លេខ/No: D427/3/1

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/OCIJ (PTC-146)

Filing Party: Nuon Chea Defence Team

Filed to: Pre-Trial Chamber

Original language: English

Date of document: 18 October 2010

CLASSIFICATION

Classification Suggested by Filing Party: PUBLIC

Classification of Pre-Trial Chamber: សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

APPEAL AGAINST THE CLOSING ORDER

Filed by

Nuon Chea Defence Team:
SON Arun
Michiel PESTMAN
Victor KOPPE
Andrew IANUZZI
Jasper PAUW
PRUM Phalla
Annebrecht VOSSENBERG (Legal Intern)

Distribution

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams

I. INTRODUCTION

1. Pursuant to Rules 67, 74, and 75 of the ECCC Internal Rules (the 'Rules'), counsel for the Accused Nuon Chea (the 'Defence') submit this appeal to the Pre-Trial Chamber (the 'PTC') against the Closing Order[1] of the Office of the Co-Investigating Judges (the 'OCIJ'). For the reasons contained herein, the Defence submits that: (i) the appeal is admissible and (ii) in confirming the jurisdiction of the tribunal, 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.

II. RELEVANT FACTS

2. With respect to the jurisdiction of the ECCC, the OCIJ has determined 'that the crimes and modes of responsibility defined in [the] section of the Closing Order [setting out the applicable law] comply with the legality principle'.[2] The CIJs have further held that genocide, crimes against humanity, war crimes, and '[a]ll of the modes of criminal responsibility set out in Article 29 (new) of the ECCC Law were part of international law applicable in Cambodia at the relevant time'.[3]

3. In reaching these conclusions, the OCIJ determined that:

   a. '[W]hether the ECCC [is] Cambodian or international "in nature" has no bearing on [its] jurisdiction to prosecute [...] crimes, provided that the principle of *nullem crimen sine lege* is respected.'[4]

   b. '[I]n order to be applied before the ECCC, where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law,

---

1 Document No D-427, 'Closing Order', 16 September 2010, ERN 00604508–00605246.
2 Closing Order, para 1299.
3 Closing Order, para 1318; *see also ibid*, paras 1310, 1313, 1316. *N.B.* The modes of liability referred to in Article 29 (new) are: planning, instigating, ordering, aiding and abetting, committing, and superior/command responsibility. The PTC has previously held that the basic and systemic forms of joint criminal enterprise liability ('JCE') amount to forms of commission within the jurisdiction of the ECCC. *See* Document No D-97/14/15, 'Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE)', 20 May 2010, ERN 00486521–00486589 (the 'JCE Decision'). However, the Closing Order refers only to the basic form of JCE. *See* Closing Order, para 1541.
4 Closing Order, para 1301.

explicitly or implicitly, and it must have existed under international law applicable in Cambodia at the relevant time.'[5]

c. 'By virtue of [the provisions of the ECCC Law dealing with subject-matter jurisdiction], the issue [of] whether international law is directly applicable in Cambodian domestic law has no bearing on ECCC jurisdiction.'[6]

d. The criminality of genocide, crimes against humanity, and war crimes, as well as the applicability of all modes of liability recognized in the Closing Order, are 'considered to have been sufficiently accessible to the Charged Persons'.[7]

e. '[T]he principle of *nullum crimen sine lege* does not prevent the CIJs from interpreting the law governing their own jurisdiction, and in so doing, taking into account the case law of other international tribunals.'[8]

4. On these (and other) bases, Nuon Chea has been indicted and sent to trial for violations of the 1956 Penal Code, genocide, crimes against humanity, and war crimes, by way of six distinct modes of liability.[9]

III. RELEVANT LAW

A. Admissibility of the Appeal

5. The Pre-Trial Chamber has recently indicated that, 'if the Closing Order confirms the jurisdiction of [the] ECCC', the Accused 'may consider the effect of Internal Rule 67(5)

---

5 Closing Order, para 1302.
6 Closing Order, para 1304.
7 Closing Order, para 1305 ('[T]he international law provisions prohibiting genocide and grave breaches of the 1949 Geneva Conventions, which expressly provide for criminal liability, were legally binding on Cambodia as set out below, and thus can be considered to have been sufficiently accessible to the Charged Persons as members of Cambodia's governing authorities.'); *ibid*, para 1306 ('With respect to crimes against humanity, their prohibition under customary law is considered to have been sufficiently accessible to the Charged Persons, with particular regard to the World War II trials held in Nuremberg and Tokyo.'); *ibid*, para 1307 ('The modes of criminal responsibility set out in the ECCC Law were partly incorporated in the 1956 Cambodian Penal Code as set out below, 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.').
8 Closing Order, para 1308.
9 *See* Closing Order, paras 1521 *et seq*, 1613.

when read in conjunction with Internal Rule 74(3)(a)'.[10] 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 an order of the OCIJ 'confirming the jurisdiction of the ECCC'. According to Rule 75, 'any notice of appeal [...] must be filed within 10 (ten) days from the date that notice of the [...] order was received',[11] and substantive 'submissions on appeal shall be filed by the appellant [...] within 30 (thirty) days from the date that notice of the [...] order was received'.[12]

B. Jurisdiction of the ECCC

6. According to the law on the establishment of the ECCC (the 'ECCC Law'),[13] 'Extraordinary Chambers shall be established *in the existing court structure* [...] to bring to trial senior leaders of Democratic Kampuchea [('DK')] and those who were most responsible for [...] serious violations of Cambodian laws [...], international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979 [(the 'DK Period')]'.[14] The tribunal 'shall have the power to bring to trial all Suspects who committed', *inter alia*: (i) 'crimes set forth in [Cambodia's] 1956 Penal Code';[15] (ii) 'the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948';[16] (iii) 'crimes against humanity';[17] and (iv) 'grave breaches of the Geneva Conventions of 12 August 1949'.[18]

7. According to the agreement between the Royal Government of Cambodia (the 'RGC') and the United Nations (the 'ECCC Agreement'),[19] the 'Extraordinary Chambers have subject-matter jurisdiction consistent with that set forth in [the ECCC Law] as adopted

---

[10] 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, para 11.
[11] Rule 75(1).
[12] Rule 75(3).
[13] Officially, the 'Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea'; promulgated on 27 October 2004.
[14] Emphasis added.
[15] ECCC Law, Article 3 (new).
[16] ECCC Law, Article 4.
[17] ECCC Law, Article 5.
[18] ECCC Law, Article 6.
[19] Officially, 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'; promulgated on 19 October 2004.

and amended by the Cambodian Legislature under the Constitution of Cambodia'.[20] In particular, the 'subject-matter jurisdiction of the [ECCC] shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court, and grave breaches of the 1949 Geneva Conventions'.[21]

8. The Trial Chamber has recently held as follows: 'The subject-matter jurisdiction of the ECCC is limited to the offences listed in Articles 3 (new) to 8 of the ECCC Law *insofar as they constituted crimes at the time of their alleged commission* [...].'[22]

C. Cambodian Constitutional Law in 1975–1979

9. The applicable constitutions in Cambodia during the relevant period were: (i) the Khmer Republic's 1972 Constitution (from April 1975 until January 1976) and (ii) DK's 1976 Constitution (from January 1976 until January 1979).[23] Neither of these constitutions provided for the direct application of international criminal law in Cambodia.[24] Indeed, no provision on the domestic effect of international law was contained in either instrument,[25] and no case-law exists on the issue.[26] Accordingly, the applicable domestic constitutional order did not allow for the direct application of international criminal law, whether customary or treaty-based.[27]

---

[20] ECCC Agreement, Article 2(1); *see also ibid*, Article 2(2) ('The present Agreement shall be implemented in Cambodia through the [ECCC Law] as adopted and amended.')

[21] ECCC Agreement, Article 9.

[22] Case File No 001/18-07-2007/ECCC/TC, Document No E-188, 'Judgment', 26 July 2010, ERN 00572517–00572797 (the 'Duch Judgment'), para 16.

[23] *See* Duch Judgment, para 29.

[24] *See* RAOUL JENNAR, THE CAMBODIAN CONSTITUTIONS 1953–1993 (White Lotus 1995). *N.B.* The phrase 'direct application of international criminal law' is understood as referring to the application of a rule of international law as a basis for a determination of criminality in domestic criminal proceedings where that rule of international law had not been incorporated or transformed into domestic criminal law. The term 'directly' then refers to the fact that it does not depend on an intervening legislative step. Direct application of international law concerning international crimes does not mean that it is applied irrespective of national law. The application of all rules of international law necessarily depends on a rule of national constitutional law, whether written or unwritten, that governs the status of that law within national legal order. What is meant by 'direct application' is that the application (by court or executive branch) of a rule of international law is not dependent on subsequent legislation making that particular rule part of domestic law.

[25] *See* JENNAR, n 24 *supra*.

[26] *N.B.* Diligent research has not revealed any jurisprudence pertaining to the relevant period suggesting that, notwithstanding the lack of constitutional provisions, international law had a direct effect in the Cambodian legal order.

[27] *See* PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN, & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 4TH ED (Intersentia 2006), p 660 ('The effect of international law within the national legal order is regulated by national constitutional law. In those Contracting States where international law has no internal effect, this effect cannot be given in incidental cases to an international criminal law provision.')

D. Cambodian Criminal Law in 1975–1979

10. The applicable criminal law in Cambodia throughout the DK Period was the 1956 Penal Code,[28] which explicitly provided for the crimes set out in Article 3 (new) of the ECCC Law (homicide, torture, and religious persecution). However, the crimes referenced in Articles 4–6 of the ECCC Law (genocide, crimes against humanity, and war crimes) are not contained in the 1956 Penal Code or any other piece of domestic legislation applicable from 1975–1979. Simply put, these international crimes were not part of Cambodian law at the time of the events alleged in the Closing Order. Although Cambodia had previously ratified the Genocide Convention and the Geneva Conventions,[29] no domestic legislation criminalizing the conduct proscribed by these international instruments was ever adopted by any Cambodian government prior to DK's demise.

E. Customary International Law in 1975–1979

11. For purposes of the instant appeal, the Defence assumes, *arguendo* (and without prejudice to its right to make further submissions on the matter at or before the initial hearing), that the crimes referenced in Articles 4–6 of the ECCC Law (genocide, crimes against humanity, and war crimes) were—*in some form, though not necessarily as set out in the Closing Order*—part of customary international law during the DK period. For example, while international criminal tribunals have consistently held that genocide and war crimes were part of customary international law during the relevant period, the status of crimes against humanity is less clear. As late as 1994, Judge Meron noted that it was impossible to find a consistent position on whether the link between crimes against humanity and armed conflict was still in tact.[30] And it was only in the following year that the ICTY Appeals Chamber announced that such link had been severed.[31]

---

[28] *See* Duch Judgment, para 29.
[29] *See* Closing Order, n 5154.
[30] *See* Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 78, 85 (1994).
[31] *See Prosecutor v Tadic*, Case No IT-94-1-A, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995, para 141.

F. The Principle of Legality

1. Generally

12. The principle of legality is a fundamental tenet of criminal law requiring all penal proscriptions to be foreseeable, ascertainable, and non-retrospective. Also referred to by the Latin phrase *nullum crimen sine lege* ('no crime without law'), the principle provides that conduct cannot amount to crime unless and until it has been clearly declared as such *within the relevant legal order.*[32] In short, it amounts to a general prohibition on the imposition of criminal sanctions for acts or omissions that were not criminal under the jurisdiction in question at the time of their commission or omission.[33] As noted by the Appeals Chamber of the ICTY, the principle of legality is 'first and foremost, a "principle of justice".'[34] In this regard, its aim is twofold: promotion of legal certainty and protection against illegal exercises of state power.[35]

13. Applicable to substantive offences as well as modes of liability,[36] the principle of legality requires—in addition to a formal declaration of criminality—that the criminal nature of the alleged conduct must have been sufficiently *foreseeable* to the accused at the time the acts in question were committed.[37] Moreover, the particular law providing for such criminality must have been sufficiently *accessible.*[38] In both cases, the determination rests not only on whether an alleged perpetrator should have been aware that his acts were criminal (e.g., in the case of murder), but additionally on whether such acts could have been perceived as being covered by a particular legal qualification (e.g., in the case of murder as a crime against humanity).[39]

---

[32] *N.B.* By its very nature, the principle of legality is only satisfied if the rule that proscribes a particular act is valid law *within the legal order in question.* It follows that the rules of different systems (e.g., the international regime or other domestic jurisdictions) are not 'law' within the legal order in question—unless they have been specifically adopted and criminalized.

[33] *See Prosecutor v Milutinovic et al*, Case No IT-99-37-AR72, 'Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*', 21 May 2003 (the 'Milutinovic Decision'), para 37 (noting that, pursuant to the principle of legality, 'a criminal conviction can only be based on a norm which existed at the time the acts or omission with which the accused is charged were committed').

[34] Milutinovic Decision, para 37 (quoting the International Military Tribunal at Nuremberg).

[35] *See* WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS (Cambridge 2006), p 238. *N.B.* Retroactive legislation is in principle incompatible with legal certainty, as individuals cannot know in advance of the legal consequences of their acts unless these are designated as criminal *ex ante.*

[36] *See* Duch Judgment, para 28 (citing Milutinovic Decision, paras 34–44).

[37] *Ibid* (citing Milutinovic Decision, para 38).

[38] *Ibid.*

[39] Likewise, the appalling nature of the acts in question may be relevant to their criminality as such (and thus also to the foreseeability of criminality as such), but—contrary to the CIJs' position (Closing Order, para

14. The principle of legality 'prevent[s] a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification'.[40] Accordingly, any approach to such clarification[41] must be tread with great caution, as the line between interpretation and development is a fine one, and the development of substantive criminal law may directly contravene the requirement of foreseeability.[42]

2. Internationally

15. On the international level, the principle of legality is codified in the International Covenant on Civil and Political Rights (the 'ICCPR'),[43] which provides as follows:

> 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.[44]
>
> 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.[45]

These provisions have been used, in part, as the basis for international criminal prosecutions at the ICTY, ICTR, SCSL, and ICC.[46] In confirming the subject-matter jurisdiction of these tribunals, where domestic criminal law regimes do not apply,[47]

1302)—it is immaterial to the question of whether any particular qualification of such act was equally foreseeable.

40 Milutinovic Decision, para 38.

41 *See, e.g.*, Duch Judgment, para 34 ('The legality principle does not prevent the Chamber from determining an issue through a process of interpretation and clarification of the elements of a particular offence. Nor does it prevent the Chamber from relying on appropriate decisions which interpret particular ingredients of an offence. Specifically, the Chamber's reliance on decisions on international tribunals that post-date January 1979 does not contravene the principle of legality. Rather these decisions provide interpretive guidance as regards the evolving status of certain offences and forms of responsibility under international law.')

42 *N.B.* The principle of legality pertains to the legal basis for a prosecution; that is, the criminality of the act as such. It is the legal basis that should be judged at the time the crime was committed.

43 1966, GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.

44 ICCPR, Article 15(1).

45 ICCPR, Article 15(2).

46 *See, e.g.*, *Prosecutor v Delalic et al*, Case No IT-96-21-A, 'Judgment', 20 February 2001 (the 'Delalic Judgment'), para 179.

47 *See, e.g.*, Milutinovic Decision, para 40 ('This Tribunal does not apply the law of the former Yugoslavia to the definition of the crimes and forms of liability within its jurisdiction. It does, as pointed out above, apply customary international law in relation to its jurisdiction *ratione materiae*.') *N.B.* International tribunals have looked to relevant domestic law in undertaking the foreseeabilty analysis. *See, e.g.*, Milutinovic Decision, para 40 ('[The ICTY] may [...] have recourse to domestic law for the purpose of establishing that the accused could reasonably have known that the offence in question or the offence committed in the way charged in the indictment was prohibited and punishable. In the present instance [...], the law of the Federal Republic of Yugoslavia in force at the time did provide for criminal liability for the foreseeable acts of others in terms strikingly similar to those used to define joint criminal enterprise.'); JCE Decision, para 45 ('[T]he question of

chambers have looked to (among other things) whether substantive crimes and modes of liability existed under customary international law at the time of the alleged offences.[48]

16. In confirming this tribunal's subject-matter jurisdiction, the OCIJ,[49] PTC,[50] and Trial Chamber[51] have made reference to the international principle of legality.

3. Nationally

17. Consistent state practice reveals that domestic jurisdictions apply a principle of legality that is far stricter than the international approach described above.[52] At the national level, in order for an international offence (based either on treaty or customary international law) to acquire the status of a domestic crime, such offence must first be formally 'criminalized' within the national system.[53] Therefore, attempts to penalize behavior on the basis of non-incorporated treaty law or customary international law are domestically inadequate.[54]

18. This strict approach is evidenced by the fact that the courts of several states have held that retroactive prosecutions for international crimes—in the absence of domestic legislation clearly criminalizing such acts—violate those states' respective *nullum crimen*

---

whether JCE is a form of responsibility recognized in domestic law may be relevant when determining whether it was foreseeable to the Charged Person that his/her alleged conduct may entail criminal responsibility.')

48 *See, e.g.*, Milutinovic Decision, para 9 ('The fact than an offence is listed in the Statute does not therefore create new law and the Tribunal only has jurisdiction over a listed crime if that crime was recognized as such under customary international law at the time it was allegedly committed. The scope of the Tribunal's jurisdiction *ratione materiae* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence *qua* custom at the time this crime was allegedly committed.'); *ibid*, para 10 ('[T]he principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal's jurisdiction *ratione materiae*, that body of law must be reflected in customary international law.'); and *ibid*, para 11 ('What must therefore be established in the present case is whether, at the time the acts were allegedly committed [...], joint criminal enterprise as a form of liability existed under customary international law.').

49 *See* Closing Order, para 1302 (According to the principle of legality, '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'.) (emphasis added) (citing, *inter alia*, ICCPR, Article 15).

50 *See* JCE Decision, paras 43 *et seq* (citing, *inter alia*, ICCPR, Article 15).

51 *See* Duch Judgment, paras 26 *et seq* (citing, *inter alia*, ICCPR, Article 15).

52 *See, e.g.*, FERDINANDUSSE, n 35 *supra*, at p 230.

53 *See* KATHRIN BREMER, NATIONALE STRAFVERFOLGUNG INTERNATIONALER VERBRECHEN DEGEN DAS HUMANITÄIRE VÖLKERRECHT (Lang 1999), pp 148, 256, 303–304 (concluding that the national principles of legality block direct application of customary international law in Belgium, Germany, and Switzerland); FERDINANDUSSE, n 35 *supra*, at p 266.

54 *Ibid.*

principles.[55] Such cases indicate that national courts tend to consider customary norms as non-self-executing due to their lack of precision.[56] Accordingly, domestic legislation specifically criminalizing the offence in question is a mandatory prerequisite for any application of international criminal principles within the national legal order.[57]

19. Those states that have sought to retroactively prosecute international crimes have gone beyond simply establishing jurisdiction by expressly criminalizing the relevant conduct.[58] It is well established that the conferral of jurisdiction to a particular court does not amount to criminalization of the underlying acts in issue.[59] Particularly in the

---

[55] *See, e.g., Public Prosecutor v Misrad Repak*, Oslo District Court, Case No 08-018985MED-OTIR/08, 2 December 2008, paras 6–9; *Movement Against Racism and for Peoples' Friendship v Aussaresses*, Court of Cassation, Appeal Judgment, Appeal no 02-80719, Decision no 122, ILDC 775 (FR 2003); *Re Habré*, Appeal Decision, Cassation No 14, ILDC 164 (SN 2001), para 33; East Timor, Court of Appeal, *Armando dos Santos*, Applicable Subsidiary Law Decision, 15 July 2003, p 14; N and Military Prosecutor of the Military Tribunal of First Instance 2 v Military Appeals Tribunal 1A, Cassation Judgment, ILDC 349 (CH 2001); *Nulyarimma v Thompson*, [1999] FCA 1192, paras 20-26, 32; *Bouterse*, Judgment on Appeal, HR 00749/01 CW 2323, ILDC 80 (NL 2001), para 4.3.2. *Cf. Spain, High Court, Public Prosecutor's Office v Scilingo Manzorro*, Case No 16/2005 'Final Appeal Judgment', ILDC 136 (ES 2005), in which it was held that the application of norms penalizing crimes against humanity did not breach Spain's national principle of legality where the penal code did not criminalize such offences until after the events in question because the crime already existed as a *ius cogens* norm of customary international law and *international custom was part of the Spanish legal order*).

[56] *See* PATRICK DAILLIER, DROIT INTERNATIONALE PUBLIC, 5 ED (LDGJ 1994), p 227. *N.B.* With regard to the application of international criminal law rules to domestic legal orders, the principles of *nullum crimen* and legal certainty are generally considered to be so fundamental that they effectively prevent the *direct* inclusion of unwritten customary rules into domestic criminal law. *See* Simona Stirling-Zanda, *The Determination of Customary International Law in European Courts*, in NON-STATE ACTORS AND INTERNATIONAL LAW (2004), p 6.

[57] See Stirling-Zanda, n 56 *supra*, at p 13.

[58] *See* Crimes Against Humanity and War Crimes Act, (Can), SC 2000 c 24, Article 6; Coroners and Justice Act 2009, Section 70 (United Kingdom), now Section 65A(2) (amended) ICC Act; *Kononov v Latvia*, ECtHR Case No 36376/04, 'Judgment', 17 May 2010, para 196. A proposal for the amendment of the Dutch International Crimes Act is contained in 'Wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering, de Wet internationale misdrijven, de Wet overlevering inzake oorlogsmisdrijven en enige aanverwante wetten (verruiming mogelijkheden tot opsporing en vervolging van internationale misdrijven), memorie van Toelichting' (7 September 2010) Kst-32475-3, pp 3-7 ('Terugwerkende kracht van rechtsmacht voor het misdrijf genocide'), 14 ('Artikel III, onderdeel D').

[59] *See, e.g.*, Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 2 (2004), 735–760, p 736 ('Jurisdiction is not a unitary concept. On the contrary, both the longstanding practice of states and doctrinal writings make it clear that jurisdiction must be considered in its two distinct aspects, *viz.* jurisdiction to prescribe and jurisdiction to enforce. Jurisdiction to prescribe or prescriptive jurisdiction—sometimes called 'legislative' jurisdiction—refers, in the criminal context, to a state's authority under international law to assert the applicability of its criminal law to given conduct [...]. Jurisdiction to enforce or enforcement jurisdiction—sometimes called 'executive' jurisdiction—refers to a state's authority under international law actually to apply its criminal law [...] through the courts. More simply, jurisdiction to prescribe refers to a state's authority to criminalize given conduct, jurisdiction to enforce the authority, *inter alia*, to arrest and detain, to prosecute, try, and sentence, and to punish persons for the commission of acts so criminalized.'); *ibid*, p 741 ('Jurisdiction to prescribe and jurisdiction to enforce are logically independent of each other. The lawfulness of a state's enforcement of its criminal law in any given case has no bearing on the lawfulness of that law's asserted scope of application in the first place, and vice versa.'); *see also* Duch Judgment, para 26 ('Notwithstanding the Chamber's subject-matter jurisdiction over them, each of the charged crimes and forms of responsibility must *also* conform to the principle of legality.') (emphasis added). *N.B.* This position is consistent with the one

domestic sphere, an additional legislative step is necessary.[60] This difference in approach was recognized in the Nuremberg era as a distinguishing feature of municipal law, which was—quite consciously (and necessarily)—dispensed with on the international plane.[61] Yet the more stringent requirements discussed in this section remain in force today domestically.[62]

4. In Cambodia

20. The current Cambodian constitution (the 'Constitution') contains clear *nullum crimen* protection: the 'prosecution, arrest, or detention of any person shall not be done except *in accordance with the law*',[63] and any subsequent trial 'shall be conducted [...] *in accordance with the legal procedures and laws in force*'.[64] Given Cambodia's dualist tradition, there is no principled reason to interpret the references to 'law' and 'laws' as anything other than established domestic law. Additionally, the Constitution enshrines the principle of *in dubio pro reo*,[65] which is specifically formulated as follows: '[a]ny case of doubt [...] shall be resolved in favor of the accused'.[66]

21. The ECCC Agreement and Law provide guarantees identical to those contained in the Cambodian Constitution: the 'procedure' applied at the ECCC 'shall be in accordance

---

taken by the ICTY and ICTR, where—despite statutes undoubtedly establishing subject-matter jurisdiction—chambers are compelled to determine, *as a separate issue*, whether the crimes in question form part of international law during the relevant period. *See, e.g.*, Delalic Judgment, paras 415–417; *Prosecutor v Rutaganda*, Case No ICTR-96-3-T, 'Judgment', 6 December 1999, paras 85–86.

60 *N.B.* As noted above, formal legislative criminalization is not required on the international plane. This is due to the nature of international tribunals and the fact that no international legislature exists.

61 *See* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO 10, VOL III (US Government Printing Office 1949), pp 974–975 (quoted in Milutinovic Decision, para 39) ('It would be sheer absurdity to suggest that the *ex post facto* rule, *as known to constitutional states*, could be applied to a treaty, a custom, or a common-law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.') (emphasis added).

62 *See* VAN DIJK *ET AL*, n 27 *supra*, at p 660 ('Here again, compliance with Article 7 [of the European Convention on Human Rights] depends on whether the person concerned could reasonably know that the offence committed by him was prohibited and punishable within the relevant legal system at that time, either by virtue of a national legal provision or by virtue of a directly applicable international legal provision with internal effect.')

63 Constitution, Article 38 (emphasis added).

64 Constitution, Article 110 (emphasis added).

65 This translates literally from the Latin to: 'when in doubt, for the accused.'

66 Constitution, Article 38; *see also* Duch Judgment, 'Separate and Dissenting Opinion of Judge Jean-Marc Lavergne on Sentence' (the 'Lavergne Dissent'), para 8 (stating that 'where the law is unclear or silent, the most favorable solution must be applied to the accused in the event of uncertainty as to the application of a given rule'; noting 'the widely-accepted principle that doubt must be resolved in favor of the accused'; and citing international criminal jurisprudence for the following proposition: 'The principle that doubt must be resolved in favor of the accused does not apply only to the assessment of the evidence pertaining to the guilt of the accused; its application is broader and includes interpretation of ambiguous or uncertain applicable legal standards.')

with Cambodian law';[67] and the prosecution, investigation, and trial of any individual shall follow 'existing procedures in force'.[68] These provisions demonstrate an overarching concern for compliance with the established domestic legal order—notably, one that recognizes a strict principle of legality.

22. Even stronger than Cambodia's current constitutional position on legality, the *nullum crimen* provision of the 1956 Penal Code is robust: *'La Loi Pénale est sans effet rétroactif. Aucune infraction ne peut être réprimée par l'application de peines qui n'étaient pas prononcées par la Loi auparavant qu'elle fut commise'*.[69] Moreover, the 1972 Constitution—formally valid until January 1976—provided that laws shall not be retroactive[70] and that no prosecution, arrest, or detention shall be permitted unless authorized by law.[71] No exception such as the one contained in Article 15(2) of the ICCPR existed in the Cambodian legal order during the DK period.

IV. ARGUMENT

A. The Appeal is Admissible

23. As the Closing Order has unequivocally confirmed the jurisdiction of the ECCC in various respects, it is therefore appealable by the Accused pursuant to Rules 67(5) and 74(3)(a). Moreover, the instant submissions—as well as the Defence's notice of appeal—have been timely filed in accordance with Rule 75.

B. In Confirming the Jurisdiction of the Tribunal, the CIJs Erred in Law by Concluding that the Application of the International Crimes and Modes of Liability Referenced in the ECCC Law Complies With the Principle of Legality

1. Because the ECCC is a Domestic Criminal Tribunal, Cambodian Law—Including the National Principle of Legality—is Strictly Applicable

24. The ECCC was 'established by Law as a judicial body *within the Cambodian court system*'.[72] Unlike the ICTY,[73] ICTR,[74] SCSL,[75] and ICC[76]—each of which possesses a

---

[67] ECCC Agreement, Article 12(1); *see also* Duch Judgment, para 35.
[68] ECCC Law, Articles 20 (new), 23 (new), 33 (new).
[69] 1956 Penal Code, Article 6.
[70] *See* 1972 Constitution, Article 72.
[71] *Ibid*, Article 6.
[72] Closing Order, para 1300 (emphasis added).
[73] *See* ICTY Statute, preamble ('Having been established by the Security Council *acting under Chapter VII of the Charter of the United Nations* [...].') (emphasis added).

'separate international legal personality'[77]—the ECCC is fundamentally a domestic criminal tribunal. Despite some ambivalence on this issue by its various constituent bodies,[78] several factors make it abundantly clear that the ECCC is nothing if not Cambodian:

a. The ECCC was established by national (rather than international) law.[79]

b. It was 'established in the existing court structure' of Cambodia.[80]

c. The RGC explicitly rejected the idea of establishing an international tribunal.[81]

d. All of the ECCC's judicial officers were appointed by the RGC, with the UN providing only a list of proposed international candidates.[82]

e. The Cambodian Constitutional Council highlighted the ECCC's position within the existing court structure as being protective of Cambodian sovereignty.[83]

f. In one of its earliest decisions, the PTC—while ruling that the ECCC was 'distinct from other Cambodian Courts in a number of respects'—nevertheless found that it operated as 'an independent entity *within the Cambodian court structure*'.[84]

g. Although (in exceptional cases) recourse may be had to procedural rules established at the international level, the starting point at the ECCC is always 'existing Cambodian law and procedure'.[85]

---

[74] *See* ICTR Statute, preamble ('Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations [...].') (emphasis added).

[75] *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, preamble ('[...] the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an *independent* special court [...]') (emphasis added); Special Court Agreement, 2002 (Ratification) Act, 2002, Section 11(2) ('The Special Court shall not form part of the Judiciary of Sierra Leone.'); *ibid*, Section 13 ('Offences prosecuted before the Special Court are not prosecuted in the name of the Republic of Sierra Leone.')

[76] *See* Rome Statute, Article 4(1) ('The [ICC] shall have international legal personality.')

[77] Goran Sluiter, *Legal Assistance to Internationalized Criminal Courts and Tribunals*, in C.P.R. ROMANO, P.A. NOLLKAEMPER, AND J.K. KLEFFNER, INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA (Oxford 2004), p 396 (noting that the SCSL has a 'separate international legal personality and is not part of the national court system in Sierra Leone').

[78] *See, e.g.*, JCE Decision, para 47.

[79] *See* ECCC Law and ECCC Agreement.

[80] ECCC Law, Article 2.

[81] *See* Report of the Secretary-General on Khmer Rouge Trials, UN Doc No A/57/769, 31 March 2003, paras 6–7.

[82] Constitution Council Decision No 040/002/2001, 12 February 2001, p 3.

[83] *Ibid*, p 4.

[84] Case No 001/18-07-2007-ECCC/OCIJ, Document No C-5/45, 'Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch"', 3 December 2007, paras 17–19 (emphasis added).

25. The mere fact that its subject-matter jurisdiction extends to international law or that some of its judges are non-Cambodians does not transform the ECCC into an international court.[86] Indeed, the tribunal's name—the Extraordinary Chambers in the Courts of Cambodia—speaks for itself.

26. Contrary to the OCIJ's position,[87] whether or not this tribunal is a domestic one is decisive. The principle of legality allows only for the application of laws that were *binding within the relevant legal system at the time of the alleged acts*.[88] Accordingly, 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*.[89]

2. Domestic Criminal Law at the Time of the Alleged Events Did Not Provide for the Criminalization of Genocide, Crimes Against Humanity, or War Crimes

27. As noted above, 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. And, irrespective of the state of customary international law in 1975–1979, Cambodia's dualist tradition prevented the direct application of any such international

---

[85] Acknowledging the need to ensure that ECCC proceedings adhere to universally accepted legal standards, the Constituent Instruments allow for the adoption of additional procedural rules in three limited cases, namely where: (i) existing Cambodian law or procedure does 'not deal with a particular matter'; (ii) 'there is uncertainty regarding' the 'interpretation or application' of an existing provision; or (iii) 'there is a question regarding' a provision's 'consistency with international standards'. ECCC Agreement, Article 12(1); ECCC Law, Articles 20 (new), 23 (new), 33 (new). In such cases—*and only in such cases*—'guidance' may be sought 'in procedural rules established at the international level'. *Ibid.* Therefore, the recognition of new procedures or any departure from 'existing procedures in force' can only be justified by reference to one of these specific statutory exceptions.

[86] *N.B.* Domestic courts routinely apply international law (subject to the rigors of their national principles of legality). And it is not uncommon for municipal courts to be composed of foreign judges, particularly in the member states of the Commonwealth.

[87] Closing Order, para 1301 (the question whether the ECCC [is] Cambodian or international "in nature" has no bearing on [its] jurisdiction to prosecute such crimes, provided that the principle of *nullum crimen sine lege* is respected').

[88] *See* Milutinovic Decision, para 10; VAN DIJK *ET AL*, n 27 *supra*.

[89] *N.B.* The question of whether retroactive criminalization of international crimes would violate the legality principle, as defined above, needs eventually to be answered on the basis of national law. Because the ECCC is a court under national law, and is embedded in the national legal order, it is only the national principle of legality that is relevant. Even assuming, *arguendo*, that the ECCC has been 'internationalized' —whatever that term means—domestic law is still clearly applicable; accordingly, there is no reason or excuse *not* to apply Cambodia's national principle of legality. To the extent a discrepancy arises between this established rule of the municpal legal order and any arguably relevant international standard, such conflict should be resolved pursuant to the principle of *in dubio pro reo*—that is, through the application of the provision most favorable to the Accused. *See* para 20 and nn 68–69, *supra*.

norms (which may or may not have existed[90]) during the same period. Moreover, no implementing legislation was passed before, or at any time during, the DK era with respect to genocide, crimes against humanity, or war crimes. Accordingly, these international offences were not '*applicable in Cambodia at the relevant time*'.[91]

28. Therefore, the CIJs' position that 'the issue [of] whether international law is directly applicable in [Cambodia] has no bearing on ECCC jurisdiction'[92] is erroneous. Because domestic law does not provide the necessary criminalization of much of the conduct alleged in the Closing Order, the only alternative basis would have been the application of international law, which—for the reasons stated in the previous paragraph—did not apply in Cambodia in 1975–1979. International custom has never been a direct part of the Cambodian legal order.

29. Likewise, the OCIJ's conclusion that the criminality of genocide, crimes against humanity, and war crimes would have been sufficiently accessible to Nuon Chea because he was allegedly a member of Cambodia's governing authority[93] misses the point. Even if the sources of then-existing *international law* on genocide, crimes against humanity, and/or war crimes had been available to Nuon Chea, such 'law' would not have been binding on him within the domestic legal order of Cambodia.[94] Therefore, the fact that the international principle of legality (relied upon by the CIJs[95]) would not be violated by Nuon Chea's prosecution for *international* crimes is irrelevant.

3. The ECCC Law Does Not Provide for the Criminalization of Genocide, Crimes Against Humanity, or War Crimes

30. The CIJs have held that, 'where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly and it must have existed under international law applicable in Cambodia at the relevant time'.[96] This statement is not, on its face, incorrect. However, the Closing Order does

---

[90] *See* para 11, *supra*.
[91] *See* Closing Order, para 1302 ('[I]n order to be applied before the ECCC, where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly, and it must have existed under international law *applicable in Cambodia at the relevant time*.') (emphasis added). *N.B.* The CIJs' position in this regard is legally correct.
[92] Closing Order, para 1304.
[93] *See* Closing Order, paras 1305–1307.
[94] *See* para 27, *supra*.
[95] *See* Closing Order, para 1302.
[96] Closing Order, para 1302.

suggest—erroneously—that the ECCC Law has somehow criminalized offences recognized under international law.[97] This is not the case.

31. The ECCC Law merely vests the tribunal with jurisdiction over certain *persons* in regard to particular crimes listed in Articles 3 (new)–6. This is made plain by the phrasing of those provisions, which simply authorizes the ECCC to 'bring to trial' individuals accused of national crimes, genocide, crimes against humanity, and war crimes. Drafted in the limiting language of jurisdiction to enforce,[98] these articles do not convey the substantive basis of criminalization, such as that found in 1956 Penal Code.

32. The principle of legality itself draws a sharp distinction between jurisdiction to enforce and the substantive basis of criminality.[99] While retroactive changes in conditions of a prosecution that are not material for the determination of criminality—for example, procedural or jurisdictional provisions—are generally not subject to the principle of legality,[100] *ex post facto* changes to substantive laws clearly are.[101] Given this distinction, it would be illogical to infer criminality from jurisdiction. Simply put, between the alleged commission of a crime and its subsequent prosecution, the scope of criminalization should not be expanded.[102] Moreover, the notion that the ECCC Law's jurisdictional provisions (could) *implicitly* criminalize genocide, crimes against humanity, and war crimes in Cambodia undermines the foreseeability and accessibility requirements of the principle of legality.

4. The International Principle of Legality Does Not Provide for Domestic Criminality

---

[97] *See* Closing Order, paras 1305–1307.

[98] *See* O'Keefe, n 59 *supra*, on the distinction between jurisdiction to prescribe and jurisdiction to enforce.

[99] *Ibid.*

[100] *See Prosecutor v Kallon et al*, Case No SCSL-04-14-AR72, 'Decision on Constitutionality and Lack of Jurisdiction', 13 March 2004, para 82 ('The fact that no court exists with jurisdiction to adjudicate crimes proscribed by international law at the time the offences were committed is not a bar to prosecution and not a violation of the principle *nullum crimen sine lege*.'); *see also* Delalic Judgment, paras 179–180; *cf Streletz, Kessler, and Krenz v Germany*, ECtHR Case Nos 34044/96 & 35532/97 & 44801/98, 'Judgment', 22 March 2001, paras 79–81; Duch Judgment, para 34.

[101] *See* RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW (Asser 2001), pp 291–292.

[102] *See* FERDINANDUSSE, n 35 supra, at p 223; *see also Erdal v Council of Ministers*, Belgium Constitutional Court, Decision No 73/2005, ILDC 9 (BE 2005) para B7 (holding that the principle of non-retroactivity of criminal law governed the extension of the scope *ratione loci* of pre-existing criminal law provisions: the laws extending the scope *ratione loci* of crimes already listed in the Penal Code (Belgium) ('Penal Code') were substantive laws in that they created a legal basis for prosecution in Belgium. Accordingly, they could not be applied retroactively).

33. Although it contemplates the domestic prosecution of international crimes in certain cases, the international principle of legality cannot, by its mere existence, inject substantive criminality into an established national legal order. As evidenced by the state practice discussed previously,[103] international *nullum crimen* is complementary to the strictures of national sovereignty (including Cambodia's own principle of legality); its invocation (however well intentioned[104]) has no normative effect on the domestic plane in the absence of municipal criminalization. Accordingly, 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.

34. For these reasons—as well as those advanced in Sections IV.B.2–3 (paras 27–32)—it cannot be said that the offences referred to in Articles 4–6 of the ECCC Law were criminalized in Cambodia during the DK period. Therefore, the indictment of Nuon Chea for any crimes not contained in the 1956 Penal Code would violate his right to a fair trial.

5. Retroactive Criminalization Violates the National Principle of Legality

35. Assuming, *arguendo,* this Chamber is convinced that the ECCC Law *has* criminalized the offences referred to in Articles 4–6, such retroactive legislation violates Cambodia's national principle of legality.[105]

36. Criminalization of prior conduct in a subsequent legal order fails to satisfy the foreseeability requirement of national *nullum crimen.* While the exception to the

---

[103] *See* paras 17–19, *supra.*

[104] *See* JCE Decision, para 47 (The status of the ECCC 'does not, in the view of the Pre-Trial Chamber, impact the Impugned Order's finding that [customary international law] is applicable before the ECCC. This is the case in light of the clear terms of Articles 1 and 2 of the ECCC Law whose purpose is to bring to trial senior leaders of [DK] and those who were most responsible for [...] serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia [...]. In this regard, the ECCC Law also makes clear that the Extraordinary Chambers shall be established within the existing court structure for this purpose.') *N.B.* For all of the reasons discussed in this brief, the mere desire or intention to 'bring to trial' alleged perpetrators of international crimes is an insufficient justification for the (attempted) establishment of domestic criminalization.

[105] *See* O'Keefe, n 59 *supra,* at p 743 ('The exercise of prescriptive jurisdiction on the basis of a jurisdictional nexus established subsequent to the commission of the offence is a form of *ex post facto* criminalization and, therefore, repugnant, in that a substantive national criminal prohibition and its attendant punishment—and not merely a national procedural competence—become applicable to the accused only after the performance of the impugned conduct. [...] [T]he exercise by a state of prescriptive jurisdiction in reliance on a jurisdictional nexus not satisfied until after the commission of the "offence" means that, at the moment of commission, the "offender" is not prohibited by the law of that state from performing the relevant act; as such, his or her subsequent conviction and punishment for that act under the law of the state in question are violations of the principle of legality.')

international principle of legality (ICCPR, Article 15(2)) would arguably apply were the ECCC an international tribunal like the ICTY or SCSL, it strains reason to suggest that Nuon Chea could have foreseen internationally-based criminality in a Cambodian court. Put another way, it is difficult to understand how a person operating in a dualist, national system with strong *nullum crimen* protection could (or should) have appreciated that such protection would one day be stripped—especially through an internationally-sanctioned process professing to uphold and promote the rule of law.

37. If the principle of legality truly is, 'first and foremost, a "principle of justice",'[106] it should not be employed to retroactively dilute individual rights at the municipal level. Any tension created by the divergence of the international and national approaches to *nullum crimen* must be alleviated in favor of the Accused pursuant to the principle of *in dubio pro reo*. Apart from violating Nuon Chea's constitutional right to prosecution 'in accordance with the law', allowing the international principle of legality to trump its more protective domestic counterpart would undermine the sovereignty of the Kingdom of Cambodia.

V. CONCLUSION

38. For the reasons stated above, the Defence submits that the OCIJ erred in law by confirming the ECCC's jurisdiction over genocide, crimes against humanity, war crimes, and any modes of liability not recognized under the Cambodian legal order in 1975–1979. Accordingly, the Defence requests the PTC to quash and/or amend the Closing Order to the extent that Nuon Chea's alleged liability is expressed with *exclusive* reference to the substantive crimes and modes of liability recognized in the 1956 Penal Code. In the interests of justice and transparency, a public, oral hearing is requested.

CO-LAWYERS FOR NUON CHEA

P.P.

SON Arun

Michiel PESTMAN & Victor KOPPE

[106] Milutinovic Decision, para 37 (quoting the International Military Tribunal at Nuremberg).