ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

លេខ/No: D427/3/12

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to 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.

Criminal Case File No: **002/19-09-2007-ECCC/OCIJ (PTC145 & PTC146)**

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: **13 January 2011**

PUBLIC
DECISION ON IENG THIRITH'S AND NUON CHEA'S APPEALS AGAINST THE CLOSING ORDER

Co-Prosecutors

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Accused

IENG Thirith
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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seized of Ieng Thirith Defence Appeal from the Closing Order (the "Ieng Thirith Appeal"),[1] and Nuon Chea's Appeal Against the Closing Order (the "Nuon Chea Appeal"),[2] filed on 18 October 2010 and 18 October 2010, respectively.

A. The Nuon Chea Appeal is submitted on the following grounds:

1. Ground 1 alleges that the OCIJ erred by concluding in the Impugned Order that "the question whether the ECCC [is] Cambodian or international "in nature" has no bearing on [its] jurisdiction to prosecute such crimes".[3] In contrast, the Nuon Chea Appeal argues that "the ECCC's status as a purely Cambodian court must result in the strict application of municipal law as it existed in 1975-1979; this includes Cambodia's national approach to *nullum crimen sine lege.*"[4]

2. Ground 2 alleges that "the domestic legal regime in force at the time of the events alleged in the Closing Order did not criminalize the offences set out in Articles 4-6 of the ECCC Law."[5]

3. Ground 3 alleges that the Impugned Order erroneously suggests that the ECCC Law provides a substantive basis for the criminalization of genocide, crimes against humanity, and war crimes in Cambodia.[6]

4. Ground 4 alleges that the international principle of legality found in "Article 33(2) of the ECCC Law—which refers to Article 15 of the ICCPR--does not itself secure criminalization of genocide, crimes against humanity, or war crimes in Cambodia because these international offences were not *applicable* in 1975-1979."[7]

5. Ground 5 claims that even if "the ECCC Law *has* criminalized the offences referred to in Articles 4-6, such retroactive legislation violates Cambodia's national principle of legality."[8]

[1] Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1 ("Ieng Thirith Appeal").
[2] Appeal Against the Closing Order, 18 October 2010, D427/3/1 ("Nuon Chea Appeal").
[3] Nuon Chea Appeal, para. 26, n. 87.
[4] Nuon Chea Appeal, para. 26.
[5] Nuon Chea Appeal, para. 27.
[6] Nuon Chea Appeal, paras 30-32.
[7] Nuon Chea Appeal, para. 33.
[8] Nuon Chea Appeal, para. 35.

B. The Ieng Thirith Appeal is submitted on the following grounds:

6. Ground 1 alleges that genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions cannot be prosecuted because they were not criminalized under the 1956 Cambodian Penal Code at the time of their alleged commission.[9]

7. Ground 2 argues that with respect to genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions,[10] the OCIJ "have incorrectly interpreted the ECCC Establishment Law in such a manner that it attempts to create new criminal law and apply such law retroactively to conduct allegedly committed more than 30 years ago."[11]

8. Ground 3 raises several arguments alleging that genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions under international law are not directly applicable before the ECCC and, therefore, Ieng Thirith cannot be prosecuted on these bases.[12]

9. Ground 4 alleges that the OCIJ erred in finding that it was foreseeable and accessible to Ieng Thirith that her conduct was punishable as genocide and crimes against humanity from 1975-79.[13]

10. Ground 5 alleges that the OCIJ erred in finding that the ECCC has jurisdiction to prosecute domestic crimes under the 1956 Penal Code[14] because the extension of the statute of limitations on these crimes for an additional 30 years under Article 3 (new) of the Establishment Law "amounts to a breach of the general principle of *nullum crimen sine lege*"[15] and "of the general principle of the right to equal treatment for equal cases."[16]

11. Ground 6 contends that the Impugned Order errs in applying joint criminal enterprise as a mode of individual liability; however, because the Pre-Trial Chamber has already ruled on

[9] Ieng Thirith Appeal, paras 16, 17, 42, 43, 67, 68.
[10] Ieng Thirith Appeal, paras. 18-21, 44-45, 70.
[11] Ieng Thirith Appeal, para. 19.
[12] Ieng Thirith Appeal, paras. 22-37, 46-57, 71-72.
[13] Ieng Thirith Appeal, paras. 35-37, 58-63. The Pre-Trial Chamber notes that, although these arguments with respect to crimes against humanity were listed under Ground 3 of the Ieng Thirith Appeal, they actually relate to Ground 4 of the appeal raising the same arguments with respect to genocide. As such, the Pre-Trial Chamber will consider them together under Ground 4.
[14] Ieng Thirith Appeal, paras. 73-79.
[15] Ieng Thirith Appeal, para. 77.
[16] Ieng Thirith Appeal, para. 78.

this issue, Ieng Thirith intends "to challenge the application of this doctrine at the Initial Hearing before the Trial Chamber, and not herein."[17]

12. Ground 7 alleges that the Impugned Order errs in applying "superior responsibility as an alternative form of liability in relation to three of the crimes defined as crimes against humanity."[18] Because "[t]here is no customary basis in international law for this doctrine's application in 1975-1979," prosecution of command responsibility is in violation of the principle of *nullum crimen sine lege*.[19] Or, alternatively, it "could only be prosecuted in relation to war crimes."[20] Further, "superior responsibility is based on a failure to act" and "[t]he Closing Order fails to establish such duty."[21]

13. Ground 8 alleges that the Impugned Order "suffers from arbitrariness" because the OCIJ failed to provide sufficient "reasoned evidential basis in support of their decisions".[22]

14. Ground 9 contends that the OCIJ "erred in failing to apply the specific facts of the present case . . . to the issues to be determined" and "merely referred to adopted legal findings made by the Trial Chamber in the *Duch* case" without appropriate reasoning.[23]

15. Ground 10 alleges that paragraph 1574 of the Impugned Order, "insofar as it indicts the Appellant with crimes under the 1956 Cambodian Penal Code, is void"[24] because it "fails to set out the legal characterization of the facts"[25] necessary for preparation of the defence "and to avoid prejudicial surprise."[26]

The Pre-Trial Chamber has determined the final disposition of the Appeal, which it hereby pronounces. The reasons for this decision shall follow in due course.

[17] Ieng Thirith Appeal, para. 80.
[18] Ieng Thirith Appeal, para. 81.
[19] Ieng Thirith Appeal, para. 84.
[20] Ieng Thirith Appeal, para. 90.
[21] Ieng Thirith Appeal, para. 93.
[22] Ieng Thirith Appeal, para. 97.
[23] Ieng Thirith Appeal, para. 98.
[24] Ieng Thirith Appeal, para. 99.
[25] Ieng Thirith Appeal, para. 100.
[26] Ieng Thirith Appeal, para. 101.

THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

1. The Appeal is admissible in its form;
2. Grounds one, two, three, four and five of the Nuon Chea Appeal and grounds one, two, three, four, five (partially) and seven (partially) of the Ieng Thirith Appeal are admissible. The rest of the grounds of these appeals are inadmissible. The inadmissible sub-grounds of grounds five and seven of the Ieng Thirith Appeal are:
   - Ground 5, in so far as it alledges that the Co-Investigating Judges's decision to confirm jurisdiction with respect to domestic crimes charged under the 1956 Penal Code is in violation of the Ieng Thirith's right to equality before the law;
   - Ground 7, in so far as it alledges that the Co-Invesstigating Judges failed to properly plead as a factual matter, the existence of a legal duty to act and its basis in domestic law as an element of superior responsibility.
3. Ground one of Nuon Chea's appeal is dismissed;
4. Ground two of Nuon Chea's appeal is dismissed;
5. Ground three of Nuon Chea's Appeal is dismissed;
6. Ground four of Nuon Chea's Appeal is dismissed;
7. Ground five of Nuon Chea's Appeal is dismissed;
8. Ground one of Ieng Thirith's Appeal is dismissed;
9. Ground two of Ieng Thirith's Appeal is dismissed;
10. Ground three of Ieng Thirith's Appeal is dismissed;
11. Ground four is granted in part as follows and is otherwise dismissed:
    1. This ground of Appeal is granted in so far as the Co-Lawyers assert that the Co-Investigating Judges erred by failing to consider that during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed conflict. The "existence of a nexus between the underlying acts and the armed conflict" is added to the "Chapeau" requirements in Chapter IV(A) of Part Three of the Closing Order.
    2. This ground of Appeal is granted in so far as the Co-Lawyers argue that rape did not exist as a crime against humanity in its own right in 1975-1979. Therefore, the Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g)) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts."
12. Those parts of ground five of Ieng Thirith's Appeal that are found admissible are dismissed;

13. Those parts of ground seven of Ieng Thirith's Appeal that are found admissible are dismissed;
14. The Appeal is otherwise dismissed;
15. The Accused Persons are indicted and ordered to be sent for trial as provided in the Closing Order being read in conjunction with this decision;
16. The provisional detention of the Accused Persons is ordered to continue until they are brought before the Trial Chamber.

In accordance with Internal Rule 77(13), this decision is not subject to appeal.

Phnom Penh, 13 January 2011 CR

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Catherine MARCHI-UHEL** **HUOT Vuthy** **PRAK Kimsan**