

**BEFORE THE PRE-TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**REPLY TO CO-PROSECUTORS' JOINT RESPONSE TO NUON CHEA, IENG SARY, AND IENG THIRITH'S APPEALS AGAINST THE CLOSING ORDER**

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## I. INTRODUCTION

1. Pursuant to Article 8.4 of the practice direction on 'Filing of Documents Before the ECCC'<sup>1</sup> and the directive of the Pre-Trial Chamber (the 'PTC') dated 24 November 2010,<sup>2</sup> counsel for the Accused Nuon Chea (the 'Defence') submit this reply to the 'Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals Against the Closing Order' (the 'Response').<sup>3</sup> In addition to those arguments set out in the Nuon Chea's 'Appeal Against the Closing Order' (the 'Appeal'),<sup>4</sup> the Defence submits that: (i) the Appeal is timely and admissible; (ii) the extension of the statute of limitation for the crimes contained in the 1956 Penal Code violates the principle of legality; and (iii) the Office of the Co-Prosecutors (the 'OCP') has failed to rebut the Defence position that, 'in confirming the jurisdiction of the tribunal,<sup>5</sup> the Co-Investigating Judges (the 'CIJs') erred in law by concluding that the application of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 (hereinafter, 'war crimes'), and the various modes of liability recognized in the Closing Order complies with the principle of legality'.<sup>6</sup>

## II. RELEVANT FACTS

2. Among other things, the Response contends:
  - a. The Appeal is time barred and inadmissible.<sup>7</sup> More specifically, the OCP suggests that: (i) the Defence's failure to challenge the tribunal's jurisdiction at an earlier stage in the proceedings amounts to a waiver of the Accused's right to do

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<sup>1</sup> Practice Direction ECCC/01/2007/Rev.5, Article 8.4 ('A reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification, in the ECCC official language which the party has elected under Article 2.2, of the response to which the participant is replying.')

<sup>2</sup> Notification of Document: Case File No 002–Nuon Chea, 24 November 2010 (in which the PTC informed the parties, *inter alia*, that: 'The Defence Teams are allowed to file written Replies to this Co-Prosecutor's Response within 10 (ten) days of its notification [...]').

<sup>3</sup> Document No D-427/3/6, 19 November 2010, ERN 00626531–00626650.

<sup>4</sup> Document No D-427/3/1, 18 October 2010, ERN 00614048–00614065.

<sup>5</sup> See Document No D-427, 'Closing Order', 16 September 2010, ERN 00604508–00605246.

<sup>6</sup> Appeal, para 1.

<sup>7</sup> See Response, paras 36–44.

so now;<sup>8</sup> and (ii) the Closing Order is not appealable as it merely ‘re-confirmed’ the ECCC’s jurisdiction over Nuon Chea.<sup>9</sup>

- b. The extension of the statute of limitation for crimes contained in the 1956 Penal Code does not violate Cambodia’s principle of legality.<sup>10</sup>
- c. Execution of the ECCC’s purported ‘general jurisdiction over international crimes and modes of liability’ would not contravene Cambodia’s principle of legality.<sup>11</sup>

### III. RELEVANT LAW

#### A. Admissibility of the Appeal

- 3. This Chamber has indicated that, ‘if the Closing Order confirms the jurisdiction of [the] ECCC’, the Accused ‘may consider the effect of Internal Rule 67(5) when read in conjunction with Internal Rule 74(3)(a)’.<sup>12</sup> Rule 67(5) provides that the Closing Order ‘is subject to appeal as provided in Rule 74’; and Rule 74(3)(a) permits an Accused to appeal against *any* order of the OCIJ ‘confirming the jurisdiction of the ECCC’.

#### B. 1956 Penal Code’s Statute of Limitation

- 4. The Defence hereby adopts and incorporates by reference the submissions set out at paragraphs 158–173 of ‘Ieng Sary Appeal Against the Closing Order’.<sup>13</sup>

#### B. The Principle of Legality

- 5. The Defence hereby incorporates by reference the submissions set out at paragraphs 12–22 of the Appeal. Additionally, Article 5(2) of the International Covenant on Civil and Political Rights (the ‘ICCPR’) provides as follows:

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,

<sup>8</sup> See Response, paras 36–38 (The OCP argues that: (i) the Provision Detention Order issued on 19 September 2007 confirmed the ECCC’s jurisdiction over Nuon Chea; and (ii) the Defence should have questioned the court’s ‘ultimate legitimacy’ by appealing that order.)

<sup>9</sup> See Response, para 43.

<sup>10</sup> See Response, paras 83–130.

<sup>11</sup> See Response, paras 131–167.

<sup>12</sup> Document No D-345/5/11, ‘Decision on Ieng Sary’s Appeal Against the Co-Investigating Judges’ Order on Ieng Sary’s Motion Against the Application of Command Responsibility’, 9 June 2010, ERN 00528364–00528370 (the ‘Command Responsibility Decision’), para 11.

<sup>13</sup> Document No D-427/1/6, 25 October 2010, ERN 00617486–00617631 (the ‘Ieng Sary Appeal’).

regulations, or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

As noted in the Appeal, Cambodia recognized a strict principle of legality in 1975–1979 ‘pursuant to law’, namely: Article 6 of the 1956 Penal Code.<sup>14</sup>

#### IV. ARGUMENT

##### A. The Appeal is Timely and Admissible

6. As the Closing Order has unequivocally confirmed the jurisdiction of the ECCC in various respects, it is therefore appealable by the Accused pursuant to the plain language of Rules 67(5) and 74(3)(a)—as previously noted by this Chamber.<sup>15</sup> Moreover, the Appeal was timely filed in accordance with Rule 75. The OCP’s arguments to the contrary<sup>16</sup> are specious. There is no provision in the Rules suggesting (let alone mandating) that jurisdictional challenges ‘must be brought earliest in time’.<sup>17</sup> Rather, when taking the form of an appeal to the PTC, such challenges may be brought in reaction to *any* order of the OCIJ ‘confirming the jurisdiction of the ECCC’, irrespective of whether previous jurisdictional orders have been issued by the CIJs. Simply put, each new order creates a new opportunity to appeal. Had the drafters of the Rules envisaged the restrictive approach advocated by the OCP, they would have expressed such intention explicitly.

##### B. Extension of the 1956 Penal Code’s Statute of Limitation Violates the Principle of Legality

7. The Defence hereby adopts and incorporates by reference the submissions set out at paragraphs 158–173 of the Ieng Sary Appeal. On this issue, the PTC should adopt the position of the international Trial Chamber judges,<sup>18</sup> which is the only approach consistent with Cambodia’s strict principle of legality.

<sup>14</sup> Article 6 of the 1956 Penal Code provides, in the original French, as follows: ‘*La Loi Pénale est sans effet rétroactif. Aucune infraction ne peut être réprimée par l’application de peines qui n’étaient pas prononcées pas la Loi auparavant qu’elle fut commise*’.

<sup>15</sup> See Command Responsibility Decision, para 11.

<sup>16</sup> See Response, paras 36–44.

<sup>17</sup> Response, para 37.

<sup>18</sup> See Ieng Sary Appeal, para 172 (citing Case 001, Document No E-187, ‘Decision on the Defence Preliminary Objections Concerning the Statute of Limitations of Domestic Crimes’, 26 July 2010, para 35 (where the Trial Chamber judges indicated 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’)).

**C. The Application of Genocide, Crimes Against Humanity,  
War Crimes, and the Various Modes of Liability Recognized  
in the Closing Order Contravenes the Principle of Legality**

***1. The Operative Principle of Legality at the  
ECCC is the One Set Out in the 1956 Penal Code***

8. Albeit an ‘extraordinary’ one,<sup>19</sup> the ECCC is—in the final analysis—a Cambodian court. And while it indeed occupies a unique position within the domestic legal order,<sup>20</sup> it remains (along with ‘ordinary Cambodian courts’<sup>21</sup>) an integral part of that order. The distinctions enumerated by the OCP<sup>22</sup> go a long way towards emphasizing the tribunal’s admittedly *sui generis* nature, yet they fall short of justifying the subordination of established domestic principles to less protective international ones.<sup>23</sup> Continued reference to the ECCC as an ‘internationalized’ institution<sup>24</sup> is merely a descriptive exercise without any legal effect; such characterization does not alter the fact that protections provided by Cambodian law must be given due effect at this tribunal. Accordingly, it is *Cambodia’s* principle of legality, as it existed in 1975–79, which must apply.<sup>25</sup> That principle is strictly enshrined in the 1956 Penal Code at Article 6,<sup>26</sup> which contains no exception such as the one provided in Article 15(2) of the ICCPR.<sup>27</sup> And the references in the former article to ‘law’ can only reasonably be interpreted to mean *law applicable in Cambodia at the relevant period*. As noted, genocide, crimes against humanity, and war crimes were not.<sup>28</sup>

<sup>19</sup> See Response, para 139.

<sup>20</sup> See Response, paras 137–142.

<sup>21</sup> See Response, paras 139.

<sup>22</sup> *Ibid.*

<sup>23</sup> See para 9, *infra*.

<sup>24</sup> See Response, para 138.

<sup>25</sup> See ANTONIO CASSESE, ED., *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* (Oxford 2009), p 438 (‘The principle of legality postulates that a person may only be held criminally liable and punished if, *at the moment when he performed a certain act, the act was regarded as a criminal offence by the relevant legal order.*’) (emphasis added).

<sup>26</sup> See Appeal, para 22; Response, para 165–167.

<sup>27</sup> Article 15(2) of the ICCPR provides: ‘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’. *N.B.* At least for part of the relevant period, the legality principle was constitutionalized in Cambodia *without exception for international crimes*. The 1972 Constitution, formally valid until January 1976, provided that laws shall not be retroactive, except for special provisions which are expressly stipulated therein. See 1972 Khmer Republic Constitution, Article 72.

<sup>28</sup> See Appeal, paras 10, 27–29.

**2. The ICCPR Does Not Allow for Derogation  
from Cambodia's Strict Principle of Legality**

9. The 'reason to depart from [the PTC and Trial Chamber] decisions confirming the ECCC's jurisdiction over international law'<sup>29</sup> is a misplaced emphasis on the international principle of legality. In invoking Article 15 of the ICCPR,<sup>30</sup> the OCP fails to take due account of an additional provision of the same covenant, one that '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'.<sup>31</sup> Article 5(2) of the ICCPR (applicable to these proceedings by virtue of the current Cambodian Constitution<sup>32</sup>) prohibits this or any other domestic court from restricting or derogating from Cambodia's strict national principle of legality, which—unlike Article 15 of the ICCPR—suffers no exception. Accordingly, that the execution of the regime envisaged by the ECCC Law (and advocated by the OCP) would not violate Article 15 is immaterial.<sup>33</sup> This is true irrespective of Article 5(2): Article 15 does not (and could not) prescribe domestic criminalization; it merely sets out the *minimum* standards applicable to national legislation. At the same time, it leaves room for more robust protection such as that provided by Article 6 of the 1956 Penal Code.<sup>34</sup> Given these factors, as well as the very definition of the principle of legality,<sup>35</sup> Article 15 surely presumes an act of domestic criminalization.

<sup>29</sup> See Response, para 136 (citing Document No D-97/16/10, PTC 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise', 20 May 2010, ERN 00486521–00486589, paras 45, 47–48, 69, 87; Case 001, Document No E-118, 'Judgment', 26 July 2010, ERN 00572517–00572797, para 30; and Document No C-22/I/74, 'Decision on Appeal Against Provisional Detention Order of Ieng Sary', 17 October 2008, ERN 00232976–00233004, paras 12–13).

<sup>30</sup> See Response, paras 145–146, 160–164.

<sup>31</sup> Ieng Sary Appeal, n 210 (citing Manfred Novak, UN Covenant on Civil and Political Rights: ICCPR Commentary 118 (NP Engel 2005)).

<sup>32</sup> See 1993 Constitution of the Kingdom of Cambodia, Article 31 (which states 'that 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 [...]').

<sup>33</sup> *N.B.* The OCP is correct to assert that '[t]he nature of the ECCC does not prevent it from applying international law'. Response, § G.2.2. Domestic courts are always free to do so, *assuming compliance with their national principles of legality*. Contrary to the OCP's claim, the Defense never suggested that the ICCPR is not 'applicable' before the ECCC. See Response, para 146.

<sup>34</sup> The ICCPR approach is comparable to the one endorsed by the European Court of Human Rights; see n 45, *infra*.

<sup>35</sup> See Cassese, n 25, *supra*.

**3. The Jurisdictional Provisions of the ECCC  
Law Cannot Secure Post Facto Criminalization**

10. While ‘the drafters of the ECCC Law [may have] intended to enable the ECCC to exercise jurisdiction over [...] specific international crimes’,<sup>36</sup> allowing the tribunal to actually do so would contravene ‘the overriding guarantees of fair trial’.<sup>37</sup> Contrary to the OCP’s position, there is indeed a ‘further pre-condition[...] on the application of those [international] laws’.<sup>38</sup> As demonstrated in the Appeal, domestic legislation specifically *criminalizing* the offence in question is a mandatory prerequisite for any application of international criminal principles within the national legal order.<sup>39</sup>
11. The OCP confidently asserts that ‘[t]here can be no argument that participation in genocide, murder, rape, enslavement, extermination of civilians or the unlawful imprisonment, torture, and killing of prisoners of war were not criminal *in any of the major legal systems between 1975 and 1979*’.<sup>40</sup> This may be the case. Yet, equally, it cannot be argued that genocide, crimes against humanity, and war crimes—as defined by the ECCC Law—were criminalized *in Cambodia* during the same period.
12. It is well established that the conferral of jurisdiction to a particular court does not amount to criminalization of the underlying acts in issue.<sup>41</sup> The OCP does not contest this position. Furthermore, the ECCC’s legal framework does not criminalize the acts over which it purports to have jurisdiction. This position is again uncontested. In fact, the OCP effectively agrees with the Defence in stating that the ECCC Law ‘*only* gives the ECCC jurisdiction in relation to conduct which was both criminal and punishable at the time of its commission’.<sup>42</sup> Because genocide, crimes against humanity, and war crimes were neither criminal nor punishable in Cambodia in 1975–79 (notwithstanding any status those crimes had then achieved under customary international law), this tribunal’s jurisdiction over them is illusory.

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<sup>36</sup> Response, para 135.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> See Appeal, paras 17–19.

<sup>40</sup> Response, para 164 (emphasis added).

<sup>41</sup> See Appeal, paras 17–20.

<sup>42</sup> Response, para 166 (emphasis added).

13. Particularly instructive in this regard is a 2007 decision of Spain's *Tribunal Supremo* (appellate court) in the *Scilingo* case.<sup>43</sup> At trial, the *Audiencia Nacional* (lower court) convicted the accused of crimes against humanity as codified in the Spanish Code of 2004. The alleged acts had taken place between 1976 and 1981, well in advance of domestic criminalization. On appeal, stressing the dualist nature of the Spanish legal order<sup>44</sup> and invoking Spain's national principle of legality,<sup>45</sup> the *Tribunal Supremo* held that Scilingo could not be convicted pursuant to the contemporary code as: (i) crimes against humanity had not yet been incorporated into Spanish law at the time of the commission of the alleged crimes and (ii) customary international law was not directly applicable.<sup>46</sup> The court proceeded to convict the accused for, 'merely', the domestic crimes of murder and illegal detention.<sup>47</sup> The analogy between Scilingo and the instant case is clear: Nuon Chea cannot be charged with international crimes that were not part of the Cambodian legal order at the time they were allegedly committed.<sup>48</sup>
14. The OCP's position that the ECCC Law 'is not a law that has "retroactive effect"'<sup>49</sup> is misleading. To the extent the Response asserts that the ECCC Law cannot, in and of itself, enable the retroactive criminalization of genocide, crimes against humanity, and war crimes in Cambodia, the Defence is in full agreement. Yet, as a practical matter, the execution of the tribunal's purported jurisdiction—as advocated by the OCP—would undoubtedly entail a *retroactive penal effect*<sup>50</sup> in violation of the clear provisions of Article 6 of the 1956 Penal Code. In short: Nuon Chea would face prosecution for international offences that attracted no sanction in this country before the enactment of

<sup>43</sup> See *Tribunal Supremo, Sala de lo Penal, Segunda Sentencia, Sentencia No 798/2007, Recurso Casacion (P) No 10049/2006 P* (the 'Scilingo Decision').

<sup>44</sup> Scilingo Decision, *Sexto*, § 4, para 1.

<sup>45</sup> Scilingo Decision, *Sexto*, § 4, para 1; § 6 para 1. The *Tribunal Supremo* also discussed the relevant provision in the European Convention of Human Rights (Article 7) and stressed that the convention allowed member states to apply more robust protections in proceedings before national courts. *Ibid*, para 2). As does, of course, the ICCPR. See para 9 of the instant submissions.

<sup>46</sup> Scilingo Decision, *Sexto* § 1, para 1; § 4, para 5.

<sup>47</sup> The court went on to recognize that the specific acts in question constituted crimes against humanity under international law, which it deemed relevant in order to assume jurisdiction over the facts. See Scilingo Decision, *Septimo, Octavo*. For a discussion of this case in English, see Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEORGETOWN LAW JOURNAL 119, 163–165.

<sup>48</sup> See also *Mpambara*, Interlocutory Decision, Hague District Court, 24 July 2007, paras 36–44 (citing, *inter alia*, *Bouterse*, Appeal Judgment, Netherlands Supreme Court, 18 September 2001) (affirmed on appeal).

<sup>49</sup> Response, para 166.

<sup>50</sup> Assuming the plain meaning of these three terms.



the ECCC Law. While such result may promote the substantive-justice aims of international criminal law,<sup>51</sup> it is manifestly at odds with a strict principle of legality.

15. Finally, the the OCP's reliance on the 12 February 2001 decision of the Constitutional Council<sup>52</sup> is inapposite, as the decision was limited to the constitutionality of the ECCC Law's extension of the statute of limitation for domestic crimes and other matters unrelated to the domestic application of internationally recognized crimes. The Council has not explicitly considered the effect of Cambodia's principle of legality on the international-criminal-law provisions contained in Articles 4–6 of the ECCC Law. Perhaps, in its wisdom, the Council has already correctly appreciated that the jurisdictional provisions of the ECCC Law cannot secure *post facto* criminalization in Cambodia's judicial chambers—however extraordinary they might be.

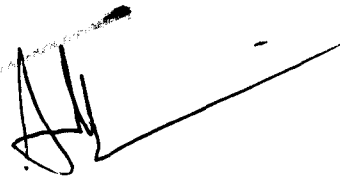
## V. CONCLUSION

16. For these reasons, as well as those contained in the Appeal, the Defence requests the PTC to vacate the Closing Order, declare the ECCC Law to be in violation of Cambodia's principle of legality, and immediately release Nuon Chea from the custody of the tribunal.

CO-LAWYERS FOR NUON CHEA



SON Arun



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<sup>51</sup> See Cassese, n 25 *supra*, at pp 438–439.

<sup>52</sup> See Response, para 165 (referring to Decision No 040/002/2001).