiction.

3. Foreseeability and accessibility

130. Even if Cambodia could directly apply international conventions or customary international law, there are two additional requirements necessary to comply with the principle of *nullum crimen sine lege*: **a.** the law criminalizing the relevant conduct must have been accessible to the Charged Person/Accused; and **b.** criminal liability must have been sufficiently foreseeable to the Charged Person/Accused.[274] The OCIJ recognized this: "In addition, the law must have been sufficiently accessible at the relevant time and the persons under investigation must have been able to foresee that they could be held criminally liable."[275] The OCIJ erred, however, in finding that liability for genocide and grave breaches would have been accessible to Mr. IENG Sary due to his position as a member of the governing authority,[276] and that liability for crimes against humanity would be sufficiently accessible "with particular regard to the World War II trials held in Nuremberg and Tokyo."[277] It further erred in finding that:

> The modes of criminal responsibility set out in the ECCC Law were partly incorporated in the 1956 Cambodian Penal Code as set out below,[278] and as such these modes of liability were sufficiently accessible to the Charged Persons. The remaining modes of liability, namely joint criminal enterprise, instigation and superior responsibility, were also set out under international law through sources such as the trials following World War II and as such can be considered sufficiently accessible to the Charged Persons.[279]

131. It would not be foreseeable to Mr. IENG Sary that he could be tried in a domestic court for genocide, crimes against humanity, grave breaches, and forms of liability which did not exist in Cambodian domestic law at the relevant time. These crimes and forms of liability would also not have been accessible to him simply because they may have existed in some post-World War II jurisprudence.

132. According to the ICTY *Vasiljević* Trial Chamber, which, unlike the ECCC, could directly apply customary international law:

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[274] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 35), Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, ERN: 00486521-00486589 ("PTC JCE Decision"), para. 43. The Pre-Trial Chamber here refers specifically to forms of liability rather than international crimes, but these criteria may equally be applied to international crimes.
[275] Closing Order, para. 1302.
[276] *Id.*, para. 1305.
[277] *Id.*, para. 1306.
[278] The OCIJ does not appear to have "set out below" which forms of criminal responsibility it considers to be "partly" incorporated in the 1956 Penal Code.
[279] Closing Order, para. 1307.

> Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law. The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context. If customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law.[280]

133. The *Vasiljević* Trial Chamber further explained that:

> [f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[281]

134. The lack of foreseeability and accessibility of these international crimes and forms of liability is apparent when considering command responsibility, although the problem exists for each of the international crimes and forms of liability the OCIJ has applied.[282] The concept of command responsibility was not defined with sufficient clarity in 1975-79 for liability to be foreseeable to Mr. IENG Sary. This is evident from the lack of clarity with regard to the requisite *mens rea* and whether it may apply to non-international conflicts and to civilian superiors.[283] Professor Martinez summarizes the inconsistencies

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[280] *Prosecutor v. Vasiljević*, IT-98-32-T, Judgment, 29 November 2002 ("*Vasiljević* Trial Judgement"), paras. 201-02 (emphasis added).
[281] *Id.*, para. 193 (emphasis added).
[282] *See* Kreicker, at 320-21, where he argues that only clearly defined and written national criminal law provisions are easily accessible, so that the individual can know what acts will make him criminally liable.
[283] Writing in 2002, Professor Ambos notes that, "In sum, the UNWCC's criticisms in 1949 that 'the principles governing this type of liability ... are not yet settled' has not completely lost its validity, in particular with regard to the criminal law problems inherent with this doctrine. Despite the increasing application of the doctrine since World War II its elements have not been defined precisely enough to be indubitably in accordance with the *nullum crimen* principle as laid down in the Rome Statute (Articles 22, 24), especially with its requirement of

that demonstrate that this form of liability was not established with sufficient consistency and clarity to form a norm of customary international law:

> At various times, international courts and tribunals have convicted superiors based on mental states that might be described as knowledge, recklessness, negligence and even, perhaps, based on strict liability. In some cases, they have applied a subjective standard for mental state, while in others they have used a seemingly objective standard. They have struggled, without great success, to situate 'wilful blindness' somewhere between knowledge and negligence. They have not always been clear in specifying whether the same mental state is required in relation to each material element of the crime committed by the subordinates. And they have done so in multiple languages, using terms that do not translate exactly from one language and legal system to another. The net result is that, despite half a century's worth of case law, it is difficult to describe with precision the mental element of command responsibility.[284]

135. It is also quite unlikely that the case law concerning international crimes and forms of liability would have been accessible to Mr. IENG Sary at the relevant time. An article written in 1972 and published in the Yale Law Journal explains that because the International Military Tribunal of the Far East ("IMTFE") Judgement, including its dissents, and concurrences "are rarely available even to major [US] university libraries," the article would instead refer to secondary materials which quote or paraphrase portions of the Judgement.[285] If this Judgement was rarely available to US academics, how can it and the other judgements of the post-World War II tribunals have been accessible to Mr. IENG Sary in Cambodia in 1975-79, especially considering the fact that Cambodia had just emerged from civil war at that time?

D. GROUND FOUR: THE OCIJ ERRED IN LAW BY HOLDING THAT THE ECCC HAS JURISDICTION TO APPLY GRAVE BREACHES OF THE GENEVA CONVENTIONS DESPITE THE STATUTE OF LIMITATIONS

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legal exactness and strictness." Kai Ambos, *Superior Responsibility*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME I 823, 847 (Oxford University Press, 2002) ("Ambos, *Superior Responsibility*"). *See also* Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 166 (2008) ("van Schaack"). "It is ... difficult to accept that the precise elements of crimes can be gleaned from the (at times) divergent conduct of the multiplicity of states coupled with their subjective psychological attitudes toward a particular practice."

[284] Jenny S. Martinez, *Understanding* Mens Rea *in Command Responsibility: From Yamashita to Blaškić and Beyond*, 53 J. INT'L CRIM. JUST. 638, 640 (2007) ("Martinez"). "Neither international treaty law nor international customary law provides comprehensive, universally accepted definitions of culpable mental states for international crimes, and any attempt to ascertain the general principles of law common to national legal systems is complicated by the varied approaches such systems take. Unfortunately, international decisions are not always self-conscious about the differences in national terminology, nor are they precise about the concepts that terminology attempts to capture." *Id.*, at 646.

[285] Curt Hessler, *Command Responsibility for War Crimes*, 82 Yale L.J. 1274, fn. 10 (1972-1973) ("Hessler").

136. The application of grave breaches at the ECCC is subject to a statute of limitations which has expired, thus barring the jurisdiction of the ECCC to apply grave breaches. Article 4 of the Establishment Law states in pertinent part: "The acts of genocide, which have no statute of limitations...."[286] Article 5 of the Establishment Law states in pertinent part: "Crimes against humanity, which have no statute of limitations...."[287] However Article 6 of the Establishment Law, which relates to grave breaches, does not have such a caveat. It therefore must be taken that the statute of limitations is applicable to grave breaches.

137. The 1956 Penal Code sets out a statute of limitations of 10 years for felonies committed in Cambodia.[288] A felony is described by the 1956 Penal Code as a crime which carries a sentence of a minimum of five years.[289] The crime of grave breaches carries a sentence of a minimum of five years at the ECCC.[290] Grave breaches must therefore be considered to be a felony according to the 1956 Penal Code. As a result, there is a 10 year statute of limitation for grave breaches. Article 3 new of the Establishment Law, which relates to national crimes, states in pertinent part: "The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above...." The crimes "enumerated above," in Article 3 new, are solely national crimes. Therefore, this extension, if applicable at all, is explicitly not applicable to grave breaches. The OCIJ erred in holding that grave breaches are applicable against Mr. IENG Sary.

E. GROUND FIVE: THE OCIJ ERRED IN LAW BY HOLDING THAT THE ECCC HAS JURISDICTION TO APPLY ARTICLE 3 NEW (NATIONAL CRIMES)

1. Summary of the Closing Order concerning Article 3 new

138. The OCIJ erred in failing to take into account any of the Defence arguments concerning application of Article 3 new which were raised in IENG Sary's Motion

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[286] Emphasis added.
[287] Emphasis added.
[288] 1956 Penal Code, Art. 109 states in pertinent part: "A person who committed a felony more than 10 years ago ... that person will not be punished..." (unofficial translation).
[289] *Id.*, Art. 21 states in pertinent part: "There are three types of felonies: 1. Capital punishment; 2. Life imprisonment with severe forced labor; 3. Limited term of imprisonment with severe forced labor... Capital punishment is the third degree felony... Life imprisonment with severe forced labor is second degree felony... Limited term of imprisonment with severe forced labor is first degree felony." Art. 32 states in pertinent part: "Life imprisonment with severe forced labor is only applied to the person whose term of punishment is life imprisonment." Art. 33 states in pertinent part: "Limited term of imprisonment with severe forced labor is imposed for a period at least 5 year and up to 20 years ... for first degree felony." (Unofficial translation).
[290] Establishment Law, Art. 39 states in pertinent part: "Those who have committed any crime as provided in Articles 3 new, 4, 5, 6 [grave breaches], 7 and 8 shall be sentenced to a prison term from five years to life imprisonment."

Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC[291] and in IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations.[292] Instead, the OCIJ considered only what occurred in Case 001.

139. The Closing Order briefly sets out the procedural history regarding the applicability of Article 3 new. It held that in Case 001, the OCIJ found that "[g]iven the multiple legal problems arising from the charges brought based on national criminal legislation, the Co-Investigating Judges deemed it preferable to accord such acts the highest legal classification, namely crimes against humanity or grave breaches of the Geneva Conventions of 12 August 1949."[293] It notes that the OCP appealed this decision,[294] that the Pre-Trial Chamber decided that the crimes of torture and murder are not subsumed by international crimes and added these crimes to the Closing Order,[295] that the Defence raised a preliminary objection to the Trial Chamber arguing that the Statute of Limitations had expired,[296] and that the Trial Chamber finally failed to reach an agreement as to whether the applicable limitation period had expired or was interrupted or suspended between 1979 and 1993.[297] It notes that the Trial Chamber was thus unable to consider the guilt or innocence of the accused with respect to national crimes, but that it considered that this finding had no impact on the Chamber's evaluation of the totality of the accused's criminal culpability or sentence.[298]

140. 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."[299] 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."[300] The Co-

[291] *Case of IENG Sary*, 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, ERN: 00532798-00532812.
[292] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359.
[293] Closing Order, para. 1564.
[294] *Id.*, para. 1565.
[295] *Id.*, para. 1566.
[296] *Id.*, para. 1567.
[297] *Id.*, paras. 1568-70.
[298] *Id.*, paras. 1571-72.
[299] *Id.*
[300] *Id.*, para. 1574.

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,"[301] and that due to their obligation to issue a ruling within a reasonable time – although the Co-Investigating Judges have had 3 years to tackle this issue – they would "leav[e] it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956."[302] They thus included the charges of murder, torture and religious persecution, crimes defined and punishable by the Penal Code 1956 in the Closing Order.[303]

2. Summary of the argument

141. The OCIJ erred in applying Article 3 new because: **a.** application violates Mr. IENG Sary's fundamental right to be treated equally before the law;[304] **b.** application violates the principle of non-retroactivity;[305] **c.** the Co-Investigating Judges disagreed as to whether it is applicable and it thus may not be applied; and **d.** the OCIJ failed to set out the facts which support the application of Article 3 new and failed to state which form of

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[301] *Id.*

[302] *Id.*

[303] *Id.*, para. 1576.

[304] Article 31 of the Cambodian Constitution provides: "[e]very Khmer citizen shall be equal before the law..." (emphasis added). Article 3 of the CPC provides: "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." Article 7 of the UDHR provides: "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." Article 14(1) of the ICCPR provides: "All persons shall be equal before the courts and tribunals." Article 26 provides: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

[305] The principle of non-retroactivity prohibits the retroactive application of a law to the detriment of an accused. New laws may only have retroactive application when they are more favorable to an Accused / Charged Person than a prior otherwise-applicable law. The purpose behind this principle is to provide a guarantee against arbitrary and capricious retroactive legislation which would deprive an Accused / Charged Person of the fair warning that might have led him to preserve exculpatory evidence. *See Stogner v. California*, 539 U.S. 607, 611 (2003) (internal citations omitted). The Constitutional Council has recognized that the principle of non-retroactivity of any new law over offenses committed in the past is a "fundamental principle" recognized in Cambodia. Constitutional Council Decision No. 040/002/2001 KBTh Ch, 12 February 2001. Article 6 of the 1956 Penal Code provides: "[c]riminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed. Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place." (Unofficial translation, emphasis added.) Article 11(2) of the UDHR provides: "[n]o one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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." (emphasis added). Article 15(1) of the ICCPR provides: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal 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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby."

liability is to be applied with respect to each of the crimes listed in Article 3 new. The ECCC does not have jurisdiction to apply Article 3 new.

3. Background of Article 3 new

142. The 1956 Penal Code has been recognized as the Penal Code which was in effect during the time period over which the ECCC has temporal jurisdiction.[306] This Penal Code contains provisions criminalizing homicide, torture, and religious persecution.[307] The 1956 Penal Code also contains a statute of limitations, which prohibits prosecution of these crimes after ten years has passed since their commission.[308]

143. 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").[309] 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.[310]

144. On 12 February 2001, the Constitutional Council[311] 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.[312]

145. 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,

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[306] *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, ERN: 00365471-00365472.

[307] 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.

[308] *See* 1956 Penal Code, Art. 109.

[309] *See* ECCC website, chronology, *available at* http://www.eccc.gov.kh/english/backgroundECCC.aspx.

[310] *See* Constitutional Council Decision No. 040/002/2001 KBTh Ch, 12 February 2001.

[311] Article 136 New of the Cambodian Constitution provides: "The Constitutional Council shall have the duty to safeguard respect of the constitution, interpret the Constitution and laws adopted by the National Assembly and reviewed completely by the Senate." Article 140 New of the Cambodia Constitution provides: "The King, The Prime Minister, The President of the National Assembly, 1/10 of the members of National Assembly, the President of the Senate, or 1/4 of the members of Senate may send laws adopted by National Assembly to the Constitutional Council for review before promulgation." Article 142 New of the Cambodian Constitution provides that decisions of the Constitutional Council are "final."

[312] *See* Cambodian Constitution, Art. 32.

'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."[313] It held 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.[314]

146. The Constitutional Council further decided 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.'"[315] 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."[316] In this case, since the new law (Article 3) would lower the applicable penalty from death to life imprisonment, the Constitutional Council concluded that this would fit the lower penalty exception to the principle of non-retroactivity and so would not be a violation of the principle.

147. On 22 June 2001, the Royal Government of Cambodia issued a Statement of Motivation regarding its letter issued the same date[317] 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.[318] On 11 July 2001, the National Assembly adopted this

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[313] *See* Constitutional Council Decision No. 040/002/2001 KBTh Ch, 12 February 2001.
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] Letter No. 104.LS.KBC, 22 June 2001.
[318] 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.

proposed amendment.[319] On 23 July 2001, the Senate approved the amended version.[320] On 7 August 2001, the Constitutional Council pronounced the amended version of the 2001 Establishment Law as being fully in accordance with the Constitution.[321] On 10 August 2001, King Norodom Sihanouk promulgated the 2001 Establishment Law.[322]

148. 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. 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.[323]

149. On 5 October 2004, the National Assembly approved these amendments.[324] On 22 October 2004, the Constitutional Council pronounced the amended law in conformity with the Constitution.[325]

150. On 27 October 2004, the Law on the Amendments to the Establishment Law was promulgated.[326] 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."[327]

151. In 2007, the Constitutional Council issued a decision ("2007 Decision") which held that Article 8 of the law on the aggravating circumstances of felonies was constitutional. This law modified an Article in the UNTAC law and there was apparently concern that it would affect the rights and interests of children.[328] Although the law in question is not related to the law challenged in this Appeal, the 2007 Decision is instructive. In the 2007 Decision, the Constitutional Council offers guidance to judges when they consider whether to apply laws which the Constitutional Council has pronounced constitutional. The Constitutional Council instructed:

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[319] *See* ECCC website, chronology, *available at* http://www.eccc.gov.kh/english/backgroundECCC.aspx.
[320] *Id.*
[321] Constitutional Council Decision No. 043/005/2001 KBT.DH, 7 August 2001.
[322] *See* ECCC website, chronology, *available at* http://www.eccc.gov.kh/english/backgroundECCC.aspx.
[323] *Id.* With no publicly available records of debates or *travaux preparatoires*, one can only speculate as to the exact meaning and purpose of the extension.
[324] *Id.*
[325] *Id.*
[326] Reach Kram, NS/RKM/1004/006, 27 October 2004.
[327] Emphasis added.
[328] Constitutional Council Decision No. 092/003/2007, 10 July 2007 (unofficial English translation provided by OHCHR Cambodia).

> 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...[329]

152. Through the 2007 Decision, the Constitutional Council recognized that although a law may not violate the Constitution, a court must also consider whether its application in a particular case would be incompatible with: **a.** provisions in the Constitution; **b.** other Cambodian law; or **c.** international conventions recognized by Cambodia.[330]

153. The requirement to consider international human rights conventions is not inconsistent with the fact that Cambodia has a dualist system and will not directly apply international law. This is because the Cambodian Constitution provides that "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights."[331] The Cambodian Constitution remains the "supreme law" of Cambodia.[332] In addition to the Constitutional Council's statement that a court shall consider international conventions, the Agreement[333] and the Establishment Law[334] each require the ECCC to abide by international standards of justice relating to fair trial rights.

4. The OCIJ erred in applying Article 3 new, as its application violates Mr. IENG Sary's right to equal treatment

154. The right to equal treatment before the law was not considered by the Trial Chamber in Case 001: it was not raised by the Defence in that case. Similarly, it appears not to have been considered by the OCIJ in the Closing Order. Mr. IENG Sary has a 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..."[335] This right is further set out in the CPC which

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[329] *Id.* (emphasis added).
[330] *Id.*
[331] Cambodian Constitution, Art. 31.
[332] Constitutional Council Decision No. 092/003/2007, 10 July 2007.
[333] Article 12(2) of the Agreement requires, "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" (emphasis added).
[334] Article 33 new of the Establishment Law requires, "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" (emphasis added).
[335] Emphasis added.

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." This right is also enshrined in the UDHR[336] and the ICCPR,[337] which the ECCC must respect pursuant to the Cambodian Constitution.[338]

155. Article 3 new of the Establishment Law extends the statute of limitations for homicide, torture, and religious persecution under the 1956 Penal Code only when those crimes are charged at the ECCC. The statute of limitations for these crimes has not been extended generally. Article 3 new thus violates Mr. IENG Sary's right to equal treatment. If it is applied at the ECCC, Mr. IENG Sary could be charged with a crime that a similarly situated Accused / Charged Person in any other court in Cambodia could not.[339]

156. The Constitutional Council does not appear to have considered this when it pronounced Article 3 new in accordance with the Cambodian Constitution. The Constitutional Council's error in failing to consider the Establishment Law's constitutionality in light of the requirement of equal treatment before the law does not mean that the ECCC may simply apply Article 3 new. As a domestic court, the ECCC is bound by the Constitutional Council's determination that the Establishment Law is constitutional; however, it is also bound to respect and uphold the Cambodian Constitution, Cambodian law, and international human rights conventions to which Cambodia is a party.

157. This is supported by the 2007 Decision which requires the ECCC to consider whether the application of Article 3 new would violate any provisions of the Cambodian Constitution, other Cambodian law, or international conventions to which Cambodia is a

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[336] UDHR, Art. 7. "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."

[337] ICCPR, 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."

[338] Cambodian Constitution, Art. 31. The ECCC must also respect the rights enshrined in the ICCPR pursuant to Article 13 of the Agreement and Article 35 new of the Establishment Law.

[339] In a similar case in Italy, 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).

party. Application of Article 3 new *would* result in a clear breach of Article 31 of the Cambodian Constitution,[340] Article 3 of the CPC, and international standards of justice.[341] Therefore, the OCIJ erred in applying Article 3 new.

5. The OCIJ erred in applying Article 3 new, as its application violates the principle of non-retroactivity

158. The 1956 Penal Code forbids the retroactive application of law.[342] International conventions such as the UDHR and the ICCPR, which Cambodia must uphold pursuant to its Constitution,[343] likewise forbid the retroactive application of law.[344]

159. The Defence does not argue that the crimes of homicide, torture, and religious persecution set out in Article 3 new were not criminalized in 1975-79. The issue is that the possibility of prosecuting these crimes more than thirty years into the future did not exist in Cambodian law at the relevant time. The Defence further does not argue that prosecution for acts of homicide, torture, and religious persecution would not have been foreseeable in 1975-79. This is not the issue. Whether these acts were widely known to be criminal in 1975-79 does not render foreseeable their prosecution beyond the expiry of the statute of limitations.

160. In Case 001, the OCP suggested that the extension of a statute of limitations is a procedural rather than a substantive matter and that therefore the principle of non-retroactivity may not be applicable.[345] Whether the extension of a statute of limitations is considered to be procedural or substantive is irrelevant. A law extending a statute of limitations has a bearing on prosecution and sentencing which sets it apart from other procedural laws. In France, for example, the criminal procedure code explicitly states

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[340] The Constitutional Council did not appear to consider that Article 3 (or apparently Article 3 new) of the Establishment Law could cause a breach of Article 31 of the Cambodian Constitution. It did not consider this provision when it determined that Article 3 was in accordance with the Constitution. *See* Constitutional Council Decision No. 040/002/2001 KBTh Ch, 12 February 2001.

[341] *See* ICCPR, Arts. 14(1), 26. *See also* UDHR, Art. 7. The requirement of equal treatment is a common provision found in many international human rights conventions. For example, Article 3 of the African (Banjul) Charter on Human and Peoples' Rights declares that "every individual shall be equal before the law" and Article 24 of the American Convention on Human Rights stipulates that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." In fact, it has been referred to as "a cornerstone" of law. *See Ex parte Melof et al.*, 735 So. 2d 1172 (Ala. 1999). Chief Justice Hooper observed that "[t]he general principle of equal protection of the laws, otherwise termed as the concept that all men are equal before the law, is written into the very warp and woof of American law. It is a cornerstone of western law itself. In that sense, I believe that without equality before the law, there can be no law at all."

[342] *See* 1956 Penal Code, Art. 6.

[343] *See* Cambodian Constitution, Art. 31.

[344] *See* UDHR, Art. 11(2); ICCPR, Art. 15(1).

[345] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Co-Prosecutors' Written Response to the Defence's Preliminary Objection to the Applicability of the 1956 Cambodian Penal Code, 18 May 2009, D288/6.9/7, ERN: 00332733-00332751 ("OCP Case 001 Response"), para. 24.

that changes to rules regarding a statute of limitations on prosecution or sentences have immediate application only where the limitation period has not expired.[346] In other words, any act which has been time-barred from prosecution by virtue of a pre-existing statute of limitations is not affected by a new rule extending that statute. Furthermore, if there is any doubt regarding retroactivity, the law should never be applied to the detriment of the accused.[347]

161. Some Civil Law countries, such as the former West Germany[348] and Hungary,[349] have held that prosecutions based on retroactive extensions of statutes of limitations are unconstitutional where the original statutes of limitations had expired. In other jurisdictions, such as the Netherlands, legislatures have abolished statutes of limitations for serious crimes, but have taken care not to apply the change retroactively to time-barred offenses.[350] In Japan, the Diet recently abolished the statute of limitations for murder and extended it for a number of other crimes; the new law only applied to cases in which the previous statute of limitations had not expired.[351]

162. The United States Supreme Court, whose Constitution prohibits the retroactive application of law, was confronted with a similar issue in *Stogner v. California*.[352] In that case, the petitioner Stogner was indicted in 1998 for child sexual abuse which allegedly occurred between 1955 and 1973. At the time the crimes were allegedly committed, the statute of limitations was only three years. A new statute of limitations enacted in 1993 permitted prosecution where the prior statute of limitations had expired if prosecution began within a year from when the victim submitted a report to the police. The Court held that the new statute of limitations could not be applied to Stogner. It explained that the issue was not whether child sexual abuse was criminalized at the relevant time, but "[a]fter (but not before) the original statute of limitations had expired, a party such as Stogner was not 'liable to any punishment.' California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in

[346] *See* French Criminal Code, N. C PÉN., Art. 112-2, para. 4.
[347] *See* Cambodian Constitution, Art. 38.
[348] *See* Martin Clausnitzer, *The Statute of Limitations for Murder in the Federal Republic of Germany*, 29 INT'L & COMP. L.Q. 473, 478-79 (1980) ("Clausnitzer").
[349] *See* RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 289 (2007) ("KOK").
[350] *Id.*, at 299-301.
[351] *See* Shinichi Kawarada, *Japan Abolishes Statute of Limitations on Murder, Extends Others*, ASAHI SHIMBUN, 28 April 2010.
[352] *Stogner v. California*, 539 U.S. 607 (2003).

the sense that, and to the extent that, it 'inflicted punishment' for past conduct that (when the new law was enacted) did not trigger any such liability."[353] The Court concluded:

> First, the new statute threatens the kinds of harm that, in this Court's view, the *Ex Post Facto* Clause seeks to avoid. Long ago the Court pointed out that the Clause protects liberty by preventing governments from enacting statutes with 'manifestly *unjust and oppressive*' retroactive effects. Judge Learned Hand later wrote that extending a limitations period after the State has assured 'a man that he has become safe from its pursuit ... seems to most of us unfair and dishonest.' In such a case, the government has refused 'to play by its own rules.' It has deprived the defendant of the 'fair warning,' that might have led him to preserve exculpatory evidence.[354]

163. Evidence that States view the abolition or amendment of a statute of limitations for crimes that have already been time-barred as a violation of the principle of non-retroactivity can be seen from States' reactions to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Many States considered that this Convention would violate the principle of non-retroactivity, as it was meant to apply to these crimes "irrespective of the date of their commission."[355] For this reason, this Convention was not widely ratified.[356] The Netherlands, for example, would not ratify this Convention for that particular reason,[357] and Mexico and Peru ratified only after attaching reservations stating that the Convention would not apply to crimes committed prior to its entry onto force.[358] Cambodia has neither signed nor ratified this Convention.[359]

164. It would not have been foreseeable to Mr. IENG Sary that if he had committed such national crimes in 1975-79, he could be charged for these crimes in a Cambodian domestic court today. The law at the relevant time provided for a statute of limitations of ten years. Mr. IENG Sary would thus not have been aware of the need to preserve exculpatory evidence in case of a possible future prosecution which might occur up to forty years into the future. That Mr. IENG Sary did not foresee this is evident by his

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[353] *Id.*, at 613.
[354] *Id.*, at 611 (internal citations omitted).
[355] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), Art. 1.
[356] *See* Christine Van den Wyngaert & John Dugard, *Non-Applicability of Statute of Limitations*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. 1 874-75 (Oxford University Press, 2002).
[357] *See* Alper Cinar & Sander van Niekerk, *Implementation of the Rome Statute in the Netherlands*, p. 6, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996521.
[358] *See* KOK, at 299.
[359] A list of signatories and State's ratifying the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en

decision to accept the RPA. A law extending the statute of limitations by thirty additional years could furthermore not have been accessible to Mr. IENG Sary, as it did not exist at the time of the alleged conduct.

165. The Constitutional Council's holding that the Establishment Law was constitutional because the principle of non-retroactivity is not found in the Cambodian Constitution is flawed. The Cambodian Constitution requires the ECCC to recognize and respect human rights as found in the UDHR and other international human rights conventions to which Cambodia is a party. The principle of legality is found in these conventions. The Constitutional Council appears not to have considered this when it stated that the principle of non-retroactivity was not found in the Cambodian Constitution.

166. The Constitutional Council's holding that the Establishment Law was constitutional because Article 3 imposed a lesser penalty (no death penalty) than the 1956 Penal Code is also flawed. The Constitutional Council misunderstood the issue. The Establishment Law did not impose a lighter penalty on any Charged Person / Accused than he or she would have faced prior to its enactment for crimes allegedly committed in 1975-79; the statute of limitations under the 1956 Penal Code had already expired before the Establishment Law was promulgated. Without applying Article 3 new, the Charged Persons could not be charged today for national crimes that allegedly were committed during 1975-79. Thus, the penalty imposed by Article 3 new is actually heavier, rather than lighter. Its application would violate the principle of retroactivity.

167. The ECCC cannot simply rely on the Constitutional Council's decision that the Establishment Law is constitutional. Before applying Article 3 new, it must, pursuant to the 2007 Decision, conduct its own analysis as to whether application would violate the Cambodian Constitution, Cambodian law, or international conventions to which Cambodia is a party. Application of Article 3 new would violate each of these.

168. In Case 001, the OCP suggested that Article 3 new may be applied without violating the principle of non-retroactivity because the statute of limitations set out in Article 109 of the 1956 Penal Code may have been tolled and thus the original statute of limitations may have been extended before it expired.[360] Statutes of limitations may be tolled in certain cases, such as "by an act of prosecution or investigation."[361] It is possible that the 1979 trial, held on 15 to 19 August 1979 to try Mr. IENG Sary, could be considered an

[360] OCP Case 001 Response, paras. 29-36.
[361] 1956 Penal Code, Art. 112 (unofficial translation).

act of prosecution which would toll the statute of limitations. However, the subsequent ten year limitation period would have extinguished on 19 August 1989. There is no evidence of further investigative or judicial acts concerning Mr. IENG Sary that could toll the statute of limitations.

169. It has also been suggested that factual circumstances amounting to a situation where criminal investigation and prosecution are rendered impossible or impracticable can also effectively suspend the statute of limitations.[362] There is no international standard or universal consensus amongst domestic jurisdictions on this question. Some States, such as the former West Germany[363] and the Czech Republic,[364] have adopted this reasoning to "reactivate" time-barred prosecutions, while others, like Hungary,[365] have held this unconstitutional.[366]

170. Regardless of whether Cambodia considers that a statute of limitations may constitutionally be suspended during a situation where prosecution is impossible or impracticable, such a situation did not occur in Cambodia after 1979.[367] A Cambodian judicial system existed and was functioning in the 1980s.[368] In fact, several Cambodian ECCC judges began their careers at that time.[369] A number of organizational statutes were enacted by the government shortly after the overthrow of the Khmer Rouge regime. Examples include the Law on the Organization of the Court and Prosecution Department,

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[362] OCP Case 001 Response, paras. 30-36. *See also* Margarita Clarens, *The Validity of Extending the Statute of Limitations for Cambodian National Crimes Tried before the Extraordinary Chambers and the Implications of* Ex Post Facto, Documentation Center of Cambodia 2008.

[363] *See* Clausnitzer.

[364] See KOK, at 301-02.

[365] *Id.*, at 300-01.

[366] Similarly, five of the nine justices of the Constitutional Court of South Korea have found that a law suspending the statute of limitations "during the period in which there existed a cause preventing the nation from exercising its prosecutorial powers" was unconstitutional if applied to prosecute individuals for whom the statute of limitations had already expired. *See* James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y 85, 121-24 (1997).

[367] The Trial Chamber in Case 001 addressed this issue, but could not come to agreement as to whether a functioning judicial system existed prior to 1993. *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 ("Case 001 National Crimes Decision").

[368] *See* EVAN GOTTESMAN, CAMBODIA AFTER THE KHMER ROUGE 241-47 (Silkworm Books, 2004); Linton, *ECCC in Context*, at 199-200. *See also* Basil Fernando, *Problems Facing the Cambodian Legal System, The System of Trial under the Vietnamese – Khmer Model (1981-1993), available at* http://www.basilfernando.net/modules.php?name=Content&pa=showpage&pid=20&cid=5; Michael Leifer, *Kampuchea in 1980: The Politics of Attrition*, 1 ASIAN SURVEY 21, 98 (1981). Leifer writes that in June 1980, Phnom Penh radio announced the trial of 17 non-communist agents associated with the leader Haem Kroesnea. They were sentenced to 3 to 20 years in prison.

[369] For example, according to the ECCC website, Presiding Pre-Trial Chamber Judge Prak Kimsan began working as Deputy Prosecutor in Kampong Cham in 1987 and Judge Ney Thol has been the president of the military court since 1987. See ECCC Website, *available at* http://www.eccc.gov.kh/english/pre-trial_chamber.aspx.

the Law on the Organization of the Military Court,[370] and the Law on the Organization of the People's Supreme Court and the General Prosecution attached to the People's Supreme Court.[371] The People's Revolutionary Tribunal, established for the 1979 trial, is evidence that a judicial system functioned.

171. In an article written in 1990, historian Michael Vickery writes:

> An item in the Phnom Penh Kampuchea newspaper on 28 July 1988 may serve as an illustration. On page 11, [there is] a list of 61 lawsuits reported as pending in the courts... The 61 cases listed by Kampuchea range from the trivial civil suits for libel and fraud to the very serious - murder and torture by police agents. Included are several cases of murder, rape, physical abuse, and nonpayment of debts. One was a complaint by an individual against the police and provincial court of Kandal for having released three alleged murderers. It is clear that courts in Cambodia are functioning according to laws and that individuals willingly enter into litigation, even bringing charges against state organs.[372]

172. The international Trial Chamber judges in Case 001 were thus correct when they stated that they 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.[373]

173. Finally, in Case 001 the OCP suggested that the extension of the statute of limitations is valid because Cambodia has an international obligation to prosecute crimes such as homicide, torture, and religious persecution.[374] This argument fails to consider that if Cambodia must abide by international obligations, it may not apply Article 3 new, as this would actually violate Cambodia's international obligations to treat all Accused equally and to prohibit the retroactive application of law. Furthermore, compliance with Cambodia's international obligations is a matter for the executive power; not the judiciary.

6. The OCIJ erred in applying Article 3 new despite a disagreement between the Co-Investigating Judges

174. The Cambodian Constitution, international fair trial standards, which must be respected pursuant to the Establishment Law and Agreement, require that any case of

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[370] *See* Koy Neam, *Overview on Cambodian Judicial System*, THE ASIA FOUNDATION (1998).
[371] Law on the Organisation of the People's Supreme Court and the General Prosecution attached to the People's Supreme Court, Decree No. 28, 31 July 1985.
[372] Michael Vickery, *The Rule of Law in Cambodia*, 14.3 CULTURAL SURVIVAL Q. (1990), *available at* http://www.culturalsurvival.org/publications/cultural-survival-quarterly/cambodia/rule-law-cambodia (emphasis added).
[373] Case 001 National Crimes Decision, para. 35.
[374] *See* OCP Case 001 Response, paras. 20-23.

doubt must be resolved in favor of the accused. The Co-Investigating Judges have failed to respect this constitutional principle and international standards of justice by deciding that Mr. IENG Sary could be sent to trial for charges under Article 3 new, even though the two Co-Investigating Judges admit that they do not agree on its applicability. Since there was doubt – by the Co-Investigating Judges' own admission – as to the applicability of Article 3 new, the Co-Investigating Judges were forbidden to apply it. Doing otherwise runs counter to Mr. IENG Sary's fundamental right to be presumed innocent. The Co-Investigating Judges may not rely upon a desire to make a ruling as soon as possible[375] as justification for a violation of Mr. IENG Sary's rights.

175. The Co-Investigating Judges have furthermore erred in failing to follow the proper dispute settlement procedure provided for in the Rules. Rule 14(7) states that "[i]n the event of disagreement between the Co-Investigating Judges, the procedure in Rule 72 shall apply."[376] The Co-Investigating Judges therefore did not follow proper procedure and acted *ultra vires* by deciding to bypass this procedure and leave the matter to the determination of the Pre-Trial Chamber or Trial Chamber.

7. The OCIJ erred in failing to set out the facts which support the application of Article 3 new and in stating which form of liability is meant to apply to these crimes

176. Rule 67(2) requires the OCIJ to set out "a description of the material facts and their legal characterisation." Failure to do so will render the Closing Order void for procedural defect.[377] The OCIJ set out the facts which it found to support the crimes of genocide, crimes against humanity, and grave breaches of the Geneva Conventions, but failed to set out the facts which it considers to support the charges under Article 3 new of murder, torture, and religious persecution.

177. The OCIJ further failed to set out the form(s) of liability through which Mr. IENG Sary could be charged with murder, torture, or religious persecution. In the discussion of applicable forms of liability, the OCIJ only discussed JCE, planning, instigating, aiding and abetting, ordering, and command responsibility.[378] The OCIJ held that these forms of liability could be applied to genocide, crimes against humanity, and grave breaches, but did not apply to Article 3 new crimes.[379] The OCIJ held that international forms of

[375] Closing Order, para. 1574.
[376] Emphasis added.
[377] Rule 67(2).
[378] Closing Order, paras. 1521-63.
[379] *Id.*, paras. 1525, 1545, 1546, 1548, 1549, 1551, 1552, 1554, 1555.

liability cannot apply to domestic crimes[380] and this holding has not been overturned by the Pre-Trial Chamber.[381]

178. Since international forms of liability cannot be applied to national crimes, the OCIJ should have set out which domestic form of liability it considers to be applicable. It then should have explained how the facts would fit such a legal qualification. If the OCIJ considered that Mr. IENG Sary personally committed murder, torture, or religious persecution, for example, it was required to have set out certain information in the Closing Order: "When alleging that the accused personally carried out the acts underlying the crime in question, the identity of the victim, the place and approximate date of the alleged criminal acts, the means by which they were committed shall be set out 'with the greatest precision.'"[382]

179. Because the OCIJ failed to set out the facts which would support the charges of murder, torture, and religious persecution, and further failed to set out the relevant form of liability and the facts which would support the application of such a form of liability, the portion of the Closing Order referring to Article 3 new crimes is void for procedural defect.

F. GROUND SIX: THE OCIJ ERRED IN LAW IN ITS APPLICATION OF GENOCIDE, SHOULD IT BE FOUND TO BE APPLICABLE AT THE ECCC

180. The OCIJ correctly set out the applicable definition of genocide,[383] but it then erred by applying the definition incorrectly. This led the OCIJ to conclude erroneously that the ECCC has jurisdiction to charge Mr. IENG Sary with genocide. The OCIJ stated, in addition to providing other reasons why it made these inferences,[384] that "the intention of the senior leaders of the CPK is inferred from the fact that the genocide of the Cham occurred in the general context of an escalating persecutory attack against the Cham directed by the CPK Centre"[385] and that "the intention of the senior leaders of the CPK is inferred from the fact that the genocide of the Vietnamese occurred in the general context of escalating deportations, persecution, incitement of hatred and anti-Vietnamese war

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[380] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056, para. 22: "modes of liability for international crimes can only be applied to the international crimes."
[381] PTC JCE Decision, para. 102.
[382] PTC Decision on *Duch* Closing Order, para. 49.
[383] Closing Order, para. 1312. The OCIJ failed, however, to state that command responsibility is not an applicable form of liability for genocide and that Mr. IENG Sary thus may not be held liable for genocide by virtue of command responsibility. This will be discussed in the Command Responsibility section *infra.*
[384] *See id.*, paras. 1340, 1347.
[385] *Id.*, para. 1341 (emphasis added).

propaganda directed by the CPK Centre."[386] The OCIJ erred in finding that genocidal intent was inferred without finding that this was the only reasonable inference available on the evidence.

181. Genocidal intent, according to ICTY jurisprudence, "may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts."[387] However, such an inference is allowed only when it is "the only reasonable inference available on the evidence."[388] This is a very high standard. In the ICTY *Jelisić* case, the Trial Chamber could not conclude that Jelisić possessed the requisite genocidal intent[389] even though it found:

> Goran Jelisić presented himself as the 'Serbian Adolf' and claimed to have gone to Brčko to kill Muslims. He also presented himself as 'Adolf' at his initial hearing before the Trial Chamber on 26 January 1998. He allegedly said to the detainees at Luka camp that he held their lives in his hands and that only between 5 to 10% of them would leave there. According to another witness, Goran Jelisić told the Muslim detainees in Luka camp that 70% of them were to be killed, 30% beaten and that barely 4% of the 30% might not be badly beaten. Goran Jelisić remarked to one witness that he hated the Muslims and wanted to kill them all, whilst the surviving Muslims could be slaves for cleaning the toilets but never have a professional job. He reportedly added that he wanted 'to cleanse' the Muslims and would enjoy doing so, that the 'balijas' had proliferated too much and that he had to rid the world of them. Goran Jelisić also purportedly said that he hated Muslim women, that he found them highly dirty and that he wanted to sterilise them all in order to prevent an increase in the number of Muslims but that before exterminating them he would begin with the men in order prevent any proliferation.[390]

182. The Defence acknowledges the "Standard of Evidence" discussion in the Closing Order,[391] in which the OCIJ held that it must merely determine whether there is a "'probability' of guilt" at this stage, rather than to determine whether guilt has been established "beyond a reasonable doubt."[392] This cannot be confused with a determination as to whether an inference is the only reasonable inference available on the

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[386] *Id.*, para. 1348 (emphasis added).
[387] *Prosecutor v. Jelisić*, IT-95-10-A, Judgement, 5 July 2001, para. 47.
[388] *Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 42 ("*Krstić* Appeal Judgement"). *See also Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 120.
[389] *Prosecutor v. Jelisić*, IT-95-10-T, Judgement, 14 December 1999, paras. 107-08.
[390] *Id.*, para. 102.
[391] Closing Order, paras. 1320-26.
[392] *Id.*, para.1323.

evidence. According to ICTY jurisprudence which the OCIJ cited favorably, "a *prima facie* case ... is understood to be a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge."[393] The OCIJ's inferences would not be sufficient to convict Mr. IENG Sary, since the OCIJ has not demonstrated or even attempted to demonstrate that they were the only reasonable inferences which could be drawn. The OCIJ was at a minimum, according to its stated standard of evidence, required to set out that on the balance of probabilities, the only reasonable inference available is that Mr. IENG Sary possessed the specific intent to destroy, in whole or in part, a protected group, as such. It has not done so. There is no *prima facie* case for applying a charge of genocide against Mr. IENG Sary and this must be struck from the Closing Order.

183. The OCIJ further erred in failing to set out which punishable act of genocide Mr. IENG Sary has been indicted for. The Establishment Law states that attempts to commit acts of genocide, conspiracy to commit acts of genocide, and participation in acts of genocide are punishable acts of genocide at the ECCC. Each of these forms of participation has certain elements which must be established. Conspiracy to commit acts of genocide, for example, "comprises two elements, which must be pleaded in the indictment: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such."[394] The OCIJ has not alleged that there was an actual agreement to commit genocide, although it has alleged that JCE members, who agreed to a common purpose which did not include genocide, were aware that implementation of their common purpose expanded to include genocide.[395] The Closing Order also makes no mention of an attempt to commit genocide. The Closing Order should be amended to make clear that Mr. IENG Sary is not charged with attempt to commit genocide or conspiracy to commit genocide.

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[393] *Id.*, para. 1325, *quoting Kordić et al.*, Review of the Indictment, 1995 (no page or paragraph number or exact date or case number provided by the OCIJ) (emphasis added).
[394] *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana* Appeal Judgement"), para. 344 (emphasis added). *See also Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura* Appeal Judgement"), para. 92: "conspiracy to commit genocide consists of an agreement between two or more persons to commit the crime of genocide. The existence of such an agreement ... should thus have been pleaded in the ... Indictment as a material fact."
[395] Closing Order, para. 1527.

G. GROUND SEVEN: THE OCIJ ERRED IN LAW IN ITS APPLICATION OF CRIMES AGAINST HUMANITY, SHOULD THEY BE FOUND TO BE APPLICABLE AT THE ECCC

1. Introduction

a. *Nullum crimen sine lege*

184. The Pre-Trial Chamber has noted that the ICTY Appeals Chamber has identified four preconditions that any form of responsibility must satisfy in order for it to come within the tribunal's jurisdiction. These are summarized as follows for the purpose of ECCC proceedings: **a.** it must be provided for in the Establishment Law, either directly or indirectly; **b.** it must have existed under customary international law at the relevant time; **c.** the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; **d.** such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.[396] Axiomatically, these criteria must equally apply to any international crimes within the jurisdiction of the ECCC. Where the OCIJ adopted in the Closing Order definitions of crimes against humanity which do not conform to these criteria, it assumed jurisdiction on the basis of an incorrect assessment of the applicable law. Consequently, the OCIJ's application of these erroneous definitions of crimes against humanity are subject to appeal pursuant to Rule 74(3)(a).

b. The applicable definition of crimes against humanity requires reference to Article 9 of the Agreement

185. The OCIJ erred by failing to take "due note" of the effect on the definition of crimes against humanity (if it is an applicable offense at all) of Article 9 of the Agreement, which purports to confer jurisdiction over crimes against humanity as defined in the ICC Statute.[397] It has been stated that a "comparison between customary international law and the ICC Statute shows that by and large the latter is based on the former."[398] Where the

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[396] PTC JCE Decision, para. 43.

[397] The OCIJ has previously stated that it takes "due note" of the characterization of crimes against humanity under Article 7 of the ICC Statute. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Civil Party Request for Investigative Action Concerning Enforced Disappearance ("Enforced Disappearance Order"), 22 December 2009, D180/6, ERN: 00417295-00417299, para. 8. However, it appears that the OCIJ has not taken note of it at all in the Closing Order. *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC ("Alternative CAH Motion"), 23 June 2010, D378/2, ERN: 00542117-00542132, paras. 5-6 for further discussion of the impact of Article 9 of the Agreement on interpretation of the definition of crimes against humanity at the ECCC (if such offense is applicable).

[398] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 123 (2nd ed. Oxford 2008) ("CASSESE, INTERNATIONAL CRIMINAL LAW 2ND ED."). *See also Korbely v. Hungary*, Judgement - Dissenting Opinion of Judge Loucaides, Eur. Ct. H.R. Grand Chamber (no. 3174/02), 19 September 2008, para. O-II4: "As regards the elements of crimes against humanity, one may take the recent Rome Statute of the International Criminal Court as declaratory of the definition in international law of this crime."

definition of crimes against humanity under today's customary international law and under the ICC Statute is more favorable to the Accused than under the customary international law of 1975-79 then, pursuant to the principle of *lex mitior*, the contemporary definition must be applied.[399]

c. The OCIJ cites sources which violate the ban on analogy

186. The OCIJ's definition of crimes against humanity violates the ban on analogy in both Civil Law and in international criminal law.[400] The OCIJ has therefore assumed jurisdiction on the basis of an incorrect assessment of the applicable law. The definition applied by the OCIJ is consequently appealable pursuant to Rule 74(3)(a). For example, the OCIJ cites the Geneva Conventions and international human rights instruments as evidence of the elements and underlying offenses of crimes against humanity.[401] Definitions of crimes contained in the Geneva Conventions cannot be imported wholesale by analogy into crimes against humanity allegedly committed in 1975-79.[402] Nor can human rights instruments be used automatically, by analogy, as a basis for a norm of criminal law. The Inter-American Court of Human Rights articulated this point succinctly in a decision which, ironically, the OCIJ cites to support its proposition that the "constituent elements of the crime against humanity of other inhumane acts through acts of enforced disappearance have been established":[403]

> The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals

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[399] *See* 1956 Penal Code, Art. 6. *See also* ICCPR, Art.15. Adherence to the principle of *lex mitior* requires that where a law that binds the court is subsequently changed to a more favorable law by which the court is also obliged to abide, the more lenient law will apply. *See also Prosecutor v. Deronjić*, IT-02-61-A, Judgement, 20 July 2005, para. 97.

[400] *See* ICC Statute, Article 22(2), which states in pertinent part: "The definition of a crime shall be strictly construed and shall not be extended by analogy." Moreover, "[n]ational courts (particularly in civil law countries) as well as international courts normally refrain from applying [international criminal law] by analogy. In national law the prohibition on the application of criminal rules by analogy ... is rooted in the need to safeguard citizens and in particular to prevent their being punished for actions that were not considered illegal when they were performed... The same principle applies in international law. Its rationale is the need to protect individuals from arbitrary behaviour of states or courts..." CASSESE, INTERNATIONAL CRIMINAL LAW 2ND ED, at 48.

[401] *See* Annex for a table setting out the instances in which the OCIJ has violated the ban on analogy in this way.

[402] *See Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005 ("*Limaj* Trial Judgement"), para. 223: "The Chamber acknowledges, however, that the definition of 'civilian' employed in the laws of war cannot be imported wholesale into discussion of crimes against humanity. In this regard the Chamber notes that the Trial Chamber in *Prosecutor v. Tadić* determined that: [The] definition of civilians contained in Common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs or war and can only be applied by analogy. The same applies to the definition contained in Protocol I and the Commentary, Geneva Convention IV, on the treatment of civilians, both of which advocate a broad interpretation of the term 'civilian'."

[403] Closing Order, para. 1470, fn.5276.

> who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.[404]

187. A norm of criminal law must always provide a Chamber with an appropriate measure to gauge alleged criminal conduct so that individuals will know what behavior is permissible and what is not.[405] The Pre-Trial Chamber must disregard the authorities cited by the OCIJ which violate the ban on analogy in this way.

2. Chapeau elements

a. Nexus with international armed conflict

188. The OCIJ erred by failing to explain that a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC. State practice and *opinio juris* demonstrate that a nexus between the underlying acts and international armed conflict was a requirement of crimes against humanity in customary international law in 1975-79.[406] The OCIJ has therefore assumed jurisdiction on the basis of an incorrect assessment of the applicable law. A nexus with international armed conflict must be included in the applicable definition of crimes against humanity so as not to violate the *nullum crimen sine lege* principle.

189. The legal foundations of crimes against humanity lie in the laws of war.[407] Article 6(c) of the Charter of the International Tribunal at Nuremberg ("IMT Charter") (as amended by the October 6th Protocol)[408] established that crimes against humanity could not exist except in conjunction with either war crimes or crimes against peace.[409] The

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[404] *Velasquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para. 134. *See also* paras. 135, 138.

[405] *See Prosecutor v. Stakić*, IT-97-24-T, Judgement ("*Stakić* Trial Judgement"), 31 July 2003, paras. 719-21.

[406] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188 ("*Duch* Trial Judgement"), paras. 291-92 where the Trial Chamber found that "the lack of any nexus with armed conflict in Article 5 of the ECCC Law comports with the customary international definition of crimes against humanity during the 1975-79 period." Currently, customary international law no longer requires that the underlying acts of crimes against humanity have a nexus with an armed conflict. *See also Tadić* Decision on Jurisdiction Appeal, para. 141; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement"), para. 71.

[407] *See, e.g.*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 77 (Kluwer 1999) ("BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW"): "The conclusion is clear that 'crimes against humanity' are analogous to war crimes and are an extension thereof, and that they are based on the same moral and legal principles that have long existed and that are the underpinning of principles, norms and rules of the humanization and regulation of armed conflicts." *See also* Egon Schwelb, *Crimes Against Humanity* 23 B. Y.B. INT'L L. 178, 206 (1946) ("Schwelb"): Crimes against humanity as interpreted in the IMT Judgement are "an 'accompanying' or an 'accessory' crime to either crimes against peace or violations of the laws and customs of war."

[408] Nuremberg Trial Proceedings Volume I: Protocol Rectifying Discrepancy in the Charter (Oct. 6th, 1945) ("October 6th Protocol"), *available at* http://avalon.law.yale.edu/imt/imtprot.asp.

[409] *See* Stuart Ford, *Crimes Against Humanity at The Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, n.70 (2006-2007) ("Ford"), *citing*

Judgement of the International Military Tribunal at Nuremberg ("IMT Judgement") and the Nuremberg Principles[410] reflect this understanding.[411] Discussions at the International Law Commission ("ILC") in the late 1940s and early 1950s regarding *the progressive development of international law*[412] demonstrate that a nexus between underlying acts and international armed conflict was seen as a legal requirement of crimes against humanity in that period.[413] From the 1950s to 1979, there is little evidence of a general practice

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Leslie C. Green, *International Regulations of Armed Conflicts, in* 1 INTERNATIONAL CRIMINAL LAW, CRIMES 355, 369 (M. Cherif Bassiouni ed., 2d ed. 1999).

[410] Principles of International Law Recognized in the Charter of the Nürnburg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/1316 (1950) ("Nuremberg Principles"), Principle VI(c). *See also* Affirmation of the Principles of International Law Recognized by the Nürnburg Tribunal *adopted* 11 December 1946, G.A. Res. 95(1), U.N. G.A.O.R. 1st Sess., 55th plen. Mtg, U.N. Doc A/64/Add.1 (1946) at 188.

[411] Judgment of the IMT, for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, London H.S.S.O. Miscellaneous No.12 (1946), at 254. Although an armed conflict requirement was removed from Article II of Control Council Law No.10, (1) the jurisdictional link to the IMT Charter in Control Council Law No.10, Article I rendered moot the effect of this deletion, with judges repeatedly requiring a nexus between the war and the acts of the accused, and (2) the Allied and German courts applying this law were "local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." Schwelb, at 218-19.

[412] This text is italicized to distinguish this ILC function from its mandate to codify existing customary international law. *See* Draft Code of Offences Against the Peace and Security of Mankind, Report by J. Spiropoulos, Special Rapporteur, dated 26 April 1950 ("Spiropoulos Report"), *available* in 2 Y.B. INT'L COMM'N 253, 255 para. 2 (1950), noting that the Rapporteur was not codifying existing international law but rather engaging in a task of a more "speculative nature." *See also id.* 257, para. 20, noting that the ILC had discussed the issue and concluded that the Draft Code of Offences represented the "progressive development of international law." It is submitted that the absence of a nexus requirement in the Genocide Convention is not material. *See* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 302-06, (2002). The Spiropoulos Report observed that the absence of a nexus requirement from the Genocide Convention was seen as a distinguishing feature of that crime viz. crimes against humanity. *See* Draft Code of Offences, at 263, para. 65. *See also* Ford, at 152-53.

[413] *See* Summary of the 48th Meeting of the International Law Commission, 16 June 1950, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf.

among States and *opinio juris* that this nexus was no longer a necessary element,[414] and objections to its removal continued until the 1998 negotiations of the Rome Statute.[415]

b. Requirement of a State or organizational policy

190. The OCIJ erred by failing to include the existence of a State or organizational policy as an element of crimes against humanity at the ECCC. The OCIJ has therefore assumed jurisdiction on the basis of an incorrect assessment of the applicable law. The Agreement refers to the definition of crimes against humanity in the ICC Statute, which requires an "attack" to involve multiple acts committed "pursuant to or in furtherance of a State or organizational policy."[416] The existence of a policy underpinning crimes against humanity was also a requirement of customary international law in 1975-79.[417] The ECCC must apply this policy requirement so as not to violate the Cambodian Constitution

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[414] *See* Ford, at 159-67, noting that the 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity: **a.** fundamentally is a political document that garnered the support of less than half the member States of the United Nations (Ford, at 161-62); **b.** gives an "overall impression" that a connection with armed conflict is required except where specific crimes, like apartheid and genocide, had developed that were explicitly not connected with armed conflict (Ford, at 160); and **c.** demonstrates that no general practice among States existed at this time (Ford, at 167, 183). The 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, and the International Convention on the Suppression and Punishment of the Crime of Apartheid (which entered into force on 18 July 1976) do not lend material support to a proposition that the nexus was no longer a requirement by 1975-79 (Ford, at 167, 168). *But see Attorney-General v. Eichmann* 36 INT'L. L. REP. 5 (JM 1961) 277-78 (S. Ct. 1962) (Isr), aff'd, 36 ILR; *Barbie* (French Court of Cassation (Criminal Chamber), 23 June 1988, reprinted in 100 INT'L. L. REP. 331, 336 (1995)); and *Touvier* (French Court of Appeal of Paris (First Chamber of Accusation, 13 April 1992, reprinted in 100 INT'L. L. REP. 361-63 (1981)), in which the nexus arguably was not required in relation to crimes against humanity committed in World War II. It is submitted that these national decisions cannot be taken as declaratory of customary international law at the time the crimes were committed. Instead, it was the definition of crimes against humanity in the IMT Judgement that was authoritative. *See* Ford, at 148.

[415] Ford, at fn. 283-87. *See also* BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, at 199, *citing* Final Report of the Preparatory Committee, 14 April 1998, U.N. Doc. A/CONF.183/2/Add.1, Part I, Art. 5, p. 26.

[416] ICC Statute, Art. 7(2)(a). *See also Prosecutor v. Katanga & Ngdujolo*, ICC-01/04-01/07, Decision on Confirmation of Charges, 30 September 2008 ("*Katanga* Confirmation of Charges Decision"), para. 396.

[417] *See* IMT Judgement, para. 254, referring to the "policy of terror" and "policy of persecution, repression, and murder of civilians." *See also Korbely v. Hungary*, para 83; Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), United Nations Security Council, S/1994/674, 27 May 1994, *cited in* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 543 (Transnational Publishers 1996) ("BASSIOUNI & MANIKAS"); *Public Prosecutor v. Menten*, The Netherlands, District Court of Amsterdam, Extraordinary Penal Chamber, reprinted in 75 INT'L. L. REP. 362-63 (1981): "The concept of 'crimes against humanity' also requires ... that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people"; BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, at 243-65, 277, 558: "State action or policy is the essential characteristic of 'crimes against humanity'"; BASSIOUNI & MANIKAS 548, "the inclusion of persecution as a separately enumerated crime against humanity in the ICTY Statute "implies the removal of the requirement under 6(c) of the IMT Charter that such persecutions form a policy of persecution". *But see Prosecutor v. Kordić & Čerkez* IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para 98; *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement"), para. 120; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević* Trial Judgement"), para. 576; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 137; *Limaj* Trial Judgement, paras. 212, 184, on the contrary position under today's customary international law.

by failing to respect the principles *nullum crimen sine lege*, *lex mitior*, and *in dubio pro reo*.[418]

c. Existence of the attack

191. The OCIJ erred by finding the *actus reus* of the attack to consist of "the imposition of dictatorial control over the entire population of Cambodia, in line with the CPK's objective to bring about rapid socialist revolution and to eliminate both internal and external enemies."[419] "The imposition of dictatorial control" with the "objective to bring about socialist revolution" does not meet the definition of an "attack" in customary international law (either today or in 1975-79). The *Duch* Trial Judgement held the definition of an "attack" to be "a course of conduct involving the multiple commission of acts of violence. The acts which constitute an attack need not themselves be punishable as crimes against humanity. They will nevertheless often be of the kind of mistreatment listed as an underlying offence in Article 5 of the ECCC Law."[420] It does not follow that "the imposition of dictatorial control" with the "objective to bring about socialist revolution" will involve "multiple commission of acts of violence" often of the kind listed as an underlying offense in Article 5 of the Establishment Law.[421] The OCIJ has therefore inappropriately characterized the legal nature of the facts allegedly proving the existence of an "attack," and has assumed jurisdiction on the basis of an incorrect assessment of the applicable law.

d. Widespread or systematic

192. The OCIJ erred by finding that the "attack was planned and gradually prevailed in the areas that came under CPK control from 1972-73...."[422] The ECCC only has jurisdiction over crimes allegedly "committed during the period from 17 April 1975 to 6 January 1979."[423] Acts perpetrated from 1972 to 16 April 1975 do not fall within the purview of an "attack" for the purposes of establishing liability for crimes against humanity at the

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[418] *But see Duch* Trial Judgement, para. 301.
[419] Closing Order, para. 1351.
[420] *Duch* Trial Judgement, para. 298. It is submitted, however, that the acts which constitute an attack will always constitute acts referred to in Article 5 of the Establishment Law. This is the definition applicable at the ICC. *See* ICC Statute – Elements of Crimes, Art. 7, para. 3.
[421] The OCIJ's definition of "attack" seems to presuppose that communist revolution *per se* meets the requirements for an "attack" as a crime against humanity. Although this is an idea that has traction among some "neo-conservative" commentators, there is vigorous debate on this issue. *See* Guy Sorman, *Communism's Nuremberg*, CITY J., 26 September 2010, *available at* http://www.city-journal.org/2010/eon0926gs.html. *But see* David Walsh, *New York Times Publishes Scurrilous Attack on Marxism*, World Socialist Website, 2 October 2010, *available at* http://www.wsws.org/articles/2010/oct2010/sorm-o02.shtml.
[422] Closing Order, para. 1352.
[423] Establishment Law, Art. 2.

ECCC.[424] In considering acts which fall outside the temporal jurisdiction of the ECCC to constitute evidence of a "widespread or systematic attack," the OCIJ has exceeded its jurisdiction.

193. The OCIJ erred by inferring that the fact that the "CPK employed five main categories of means to implement its revolutionary project"[425] constitutes indicia of a widespread or systematic attack. These alleged categories were: **a.** repeated movements of the population; **b.** establishment and operation of cooperatives and worksites; **c.** reeducation of "bad elements" and enemies; **d.** targeting of specific groups; and **e.** regulation of marriage.[426] Taking "due note" of the definition of crimes against humanity in the ICC Statute, the acts which constitute an "attack" will always be those referred to in Article 5 of the Establishment Law.[427] The OCIJ noted that the "the obligation to live in cooperatives led to the expropriation of all property... [L]ife and morality had become public matters controlled by 'organizational methods' involving compulsion."[428] However, the expropriation of property and abolition of the private sphere are not acts referred to in Article 5 of the Establishment Law. To consider the expropriation of private property by the State a crime against humanity under customary international law in 1975-79 is contextually misconceived when one considers the widespread acceptance of communist ideology by States across the world in 1975-79.[429] The OCIJ has inappropriately characterized the legal nature of the facts allegedly proving the existence of a "widespread or systematic attack" and has assumed jurisdiction on the basis of such a false characterization.

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[424] *See*, in relation to the ICTR (whose temporal jurisdiction is limited to 1994 pursuant to Article 7 of the ICTR Statute), *Nahimana* Appeal Judgement, paras. 310, 313-14: "There is no doubt that ... an accused can only be held responsible by the Tribunal for a crime ... having been committed in 1994.... In the opinion of the Appeals Chamber ... it was the intention of the framers of the Statute that the Tribunal should have jurisdiction to convict an accused only where all of the elements required to be shown in order to establish his guilt were present in 1994. Further, such a view accords with the principle that provisions conferring jurisdiction on an international tribunal or imposing criminal sanctions should be strictly interpreted.... The Appeals Chamber finds that the Trial Chamber was wrong insofar as it convicted the Appellants on the basis of criminal conduct which took place prior to 1994...." *Cf. Prosecutor v. Rwamakuba,* ICTR-98-44C-T, Judgement, 20 September 2006, para. 48: "Evidence of events prior to 1994 that can establish a 'pattern, design or systematic course of conduct by the accused' or provide a context or background to crimes falling within the temporal jurisdiction of the Tribunal is ... admissible" (emphasis added).

[425] Closing Order, para. 1353.

[426] *See also id.*, paras. 157, 1353.

[427] *See* ICC Statute – Elements of Crimes, Art. 7, para. 3.

[428] Closing Order, para. 1355.

[429] *See* Ignaz Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation: Critical Comments,* 7 AM. J. COMP. L. 541, 543-48 (1958). *See also* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 235 (Routledge 7th ed.) 1997.

194. Although the OCIJ recognized that "the existence of an ideological project "cannot, as such, be considered to be a legal element of crimes against humanity,"[430] it erred by finding that "the implementation of the plan adopted, by criminal means ... demonstrates the widespread and systematic character of the attack."[431] The "criminal means" alleged by the OCIJ to demonstrate the widespread and systematic character of the attack cannot be characterized as such. These include "the replacement of the economic, administrative and political institutions of Cambodia by the revolutionary power structure..."[432] Such means are common to communist revolution,[433] and cannot be considered to demonstrate the widespread and systematic character of an attack. Similarly, the OCIJ erred by characterizing the fact that "basic principles governing criminal justice were abandoned by the CPK in favour of a highly centralized system of political control"[434] as criminal means demonstrating a widespread and systematic attack. The centralization of political control, including the abolition of the separation of powers, is a feature of communist government to this day,[435] and cannot be considered indicative of a widespread and

[430] Closing Order, para. 1357.
[431] *Id.*
[432] *Id.*
[433] In relation to the revolution in most advanced countries, Marx and Engels noted that the following means "will generally be applicable: 1. Abolition of property in land and application of all rents of land to public purposes. 2. A heavy progressive or graduated income tax. 3. Abolition of all rights of inheritance. 4. Confiscation of the property of all emigrants and rebels. 5. Centralization of credit in the banks of the state, by means of a national bank with state capital and an exclusive monopoly. 6. Centralization of the means of communication and transport in the hands of the state. 7. Extension of factories and instruments of production owned by the state; the bringing into cultivation of waste lands, and the improvement of the soil generally in accordance with a common plan. 8. Equal obligation of all to work. Establishment of industrial armies, especially for agriculture. 9. Combination of agriculture with manufacturing industries; gradual abolition of all the distinction between town and country by a more equable distribution of the populace over the country. 10. Free education for all children in public schools. Abolition of children's factory labor in its present form. Combination of education with industrial production, etc." KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY, 1848, Chapter II - Proletarians and Communists *available at* http://www.anu.edu.au/polsci/marx/classics/manifesto.html (emphasis added).
[434] Closing Order, para. 1358.
[435] In the People's Republic of China, the separation of powers has been analyzed in the following terms: "Some ... regard that only the 'separation of (three) powers is genuine democracy and can guarantee the benign operation of the political system, so they stand for copying Western models and implementing the checks and balance of power. Some extremists even label the separation of powers as the most 'democratic' form of government. This absurdity is one-sided of course. In fact, the separation of powers can indeed stem [sic] one given interest group from monopolizing or arrogating to some extent all power to itself, so the 'democracy' is ensured for the ruling clique. This form of government, however, is not designed to guarantee the democratic rights of people. Some people assert that the system of the separation of powers can possibly guard against corruption, and this also doest [sic] not tally with facts. In the last few years, six arms dealers, including Boeing and Lockheed, were awarded numerous billion-dollar contracts with huge direct and indirect profits for their lobbing [sic] on Capitol Hill, and such illegal covert deals so far exposed is only the tip of the 'iceberg'. Some advocators of the separation of powers even cite the 'separation of powers' as the international convention with some sort of universality and, therefore, China should also follow suit. This notion is also groundless. It must be pointed out that there are no political or social basis [sic] for separating legislative, judicial and executive powers in China, let alone the economic basis and the class base. If it does copy the political system with a

systematic attack. The OCIJ again incorrectly categorized the facts allegedly establishing a "widespread and systematic attack," and assumed jurisdiction on the basis of such a false categorization.

e. Directed against the civilian population

195. The OCIJ supported its proposition that the "target of the attack was the entire population of Cambodia" by alleging that "[e]ven people enjoying 'full rights' status, such as peasants, had been expropriated and had suffered other violations of their rights well before April 1975, and they continued to be victims of such violations thereafter."[436] As noted above, the ECCC only has jurisdiction over crimes allegedly "committed during the period from 17 April 1975 to 6 January 1979."[437] An attack directed against a civilian population perpetrated "well before April 1975" does not fall within the temporal jurisdiction of the ECCC. In considering acts which fall outside the temporal jurisdiction of the ECCC to constitute evidence of an attack directed against a civilian population, the OCIJ has exceeded its jurisdiction. The definition of "directed against a civilian population" is therefore appealable pursuant to Rule 74(3)(a). Further, in the absence of evidence of acts enumerated as underlying offenses of Article 5 of the Establishment Law, expropriations and even other serious violations of human rights would not constitute an "attack directed against a civilian population." To define an "attack directed against a civilian population" as such inappropriately characterizes the legal nature of the facts.

196. The OCIJ observed that "members of Cambodian military and security forces were also among the targeted population... Former ranking officers and officials of the Khmer Republic ... were targeted because they were likely to be hostile to the CPK. CPK military personnel were often disarmed before being re-deployed for non-military activities...; thus, they no longer exercised their functions."[438] To infer that military and security personnel, even those *hors de combat*, were the "civilian population" is to mischaracterize the facts. The *Duch* Trial Chamber found that "[t]he civilian population

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separation of powers from capitalist countries in defiance of its own national conditions and fundamental interests of its people, the foundation of its political stability will be undermined, Chinese society will be fall [sic] into the state of disorder, and people would suffer too. So, it is imperative for China to keep to the intrinsic unity of Party leadership, people assuming as masters of their own destiny and the managing of state affairs according to law. This essential practice has given an eloquent proof that people in the country must keep to this point and never sway on it..." *NPC system to be adhered to and further improved*, PEOPLE'S DAILY ONLINE, 19 June 2009, *available at* http://english.peopledaily.com.cn/90001/90780/6682417.html (emphasis added).

[436] Closing Order, para. 1363.

[437] Establishment Law, Art. 2.

[438] Closing Order, para. 1364.

... includes all persons who are not members of the armed forces or otherwise recognised as combatants... [S]oldiers *hors de combat* do not qualify as civilians for the purposes of Article 5 of the Establishment Law."[439] Moreover, "the civilian population must be the primary object of an attack."[440] Acts of violence in which soldiers (including those *hors de combat*) were the primary object of an attack would, for the avoidance of doubt, not constitute evidence of an attack establishing crimes against humanity at the ECCC.

f. On national, political, racial, or religious grounds

197. The OCIJ held that "Article 5 of the ECCC Law ... requires the attack to be launched '*on national, political, ethnical, racial or religious grounds*,'" but erred in holding that this refers "only to the nature of the attack *per se* and does not imply a specific discriminatory intent as an element of the underlying offences..."[441] In 1975-79, customary international law did include a discriminatory intent requirement in the definition of crimes against humanity. *Opinio juris* as late as 1993 required that crimes against humanity be committed "on national, political, ethnic, racial or religious grounds."[442]

198. The OCIJ erred in finding that "[e]ven before it took power, the CPK decided that certain categories of persons ... were to be eliminated."[443] The ECCC only has jurisdiction over crimes allegedly "committed during the period from 17 April 1975 to 6 January 1979."[444] Acts perpetrated before 16 April 1975 do not fall within the temporal jurisdiction of the ECCC. In considering acts which fall outside the temporal jurisdiction of the ECCC to constitute evidence of an attack on discriminatory grounds, the OCIJ has exceeded its jurisdiction. The definition of an attack "*on national, political, ethnical, racial or religious grounds*" is therefore appealable pursuant to Rule 74(3)(a).

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[439] *Duch* Trial Judgement, para. 304, *citing, inter alia, Prosecutor v. Mrkšić et al.*, IT-95-13-1-A, Judgement, 5 May 2009, para. 35.
[440] *Id.*, para. 308.
[441] Closing Order, para. 1365. *See also* Closing Order, para. 1371, where the OCIJ states: "As the requirement of "discriminatory grounds" in the "chapeau" of Article 5 of the ECCC Law implies no additional *mens rea*, it is not necessary to demonstrate that the act was committed with the intent to further the attack or ideology, policy or plan underpinning the attack."
[442] *See* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704, para. 48. *See also* Provisional Verbatim Record of the 3217th Meeting, U.N. Doc. No. S/PV.3217 (25 May 1993), p. 11 (statement of France, listing national, ethnic, racial and religious grounds), 16 (statement of the United States, listing national, political, ethnic, racial, gender and religious grounds) and 45 (statement of the Russian Federation, listing national, political, ethnic, religious or other grounds); WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 196-198 (Cambridge 2006); BASSIOUNI & MANIKAS, at 543.
[443] Closing Order, para. 1367.
[444] Establishment Law, Art. 2.

199. The OCIJ erred in finding that in "the instant case, the overall attack was based primarily on political grounds."[445] The OCIJ does not explain or provide detail as to how "political grounds" are to be defined. The ICTR *Kayishema* Trial Chamber held that political grounds "include party political beliefs and political ideology."[446] The ICTR *Bagosora* Trial Chamber found that an attack based on the "the actual or perceived political leanings of many of those killed" was on political grounds.[447] Jurisprudence from both the *ad hoc* tribunals and Nuremberg demonstrates that the nature of discrimination is to be viewed subjectively.[448] In the Closing Order, the OCIJ appears to categorize the following conduct as an attack "based primarily on political grounds": **a.** "dividing the population into categories, which fixed the scope of their rights";[449] **b.** categorization as an "enemy" of "any person who did not comply with the policy of the regime, or who was considered to be an obstacle to its implementation";[450] and **c.** movements of "new people," Chams, and the population of the East Zone.[451] The OCIJ erred by failing to consider the alleged discriminatory basis of the attack from a subjective perspective. If it had, the Defence submits that it may have found such basis to be discriminatory on social, or class grounds rather than political grounds.[452] Similarly, the OCIJ appears to have categorized the "abolition of all 'reactionary' religions" as an

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[445] Closing Order, para. 1366.
[446] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1-T, Judgement, 21 May 1999, para. 130 ("*Kayishema & Ruzindana* Trial Judgement").
[447] *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgement, 18 December 2008, para. 2165 ("*Bagosora* Trial Judgement") (emphasis added). *See also* paras. 2170-72, 2174-77, 2182, 2183.
[448] *See Duch* Trial Judgement, paras. 316-17, *citing Judgement of Josef Altstotter et al.*, Law Reports of Trials of War Criminals, vol.6, p.81, fn.1: "'Political' as all Nazi judges construed it – and the defendant Cuhorst construed it – meant any person who was opposed to the policies of the Third Reich..." *See also Prosecutor v. Naletilić et al.*, Judgement, IT-98-34-T, 31 March 2003 ("*Naletilić* Trial Judgement"), para. 636: "[I]t is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status... [I]n such cases, a factual discrimination is a given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator." *See also Prosecutor v. Kvočka et al.*, IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka* Trial Judgement"), para. 195.
[449] Closing Order, para. 1366.
[450] *Id.*, para. 1367.
[451] *Id.*, para. 1368.
[452] The *Tadić* Appeals Chamber, in finding that discriminatory intent is no longer an element of crimes against humanity in customary international law, stated *obiter* that "the extermination of 'class enemies' in the Soviet Union during the 1930s ... and the deportation [sic] of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report." *Prosecutor v. Tadić*, IT-94-1-A, Judgement ("*Tadić* Appeal Judgement"), 15 July 1999, para. 285. The discriminatory grounds referred to in the Secretary General's Report are the same as those listed in the *chapeau* to Article 5 of the Establishment Law, i.e. national, political, ethnic, racial or religious grounds. *See* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex, U.N. Doc. S/25704, para. 48.

attack "on account of real or perceived ... religious identity (Buddhists and Chams)."[453] If it had considered the discriminatory basis of the attack from a subjective perspective, the Defence submits that it may have found such basis to be discriminatory on social, or class grounds rather than religious grounds.[454]

3. Underlying offenses

a. Murder

200. The OCIJ erred in finding that even "in instances where torture or violence resulted in death without the perpetrators having ... intent, they must have reasonably foreseen that the injury could cause death..."[455] The *mens rea* required for murder as a crime against humanity, in the absence of intent to kill, is "reasonable knowledge that [the Accused's act or omission] would likely result in death."[456] Foreseeing that death could result is insufficient. The OCIJ therefore may have incorrectly characterized the facts allegedly proving the elements of "murder" as a crime against humanity, and assumed jurisdiction on the basis of such a false characterization.

b. Extermination

201. The OCIJ erred by holding that the "legal elements of the crime of extermination have been established."[457] There is doubt as to the applicable *actus reus*. At the ICC, the *actus reus* requires that: **a.** the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population; and **b.** the conduct constituted, or took place as part of, a mass killing of members of a civilian population.[458] The *Duch* Trial Chamber noted that it has been suggested that one or a limited number of killings would not be sufficient to constitute extermination.[459] Applying the principle of *in dubio pro reo*, in accordance with the Cambodian Constitution, requires that one or a limited number of killings would not be sufficient to constitute extermination at the ECCC.

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[453] Closing Order, para. 1369.
[454] The Marxist critique of religion is framed in social, or class, terms. *See* Karl Marx, *Introduction to A Contribution to the Critique of Hegel's Philosophy of Right,* DEUTSCH-FRANZÖSISCHE JAHRBÜCHER, February 1844, Preface: "Religious suffering is, at one and the same time, the expression of real suffering and a protest against real suffering. Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people."
[455] Closing Order, para. 1379 (emphasis added).
[456] *Sesay* Trial Judgement, para. 138.
[457] Closing Order, para. 1381.
[458] ICC Statute – Elements of Crimes, Art. 7(1)(c), paras. 1-2.
[459] *See Duch* Trial Judgement, para. 336, *citing Vasiljević* Trial Judgement, para. 227.

202. The OCIJ characterized the *mens rea* of extermination as the "intent to cause the death of a large number of people."[460] Consistent with the Defence's submission that the existence of a plan or policy was an element of crimes against humanity in 1975-79, the Defence submits that a requirement of the *mens rea* of extermination is knowledge that the perpetrator's action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed.[461] Moreover, the Defence submits that evidence is required that shows that victims were subjected to conditions inevitably leading to death.[462] Causation, rather than a mere contribution to the victims' deaths, must be proved.[463] The OCIJ has therefore indicted on the basis of the application of an erroneous definition of "extermination" as a crime against humanity. The definition applied in the Closing Order is therefore subject to appeal pursuant to Rule 74(3)(a).

c. Enslavement

203. The OCIJ erred by holding that that the "legal elements of the crime against humanity of enslavement have been established."[464] Although the Defence agrees that the applicable *actus reus* of enslavement is correctly stated in the authorities cited in the Closing Order (it is "the exercise of all of the powers attaching to the right of ownership over a person,")[465] as is the *mens rea* ("the intentional exercise of such powers"),[466] the indicia of enslavement identified by these authorities must,[467] in light of Article 9 of the Agreement, also be considered in light of the definition of enslavement at the ICC, which

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[460] Closing Order, para. 1388.

[461] *See, e.g.* ICC Statute, Article 30. *See also Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390, ERN: 00591062-00591992 ("Final Submission"), para. 1253; *Vasiljević* Trial Judgement, para. 229. *But see Duch* Trial Judgement, para 337; *Blagojević* Trial Judgement, para. 576. *See also Prosecutor v. Semanza*, ICTR-97-20-T, Judgement, 15 May 2003 ("*Semanza* Trial Judgement"), para. 341: "[I]n the absence of express authority in the Statute or in customary international law, international criminal [responsibility] should be ascribed only on the basis of intentional conduct. [T]he mental element for extermination is the intent to perpetrate or participate in a mass killing."

[462] *Stakić* Trial Judgement, 31 July 2003, para. 641. *See also Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement"), para. 86, *citing Ntakirutimana* Appeal Judgement, para. 522.

[463] The Closing Order appears to recognize this obliquely: "many people died as a result of the conditions imposed..." Closing Order, para. 1387 (emphasis added).

[464] *Id.*, para. 1391.

[465] *Duch* Trial Judgement, para. 342; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, Judgement, 12 June 2002, ("*Kunarac* Appeal Judgement"), para. 116; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement"), paras. 350-51; *Sesay* Trial Judgement, para. 198.

[466] *Kunarac* Appeal Judgement, para. 116; *Duch* Trial Judgement, para. 345; *Krnojelac* Trial Judgement, 350; *RUF* Trial Judgement, para. 198. *But see also Sesay* Trial Judgement, para. 201.

[467] *Kunarac* Appeal Judgement, para. 119; *Sesay* Trial Judgement, para. 199. The indicia of enslavement considered by the *Kunarac* Appeals Chamber include "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."

requires that the perpetrator exercise any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[468] The applicable definition of enslavement at the ECCC requires, therefore, in addition to the elements identified by the OCIJ, proof of the treatment of persons as chattel.[469] The OCIJ has therefore indicted on the basis of the application of an erroneous definition of "enslavement" as a crime against humanity. The definition applied in the Closing Order is therefore subject to appeal pursuant to Rule 74(3)(a).

d. Deportation

204. The OCIJ erred by holding that "[t]he legal elements of the crime against humanity of deportation have been established in **Prey Veng** and **Svay Rieng** as well as in the **Tram Kok Cooperatives**."[470] Further, "a large number of Vietnamese living in Cambodia were forced to leave the places where they had been residing legally and to cross the Vietnamese border."[471] Rule 55(2) requires that: "[t]he Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission."[472] The sections of the Introductory Submission and Supplementary Submissions which consider crimes allegedly committed in Prey Veng,[473] Svay Rieng,[474] and in the Tram Kok Cooperatives[475] do not set out facts which suggest that "a large number of Vietnamese living in Cambodia were forced to leave the places where they had been residing legally and to cross the Vietnamese border." The OCIJ had no jurisdiction to investigate the alleged deportation of the Vietnamese in Prey Veng, Svay Rieng and in the Tram Kok Cooperatives and paragraphs 1397-1401 of the Closing Order must be struck out accordingly.

e. Imprisonment

205. The OCIJ erred by holding imprisonment to be an *enumerated* act constituting a crime against humanity.[476] Imprisonment, as an *enumerated crime against humanity*, is not listed in: **a.** the IMT Charter; **b.** the 1946 Charter of the IMTFE; **c.** the Nuremberg

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[468] ICC Statute – Elements of Crimes, Art. 7(1)(c).
[469] *See Katanga* Confirmation of Charges Decision, para. 430.
[470] Closing Order, para. 1398.
[471] *Id.*
[472] Rule 55(2).
[473] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007, D3, ERN: 00141011-00141166, paras. 11, 42, 69-70.
[474] *Id.*, paras. 42, 66, 69, 72.
[475] *Id.*, para. 43.
[476] Closing Order, para. 1314.

Principles; **d.** the 1954 Draft Code of Offences Against the Peace and Security of Mankind; or **e.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[477] The exclusion from these instruments of imprisonment as a crime against humanity demonstrates that imprisonment was not an *enumerated crime against humanity* in customary international law in 1975-79. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable, an act of imprisonment can only violate Article 5 of the Establishment Law if: **a.** "other inhumane acts" as a category is applicable; and **b.** imprisonment constituted an "other inhumane act" in 1975-79.

206. The OCIJ cited the ICCPR to support the proposition that imprisonment is an applicable, enumerated crime against humanity. To cite a human rights instrument to establish a norm of criminal law in this way constitutes a violation of the rule against analogy.[478] The OCIJ also cited an indictment to support this proposition.[479] However, an indictment cannot be taken to be an authoritative, judicial statement of the law.

207. The OCIJ erred by failing to find whether the alleged perpetrators possessed the requisite *mens rea* of "imprisonment", i.e. whether they were aware of the factual circumstances establishing the gravity of their conduct.[480] The OCIJ has therefore indicted on the basis of the application of an erroneous definition of "imprisonment" as a crime against humanity. The definition applied in the Closing Order is therefore subject to appeal pursuant to Rule 74(3)(a).

f. Torture

208. The OCIJ erred by holding torture to be an *enumerated* act constituting a crime against humanity.[481] Torture, as an enumerated crime against humanity, is not listed in: **a.** the IMT Charter; **b.** the 1946 Charter of the IMTFE; **c.** the Nuremberg Principles; **d.** the 1954 Draft Code of Offences Against the Peace and Security of Mankind; or **e.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes

[477] It is submitted that the enumeration of imprisonment as a crime against humanity in Control Council Law No. 10 is not material. The Allied and German courts applying this law were "local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." Schwelb, at 218-19.
[478] Closing Order, fn. 5190 *citing* ICCPR, Art.9. *See also* Annex.
[479] *Id., citing Greifelt et al.*, Control Council Law No.10 Trials [1947] Indictment Vol. IV, p.609. *See also* Annex.
[480] *See* ICC Statute – Elements of Crimes, Art. 7(1)(e).
[481] Closing Order, para. 1314.

Against Humanity.[482] The exclusion from these instruments of torture as a crime against humanity demonstrates that torture was not an *enumerated crime against humanity* in customary international law in 1975-79. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable, an act of torture can only violate Article 5 of the Establishment Law if: **a.** "other inhumane acts" as a category is applicable; and **b.** torture constituted an "other inhumane act" in 1975-79.[483] It bears emphasis that certain of the authorities relied upon by the OCIJ to support the proposition that torture is an applicable, enumerated crime against humanity violate the rule against analogy,[484] while others are references to indictments and cannot be taken to be authoritative, judicial statements of the law.[485]

209. The OCIJ erred by holding that the "legal elements of the crime against humanity of torture have been established."[486] In support of this proposition, the OCIJ cited, *inter alia*, the *Duch* Trial Judgement.[487] However, the *Duch* Trial Chamber itself erred in finding that the definition of torture in the CAT, "which closely mirrors that of the 1975 General Assembly Declaration [on Torture ("Torture Declaration")], ... had in substance been accepted as customary by 1975."[488] General Assembly Resolutions do not have the power or authority to declare or transmute concepts into customary international law; thus, they are not binding.[489] In addition, the Torture Declaration was not declarative of customary international law in 1975-79.[490] Nor is the definition of torture in the CAT

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[482] It is submitted that the enumeration of imprisonment as a crime against humanity in Control Council Law No. 10 is not material. The Allied and German courts applying this law were "local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." Schwelb, at 218-19.
[483] *But see Duch* Trial Judgement, para. 353.
[484] Closing Order, fn. 5191. *See also* Annex.
[485] Closing Order, fn. 5191.
[486] *Id.*, para. 1408.
[487] *Id.*, fn. 5267. In the same footnote, the OCIJ also cites, *inter alia*, the *Furundžija* Appeal Judgement, para. 111 and the *Kunarac* Appeal Judgement, paras. 142, 147, and 150, which found the definition of torture in the CAT to reflect customary international law.
[488] *Duch* Trial Judgement, para. 353.
[489] *See* Hugh Thirlway, *The Sources of International Law, in* INTERNATIONAL LAW 115, 124 (M. Evans, ed., Oxford University Press, 2006), stating that General Assembly Resolutions have been viewed as evidence of *opinio juris*, but not as acts of State practice.
[490] *See* Hans Danelius, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW 1 (United Nations), 2008: "[T]he Torture Declaration was intended to be the starting-point for further work against torture ... The definition of torture which appeared in the Torture Declaration was considered not to be precise enough and was criticized on various points."

applicable. In 1975-79, the CAT did not exist.[491] To apply its definition of torture would be a violation of the *nullum crimen sine lege* principle.[492] If torture is applicable as an "other inhumane act," and mindful of the fact that principles of international humanitarian law cannot be imported wholesale by analogy into crimes against humanity allegedly committed in 1975-79, guidance as to the definition which must be applied is contained in the Commentaries to the 1949 Geneva Convention; where torture is defined as:

> the infliction of suffering on a person to obtain from that person, or from another person, confessions or information... It is more than a mere assault on the physical or moral integrity of a person. What is important is not so much the pain itself as the purpose behind its infliction.[493]

The OCIJ has indicted on the basis of the application of an erroneous definition of "torture" as a crime against humanity. The definition applied in the Closing Order is therefore subject to appeal pursuant to Rule 74(3)(a).

g. Persecution on political, racial, or religious grounds

210. The OCIJ erred by holding that the "legal elements of the crime against humanity of persecution on political, racial or religious grounds have been established."[494] In support of this proposition, the OCIJ cites, *inter alia*, the *Duch* Trial Judgement.[495] However, the *Duch* Trial Chamber erred in considering only jurisprudence from the *ad hoc* tribunals and post-World War II jurisprudence in formulating the applicable definition of persecution.[496] The applicable definition of persecution must, in light of Article 9 of the Agreement, be considered in light of the definition of persecution at the ICC. According to the ICC Statute, acts of persecution are limited to those which have a nexus with other crimes within the Court's jurisdiction.[497] The Establishment Law does not contain this requirement, nor does it exclude it. Therefore, this limitation must be applied at the ECCC. The OCIJ has indicted on the basis of the application of an erroneous definition of "persecution on political, racial or religious grounds" as a crime against humanity. The definition applied in the Closing Order is therefore subject to appeal pursuant to Rule 74(3)(a).

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[491] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Grave Breaches of the Geneva Conventions at the ECCC, 1 June 2010, D379/2, ERN: 00526277-00526292 ("Alternative Grave Breaches Motion"), para. 35.
[492] ICCPR, Art. 15(1).
[493] Geneva Convention IV, Art. 147 and Commentary. *See also* Alternative Grave Breaches Motion, paras. 33-35.
[494] Closing Order, para. 1415.
[495] *Id.*, fn. 5268.
[496] *See Duch* Trial Judgement, paras. 374-75.
[497] ICC Statute, Art. 7(1)(h).

1. Political persecution

211. The OCIJ found that the "entire population remaining in towns after the CPK took power was labeled as 'new people' ... and subjected to harsher treatment than the old people... Intellectuals, students and diplomatic staff who were living abroad were recalled to Cambodia and, upon arrival, sent to reeducation camps or **S-21**."[498] This conduct is categorized under the heading "political persecution," and the only possible inference is that the persons described were discriminated against on political grounds. The Defence submits that the OCIJ erred by failing to consider the discriminatory basis of the alleged political persecution from a subjective perspective.[499] If it had, the Defence submits that it may have found such basis to be discriminatory on social, or class grounds rather than political grounds.[500]

212. The OCIJ found that in "cooperatives and worksites, and during population movements, real or perceived enemies of CPK were subjected to harsher treatment and living conditions than the rest of the population."[501] Similarly, the OCIJ found that "new people" were "subjected to harsher treatment than the old people, with a view to reeducating them or identifying 'enemies' among them."[502] This pleading does not charge particular acts or omissions amounting to persecution and lacks sufficient specificity.[503] This is because:

> Persecution cannot, because of its nebulous character, be used as a catch-all charge. Pursuant to elementary principles of criminal pleading, it is not sufficient for an indictment to charge a crime in generic terms. An indictment must delve

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[498] Closing Order, para. 1417.

[499] *See Duch* Trial Judgement, paras. 316-17, *citing Judgement of Josef Altstotter et al.*, Law Reports of Trials of War Criminals, vol.6, p.81, fn.1: "'Political' as all Nazi judges construed it – and the defendant Cuhorst construed it – meant any person who was opposed to the policies of the Third Reich..." *See also Naletilić* Trial Judgement, para. 636: "[I]t is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status... [I]n such cases, a factual discrimination is a given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator."; *Kvočka* Trial Judgement, para. 195.

[500] The *Tadić* Appeals Chamber, in finding that discriminatory intent is no longer an element of crimes against humanity in customary international law, stated *obiter* that "the extermination of 'class enemies' in the Soviet Union during the 1930s ... and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report." *Tadić* Appeal Judgement, para. 285. The discriminatory grounds referred to in the Secretary General's Report are the same as those listed in the *chapeau* to Article 5 of the Establishment Law, i.e. national, political, ethnic, racial or religious grounds. *See* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704, para. 48.

[501] Closing Order, para. 1418.

[502] *Id.*, para. 1417.

[503] *Blaškić* Appeal Judgement, para. 139: "The Appeals Chamber notes that the Prosecution is required to charge particular acts as persecutions." *See also Blagojević* Trial Judgement, para. 581; *Brđanin* Trial Judgement, para. 994; *Stakić* Trial Judgement, para. 735.

> into particulars. This does not mean, however, as correctly noted in the jurisprudence of this Tribunal, that the Prosecution is required to lay a separate charge in respect of each basic crime that makes up the general charge of persecution. What the Prosecution must do, as with any other offence under the Statue, is to particularize the material facts of the alleged criminal conduct of the accused that, in its view, goes to the accused's role in the alleged crime. Failure to do so results in the indictment being unacceptably vague since such an omission would impact negatively on the ability of the accused to prepare his defence.[504]

213. The OCIJ does not specify how "new people" were treated differently, and it does not specify how conditions experienced by real or perceived enemies were harsher than those experienced by others. The OCIJ has failed to particularize the material facts of the alleged criminal conduct of Mr. IENG Sary that, in its view, go to his role in the alleged crime of persecution on political grounds.

2. Religious persecution

214. The OCIJ found that "Buddhist and Cham people were targeted on discriminatory grounds, due to their membership of the group."[505] This conduct is categorized under the heading "religious persecution," and the only possible inference is that the persons described were discriminated against on religious grounds. The Defence submits that the OCIJ erred by failing to consider the discriminatory basis of the alleged persecution of Buddhists from a subjective perspective.[506] If it had, the Defence submits that it may have found such basis to be discriminatory on social or class grounds rather than religious grounds.[507]

215. As regards the *mens rea* of religious persecution, the OCIJ failed to specify how "the context of the attack and the circumstances surrounding the commission of the acts" reflect a specific intent to discriminate on religious grounds.[508] This pleading does not

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[504] *Prosecutor v. Kupreškić et al*, IT-95-16-A, Judgement, 23 October 2001, para. 98.
[505] Closing Order, para. 1419.
[506] *See Duch* Trial Judgement, paras. 316-17, *citing Judgement of Josef Altstotter et al.*, Law Reports of Trials of War Criminals, vol.6, p.81, fn.1: "'Political' as all Nazi judges construed it – and the defendant Cuhorst construed it – meant any person who was opposed to the policies of the Third Reich..." *See also Naletilić* Trial Judgement, para. 636: "[I]t is the perpetrator who defines the victim group while the targeted victims have no influence on the definition of their status... [I]n such cases, a factual discrimination is a given as the victims are discriminated in fact for who or what they are on the basis of the perception of the perpetrator." *See also Kvočka* Trial Judgement, para. 195.
[507] The Marxist critique of religion is framed in social, or class, terms. *See* Karl Marx, *Introduction to A Contribution to the Critique of Hegel's Philosophy of Right,* DEUTSCH-FRANZÖSISCHE JAHRBÜCHER, February 1844, Preface: "Religious suffering is, at one and the same time, the expression of real suffering and a protest against real suffering. Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people."
[508] *See* Closing Order, para. 1423.

charge particular acts or omissions amounting to the specific intent required to establish religious persecution; it therefore lacks sufficient specificity.

3. Racial persecution

216. The OCIJ found that "Vietnamese people were deliberately and systematically identified and targeted due to their perceived race."[509] The Defence submits that the OCIJ erred by failing to consider the discriminatory basis of the alleged persecution of the Vietnamese from a subjective perspective. If it had, the Defence submits that it may have found such basis to be discriminatory on national or ethnic grounds rather than racial grounds.[510]

217. As regards the *mens rea* of persecution on racial grounds, the OCIJ does not specify how "the context of the attack and the circumstances surrounding the commission of the acts" reflects a specific intent to discriminate on racial grounds.[511] This pleading does not charge particular acts or omissions amounting to the specific intent required to establish racial persecution; it therefore lacks sufficient specificity.

h. Rape

218. The OCIJ erred by holding rape to be an enumerated act constituting a crime against humanity.[512] Rape, as an enumerated crime against humanity, is not listed in: **a.** the IMT Charter; **b.** the 1946 Charter of the IMTFE; **c.** the Nuremberg Principles; **d.** the 1954 Draft Code of Offences Against the Peace and Security of Mankind; or **e.** the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[513] The exclusion from these instruments of rape as a crime against humanity demonstrates that it was not an enumerated crime against humanity in customary international law in 1975-79. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable, an act of rape can only

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[509] *Id.*, para. 1422.

[510] At the ICTR, a "racial" group has been defined as having "hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors." *Prosecutor v. Akayesu* ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* Trial Judgement"), para. 514. *See also Kayishema & Ruzindana* Trial Judgement, para. 98. A "national group" has been defined as "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties." *Akayesu* Trial Judgement, para. 512. An "ethnic group" has been defined as "one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)." *Kayishema & Ruzindana* Trial Judgement, para. 98. *See also Akayesu* Trial Judgement, para. 513.

[511] *See* Closing Order, para. 1423.

[512] *Id.*, para. 1314.

[513] It is submitted that the enumeration of rape as a crime against humanity in Control Council Law No.10 is not material. The Allied and German courts applying this law were "local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." Schwelb, at 218-19.

violate Article 5 of the Establishment Law if **a.** "other inhumane acts" as a category is applicable, and **b.** rape constituted an "other inhumane act" in 1975-79.[514]

219. In support of its holding that rape is a crime against humanity, the OCIJ cited both the ICTY *Kunarac* Appeal Judgement and the ICTR *Akayesu* Trial Judgement, which contain different definitions of rape.[515] However, it is the *Akayesu* definition of rape which is applied, with modification, by the OCIJ: "the perpetrators purposefully committed physical invasions of a sexual nature against victims in coercive circumstances."[516] The OCIJ has added that an absence of consent "of which the perpetrators were aware" may be an alternative to proof of "coercive circumstances."[517] The *Duch* Trial Chamber adopted the *Kunarac* definition of rape.[518] The Defence submits that if rape is an applicable crime against humanity, the *Duch* Trial Chamber was correct and should be followed in Case 002. It bears emphasis that the definition of rape in the ICC Elements of Crimes closely reflects the ICTY definition adopted by the *Duch* Trial Chamber.[519] The OCIJ has indicted on the basis of the application of an erroneous definition of "rape" as a crime against humanity. The definition applied in the Closing Order is therefore subject to appeal pursuant to Rule 74(3)(a).

i. Other inhumane acts

220. The OCIJ erred by holding "other inhumane acts" to be an applicable underlying offense constituting crimes against humanity.[520] As a Cambodian court based on the Civil Law system, the ECCC only has jurisdiction over crimes explicitly pronounced by the law.[521] The ICTY *Kordić* Appeals Chamber stated that it "considers that the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle."[522] The inherent lack of specificity of "other

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[514] *But see Duch* Trial Judgement, para. 366, in which the *Duch* Trial Chamber found rape applicable as "a separate and recognized offence both within the ECCC Law and international criminal law… [and] rape may also constitute torture where all other elements of torture are established."
[515] Closing Order, para. 1426.
[516] *Id.*, para. 1427. *See also*, in the context of forced marriage, para. 1431.
[517] *Id.*
[518] *Duch* Trial Judgement, para. 362. *See also* Final Submission, para. 1260, where the OCP noted the same. Moreover, the ICTR *Gacumbitsi* Appeals Chamber also cited the definition in *Kunarac*. *See Gacumbitsi* Appeal Judgement, paras. 151, 153; *Semanza* Trial Judgement, paras. 344-45.
[519] ICC Statute – Elements of Crimes, Art. 7(1)(g)-1.
[520] Closing Order, para. 1314.
[521] Article 6 of the 1956 Penal Code provides that "No crime can be punished by the application of penalties which were not pronounced by the law before it was committed." (Unofficial translation).
[522] *Kordić* Appeal Judgement, para. 117. The ICTY *Stakić* Trial Chamber highlighted that "other inhumane acts" as a category "may well be considered to lack sufficient clarity, precision and definiteness," that is to violate the principle of certainty. *See Prosecutor v. Stakić*, IT-97-24-T, Decision Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002, para. 131. *But see Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22

inhumane acts" is also demonstrated by the inconsistent approach to the interpretation of this category at the ICTY, where it has been judged on the one hand to violate the principle of certainty, and on the other to form part of customary international law.[523] Due to this lack of certainty, a problem which is particularly acute in a Civil Law system like Cambodia's, "other inhumane acts" as a category violates the requirement that crimes must be explicitly pronounced and the ECCC lacks jurisdiction to try the offense. In the event that the Pre-Trial Chamber decides "other inhumane acts" to be applicable, the Defence makes the following further submissions.

221. The OCIJ erred in finding that by "depriving the civilian population of adequate food, shelter, medical assistance, and minimum sanitary conditions, the CPK authorities inflicted on victims serious mental and physical suffering and injury, as well as a serious attack on human dignity of similar gravity to other crimes against humanity."[524] Whether an act is of similar gravity to other crimes against humanity is to be determined on a case by case basis.[525] In the case of Cambodia in 1975-79, *inter alia* after five years of civil war and the United States bombing campaign, it cannot be stated that any failure of the State to provide food, shelter, medical assistance and sanitary conditions to the population during phases 1 and 2 of the population movements and in the worksites and cooperatives constituted "other inhumane acts" establishing criminality under international law.[526]

March 2006 ("*Stakić* Appeal Judgement"), para. 315. The Appeals Chamber overruled the Trial Chamber on this point and ruled that "other inhumane acts" forms part of customary international law. It is submitted that in a Civil Law system such as the ECCC, the *Kordić* Appeal Chamber's and *Stakić* Trial Chamber's views should be preferred.

[523] Furthermore, in attempting to establish the scope of "other inhumane acts," the ICTY *Kupreškić* Trial Chamber identified international standards on human rights "such as those laid down in the Universal Declaration on Human Rights of 1948 and the United Nations Covenants on Human Rights of 1966" as setting the foreseeable parameters of what would constitute "other inhumane acts." *See Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić* Trial Judgement"), para. 566. This approach was criticized by the ICTY *Stakić* Trial Chamber: "The Trial Chamber recalls the report of the Secretary-General according to which 'the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law.' Accordingly, this Trial Chamber hesitates to use such human rights instruments automatically as a basis for a norm of criminal law, such as the one set out in Article 5(i) of the Statute... A norm of criminal law must always provide a Trial Chamber with an appropriate yardstick to gauge alleged criminal conduct for the purposes of Article 5(i) so that individuals will know what is permissible behaviour and what is not." *Stakić* Trial Judgement, para. 721 (emphasis added). *See also Blagojević* Trial Judgement, para. 625.

[524] Closing Order, paras. 1435-37.

[525] *See Duch* Trial Judgement, para. 369. *See also, e.g., Prosecutor v. Kamuhanda,* ICTR-95-54-A, Judgement, 22 January 2004, para. 717.

[526] At the ICTY, criminal behavior that has fallen within "other inhumane acts" has included mutilation and other types of severe bodily harm, beatings and other acts of violence, serious physical and mental injury, inhumane and degrading treatment, forced prostitution, and forced disappearance. *See Kvočka* Trial Judgement, para. 208. The Defence submits that these acts reach a level of seriousness that, in context, exceeds the

Moreover, when considered in context, any such failure cannot be considered to be of "similar gravity" to other acts enumerated as crimes against humanity.[527] The Pre-Trial Chamber must strike out paragraphs 1436 and 1437 of the Closing Order accordingly.

222. The OCIJ erred in finding, with respect to the *mens rea*, "that the perpetrators were aware of the factual circumstances that established the gravity of their acts."[528] In order to establish "other inhumane acts," the perpetrator must "at the time of the act or omission, [have] had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or ... knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act."[529] The *mens rea* found by the OCIJ is not sufficiently comprehensive.

j. Forced marriage as an "other inhumane act"

223. The OCIJ erred by holding forced marriage to constitute an applicable "other inhumane act."[530] Forced marriage has been recognized as a crime against humanity only by the SCSL,[531] which has jurisdiction over crimes that were committed in "the territory of Sierra Leone since 30 November 1996."[532] As such, any determination by that Court that forced marriage was a crime against humanity under customary international law applies solely to crimes committed after this date. It is noteworthy that no international convention outlawing forced marriage, nor any domestic jurisprudence ascribing criminal liability for forcing marriages, was provided and relied upon by the SCSL. This is simply because in many countries, although possibly anathema to Western values, arranged or

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seriousness of the acts described in the Closing Order, paras. 1436 and 1437. *See also Duch* Trial Judgement, para. 370.

[527] *See Blagojević* Trial Judgement, para. 627: "The element of 'similar seriousness' is to be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s)" (emphasis added).

[528] Closing Order, paras. 1439, 1444, 1465, 1475.

[529] *Blagojević* Trial Judgement, para. 628; *See also Prosecutor v. Galić*, IT-98-29-T, Judgement, 5 December 2003, para. 154. *See also Bagosora* Trial Judgement, para. 2218.

[530] Closing Order, para. 1314.

[531] *See Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgement, 22 February 2008 ("*Brima* Appeal Judgement"), paras. 175-202; *Sesay* Trial Judgement, para. 164. *See also* Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 6(5) J. INT'L CRIM. JUST. 1013, 1014 (2008); Michael Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crimes Against Humanity*, Case Research Paper Series in Legal Studies, Working Paper 05-35, October 2005, at 2; Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of "Forced Marriage"*, 7 NW. U. J. INT'L HUM. RTS. 128, 137 (2009).

[532] SCSL Statute, Art. 1.

forced marriage is an accepted part of society.[533] It was certainly not criminalized by customary international law in 1975-79.[534]

224. The OCIJ held the *actus reus* of forced marriage to include the entry into "conjugal relationships in coercive circumstances."[535] In emphasizing the significance of so-called "conjugal relationships" (as distinct from sexual relationships) the OCIJ has effectively incorporated centuries old gender stereotypes of women's work into the jurisprudence of the ECCC.[536] Moreover, it is unclear from the OCIJ's definition of the *actus reus* of forced marriage whether there is a minimum threshold of conduct required before criminal liability will attach.[537] The Closing Order is lacking sufficient specificity in this regard. It bears emphasis that certain of the authorities relied upon by the OCIJ to support the proposition that forced marriage is an applicable crime against humanity violate the rule against analogy.[538] That forced marriage was not enumerated as a crime against humanity in the ICC Statute provides further evidence that it is not a crime against humanity under customary international law today, let alone in 1975-79. The ECCC has no jurisdiction to try Mr. IENG Sary for this offense.

k. Sexual violence as an "other inhumane act"

225. The OCIJ erred by holding sexual violence to constitute an "other inhumane act."[539] "Sexual violence" did not constitute a crime against humanity under customary international law in 1975-79 and its application at the ECCC would violate the principle

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[533] *See, e.g.*, ELC Research Unit, *Are Forced or Arranged Marriages a Violation of Human Rights or a Valuable Cultural Practice which Promotes Social Cohesion?*. *See also* M.M. Mehndiratta, B. Paul & P. Mehndiratta, *Arranged Marriage, Consanguinity and Epilepsy*, NEUROLOGY ASIA 12, 15-17 (2007); Binaya Kumar Bastia, *Socio-Cultural Aspects of Sexual Practices and Sexual Offences – An Indian Scenario*, 13 J. CLIN. FORENSIC MED. 208, 210 (2006); Michelle Vachon, *Book Examines 'Ritualcide' During KR Regime*, CAMBODIA DAILY, 29 April 2010: "Arranged marriages are still the traditional means of matrimony in Cambodia, and people interviewed ... did not use the word 'forced' to describe their marriage during the [Khmer Rouge] regime."

[534] Note that it has been suggested that "although the use of the term 'wife' is not necessarily a prerequisite for a finding of sexual slavery or enslavement, this sole distinction does not justify the recognition of an entirely new crime under international humanitarian law. By drawing flawed distinctions, the [SCSL] Appeals Chamber cloud[s] important differences between forced marriages that amount to violations of international human rights law from those that constitute crimes against humanity." Jennifer Gong-Gershowitz, *Forced Marriage: A "New" Crime Against Humanity?*, 8 NW. U. J. INT'L HUM. RTS. 53, 58 (2009) ("Gong-Gershowitz").

[535] Closing Order, para. 1443.

[536] *See* Gong-Gershowitz, at 60.

[537] *Id.*, at 71: "The following questions are illustrative of the problem: First, is it necessary for a perpetrator to use the term 'wife'?... Second, is it necessary for a victim to perform stereotypical 'conjugal' duties like cooking and cleaning... [Third], are there any temporal requirements...?"

[538] Closing Order, fn. 5195. *See also* Annex.

[539] *Id.*, para. 1314.

of *nullum crimen sine lege*.[540] Several of the authorities relied upon by the OCIJ stating that these acts constitute "other inhumane acts"[541] either post-date 1975-79, or violate the rule against analogy. The ECCC has no jurisdiction to try Mr. IENG Sary for this offense.

l. Forced transfers of population as an "other inhumane act"

226. The OCIJ erred by holding forced transfers of population to constitute an "other inhumane act."[542] Although it is clear that the concept of forcible transfer was not unknown to the drafters of the Establishment Law – it is included as one of the punishable acts of genocide under Article 4 ("forcible transfer of children from one group to another") – it is not explicitly stated as an enumerated crime against humanity. Mindful of the Civil Law requirement that the ECCC only has jurisdiction over crimes explicitly pronounced by the law, "forcible transfer" cannot be prosecuted as an "other inhumane act"[543] and the OCIJ has no jurisdiction to try Mr. IENG Sary for this offense.

227. If, however, the Pre-Trial Chamber concludes that the ECCC has jurisdiction to try "forced transfer" as an "other inhumane act," the OCIJ erred in finding that because "the necessity of protecting the security of the population was not of itself the sole justification for this population movement,"[544] there were no grounds permitted by international law rendering legal phases 2 and 3 of the alleged forced transfers. Whether grounds permitted by international law are the sole justification for an evacuation is not an element which determines legality.[545] The OCIJ has taken into account an irrelevant consideration in finding that there were no grounds under international law for phases 2 and 3 of the movements of population.

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[540] The inclusion of "gender" crimes as crimes against humanity in the ICC Statute has been attributed to the work of the Women's Caucus for Gender Justice in the International Criminal Court. *See* Kelly D. Askin, *Crimes Within the Jurisdiction of the International Criminal Court*, 10(1) CRIM. L. F. 33, 45. The Women's Caucus was created in February 1997 (i.e. nearly two decades after the crimes for which Mr. IENG Sary is charged were allegedly committed). *See* Cleo Wilder, *Gender Justice and the ICC: Turning a Miracle into Reality*, 14 April 2010, *available at* http://www.opendemocracy.net/cleo-wilder/gender-justice-and-icc-turning-miracle-into-reality.

[541] *See* Closing Order, fn. 5196.

[542] *Id.*, para. 1314.

[543] *See Stakić* Trial Judgement, para. 721.

[544] Closing Order, para. 1454.

[545] *See* Geneva Convention IV of 1949, Art. 49(2): "Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased" *available at* http://www.icrc.org/ihl.nsf/full/380?opendocument. *See also* Commentary to Article 49(2) *available at* http://www.icrc.org/ihl.nsf/COM/380-600056?OpenDocument, which emphasizes the "imperative" nature of an evacuation, rather than whether it was solely justified on grounds permitted by international law.

228. As to the doubt expressed by the OCIJ regarding whether prevention of food shortages and ensuring access to medical care are grounds permitted for an evacuation under international law,[546] under today's international humanitarian law (which the Defence recognizes cannot be imported wholesale by analogy into the definition of crimes against humanity in customary international law), evacuation is permissible for humanitarian reasons in situations of armed conflict. The Commentary to Article 17 of Additional Protocol II indicates that for reasons such as the outbreak or risk of outbreak of epidemics, natural disasters, or the existence of a generally untenable and life-threatening living situation, forcible displacement of the civilian population may be lawfully carried out by parties to a conflict.[547]

229. The requisite *mens rea* for forcible transfer is the intent to remove the victim, which implies the intention that the victim can or will not return.[548] The knowledge based *mens rea* set out in the Closing Order is not sufficient to establish forced transfer.[549]

m. Enforced disappearance as an "other inhumane act"

230. The OCIJ erred by holding enforced disappearance to constitute an "other inhumane act."[550] Enforced disappearance did not constitute an "other inhumane act" in 1975-79.[551] There are no international instruments which pre-date 1975-79 enumerating enforced disappearance as a crime against humanity. Only in 1992 did the UN General Assembly adopt the Declaration on Protection of all Persons from Enforced Disappearance.[552] Yet, this Declaration is not of binding character. The first legally binding instrument in this field – which does not bind Cambodia – was the Inter-American Convention on Forced Disappearance, adopted by the General Assembly of the Organization of American States

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[546] *See* Closing Order, paras. 1458, 1461.
[547] *Blagojević* Trial Judgement, para. 600.
[548] *See Prosecutor v. Krnojelac,* IT-97-25-A, Judgement - Separate Opinion of Judge Schomburg, 17 September 2003, para. 16; *Blagojević* Trial Judgement, para. 601; *Naletilić* Trial Judgement, para. 521.
[549] Closing Order, para. 1465.
[550] *Id.*, para. 1314.
[551] *See* discussion in *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009, D180/4, ERN: 00373977-00373994, paras. 21-27, for an explanation of why sources which post-date the period at issue cannot be relied upon as evidence of customary international law.
[552] G.A. Res. 47/133, U.N. G.A.O.R 47th Sess., Agenda item 97(b), U.N. Doc A/RES/47/133 (1993). Despite the fact that the UN General Assembly Declaration was adopted in December 1992, very few States even today have taken specific action to comply with its standards.

only in 1994.[553] The ICTY Statute does not enumerate enforced disappearance as a crime against humanity and the ICTY has never charged this crime.[554]

231. All of the authorities cited by the OCIJ in support of its finding that the "constituent elements ... of enforced disappearance have been established" relate to events which post-date 1975-79.[555] In support of its holding that "enforced disappearance" is an underlying offense constituting a crime against humanity, the OCIJ relies on international human rights instruments, the Geneva Conventions and the Additional Protocols which either did not exist in 1975-79 or violate the ban on analogy.[556] To cite instruments such as the Magna Carta to support a proposition that enforced disappearance constituted a crime against humanity in 1975-79, as the OCIJ has done in the Closing Order,[557] demonstrates the OCIJ's disregard for the ban on analogy in Civil Law systems and in international criminal law. While enforced disappearance may now be recognized as a crime against humanity in customary international law after ratification of the ICC Statute in 1998,[558] it was not a crime against humanity under customary international law during 1975-79.

H. GROUND EIGHT: THE OCIJ ERRED IN LAW IN ITS APPLICATION OF GRAVE BREACHES, SHOULD THEY BE FOUND TO BE APPLICABLE AT THE ECCC

1. General requirements[559]

a. The OCIJ erred in failing to set out the requirements to find an international armed conflict

232. The OCIJ correctly identified that in order for grave breaches to apply, an international armed conflict must be found to exist.[560] However, the OCIJ erred in failing

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[553] The Convention has been ratified by 14 out of 34 OAS member States, hardly evidence of the consistent State practice required to establish customary international law. A list of States which have ratified the Convention is *available at* http://www.oas.org/juridico/english/sigs/a-60.html.

[554] The only reference to enforced disappearance was an *obiter dictum* in the *Kupreškić* Trial Judgement, para. 566, which is also cited in the *Kvočka* Trial Judgement, para. 208, stating that enforced disappearance could be considered as "other inhumane acts," relying upon the UN General Assembly Declaration of 1992 and the Inter-American Convention of 1994. Although the OCIJ cites (at Closing Order, fn.5276) *Prosecutor v. Nikolić*, IT-02-60/1-S, Judgement, 2 December 2003, para. 113 to support its proposition that the elements of enforced disappearance are "established", this paragraph goes to the issue of the gravity of the offenses perpetrated, not the elements or existence of "enforced disappearance" as a crime against humanity.

[555] *See* Closing Order, fn. 5276.

[556] *Id.*, fn. 5197. *See also* Annex.

[557] Closing Order, fn.5197.

[558] ICC Statute, Art. 7(1)(i).

[559] The term "'chapeau' elements" was used by the OCIJ instead of "general requirements." Closing Order, p. 361.

[560] Closing Order, para. 1317. *See also Duch* Trial Judgement, para. 413; Geneva Conventions, Common Art. 2. Common Article 2 states, "The Geneva Conventions apply during "all cases of declared war or ... any other armed conflict."

to set out the requirements to find an international armed conflict. The *Duch* Trial Chamber erred when it held that international humanitarian law applies from the initiation of the armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached.[561] As grave breaches can only be violated when the Geneva Conventions apply, grave breaches can only occur during times of war or other armed conflict.

233. The Geneva Conventions are not clear as to what constitutes an armed conflict.[562] However, many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts.[563] Dr. Dieter Fleck concludes that "[i]t may well be, therefore, that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of international humanitarian law apply."[564] Indicators as to the level of intensity of a conflict have included, *inter alia*, the number and frequency of attacks, the extent of civilian casualties and displacement, and the severity of the State's response.[565]

234. An armed conflict assumes an international character when it involves two or more States.[566] The ICTY *Tadić* Appeals Chamber held that an armed conflict within the territory of just one State can become "international (or, depending on the circumstances, international in character alongside an internal armed conflict) if 1) another State intervenes in that conflict through its troops, or alternatively if 2) some of the participants in the internal armed conflict act on behalf of that other State."[567] For the second alternative, the *Tadić* Appeals Chamber held the test is whether the other State exercises "overall control" over the troops participating in the conflict.[568] The *Tadić* Appeals Chamber interpreted the "overall control" test as follows:

> The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in

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[561] *Duch* Trial Judgement, para. 415.
[562] Commentary to Geneva Convention IV, Art. 2 states in pertinent part: "It remains to ascertain what is meant by 'armed conflict.'"
[563] DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 48 (2ND ed. Oxford University Press).
[564] *Id.*
[565] *See, for example, Prosecutor v. Haradinaj et. al.*, IT-04-84-T, Judgement, 3 April 2008, paras. 90-99 citing evidence of nearly 1,500 attacks by the group, daily shelling and clashes involving state forces and the group, deployment of state forces numbering 1,500 to 2,000, and the flight and disappearances of civilians to find the requisite "intensity" of fighting.
[566] Geneva Conventions, Common Art. 2.
[567] *Tadić* Appeal Judgement, para. 84.
[568] *Id.*, paras. 137, 145; *Naletilić* Trial Judgement, para. 181.

> addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[569]

235. In *Nicaragua v. United States*, the International Court of Justice ("ICJ") employed a different test, referred to as the "effective control" test. It held that a high degree of control was necessary under this test: it required that a Party not only be in effective control of a military or paramilitary group, but that the control be exercised with respect to the specific operation in the course of which breaches may have been committed.[570] As neither the *Tadić* Appeals Judgement, nor the ICJ *Nicaragua* Merits Judgement was rendered in 1975, only the Geneva Conventions can be relied upon to determine when a conflict assumes an international character. Common Article 2 to the Geneva Conventions only states that an armed conflict assumes an international character when it involves two or more States.[571]

b. The OCIJ erred in failing to clearly set out the definition of a protected person

236. The OCIJ erred in "making no determination as to whether the formulation known as the 'allegiance test' was applicable law at the time of the [temporal jurisdiction of the ECCC]."[572] The "allegiance test" set out by the ICTY *Tadić* Appeals Chamber was not applicable law during the time the ECCC has temporal jurisdiction. The *Tadić* Appeals Chamber applied the "allegiance test" only in the context of the potential creation of new States in a modern inter-ethnic armed conflict. Unless there is the potential creation of new States in a modern inter-ethnic armed conflict, the limited definition of nationals – as recognized in the Geneva Conventions and their commentary – must be applied.[573]

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[569] *Tadić* Appeal Judgement, para. 137. *See also Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, para. 134; *Čelebići* Appeal Judgement, para. 26; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgement ("*Kordić* Trial Judgement"), 26 February 2001, paras. 114-15.

[570] There must be "effective control of the military or paramilitary operations in the course of which the alleged violations [of international human rights and humanitarian law] were committed". *Nicaragua v. United States*, para. 115.

[571] Geneva Conventions, Common Art. 2.

[572] Closing Order, para. 1482.

[573] The *Tadić* Appeals Chamber extended the definition of protected person because: "[t]his legal approach, hinging on substantial relations more than formal bonds, becomes all the more important in present-day international armed conflicts." *Tadić* Appeal Judgement, para. 166. In defining "present-day international armed conflicts," the *Tadić* Appeals Chamber stated: "While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance." *Id.* (*emphasis added*).

237. The Geneva Conventions and the commentary to the Geneva Conventions make clear that a protected person is defined by his or her nationality. The "allegiance test" focuses on allegiance of the person to a State rather than their nationality.[574] Until June 1999, the ICTY defined protected persons based on their nationality.[575] Only in July 1999 did the ICTY *Tadić* Appeals Chamber extend the definition of "nationals" to persons with different ethnicity[576] – the "allegiance test." The ECCC has temporal jurisdiction over the period of 1975-79, at which time such an extended definition did not exist. The formulation known as the "allegiance test" would have been insufficiently accessible and foreseeable to any of the Accused, if applied, to satisfy *nullum crimen sine lege*.[577] The definition of protected persons at the ECCC may only include persons protected on the basis of their nationality.

c. The OCIJ erred in failing to clearly set out the necessity of a nexus between the international armed conflict and the crimes

238. The OCIJ erred in failing to clearly set out that there must be a nexus between the conflict and the crimes alleged.[578] This may have led it to assume jurisdiction without finding that all elements of grave breaches have been met. The *Duch* Trial Chamber held that such a nexus must exist[579] Logically, if the underlying act is not related to the international armed conflict, there is no violation of international humanitarian law. The ICTY has followed this reasoning.[580] The ICTY *Kunarac* Appeals Chamber set a high threshold for the nexus between the alleged crime and the international armed conflict, namely that the "existence of an armed conflict, at a minimum, must have played a substantial part in the perpetrator's ability to commit [the grave breach], his decision to commit it, the manner in which it was committed or the purpose for which it was committed."[581] This qualification is necessary in order to "distinguish a war crime from a purely domestic offence."[582] A "substantial part" suggests the international armed conflict must play a significant role in the Accused's ability to commit the crime. Only having "some part" will not make the crime a grave breach.

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[574] *See, e.g., Kordić* Appeal Judgement, paras. 322-23, 328-30.
[575] *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999, para. 46.
[576] *Tadić* Appeal Judgement, para. 166.
[577] Closing Order, para. 1482.
[578] *Id.*, para. 1483.
[579] *Duch* Trial Judgement, para. 416.
[580] *Prosecutor v. Tadić*, IT-94-I-T, Opinion and Judgement, 7 May 1997, para. 572; *Čelebići* Trial Judgement, para. 193.
[581] *Kunarac* Appeal Judgement, para. 58 (emphasis added).
[582] *Id.*

2. Underlying acts

a. The OCIJ erred in applying the incorrect *mens rea* for willful killing

239. The OCIJ erred when it concluded that the grave breach of willful killing had occurred because "[a]s regards the *mens rea*, the killing of these protected persons was committed by the personnel of S-21 intentionally or recklessly."[583] The *mens rea* required for willful killing, as explained by the *Duch* Trial Chamber, is that "the act or omission of the perpetrator was undertaken with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that the act or omission would likely lead to death."[584] This is also clear from the commentary to Geneva Convention IV, Article 147. Discussing willful killing through omission, it states, "Of course, the omission must have been wilful and there must have been an intention to cause death by it."[585]

240. The OCIJ's incorrect understanding of the applicable *mens rea* lead it to err in finding that "the deaths of a number [of] Vietnamese prisoners of war and civilians was caused indirectly as a result of the methods of interrogation they were subjected to as well as the general conditions imposed upon them whilst detained, inflicted in the reasonable knowledge that the death of the protected person was likely."[586] As just explained, there must always be an intent to kill or to cause serious bodily harm. If the intent is to cause serious bodily harm rather than to kill, there is a secondary requirement of reasonable knowledge that the act would likely lead to death. Reasonable knowledge alone that death was likely, absent the intent to kill or cause serious bodily harm, does not amount to willful killing.

b. The OCIJ erred in failing to fully set out the requirements of torture

241. The OCIJ erred in not setting out whether the involvement of a public official or other person acting in an official capacity, or with that person's consent or acquiescence, was a requirement of torture. The *Duch* Trial Chamber held that in 1975, the involvement of a public official or other person acting in an official capacity, or that person's consent or acquiescence, was a requirement.[587] The Geneva Conventions, from which grave breaches derive, are only applicable "between two or more of the High Contracting

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[583] Closing Order, para. 1493.
[584] *Duch* Trial Judgement, para. 333 (emphasis added).
[585] *Available at* http://www.icrc.org/ihl.nsf/COM/380-600169?OpenDocument (emphasis added).
[586] Closing Order, para. 1492 (emphasis added).
[587] *Id.*, para. 357.

Parties."[588] High Contracting Parties can only be States, with those representing them being public officials or other persons acting in an official capacity. This logically leads to the conclusion that only public officials or other person acting in an official capacity can violate grave breaches of the Geneva Conventions, including torture. Hence, for the underlying act of torture to constitute a grave breach, the involvement of a public official or other person acting in an official capacity, or with that person's consent or acquiescence is a requirement.

c. The OCIJ erred in failing to fully set out the requirements of inhumane treatment

242. The OCIJ erred in asserting that: **a.** mental pain and physical suffering or injury must be "serious;" and **b.** "serious acts on human dignity" are included within the definition of inhumane treatment.[589] Although this is the test used at the ICTY,[590] the Preparatory Committee on the Establishment of the ICC has created ambiguity by departing from the case law of the ICTY by: **a.** stating the physical or mental pain must be "severe;"[591] and **b.** not including in the definition "serious acts on human dignity."[592] Any ambiguity in the law must be resolved in favor of the Accused. This is in accordance with the principle of *in dubio pro reo* as provided by Article 38 of the Cambodian Constitution. Therefore for a crime to constitute inhumane treatment, the physical or mental pain must be "severe" and a "serious act on human dignity" alone does not constitute inhumane treatment.

243. The OCIJ further erred in holding that the *mens rea* of inhumane treatment is intention or recklessness. The *Duch* Trial Chamber erred when holding the *mens rea* of inhumane treatment is intention or recklessness and its citation to the *Čelebići* Trial Chamber does not support its holding.[593] The *Čelebići* Trial Chamber defines the *mens rea* of inhumane treatment as intent.[594] The *Čelebići* Appeals Chamber supports the

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[588] Geneva Conventions, Common Art. 2.
[589] Closing Order, para. 1501.
[590] *Čelebići* Trial Judgement, para. 543; *Blaškić* Trial Judgement, paras. 154-55; *Kordić* Trial Judgement, para. 256.
[591] KNUT DÖRMANN ET AL., ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 62 (Cambridge University Press, 2002).
[592] *Id.*, at 63.
[593] Duch Trial Judgement, para. 444.
[594] "An intentional act or omission..." *Čelebići* Trial Judgement, para. 543 (emphasis added).

holding that inhumane treatment must be carried out intentionally.[595] The OCP agrees that inhumane treatment must be intentional.[596]

d. The OCIJ erred in applying the *incorrect mens* rea for willfully causing suffering or serious injury to body or health

244. The OCIJ erred in holding the *mens rea* of willfully causing great suffering or serious injury to body or health is intention or recklessness.[597] The *Duch* Trial Chamber held[598] and the OCP agrees[599] that the *mens rea* for willfully causing great suffering or serious injury to body or health is solely intention.

245. The OCIJ further erred in failing to fully set out that willfully causing great suffering or serious injury to body or health does not encompass harm relating solely to an individual's human dignity. This was held by the *Duch* Trial Chamber and the OCP agrees.[600]

246. The OCIJ has provided examples of conditions that are deemed to cause great suffering or serious injury to body or health.[601] It is yet to be determined whether these amount to causing great suffering or serious injury to body or health, and the Defence reserves its right to challenge these examples.

e. The OCIJ erred in failing to fully set out the requirements of deprivation of a fair and regular trial

247. The OCIJ stated that the following rights cannot be denied: **a.** the right not to be sentenced without judgement pronounced by a competent court; and **b.** the presumption of innocence.[602] The OCIJ has not provided any citation from the Geneva Conventions to support these conclusions. The right not to be sentenced without previous judgement pronounced by a regularly constituted court is only found in Common Article 3 of the Geneva Conventions, which is only applicable in a non-international armed conflict. Grave breaches are not applicable in a non-international armed conflict, and therefore violation of the right not to be sentenced or executed without previous judgement pronounced by a regularly constituted court is not a grave breach offense.

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[595] "an intentional act or omission..." *Čelebići* Appeal Judgement, para. 426 (emphasis added).
[596] *See* Final Submission, para, 1279, *citing Čelebići* Appeal Judgement, para. 426.
[597] *Id.*, para. 1506.
[598] *Duch* Trial Judgement, paras. 451-52, *citing Kordić* Trial Judgement, para. 245.
[599] Final Submission, para, 1280, *citing Čelebići* Appeal Judgement, para. 424.
[600] *Duch* Trial Judgement, para. 453; Final Submission, para. 1280, *citing Kordić* Trial Judgement, paras. 244-45.
[601] Closing Order, para. 1502.
[602] *Id.*, paras. 1509, 1513.

248. The OCIJ found that "as regards the *mens rea*, the denial of these rights of fair and regular trial was committed by the personnel of S-21 intentionally or recklessly";[603] however, it failed to first hold that the *mens rea* of this grave breach was intention or recklessness, let alone to provide any support for such a holding.

I. GROUND NINE: THE OCIJ ERRED IN LAW IN ITS APPLICATION OF JCE

1. JCE is not applicable at the ECCC

249. The Pre-Trial Chamber has previously held that JCE I and II – but not JCE III – are applicable at the ECCC.[604] The Defence recognizes that it is bound by this Pre-Trial Chamber Decision – as are the other parties and the OCIJ – but still considers, as discussed *supra*, that international forms of liability may not be applied in this domestic Cambodian court. The Defence further considers that the Pre-Trial Chamber erred[605] in reaching the conclusion that JCE I and II were part of customary international law in 1975-79, for the reasons below.[606] While the Pre-Trial Chamber is not being asked to reconsider its position, the Defence does not waive or concede the issue and reserves the right to raise this issue before the Trial Chamber. Lest there be any question as to whether the Defence has waived the issue of the applicability of JCE at the ECCC, the Defence makes the following points.

250. According to the Pre-Trial Chamber:

> [W]hen determining the state of customary international law in relation to the existence of a crime or a form of individual responsibility, a court shall assess existence of 'common, consistent and concordant' state practice, or *opinio juris*, meaning that what States do and say represents the law. A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists; '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[607]

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[603] *Id.*, para. 1510.
[604] PTC JCE Decision, paras. 69, 88.
[605] Unfortunately, the ECCC Trial Chamber in *Duch* also made the same mistake. *See Duch* Trial Judgement, para. 512.
[606] These reasons may also be found in Michael G. Karnavas, *Joint Criminal Enterprise at the ECCC: A Critical Analysis of Two Divergent Commentaries on the Pre-Trial Chamber's Decision against the Application of JCE*, CRIM. L. F. (forthcoming 2010).
[607] PTC JCE Decision, para. 53, *citing Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits, 1974 ICJ Rep. 3, at 50; 1946 Statute of the International Court of Justice, Art. 38(1); *North Sea Continental Shelf (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, Merits, 20 February 1969, ICJ Rep. 3, para. 77. *See also* Anthony Dinh, *Joint Criminal Enterprise at the ECCC: The Challenge of Individual Criminal Responsibility for Crimes Committed under the Khmer Rouge*, CAMBODIA TRIBUNAL, 18 June 2010 ("Dinh"), at 35, *available at* http://cambodiatribunal.org/images/CTM/ctm%20adinh-international%20criminal%20law-jce.pdf. Dinh's proposition that the "distinction between international law of states and the international criminal prosecution of individuals ... limits the applicability of the *opinio juris*

251. JCE has never been a form of responsibility in common, consistent and concordant State practice. The *Tadić* Appeals Chamber relied upon too few cases to support the existence of such practice,[608] and the additional two cases relied upon by the Pre-Trial Chamber[609] are not enough to remedy this deficiency.

252. To find the existence of JCE I, the *Tadić* Appeals Chamber relied upon only six cases[610] – four British, one Canadian, and one American.[611] According to some scholars, this is "perhaps the most worrying characteristic of the *Tadić* analysis."[612] As Professor Ambos notes, "*Tadić's* recourse to World War II case law is, at least in part, of 'dubious precedential value."[613] To establish the second form of JCE, the *Tadić* Appeals Chamber relied only upon one English Royal Warrant and one American case.[614] This is not an

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requirement on issues such as the applicability of JCE ... because no situation would arise that would require a state to declare that it considers itself bound under the doctrine of JCE" is misconceived and ignores the process of negotiation and ratification of the ICC Statute by which precisely such a situation did arise, and which led to the deliberate rejection of JCE in contemporary *opinio juris.*

[608] "The [*Tadić*] Appeals Chamber ... held the view that 'the notion of common design as a form of accomplice liability is firmly established in customary international law.' This conclusion would seem rather far-fetched. It is questionable whether one could speak of such a general principal of criminal law as being part of customary international law on the basis of so few cases." MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES, para. 274 (Intersentia, 2002). *See also* para. 282, where Boot states that "These observations may amount to the conclusion that the Appeals Chamber violated the *nullum crimen sine lege* principle in this case." *See also* Lamb, at 746, where Lamb states that "[t]he dearth of State practice to guide the *ad hoc* Tribunals has ensured that the definition of international crimes by the *ad hoc* Tribunals has had a somewhat emotive, *de lege ferenda* quality." In addition to relying on too few cases, it appears that the *Tadić* Appeals Chamber erred in its analysis of the *Einsatzgruppen* case, which it found supported the existence of JCE I. Professor Kevin Jon Heller recently discovered that the *Tadić* Appeals Chamber quoted the Prosecution's closing argument as if it were the tribunal's judgement. Heller referred to this as "an egregious error." Kevin Jon Heller, *An Egregious Error in Tadić*, OPINIO JURIS, 8 July 2010, *available at* http://opiniojuris.org/2010/07/08/an-egregious-error-in-tadic/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

[609] *See* PTC JCE Decision, para. 65.

[610] A couple of other cases are not analyzed, but are mentioned briefly in the footnotes discussing these 6 cases.

[611] *See Tadić* Appeal Judgement, paras. 196-200.

[612] GIDEON BOAS ET AL., INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY, VOLUME I: FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 21 (Cambridge University Press, 2007). *See also* Attila Bogdan, *Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the* ad hoc *International Tribunal for the Former Yugoslavia*, 6 INT'L CRIM. L. REV. 63, 109-12 (2006) ("Bogdan").

[613] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008, D99/3/27, ERN: 00234912-00234942 ("Ambos Brief"), p. 23.

[614] *See Tadić* Appeal Judgement, para. 202. One other case is mentioned in a footnote, but even an *amicus curiae* brief submitted in the *Duch* case by McGill University notes that: "The last case that the ICTY cited in support of JCE 2 in fact supports the application of aiding and abetting principles more strongly. *Mulka* should therefore be distinguished by future courts because, as the ICTY admits, 'if it could not be proved that the accused actually identified himself with the aims of the Nazi regime, then the court would treat him as an aider and abettor because he lacked the specific intent to 'want the offence as his own.'" *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Amicus Curiae Brief Submitted by the Centre for Human

indication of the customary status of JCE liability. The number of cases and jurisdictions examined – not to mention the total exclusion of any case law from Civil Law jurisdictions – is far too low to establish common, consistent and concordant State practice. "[T]he judgment also fails to examine the *opinio juris*, meaning the 'policies and pronouncements of states as expressions of their national commitment.'"[615]

253. At Nuremburg, defendants were not classified as "perpetrators" or "accomplices," so there was nothing in the judgments defining the relationship between the direct perpetrators and the accused.[616] The verdicts were quite short, with limited legal reasoning. The *Tadić* Appeals Chamber, therefore, had to infer the form of liability under which the accused were ultimately convicted based on the prosecutor's statements.[617] It made no effort to discern whether the accused in these cases were convicted as principals or as accessories. The problem with the *Tadić* Appeals Chamber's approach stems from the common law approach that the judges followed. In failing to differentiate between different forms of participation at the level of attribution, they in essence embraced a unitary model of liability (typical for common law jurisdictions), which treats principals and accessories equally.

254. Many States, such as Cambodia, do not apply JCE liability, but instead use a model of co-perpetration distinct from JCE. In Cambodia, according to Article 82 of the 1956 Penal Code, "Any person participating voluntarily, either directly or indirectly, in the

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Rights and Legal Pluralism, McGill University, 27 October 2008, D99/3/25, ERN: 00234856-00234883 ("McGill Brief"), para. 22.

[615] Bogdan, at 110.

[616] At Nuremberg, the judges declined to make a distinction between perpetrators and accomplices, or principals and aiders and abettors. "Individual responsibility was put under the heading of criminal participation.... No distinction in parties to a crime was made, variance in role and degree was expressed in the sentence." ELIES VAN SLIEDREGT, THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW 27, 31 (The Hague, TMC Asser Press, 2003).

[617] Professor Ohlin explains, "For example, the *Tadić* court relies on cases such as *Kurt Goebell et al.* (*The Borkum Island Case*), a 1944 US military court decision. See *Tadić*, § 210-212. In that case, a US Flying Fortress aircraft was shot down over German territory and its crew was subjected to a death march. The airmen were escorted by German soldiers who encouraged civilians to beat the prisoners who were eventually shot and killed. The US prosecutor argued for a guilty verdict based on a broad theory of common criminal purpose. Although the facts of the case are directly relevant to a discussion of joint criminal enterprise, the military court issued only a simple guilty verdict and made no extensive legal findings on the issue of common criminal plans or mob beatings. Consequently, the *Tadić* court is left to quote the words of the US military prosecutor and *infer* that the judges adopted the prosecutor's reasoning. These types of cases are of negligible value for precisely this reason. Indeed, the prosecutor's discussion of the issue is internally contradictory." Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 75 fn. 10 (2007) (emphasis added). *See also* McGill Brief, para. 23, discussing the *Essen Lynching* and *Borkum Island* cases: "The two fundamental problems with the use of such cases in support for a broad principle of extended JCE are that the circumstances of this case are not clear on the role or intentions of each participant and that the court's findings must be inferred from the prosecution's arguments and the eventual findings of guilt."

commission of a crime or infraction, is liable for the same punishment as the principal perpetrator. Direct participation constitutes co-perpetration, indirect participation constitutes complicity."[618] This model of co-perpetration distinguishes between principal and accessorial liability. The difference is important in Civil Law systems, such as Cambodia, "because of the distinction in some civil law systems of handing down a lower maximum sentence to a person who merely aids and abets the principal."[619] Many other States use this model of co-perpetration as well. According to the Max Planck Institute, most States use co-perpetration rather than JCE liability.[620]

255. The text of the ICC Statute and the way it has been interpreted are also relevant when considering whether JCE has a basis in customary international law. By admission of the *Tadić* Appeals Chamber, the ICC Statute is a "text supported by a great number of States [which] may be taken to express the legal position i.e. *opinio juris* of those States."[621] However, the JCE doctrine as created in *Tadić* was not included within the wording of the ICC Statute.

256. Article 25 of the ICC Statute deals with forms of individual criminal liability applicable at the ICC. It was drafted within the broader negotiations of the ICC Statute over a 3-year period and with 160 participating countries.[622] The main aim of the Rome Conference was to achieve the broadest possible acceptance of the ICC by adopting into the Statute provisions recognized under customary international law.[623] The new court was to conform to principles and rules that would ensure the highest standards of justice and these rules were to be incorporated in the statute itself rather than being left to the

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[618] Unofficial translation.

[619] This is why, according to Damgaard, the *ad hoc* tribunals have focused on the issue of whether JCE is a form of principal or accomplice liability. *See* Ciara Damgaard, *The Joint Criminal Enterprise Doctrine: A "Monster Theory of Liability" or a Legitimate and Satisfactory Tool in the Prosecution of the Perpetrators of Core International Crimes?, in* INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 129, 194 (Springer, 2008).

[620] *See* Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – ICTY, Office of the Prosecutor Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans Georg Koch, Jan Michael Simon, Max Planck Institut für ausländisches und internationales Strafrecht, Freiburg, Germany, Part 1: Comparative Analysis of Legal Systems, p. 16. Furthermore, according to this study, "a comparison of the rules governing participation in crime reveals a high degree of variance among the legal systems studied..." Introduction, p. 3 (emphasis added).

[621] *Tadić* Appeal Judgement, para. 223.

[622] John Washburn, *The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century*, 11 PACE INT'L L. REV. 361, 361 (1999).

[623] GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 402,.fn. 108 (TMC Asser Press, 1st ed., 2005) ("WERLE").

uncertainty of judicial discretion.[624] Indeed, given this level of participation and the length of the drafting process, the ICC Statute is generally considered to codify customary international law on international crimes.[625] This process has also been described as a *de facto* consolidation of national criminal principles on an international level.[626] Certainly, there is a general agreement that the drafters of the ICC Statute would not have opted to create new law or a new form of liability contradicting established customary international law.[627] As the chairman of the Rome Conference himself, Philippe Kirsch, has affirmed, "it was understood that the statute was not to create new substantive law, but only to include crimes already prohibited under international law."[628] The deliberate exclusion of JCE despite a lengthy and thorough drafting exercise is indicative of the fact that JCE liability should not be considered part of customary international law. Furthermore, when asked to apply JCE despite the wording of the ICC Statute, the Pre-Trial Chamber in *Lubanga*, then presided by former ICTY President Judge Claude Jorda, "rejected an explicit invitation by one of the victims' counsel to incorporate the concept of JCE into the ICC Statute's notion of 'commits such a crime ... jointly with another,'" voicing substantial reservations against accepting JCE as a form of liability.[629] The *Lubanga* Pre-Trial Chamber explained that there are three approaches to determining

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[624] WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 16-17, (Cambridge University Press, 3rd ed. 2007).

[625] "Numerous treaties in the area of international criminal law expressly or incidentally codify customary law; this is true, for example, of the definitions of crimes in the ICC Statute." WERLE, at 45, marginal no. 127. "The provisions of Article 25(3)(b), second and third alternatives, of the ICC Statute reflect customary law." *Id.*, at 125, marginal no. 358.

[626] *See* DOMINIC MCGOLDRICK ET AL., THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 340 (Hart Publishing, 1st ed., 2004).

[627] "Because of the general agreement that the definitions of crimes in the ICC Statute were to reflect existing customary international law, and not to create new law, states relied heavily on accepted historical precedents in crafting the definitions in Articles 6 to 8 of the ICC Statute." Foreword by Philippe Kirsch, *in* DÖRMANN, at xiii. *Cf. Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, para. 227: "Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallize them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States." It is submitted that in the absence of cogent evidence demonstrating how a provision of the ICC Statute departs from customary international law, such provision can be considered reflective of that body of law.

[628] Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: the Negotiating Process*, 93 AM. J. INT'L L. 2, 7, fn. 10 (1999). ICTY/ICTR Appeals Chamber Judge Schomburg, commenting on Article 25 in *Gacumbitsi*, noted that given the wide acknowledgment of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law. *See Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 21.

[629] Thomas Weigend, *Intent, Mistake of Law and Co-Perpetration in the Lubanga Decision on Confirmation of Charges*, 6 J. INT'L CRIM. JUST. 471, 476-78 (2008).

whether certain conduct entails principal or accessorial liability: the objective approach, the subjective approach, and the "control over the crime" approach.[630]

257. The objective approach focuses on the realization of one or more of the objective elements of the crime. From this perspective, only those who physically carry out one or more of the objective elements of the offense can be considered principals to the crime.[631]

258. The subjective approach, according to the *Lubanga* Pre-Trial Chamber, "is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine."[632] This approach "moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission."[633]

259. The control over the crime approach (*Tatherrschaftslehre*), the *Lubanga* Pre-Trial Chamber found, is applied in numerous legal systems.[634] According to this theory, a perpetrator can be said to control the criminal act by either controlling the action itself (*Hanlungscherrschaft*), by controlling the will of another person (*Willenscherrschaft*) or by exercising functional control (*funktionale Tatherrschaft*).[635] "The notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed."[636] This approach involves an objective element, consisting of the appropriate factual circumstances for exercising control over the crime, and a subjective element, consisting of the awareness

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[630] *Prosecutor v. Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, ("*Lubanga* Confirmation of Charges Decision"), paras. 327-30.
[631] *Id.*, para. 328. The *Lubanga* Pre-Trial Chamber noted that it could not follow this approach because the notion of committing an offense through another person in Article 25(3)(a) of the ICC Statute cannot be reconciled with the idea of limiting the class of principals to those who physically carry out one or more of the objective elements of the offense. *Id.*, para. 333.
[632] *Id.*, para. 329.
[633] *Id.*
[634] *Id.*, para. 330.
[635] *See* Kai Hamdorf, *The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law*, 5(1) J. INT'L CRIM. JUST. 208, 210 (2007). *See also* Ambos Brief, at 10. "[T]he doctrine of functional domination of the act (*funktionelle Tatherrschaftslehre*), [is] widely recognized in civil law systems and recently also by the ICC's Pre-Trial Chamber."
[636] *Lubanga* Confirmation of Charges Decision, para. 330.

of such circumstances.[637] According to this approach, only those who have control over the commission of the offense – and who are aware of having such control – may be principals.[638]

260. The *Lubanga* Pre-Trial Chamber explained that it could not follow either the objective approach, or the subjective approach taken by the ICTY for distinguishing between principals and accessories to a crime. Article 25(3)(d) of the ICC Statute moves away from the concept of co-perpetration embodied in Article 25(3)(a), and defines the concept of contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose, with the aim to further criminal activity of the group or in knowledge of the criminal purpose. Such aim or knowledge would have been the basis of the concept of co-perpetration within the meaning of Article 25(3)(a) if the drafters had opted for a subjective approach to distinguishing between principals and accessories.[639] However, The *Lubanga* Pre-Trial Chamber held that the control over the crime (*Tatherrschaftslehre*) approach was the correct approach to follow and distinguished collective responsibility under Article 25(3)(d) of the ICC Statute from JCE liability as formulated in the jurisprudence of the *ad hoc* tribunals.[640]

261. Subsequently, in setting out the elements of essential contribution and mutual control over the realization of the crime, the Chamber in effect also distinguished co-perpetration within the meaning of Article 25(3)(a) and co-perpetration based on the existence of JCE I.[641] In *Katanga*, it explained, "By adopting the final approach of control of the crime, the Chamber embraces a leading principle for distinction between principals and accessories to a crime... The control over the crime approach has been applied in a number of legal systems, and is widely recognized in legal doctrine."[642]

262. In this sense, and as noted above, the *Lubanga* Confirmation of Charges Decision can be read as consistent with the line of dissent regarding the validity of JCE from the *Stakić* Trial Judgement onwards. To paraphrase Judge Lindholm, these decisions can, based on the doctrine of "power over the act" (*Tattherschaftslehre*), be read as distancing

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[637] *Id.*, para. 331.
[638] *Id.*, para. 332.
[639] *Id.*, paras. 334-35.
[640] The Pre-Trial Chamber explained, "Not having accepted the objective and subjective approaches for distinguishing between principals and accessories to a crime, the Chamber considers, as does the Prosecution and, unlike the jurisprudence of the *ad hoc* tribunals, that the Statute embraces the third approach, which is based on the concept of control of the crime." *Id.*, para. 338.
[641] *Id.*, paras. 343-67.
[642] *Katanga* Confirmation of Charges Decision, paras. 484-85.

themselves from JCE.[643] Indeed, the ICC Pre-Trial Chambers have cited the ICTY *Stakić* Trial Chamber approvingly for its discussion of the co-perpetration model.[644] Although the ICTY *Stakić* Appeals Chamber noted that co-perpetration "as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal" and instead asserted that JCE liability is firmly established in customary international law,[645] the ICC's rejection of this conclusion is clear. Professor Ambos exclaims that the *Stakić* Appeals Chamber's assertion "demonstrates such a blatant ignorance of basic principles of criminal law that even principled supporters of the International Criminal Tribunals, such as this writer, must rethink their support."[646] The Pre-Trial Chamber may not simply accept the *Stakić* Appeals Chamber's conclusion without explaining why it considers the *Stakić* Trial Chamber and the ICC to be in error. It is submitted that the *Stakić* Trial Chamber and the ICC are correct. The control over the crime approach captures the important distinction between perpetration as principal and aiding and abetting as accessory liability.[647] Such an approach respects the *nullum crimen sine lege* principle by drawing a precise line between principal and accessory, thereby helping avoid the findings of guilt by association that are the presumably unintended, but natural and foreseeable consequence of the application of JCE.

263. The fact that most legal systems do not apply JCE, coupled with the fact that the ICC Statute – a consolidation of customary international law at the time it was drafted – did not provide for it (and two ICC Pre-Trial Chambers rejected its application) demonstrate that this form of liability cannot be considered customary international law today, let alone in 1975-79.

2. The OCIJ erred in its application of JCE I

264. Even if the Pre-Trial Chamber still concludes that JCE is applicable, despite all the arguments above to the contrary, the ECCC still does not have jurisdiction to apply JCE I against Mr. IENG Sary in this case, as the OCIJ erred in its application. Specifically, the OCIJ erred in: **a.** applying the incorrect *mens rea* concerning Mr. IENG Sary's

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[643] *Prosecutor v. Simić*, IT-95-9-T, Judgement – Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm ("*Simić* Trial Judgement"), 17 October 2003, para. 2.
[644] *See Lubanga* Confirmation of Charges Decision, paras. 342-43, 346; *Katanga* Confirmation of Charges Decision, paras. 509-10.
[645] *Stakić* Appeal Judgement, para. 62.
[646] Ambos Brief, fn. 41.
[647] *See id.*, at 10.

participation in a common criminal plan; and **b.** finding that the common criminal plan expanded to include genocide, absent a showing of specific intent.

a. The OCIJ erred in applying the incorrect *mens rea* as to Mr. IENG Sary's participation in a common criminal plan

265. According to the Pre-Trial Chamber, "The basic form of JCE (JCE I) exists where the participants act on the basis of a common design or enterprise, sharing the intent to commit a crime."[648] The OCIJ has failed to demonstrate that Mr. IENG Sary participated in a JCE sharing the intent to commit a crime within the jurisdiction of the ECCC and appears to have misapplied JCE based on a misunderstanding of the requisite *mens rea* for JCE I. It found that:

> The common purpose of the CPK leaders was to implement rapid socialist revolution by in Cambodia through a 'great leap forward' and to defend the Party against internal and external enemies, by whatever means necessary. The purpose itself was not entirely criminal in nature but its implementation resulted in and/or involved the commission of crimes within the jurisdiction of the ECCC. To achieve this common purpose, the CPK leaders designed and implemented five policies. Their implementation resulted in and/or involved the commission of the following crimes which were committed by members and non-members of the JCE...[649]

266. The OCIJ seems to admit that the common purpose may not have been criminal and that this common purpose may not have even been intended to be implemented through policies which were necessarily criminal; only the result of the implementation of the policies involved the commission of crimes. It claims that "[b]y his words, his actions and his omissions **Ieng Sary** intended this result."[650] However, "[t]he first form of the JCE exists where the common objective amounts to, or involves the commission of a crime provided for in the Statute. The mens rea required for the first form is that the JCE participants, including the accused, had a common state of mind, namely the state of mind that the statutory crime(s) forming part of the objective should be carried out."[651] The existence of a common plan which merely "resulted in" the commission of crimes is inconsistent with the requirement that Mr. IENG Sary must have entered into a common

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[648] PTC JCE Decision, para. 37 (emphasis added).
[649] Closing Order, paras. 1524-25 (emphasis added).
[650] *Id.*, para. 1535.
[651] *Prosecutor v. Krajišnik*, IT-00-39-T, Judgement, 27 September 2006, para. 883. *See also Prosecutor v. Brđanin*, IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement"), para. 418: "What JCE requires in any case is the existence of a common purpose which amounts to, or involves, the commission of a crime.... [A]s far as the basic form of JCE is concerned, an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*." (underlined emphasis added, italicized emphasis in original). *See also* PTC JCE Decision, para. 38.

criminal plan with the shared intent to commit crimes within the jurisdiction of the ECCC.[652] Claiming that he intended this result – especially without providing any evidence of this intent – is not enough to support a *prima facie* case of JCE I.[653]

267. The OCIJ's conclusion that a JCE can exist when crimes were merely the result of the non-criminal policies used to implement a non-criminal common plan departs from established jurisprudence at the *ad hoc* tribunals. This standard appears to be lower even than the heavily criticized[654] standard which has developed at the SCSL – that the criminal plan must merely "contemplate" the commission of crimes within the SCSL's Statute as the means of achieving an objective.[655] As observed by Judge Fisher in her partially dissenting opinion in the *Sesay et al.* Appeal Judgement, "The doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application. International criminal tribunals must take such warnings seriously, and ensure that the strictly construed legal elements of JCE are consistently applied to safeguard against JCE being overreaching or lapsing into guilt by association."[656]

268. If the OCIJ found through inference that Mr. IENG Sary did actually participate in a common criminal plan with the shared intent to commit crimes, not only must this have been the only reasonable inference that could be drawn,[657] the OCIJ was required to set out "the facts and circumstances from which the inference is sought to be drawn."[658] It did not do so. The "facts" and circumstances it sets out in relation to Mr. IENG Sary's participation or contribution to the common plan do not support an inference that he shared the intent to perpetrate a crime.[659] They simply support an inference that he

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[652] *See* PTC JCE Decision, para. 39. "JCE I requires a shared intent to perpetrate the crime(s)."
[653] "[A] *prima facie* case ... is understood to be a credible case which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge." Closing Order, para. 1325, *quoting Kordić et al.*, Review of the Indictment, 1995 (no page or paragraph number or exact date or case number provided) (emphasis added).
[654] *See, e.g.*, Wayne Jordash & Penelope Van Tuyl, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone*, 8 J. INT'L CRIM. JUST. 591 (2010); Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes*, 7(2) J. INT'L CRIM. JUST. 353 (2009).
[655] *Brima* Appeal Judgement, para. 76.
[656] *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, 26 October 2009, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, para. 44.
[657] *Brđanin* Appeal Judgement, para. 429.
[658] *Prosecutor v. Krnojelac*, IT-97-25-T, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.
[659] *See* Closing Order, para. 1534.

intended to participate in a plan which was not inherently criminal and which was intended to be implemented through policies which were not inherently criminal.

269. Furthermore, as crimes against humanity and genocide require specific intent, the OCIJ was required to set out the facts and circumstances from which it inferred that Mr. IENG Sary possessed this specific intent. As explained by the ICTY *Kvočka* Trial Chamber and affirmed by the Appeals Chamber, "[w]here the crime requires special intent ... the accused must also satisfy the additional requirements imposed by the crime, such as the intent to discriminate on political, racial, or religious grounds if he is a co-perpetrator."[660] The OCIJ did not explain what evidence it found to support such intent on the part of Mr. IENG Sary.

b. The OCIJ erred in holding that the common criminal plan expanded to include genocide, absent a showing of specific intent

270. The OCIJ found:

> With regard to the policies targeting Chams and Vietnamese, the plan to eliminate these groups may not have existed until April 1977 for the Vietnamese and from 1977 for the Cham. From that moment the members of the JCE knew that the implementation of the common purpose expanded to include the commission of genocide of these protected groups. Acceptance of this greater range of criminal means, coupled with persistence in implementation, amounted to an intention of the JCE members to pursue the common purpose through genocide.[661]

271. ICTY jurisprudence allows for the possibility that the common criminal plan at the heart of a JCE may expand and that acceptance of this expansion on the part of the JCE members may be determined by inference.[662] The problem with the OCIJ's finding lies in the fact that genocide is a specific intent crime. Knowledge and acceptance of genocide do not amount to the specific intent to destroy, in whole or in part, a group, as such. This was explained by the ICTY *Krstić* Appeals Chamber. It found:

> all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of

[660] *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Appeal Judgement"), paras. 109-10.
[661] Closing Order, para. 1527 (emphasis added).
[662] *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009, para. 163.

specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.[663]

272. The issue is not whether the OCIJ has set forth sufficient evidence to support an inference of genocidal intent. This is a matter for the Trial Chamber. The problem lies in the fact that the OCIJ erroneously concluded that the specific genocidal intent required for a JCE I participant may be inferred from mere knowledge of the JCE's expansion and acceptance of that knowledge. It may not.

J. GROUND TEN: THE OCIJ ERRED IN LAW IN ITS APPLICATION OF PLANNING, INSTIGATING, ORDERING, AND AIDING AND ABETTING

1. The OCIJ erred in failing to specify the particular acts or particular course of conduct which forms the basis for liability

273. The OCIJ has failed to set out a sufficient legal characterization of the facts in order to support liability for planning, instigating, aiding and abetting, and ordering. According to the Pre-Trial Chamber, "Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the commission of the alleged crimes, the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question must be identified."[664] The OCIJ did not do this, but simply stated in each relevant section of the heading "Legal Findings on Modes of Responsibility" that:

> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan**, planned through their acts of knowingly and willingly participating in designing the commission of the following crimes:
> ...
> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** instigated others in the commission of the following crimes:
> ...
> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan**, aided and abetted the commission of the following crimes:
> ...
> Pursuant to the evidence set out in the 'Roles of the Charged Persons' section of this Closing Order, there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** ordered their subordinates (the RAK; Zone, sector, district members; local militia and cadre; security office staff; and supervisors and unit chiefs of worksites and cooperatives) which contributed to the commission of the following crimes...[665]

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[663] *Krstić* Appeal Judgement, para. 134 (emphasis added).
[664] PTC Decision on *Duch* Closing Order, para. 49 (emphasis added).
[665] Closing Order, paras. 1545, 1548, 1551, 1554.

274. The particular acts or particular course of conduct that would satisfy each different form of liability applied was not alleged. The "Roles of the Charged Person" section does not explain with any clarity or precision how these forms of responsibility apply. It does not, for example, explain the way in which Mr. IENG Sary allegedly fulfilled the necessary criteria for ordering: "Criminal responsibility for ordering results when person in a position of authority gives or transmits implicitly or explicitly, the order to commit a crime, with the intention or the awareness of the real probability[666] that the crime may be committed during the execution of the order."[667] Nor does it ever claim that Mr. IENG Sary instigated any crimes. Because the OCIJ failed to set out the particular acts or particular course of conduct which would support the application of planning, instigating, aiding and abetting, or ordering, the portion of the Closing Order applying these forms of liability must be struck as procedurally void.

2. The OCIJ erred in stating and applying the incorrect *mens rea*

275. The OCIJ set out the incorrect *mens rea* with regard to planning, instigating, aiding and abetting, and ordering. With regard to planning, the OCIJ stated, "Criminal responsibility for planning results as soon as one or more people form the intention to commit criminal behaviour, constituting one or more crimes. This behaviour must involve determining the commission of crimes charged and the person must have acted with the intention or the awareness of the real probability that crimes may be committed during the execution or implementation of the plan."[668] The OCIJ erred in stating that the *mens rea* is either intention or "acting with awareness of the real probability." The correct *mens rea*, according to the *Duch* Trial Chamber[669] and jurisprudence from the *ad hoc* tribunals[670] is intention or awareness of the "substantial likelihood" rather than the "real probability." The OCIJ likewise made the same mistake concerning the *mens rea* for instigating[671] and ordering.[672]

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[666] *See* discussion in the following section for the correct *mens rea*, which is actually "awareness of the substantial likelihood" rather than "awareness of the real probability."
[667] Closing Order, para. 1553.
[668] *Id.*, para. 1544 (emphasis added).
[669] *Duch* Trial Judgement, para. 519.
[670] *Nahimana* Appeal Judgement, para. 479; *Kordić* Appeal Judgement, para. 31; *Limaj* Trial Judgement, para. 513.
[671] The OCIJ states, "These acts or omissions must have been determinative in the commission of the crimes charged and the person must have the intention or awareness of the real probability that crimes may be committed during the execution resulting from such instigation." Closing Order, para. 1547 (emphasis added). The correct *mens rea*, according to the *Duch* Trial Chamber and jurisprudence from the *ad hoc* tribunals is intention or awareness of the "substantial likelihood" rather than the "real probability." *See Duch* Trial Judgement, para. 524; *Kordić* Appeal Judgement, para. 32; *Limaj* Trial Judgement, para. 514.

276. The OCIJ made a similar mistake concerning the *mens rea* for aiding and abetting, stating that it is "intention or the awareness of the real probability that [the] crime may be committed."[673] Jurisprudence from the *ad hoc* tribunals[674] shows that knowledge or awareness is required, but the requisite knowledge is the "knowledge that the acts performed assist the commission of the specific crime" not the mere knowledge of a "probability" that the acts performed could assist with commission. The OCIJ also fails to state that knowledge of the *mens rea* of the principal perpetrator is required.[675]

277. It is possible that the OCIJ made these errors concerning the applicable *mens rea* due to its obligation to determine whether there is a "'probability' of guilt" at this stage, rather than to determine whether Mr. IENG Sary's guilt has been established beyond a reasonable doubt.[676] It is otherwise unclear where the OCIJ's new *mens rea* standard of "real probability" could come from, considering that the jurisprudence at the ECCC and the *ad hoc* tribunals routinely refers to "substantial likelihood" rather than "real probability."

278. The OCIJ's standard for determining the sufficiency of the charges cannot be mistaken for the requisite *mens rea* necessary to apply a form of liability. The *mens rea* of a form of liability may not be altered at different stages of the proceedings. If the OCIJ could not find that Mr. IENG Sary had the correct *mens rea* necessary to apply a certain form of liability, that form of liability simply may not be applied.

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[672] The OCIJ states that "Criminal responsibility for ordering results when person in a position of authority gives or transmits implicitly or explicitly, the order to commit a crime, with the intention or the awareness of the real probability that the crime may be committed during the execution of the order." Closing Order, para. 1553 (emphasis added). The correct *mens rea*, according to the *Duch* Trial Chamber and jurisprudence from the *ad hoc* tribunals is intention or awareness of the "substantial likelihood" rather than the "real probability." *See Duch* Trial Judgement, para. 528; *Kordić* Appeal Judgement, para. 30: "[T]he Appeals Chamber has held that a standard of *mens rea* that is lower than direct intent may apply in relation to ordering under Article 7(1) of the Statute. The Appeals Chamber held that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime." *See also Blaškić* Appeal Judgement, para. 166; *Nahimana* Appeal Judgement, para. 481.

[673] Closing Order, para. 1550 (emphasis added).

[674] *See Prosecutor v. Seromba*, ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement"), para. 56: "The requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. In particular, as correctly outlined by the Trial Chamber, in cases of crimes requiring specific intent, such as genocide, it is not necessary to prove that the aider and abettor shared the *mens rea* of the principal, but that he must have known of the principal perpetrator's specific intent." *See also Prosecutor v. Muhimana*, ICTR-95-1b-A, Judgement, 21 May 2007, para. 189; *Ntagerura* Appeal Judgement, para. 370.

[675] *Duch* Trial Judgement, para. 535; *Prosecutor v. Mpambara*, ICTR-01-65-T, Judgement, 11 September 2006, para. 16: "The aider and abettor need not (although he or she may) share the principal's criminal intent, but must at least know that his or her acts are assisting the principal to commit the crime."

[676] *See* Closing Order, "Standard of Evidence" section, paras. 1320-26.

279. It is unclear whether this is simply a mistake in translation, or whether the OCIJ has lowered the requisite *mens rea* for these forms of liability. The Defence requests the Pre-Trial Chamber to ensure that there is evidence to support the correct *mens rea* before allowing these forms of liability to remain in the Closing Order (should they not be struck for other reasons).

280. The OCIJ also erred in applying the appropriate *mens rea* for each of these forms of liability in another respect: it found that Mr. IENG Sary could be liable for planning, instigating, aiding and abetting, and ordering rape "in the context of" forced marriage.[677] If the requisite *mens rea* for each of these forms of liability is either intent or awareness of the real probability/substantial likelihood, the OCIJ would have been required to show more than that Mr. IENG Sary intended or was aware of forced marriages or that rapes occurred during forced marriages. To apply these forms of liability to this crime, the OCIJ must have evidence that Mr. IENG Sary either intended the rapes to occur or that he knew that there was a substantial likelihood that they would occur. While the sufficiency of the evidence will be assessed at the trial stage, the Defence notes that the OCIJ has set out no evidence whatsoever that this was the case.

3. The OCIJ erred in holding that these forms of liability could be applied either "additionally or in the alternative"

281. The OCIJ stated, after discussing JCE, that "[a]dditionally or in the alternative, one or more of the modes of responsibility described below [planning, instigating, ordering, and aiding and abetting] apply to the instant case."[678] It is erroneous to state that these forms of liability may be applied in addition to commission via JCE. A person may not be held liable for both committing a crime and for planning the same crime. "Where an accused is found guilty of having committed a crime, he or she cannot at the same time be convicted of having planned the same crime. Involvement in the planning may however be considered an aggravating factor."[679] This is likewise true for instigating,[680] ordering[681] and for aiding and abetting.[682] If the OCIJ intended to find that Mr. IENG

[677] *See* Closing Order, paras. 1545, 1548, 1551, 1554.
[678] *Id.*, para. 1542 (emphasis added).
[679] *Brđanin* Trial Judgement, para. 268. *See also Kordić* Trial Judgement, para. 386: "[A] person found to have committed a crime will not be found responsible for planning the same crime."
[680] *Blaškić* Appeal Judgement, paras. 91–92; *Kvočka* Appeal Judgement, para. 104; *Kordić* Appeal Judgement, paras. 33–35; *Čelebići* Appeal Judgement, para. 745; *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, Appeal Judgement, 23 May 2005, paras. 81–82, 91; *Prosecutor v. Milutinović et al.*, IT-05-87-T, Judgement, 26 February 2009, para. 77.
[681] *Stakić* Trial Judgement, para. 445.

Sary committed a certain crime or crimes while only planning, instigating, ordering, or aiding and abetting another crime or crimes, this should have been set out clearly and with specificity. Instead, the OCIJ erroneously stated that Mr. IENG Sary has committed each crime in the Closing Order through his participation in a JCE[683] (failing to note that JCE is not a valid form of commission for the national crimes charged) and also that he may be liable for genocide, crimes against humanity, and grave breaches through planning, instigating, ordering, and aiding and abetting.[684]

4. Other errors relating to planning, instigating, ordering, and aiding and abetting

282. Concerning planning, the OCIJ failed to state that in order for liability to arise through planning, the planning must be a substantially contributing factor to the criminal conduct.[685] Failure to take this necessary element of planning into account may have caused the OCIJ to apply this form of liability erroneously. Concerning aiding and abetting, the OCIJ stated that the "acts or omissions must have had an important effect on the commission of the crime by the main perpetrator before, during or after the commission."[686] This may differ from the standard applied by the *Duch* Trial Chamber[687] and the *ad hoc* tribunals,[688] which require a "substantial effect" rather than an "important effect."

K. GROUND ELEVEN: THE OCIJ ERRED IN LAW BY HOLDING THAT THE ECCC HAS JURISDICTION TO APPLY COMMAND RESPONSIBILITY AND IN ITS APPLICATION OF COMMAND RESPONSIBILITY SHOULD IT BE FOUND TO BE APPLICABLE AT THE ECCC

1. The OCIJ erred in law in holding that the ECCC has jurisdiction to apply command responsibility, as it did not exist in customary international law in 1975-79

283. As discussed *supra*, customary international law can only be created through (a) general and consistent State practice which is an expression of (b) *opinio juris*.[689] State

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[682] *Prosecutor v. Simić et al.*, IT-95-9-T, Judgement, 17 October 2003, para. 138: "The Appeals Chamber recently confirmed that an accused found criminally liable for his participation in a joint criminal enterprise should be regarded as having 'committed' that crime, as opposed to having aided and abetted the crime; in other words, participation in a joint criminal enterprise is a form of co-perpetration."
[683] Closing Order, para. 1540.
[684] *Id.*, paras. 1545, 1548, 1551, 1554.
[685] *Duch* Trial Judgement, para. 518.
[686] Closing Order, para. 1550 (emphasis added).
[687] *Duch* Trial Judgement, para. 533.
[688] *See Seromba* Appeal Judgement, para. 44; *Prosecutor v. Ndindabahizi*, ICTR-01-71-A, Judgement, 16 January 2007, para. 117; *Prosecutor v. Strugar*, IT-01-42-T, 31 January 2005, para. 349.
[689] Professors Fletcher and Ohlin explain that "[c]ustomary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them." Fletcher & Ohlin, *Reclaiming Fundamental Principles*, at 556. It must be noted that "[i]t is notoriously difficult to establish

practice should be "extensive and virtually uniform in the sense of the provision invoked."[690] As for *opinio juris,* the ICJ has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[691] Justice Robertson of the SCSL has explained that "[i]t should go without saying that the question of whether and when a particular conduct becomes criminal must be carefully separated from the question of whether it *should* be or have been criminalized."[692]

284. In 1975-79, command responsibility did not have customary international law status: **a.** the application of command responsibility in certain post-World War II cases was not enough to create customary status; **b.** State practice in 1975-79 was not widespread or uniform enough to have created a norm of customary international law; and **c.** Additional Protocol I[693] did not codify customary international law in this respect.[694]

a. Post-World War II case law does not clearly define the elements of command responsibility

285. While the idea that a commander must have responsible command of his troops has existed for centuries,[695] the post-World War II tribunals were the first to link the concept of command responsibility to criminal liability.[696] However, as Professor Damaska explains:

> one vainly leafs through dusty volumes containing these treaties for any trace of the notion that a military commander is primarily liable for war crimes committed

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sufficient consensus to validate a rule as customary international law." *Id. See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 35), IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010, D97/14/5, ERN: 00429213-00429253, Annex A, Section II F for an in-depth discussion of the creation of customary international law.

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

[691] *Nicaragua v. United States*, para. 207.

[692] Justice Robertson Dissent, para. 7.

[693] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), 8 June 1977.

[694] Additional Protocols I and II may not be relied upon for anything other than their potential to express customary international law. Additional Protocols I and II were only ratified by Cambodia on 14 January 1998.

[695] *See* Martinez, at 661. "Scholars have traced the notion that a military commander is responsible for the actions of his troops at least as far back as Sun Tzu's writings on military discipline in 500 BC; it was part of European military practice as early as the 1400s; and it had a place in the American Articles of War enacted in 1776."

[696] *See* Ambos, *Superior Responsibility*, at 825. *But see* Jason Sengheiser, *Command Responsibility for Omissions and Detainee Abuse in the War on Terror*, 30 T. JEFFERSON L. REV. 693, 702-03 (2008). "At the end of World War I, command responsibility for failing to prevent or punish illegal acts was recognized for the first time in an international context in the report of the International Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. This report recommended the establishment of a tribunal for the prosecution of those who, among other things, 'ordered, or with knowledge thereof and power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing violations of the laws or customs of war.' However, these principles were not applied because there was to be no international tribunal until after World War II."

> by his soldiers. The language of these treaties suggests no more than that a superior whose troops commit a war crime is subject to some form of disciplinary or criminal punishment: its nature remains undetermined. In fact, as late as the immediate post-World War II period, treaty law still limited the scope of command responsibility to those superiors who either personally committed war crimes, were accomplices in them, or ordered those crimes to be committed.[697]

286. Although some post-World War II trials applied various notions of command responsibility as a form of liability, none of the statutory texts creating the post-World War II tribunals – the IMT Charter, Control Council Law No. 10, or the IMTFE Charter – actually contained provisions setting out this form of liability. The United States's proposal that a command responsibility provision be included in the Nuremberg and IMTFE Charters did not garner the requisite support for inclusion.[698]

287. The post-World War II trials are of limited value in assessing the existence of command responsibility in customary international law: the verdicts were short and contained limited, if any, legal reasoning. Crucially, the contours of this form of liability were wholly unsettled: the cases were grossly inconsistent concerning the requisite *mens rea*.

288. In the famous *Yamashita* case, individual criminal responsibility was imposed based on the concept of responsible command. The United States Supreme Court determined the existence of this concept to be based on Articles 1 and 43 of the Annex to the Fourth Hague Convention of 1907, Article 19 of the Tenth Hague Convention and Article 26 of the Geneva Red Cross Convention of 1929.[699] In his dissenting opinion, Justice Murphy poignantly argued that that these provisions did not impose individual responsibility on a commander to control his troops, stating: "[i]t seems apparent beyond dispute that the word 'responsible' was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances."[700]

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[697] Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 485 (2001) ("Damaska").
[698] Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT'L L. 89, 105-06 (2000).
[699] *In re Yamashita*, 327 U.S. 1, 15-16 (1946).
[700] *Id.*, at 34.

289. By a majority, the court appeared to endorse a strict liability[701] standard to convict General Yamashita by defining the standard as, "an unlawful breach of duty ... [by] an army commander to control the operations of the members of his command by 'permitting them to commit' the extensive and widespread atrocities specified."[702] As General Yamashita had neither committed nor directed the criminal acts, Justice Murphy's main argument against this decision was indeed the lack of a knowledge element, or *mens rea*. He opined that "had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different."[703] Similarly, Justice Rutledge, in his dissent stated that "mass guilt we do not impute to individuals, perhaps in any case, but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so."[704]

290. In contrast, in the *High Command* case in establishing the guilt of a defendant for command responsibility, the court stated that "[a] high commander cannot keep completely informed of the details of military operations of subordinates... Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations."[705] The court also stated that "not only must knowledge be established [by the Prosecution] but the time of such knowledge must be established" as well.[706] In the *Hostage* case, applying yet another

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[701] Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 294 (1995). "General Yamashita had no way of knowing that he would be judged against the strictest standard ever devised to hold a commander responsible for the actions of his subordinates." *See* also, Martinez, at 641: "The Yamashita decision has cast a long shadow over the development of superior responsibility doctrine, as both the first modern case to apply the doctrine and the case most often criticized for allowing conviction based on negligence or, perhaps, even strict liability."

[702] *In re Yamashita*, 327 U.S. 14.

[703] *Id.*, at 39.

[704] *Id.*, at 43-44 (emphasis added).

[705] *United States v. Wilhelm von Leeb et al.*, Vol. XII. Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 ("*High Command* case"), p. 76.

[706] *Id.*, at 80.

standard, the tribunal held that a superior is liable only for acts that he knew about or "ought to have known about."[707]

291. The "greatest shortcoming [of these cases] is that they express a variety of inconsistent views on the mental state required for liability – sometimes, unfortunately, within the same decision. In this way, they foreshadowed much of the confusion that has accompanied the doctrine in the ICTY and ICTR."[708] Notably the ICTY *Halilović* Trial Chamber found that, "post World War II case law *was not uniform* in its determination as to the nature of the responsibility arising from the concept of command responsibility."[709]

292. This lack of clarity led the United Nations War Crimes Commission to take the position in 1949 that "the principles governing [command responsibility] ... are not yet settled."[710] Besides the inconsistencies as to the applicable *mens rea*, the post-World War II cases that employed command responsibility cannot be considered to have significant precedential value as many of these cases were criticized and de-legitimized for applying "victor's justice."[711] On *Yamashita*, for example, Professor Ambos writes, "[a]lthough one should not go so far as to negate *any* precedential value of the *Yamashita* decision, it cannot be denied that its mixture of technical-legal flaws, as particularly criticized in

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[707] *United States v Wilhelm List et al.*, Vol. VIII, Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law No. 10 ("*Hostage* case"), p. 89. "A corps commander must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which the corps commander knew or ought to have known about."

[708] Martinez, at 647-48. *See also* Hessler, at 1281. "The post-war tribunals reached no consensus in specifying the mental elements of command responsibility." *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010, D345/3, ERN: 00475746-00475757, Annex, for a discussion of how the *mens rea* standard has been applied at the *ad hoc* tribunals.

[709] *Prosecutor v. Halilović*, IT-01-48-T, Judgement, 16 November 2005 ("*Halilović* Trial Judgement"), para. 48 (emphasis added).

[710] As quoted in Ambos, *Superior Responsibility*, at 831.

[711] *See* RICHARD H. MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL 16 (1971). "[W]here the present state of international law was unclear or unsatisfactory - as, for example, in regard to individual responsibility for acts of state - then the Big Four would codify international law in such a way that German and Japanese acts became criminal and individual enemy leaders became accountable." *See also* Damaska, at 486-87. "It does not require deep immersion into the study of decisions rendered by post World War II military courts to realize that they are not the most obvious wellspring from which one would expect the demiurges of modern international law to drink for inspiration. That these courts faced unsavory individuals charged with horrendous crimes should not blind us to the fact that the legal standards they crafted (especially in the Far East) were deficient in terms of our current understanding of criminal law with humanitarian aspirations. As a well-known international scholar remarked long ago, these standards were frequently such as 'to make a lawyer wish to forget all about them at the earliest possible moment.' Their general characteristic, most relevant for present purposes, was an unabashed severity that can rightly be regarded as the principal source of the escalations of culpability inherent in imputed command responsibility." *See also* Hessler, at 1275. "Most 'decisions' were attempts by a trial forum to marshal *all* the possible legal, moral, and evidentiary support for its verdict."

Judge Rutledge's dissent, and ideological-racial prejudice, as recently demonstrated by Prévost's study, severely hampers its legal and, above all, moral value."[712]

b. State practice does not show that command responsibility existed in customary international law in 1975-79

293. Most States, like Cambodia, did not have specific command responsibility provisions in their penal codes in 1975-79.[713] Where national legal regimes did contain such provisions, these provisions were not uniform enough to be the basis of the widespread and consistent State practice required to find customary international law.[714] According to Professor Bantekas, after World War II there was a "decline in the use of the doctrine of superior responsibility for a period of over thirty years. During this time national forums, conscious of the political implications of such charges, were reluctant to convict any officer for the crimes of their subordinates.... Additionally, no consensus concerning the appropriate *mens rea* could be reached by the international community."[715]

294. Following World War II, command responsibility was added to the military handbooks of certain States. For example, the U.S. Army Field Manual on the Law of Warfare of 1956 stated that "military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control... The commander is ... responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he

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[712] Ambos, *Superior Responsibility*, at 827. *See also* Justice Murphy's dissent in *Yamashita*, as quoted in Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 35 (1973) (emphasis added). "He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge."

[713] Professor Damaska explains that "[the command responsibility provision of the ICTY Statute] extends the boundaries of liability in international criminal law substantially beyond limits established by national legal systems. A superior who does not take 'necessary and reasonable' steps to prevent a crime of his underlings, or does not punish them after they have committed it, may be made personally liable for that crime, even if he did not 'plan, instigate, order, commit, or otherwise aid and abet' the criminal activity. The basis of liability under this paragraph is hence not participation in terms of conventional categories of municipal law: rather, the superior is held accountable for the criminal acts of his underlings on stricter, more exotic grounds - the failure to prevent and the failure to punish. Both have ramifications that are difficult to reconcile with principles that inform municipal criminal law." Damaska, at 461 (emphasis added). *See also* the National Implementing Legislation Database on the ICC website, which lists the small number of countries that currently have command responsibility implementing legislation.
Available at http://iccdb.webfactional.com/data/keyword/569/.

[714] "[N]ational definitions of international crimes are often underinclusive, overinclusinve or both. ... Such discrepancies are also found abundantly in national definitions of ... ancillary issues like command responsibility." FERDINANDUSSE, at 118-19.

[715] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 574-75 (1999) ("Bantekas, *The Contemporary Law of Superior Responsibility*") (emphasis added).

fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof."[716]

295. Notwithstanding the command responsibility standard in its Army Field Manual, the US military courts did not apply this standard when dealing with the trial of Captain Ernest Medina for the My Lai massacre that occurred during the Vietnam War. During the 1971 trial of Captain Medina, the military judge instructed the panel that for a conviction through command responsibility, the law required actual knowledge:

> [A] commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act.[717]

296. Further evidence that the standard was unclear is found in a 1982 article written by US Army Colonel William Eckhardt, in which he explained that the standard for command responsibility was not clear and that the knowledge expected of an officer must be precisely defined.[718] He states that "[a]n examination of the current and proposed new standards reveal an alarmingly unsettled and dangerously inarticulated expression of the most basic social contract between a soldier and the citizenry he serves."[719]

297. The fact that there is little evidence that most States included and actually applied command responsibility provisions in their national legislation in 1975-79 and that there is evidence that the constituent elements for command responsibility were not consistently applied within and between different States – when applied at all – demonstrates that command responsibility was not clearly established in customary international law at that time.

c. Additional Protocol I did not codify customary international law related to command responsibility

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[716] As quoted in *Prosecutor v. Hadžihasanović et al.*, IT-47-01-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para. 79 (emphasis added). Other States, however, only included provisions which would punish commanders for their positive acts, rather than omissions. The British Manual of Military Law of 1958 copied the American Field Manual, but removed the section that held superiors responsible when they had "actual knowledge, should have knowledge..." *Id.*, para. 80. It therefore restricted liability to situations in which subordinates committed crimes pursuant to a superior's orders.

[717] As quoted in Major James D. Levine II, *The Doctrine of Command Responsibility and its Application to Superior Civilian Leadership: Does the International Criminal Court have the Correct Standard?*, 193 MIL. L. REV. 52, 66-67 (2007) (emphasis added).

[718] Colonel William G. Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 MIL. L. REV. 1 (1982). *See* especially p. 18-21.

[719] *Id.*, at 1.

298. Despite the use of command responsibility as a form of liability in certain post-World War II trials, this concept was not codified in the 1949 Geneva Conventions. Additional Protocol I came into effect on 8 June 1977. Articles 86 and 87,[720] which deal with command responsibility in international armed conflicts, mark the first time that command responsibility imposed penal sanctions for a failure to act in international law.

299. Additional Protocol I cannot be considered to codify existing customary international law related to command responsibility given the inconsistent or lacking State practice and doctrinal divergence that the post World War II case law exemplified. As shown above, State practice and post World War II case law, was inconsistent; reflective of the lack of a settled customary norm. The glaring silence of Article 86(2) as to the nature of criminal responsibility for command responsibility is compelling evidence of the persisting doctrinal confusion that accompanied this form of liability.

300. The imputed knowledge element found in Article 86 of Additional Protocol I was redrafted five times before being further amended.[721] This demonstrates that what ultimately was agreed upon was based on negotiations and compromise between States and does not necessarily reflect the state of customary international law. Furthermore, by the end of 1978, while 54 States had signed on to Additional Protocol I (Cambodia not being one of them),[722] only 3 States had ratified it: El Salvador, Ghana, and Libya.[723]

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[720] Article 86 states, "Failure to act 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so. 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."
Article 87 states, "Duty of commanders 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof."

[721] *See* Bantekas, *The Contemporary Law of Superior Responsibility*, at 591.

[722] *See* ICRC list of States Parties, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.

[723] In contrast, in 2001, the *Čelebići* Appeals Chamber considered Article 87 of Additional Protocol I to reflect customary international law since by the end of 1992, 119 States had ratified it. *Čelebići* Appeal Judgement, fn. 251.

Most States did not ratify Additional Protocol I until much later, if at all.[724] Consider the five permanent members of the UN Security Council: Russia ratified it in 1989, the United Kingdom in 1998, and France in 2001.[725] China and the United States have not yet ratified it.[726] This does not show the widespread, consistent State practice necessary to form customary international law. "There are good reasons to be suspicious of promises that do not blossom into full-fledged conduct. Either the alleged rule is an empty piety because it is too general or, worse still, the statements are disingenuous."[727] According to Professor Martinez, "Additional Protocol I obfuscated rather than clarified the *mens rea* requirement" of command responsibility in international law.[728] Article 86 of Additional Protocol I cannot give a consistent definition of command responsibility. The commentary to Additional Protocol I notes that within the final English and French versions of Article 86 there seems to be a divergence in the requisite *mens rea* for command responsibility.

> In the first place, it should be noted that there is a significant discrepancy between the English version, 'information which should have enabled them to conclude', and the French version, 'des informations leur permettant de conclure', which means 'information enabling them to conclude'. In such a case the rule is to adopt the meaning which best reconciles the divergent texts, having regard to the object and purpose of the treaty, and therefore the French version should be given priority since it covers both cases.[729]

301. Furthermore, when Additional Protocol I was drafted in 1977, it was meant to impose obligations on States, not on individuals.[730] As Professor Damaska notes, Additional Protocol I:

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[724] A review of the dates of accession or ratification shows that most States ratified Additional Protocol I between 1985-95. Between 1985-90, there were 45 new ratifications/accessions and between 1990-95, there were 44 new ratifications/accessions.
See ICRC list of States Parties, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P.
[725] *Id.*
[726] *Id.*
[727] Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 Am. J. Int'l L. 747, 752 (2005). *See also* Fletcher & Ohlin, *Reclaiming Fundamental Principles*, at 557: "It is understandable that the pious leaders of the West ... would declare ... peremptory rules of CIL. Unfortunately, the piety of the West cannot coherently be considered a source of law."
[728] Martinez, at 653.
[729] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Commentary, para. 3545.
[730] *See* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5(1) J. INT'L CRIM. JUST. 1, 9 (2007). "Although these rules were initially addressed only to State Parties, they are now considered the basis of rules of responsibility for an individual's failure to act since the doctrine of superior responsibility and the major part of the offences established by the Geneva law (including AP I) have been 'individualized' by the ICC Statute and by national implementation laws." (emphasis added).

> refrained from determining the character of responsibility entailed... [I]ts provisions only stipulated that superiors who fail to prevent or repress the crimes of their subordinates shall not be absolved from responsibility for these crimes. The more specific determination of this responsibility – penal or disciplinary, primary or vicarious – was left to the domestic law of the ratifying states.[731]

302. Justice Robertson explains that to impose liability a criminal tribunal must first: identify whether the prohibition of certain conduct has become a rule of international law binding on States, before second: identifying whether the norm of international law has metamorphosed into a criminal law, for the breach of which individuals might be punished if convicted by the court.[732] During the time period at issue, Additional Protocol I was only meant to be binding on States. Thus, in this case, neither the first nor the second criteria are fulfilled.

2. The Closing Order is defective with regard to command responsibility and the portion of the Closing Order which relates to command responsibility is void

303. According to the *Duch* Pre-Trial Chamber, "An allegation of superior responsibility requires that not only what is alleged to have been the superior's own conduct, but also what is alleged to have been the conduct of those persons for whom the superior bears responsibility be specified with as many particulars as possible."[733]

304. According to ICTR jurisprudence (the Pre-Trial Chamber has previously stated that the jurisprudence of the *ad hoc* tribunals concerning the form of the indictment is relevant at the ECCC[734]):

> If the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6(3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[735]

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[731] Damaska, at 486.
[732] Justice Robertson Dissent, para. 12.
[733] PTC Decision on *Duch* Closing Order, para. 49 (emphasis added).
[734] PTC JCE Decision, para. 93.
[735] *Prosecutor v. Muvunyi*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 19 (emphasis added).

305. The OCIJ did not comply with this requirement of specificity. The OCIJ simply stated:

> there is sufficient evidence that **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** are responsible by virtue of superior responsibility by their effective control over their subordinates (the RAK; Zone, Sector, District Committee members; local militia and cadre; security office staff; and supervisors and unit chiefs of worksites and co-operatives) who committed the following crimes: GENOCIDE, by killing ... specifically, genocide of: (a) Cham (b) Vietnamese GRAVE BREACHES OF THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ... specifically: (a) wilful killing (b) torture or inhumane treatment (c) wilfully causing great suffering or serious injury to body or health (d) wilfully depriving a prisoner of war or civilian the rights of fair and regular trial (e) unlawful confinement of a civilian (f) unlawful deportation of a civilian CRIMES AGAINST HUMANITY ... specifically: (a) murder (b) extermination (c) enslavement (d) deportation (e) imprisonment (f) torture (g) rape in the context of forced marriage (h) persecution on political grounds (i) persecution on racial grounds of the Vietnamese (j) persecution on religious grounds of the Cham (k) persecution on religious grounds of Buddhists (1) other inhumane acts through 'attacks against human dignity', forced marriage, forced transfer and enforced disappearances. **Nuon Chea**, **Ieng Sary**, and **Khieu Samphan** knew or had reason to know that the commission of the crimes listed above, by their subordinates was imminent, and they failed in their duty to take the necessary measures to prevent the below crimes. Moreover, **Nuon Chea**, **Ieng Sary** and **Khieu Samphan** knew or had reason to know that these crimes had been effectively committed by their subordinates and they failed to fulfil their obligation to punish the perpetrators of these crimes.[736]

306. This statement fails to specify any particulars at all as to Mr. IENG Sary's conduct, who his subordinates were, the nature of the superior/subordinate relationship, evidence that Mr. IENG Sary exercised effective control over subordinates, what particular acts his subordinates committed which amounted to genocide, grave breaches, and crimes against humanity, what evidence supports Mr. IENG Sary's knowledge of these crimes by his subordinates, or what evidence supports a contention that he failed to prevent these crimes or punish the perpetrators. This statement is not specific enough to provide proper notice to Mr. IENG Sary of the way in which command responsibility will be applied in this case. Because the OCIJ failed to set out the particular acts or particular course of conduct which would support the application of this form of liability, the portion of the Closing Order referring to command responsibility must be struck as procedurally void.

3. The OCIJ erred in the application of command responsibility, should the ECCC be found to have jurisdiction to apply command responsibility

[736] Closing Order, para. 1559-60.

a. Command responsibility may only be applied to international armed conflicts

307. The OCIJ erred in failing to limit command responsibility to situations involving an international armed conflict. It may have found it unnecessary to consider this issue, as it found that an international armed conflict existed throughout the temporal jurisdiction period of the ECCC.[737] The issue of whether command responsibility is limited to situations of international armed conflict must be decided at this point, however, as the existence of an international armed conflict during the temporal jurisdiction of the ECCC is an issue which will be finally determined at trial. If an international armed conflict is found not to exist at trial, command responsibility may incorrectly be applied to Mr. IENG Sary if this limitation is not acknowledged.

308. The post-World War II tribunals which applied command responsibility solely dealt with cases set in the context of an international armed conflict; hence these tribunals could only create jurisprudence for cases set in the context of international armed conflict. Likewise, Additional Protocol I, which has been relied upon in support of the existence of command responsibility in modern customary international law[738] is applicable only to international armed conflicts. Additional Protocol II, which is applicable to non-international armed conflicts, does not contain a similar provision. There is no conventional basis for applying command responsibility to internal conflicts that occurred in 1975-79. In 1993, the International Committee of the Red Cross confirmed that command responsibility for war crimes applied only in international armed conflicts.[739]

309. Despite the lack of jurisprudence which would demonstrate that command responsibility could apply to internal armed conflicts, in 2003 the ICTY *Hadžihasanović* Appeals Chamber held that command responsibility is applicable to war crimes that occurred in internal armed conflicts.[740] Although the ECCC is not bound by such a

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[737] *Id.*, paras. 150-55.

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

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

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

determination made by an ICTY Chamber, it is useful to consider the Appeals Chamber's reasoning.

310. The *Hadžihasanović* Appeals Chamber did not consider the fact the command responsibility can be found in Additional Protocol I but not Additional Protocol II to affect its conclusion. It simply stated – without out referring to any authority – that:

> the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber considers that, at the time relevant to this indictment, it was, and that this conclusion is not overthrown by the play of factors responsible for the silence which, for any of a number of reasons, sometimes occurs over the codification of an accepted point in the drafting of an international instrument.[741]

311. This conclusion is flawed. As explained by Professor van Schaack:

> In this analysis, the ICTY largely overlooked obvious reasons why states may have chosen not to apply the doctrine to non-international armed conflicts when they were drafting Protocol II. Besides the fact that states have historically been more reluctant to develop binding rules addressing internal conflicts, they may have considered the doctrine inapplicable in such conflicts where armed forces may be disorganized and spontaneous, and lines of authority may be self-proclaimed, de facto, and decentralized. Indeed, the principle of unity of command--which states that there is only one commander at any given level of the military hierarchy with command authority over subordinates--may be undercut or entirely absent in the context of a non-international armed conflict.[742]

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

> It does not explain why the concept of responsible command, which imposes duties on the belligerents, automatically entails criminal responsibility for individuals. Nor does it explain why it is illogical for one concept of customary international humanitarian law to be applicable in international but not internal conflicts, while, nevertheless, conceding that not all of the principles of that law extend to both types of conflict. Indeed, one might argue that a different approach to command responsibility might be appropriate in a non-international armed conflict, because the armed forces involved in such conflicts are often less structured and well organised (particularly on the non-governmental side) than in international hostilities. It is also worth remembering that, only 10 years earlier, the International Committee of the Red Cross had taken the view that international law imposed no criminal responsibility at all for violations of the law of internal armed conflict.[743]

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[741] *Id.*, para. 29.
[742] van Schaack, at 145.
[743] Christopher Greenwood, CMG, QC, *Notes and Comments: Command Responsibility and the Hadžihasanović Decision*, 2.2 J. INT'L CRIM. JUST. 598, 601 (2004). Major Michael L. Smidt explains that "While Protocol I

313. The *Hadžihasanović* Appeals Chamber admitted that "[i]t is true that, domestically, most States have not legislated for command responsibility to be the counterpart of responsible command in internal conflict."[744] The lack of State practice and *opinio juris* to create command responsibility in internal armed conflicts cannot simply be ignored. If the ECCC could apply customary international law and if command responsibility were considered to be customary international law during this period, it could only be considered customary international law in relation to international armed conflicts.

b. Command responsibility may only be applied to military commanders

314. The OCIJ erred in holding that the "criminal responsibility of the superior applies at both to military superiors and to civilian superiors [sic]..."[745] Although command responsibility was sometimes applied to non-military superiors by the post-World War II tribunals,[746] there was no widespread, consistent State practice to hold non-military superiors accountable for the acts of their subordinates at that time or in 1975-79. The origin of the concept of command responsibility is found in "the peculiar culture of military organizations and is intertwined with other central concepts in the laws of war."[747] Professor Bassiouni notes:

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

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

[744] *Hadžihasanović* Decision on Interlocutory Appeal, para. 17.

[745] Closing Order, para. 1558. *See also* para. 1319.

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

[747] Martinez, at 661.

the world, which allows the compartmentalization of different aspects of the law.[748]

315. Further, Article 87 of Additional Protocol I makes specific reference to "military commanders"[749] and states that "commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol."[750] The Final Report of the Commission of Experts on Command Responsibility also stated that "most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused."[751]

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

1. Command responsibility requires causation

316. The OCIJ erred in failing to state that command responsibility may only be applied where there was a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a pre-existing legal duty to prevent and punish. If the post-World War II cases are evidence of customary international law, these cases demonstrate that customary international law requires that a superior may only be held liable through command responsibility where the underlying crimes occurred as a result of the superior's omission. The *Hostage* case, for example, required proof of a causative, overt act or omission from which guilty intent could be inferred.[752] In the *Schonfeld et al.* case, the Judge Advocate stated that the crimes must be "the natural result of the negligence of the accused; in other words, that a direction from [the accused], given at the correct time, would have prevented any unjustifiable killing taking place."[753]

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

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

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

[751] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) UN. Doc. S/1994/647, 27 May 1994, p. 16.

[752] *Hostage* case, p. 76.

[753] *Trial of Franz Schonfeld et al.*, Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Vol. XI, London: HMSO, 1948, p. 71.

317. The ICTY's position that a causation requirement is not necessary does not meet the requirements of customary international law. The *Čelebići* Trial Chamber stated that customary international law did not require proof of a causal relationship between the conduct of the accused and the crimes of his subordinates.[754] The *Blaškić* Appeals Chamber noted that the *Čelebići* Trial Chamber did not cite any authority for this statement;[755] however, subsequent judgments at the ICTY adopted this view without independent analysis.[756]

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

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

319. The OCIJ erred in failing to state that civilian superiors may only be held liable for an omission to prevent or punish when these superiors first had a duty to prevent or punish. According to Professors Zahar and Sluiter, although the requirement of a duty is not listed as a separate element of command responsibility in the Statutes of the *ad hoc* tribunals, "it remains implicit in the provision."[757] This is because "[a] general legal principle is that an omission will give rise to liability *only* if it is possible to establish a duty to act."[758]

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

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[754] *Čelebići* Trial Judgement, para. 398.
[755] *Blaškić* Appeal Judgement, para. 76.
[756] *See, e.g., Kordić* Appeal Judgement, paras. 830-32; *Halilović* Trial Judgement, para. 78; *Prosecutor v. Orić*, IT-03-68-T, Judgement, 30 June 2006, para. 338; *Brđanin* Trial Judgement, para. 280.
[757] ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 259 (Oxford University Press 2008).
[758] *Id.* (emphasis added).

321. The requirement of a nexus between the crimes and the civilian superior's authority would fit with the *Čelebići* Trial Chamber's statement that "[w]hile the criminal liability of a superior for positive acts follows from general principles of accomplice liability, ... the criminal responsibility of superiors for failing to take measures to prevent or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act."[759]

322. This requirement helps to protect against situations where a civilian superior is held liable for crimes committed by his subordinates despite the fact that these crimes had nothing to do with the nature of the superior-subordinate relationship. "[G]reat care must be taken lest an injustice be committed in holding individuals responsible for acts of others in situations where the link of control is absent or too remote."[760] This situation occurred in the ICTR *Musema* case. In *Musema*, the Trial Chamber held that Musema, a tea factory manager, was guilty of genocide because workers at his tea factory had committed genocide and he failed to prevent this or to punish them.[761] The flaw in the ICTR's reasoning is that Musema, as the tea factory manager, likely had the ability to punish his employees for failing in their duties at work, but this does not mean that he had the responsibility or authority to punish them for committing acts of genocide, which obviously had nothing to do with their work. Professor Zahar explains that the Trial Chamber's reasoning is misguided:

> It does not distinguish Musema from any ordinary factory director. Yet it cannot be that all business managers stand liable to be convicted for international crimes perpetrated by their employees for the reason only that they were linked to them through commonplace ties of labour. The commander envisaged [in the command responsibility provision of the ICTR Statute], in its classical (martial) form, was connected to his or her troops not by a mere supervisory link; he or she was at the core of a combat unit with powers of life and death...[762]

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

323. The OCIJ erred in failing to state that command responsibility could not be applied to specific intent crimes. Command responsibility is inconsistent with specific intent

[759] *Čelebići* Trial Judgement, para. 334 (emphasis added).
[760] *Id.*, para. 337.
[761] *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January 2000, paras. 894-95.
[762] Alexander Zahar, *Command Responsibility of Civilian Superiors for Genocide*, 14 LEIDEN J. INT'L L. 591, 603 (2001).

crimes.[763] This is because a commander may be liable under command responsibility when he did not intend a crime to take place and may not have even learned of its occurrence until after the fact. However, specific intent crimes, like genocide, require that liability only attach to a crime when it was carried out with the requisite specific intent.

> Command responsibility for genocide is inconsistent in several respects with the understanding of the crime of genocide as a narrow offense of specific intent. There are multiple issues warranting critique, as the theoretical inconsistencies extend across: (i) the fault requirements warranting conviction; (ii) the scope of the offender's pre-existing duty; (iii) inherent notions of personal responsibility and a general hostility in the criminal law to vicarious liability; and (iv) the proper labeling of the criminal conduct at issue.[764]

324. The ICTY and ICTR have found commanders liable for genocide despite the fact that the commanders themselves lacked the specific intent to commit genocide. However, as Professor Schabas notes, these judgments "indicate a profound judicial malaise with the entire concept."[765] Schabas explains that "[i]n the case of genocide, for example, it is generally recognized that the mental element of the crime is one of specific intent. It is logically impossible to convict a person who is merely negligent of a crime of specific intent."[766]

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

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

[765] SCHABAS, GENOCIDE IN INTERNATIONAL LAW, at 309.

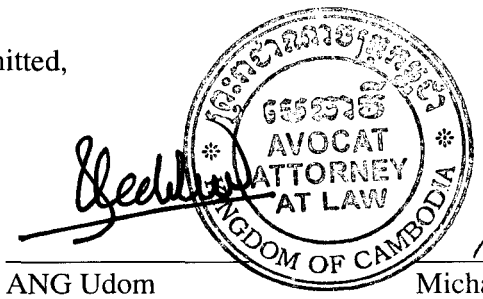
[766] William A. Schabas, *Canadian Implementing Legislation for the Rome Statute*, 3 Y.B. INT'L HUMANITARIAN L. 337, 342 (2000).

IV. RELIEF SOUGHT

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

a. DECLARE that the current appeal is admissible under Rules 74(3)(a) and 21;
b. HOLD that the ECCC does not have jurisdiction to indict Mr. IENG Sary, due to the principle of *ne bis in idem*;
c. HOLD that the ECCC does not have jurisdiction to indict Mr. IENG Sary, due to his validly granted and applicable Royal Pardon and Amnesty; or alternately:
d. HOLD that the ECCC does not have jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions, or National Crimes; or alternatively FIND that these crimes may not be applied against Mr. IENG Sary due to the OCIJ's failure in defining and applying these crimes against Mr. IENG Sary and/or its lack of specificity in the indictment;
e. FIND that JCE, as understood by the Pre-Trial Chamber to be applicable, may not be applied against Mr. IENG Sary;
f. STRIKE planning, instigating, aiding and abetting, and ordering from the Closing Order as they are applied to Mr. IENG Sary; and
g. HOLD the ECCC does not have jurisdiction over command responsibility; or alternatively STRIKE command responsibility with respect to Mr. IENG Sary from the Closing Order; or alternatively FIND the Defence's characterization of command responsibility applicable at the ECCC.

Respectfully submitted,



ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **25th** day of **October, 2010**