BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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JOINT OBSERVATIONS ON MR NUON CHEA, MR IENG SARY AND MRS IENG THIRITH'S APPEALS AGAINST THE CLOSING ORDER

Filed by:

Co-Lawyers for the Civil Parties

LOR Chunthy
Olivier BETHUNE

Assisted by:
CHHOEUN Sopheap
SOCHEATH Chunnineath
Audrey ROELANDT
TUY Chan

Before:

The Pre-Trial Chamber

Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge MARCHI-UHEL
Judge Rowan DOWNING

Co-Lawyers for the Charged Persons

ANG Udom
Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SON Arun
Michel PESTMAN

Victor KOPPE

Co-Prosecutors:

CHEA Leang

Andrew T. CAYLEY

Co-Lawyers for the Civil Parties:

KIM Mengkhy
MOCH Sovannary
Martine JACQUIN
Philippe CANONNE
Elizabeth RABESANDRATANA
Annie DELAHAIE
Fabienne TRUSSES-NAPROUS
Ferdinand DJAMMEN-NZEPA
Christine MARTINEAU
Laure DESFORGES
Isabelle DURAND
Françoise GAUTRY
Barnabé NEKUIE
Nicole DUMAS
Daniel LOSQ
NY Chandy
Lyma NGUYEN
Mahdev MOHAN
Marie GUIRAUD
Patrick BAUDOIN
CHET Vanly
PICH Ang
VEN Pov
HONG Kimsuon
KONG Pisey
YUNG Panith
SIN Soworn
Silke STUDZINSKY
Pascal AUBOIN
Julien RIVET
Emmanuel ALTIT
Emmanuel JACOMY

INTRODUCTION AND APPLICATION

1. Considering the OCIJ Closing Order, dated 15 September 2010 (the "Closing Order").[1]

2. Considering the Appeals taken against the Closing Order by the Defence teams of Mrs IENG Thirith,[2] Mr NUON Chea[3] and Mr IENG Sary;[4] the first two notified in English and Khmer on 19 and 21 October, respectively, and the third in English and Khmer on 26 October and 5 November, respectively.

3. Considering the Decision of the Pre-Trial Chamber, dated 28 October 2010, and notified in English, French and Khmer on the same day, authorizing "the Co-Prosecutors to file a Joint Response to the Appeals from Ieng Sary, Ieng Thirith and Nuon Chea against the Closing Order [...] within fifteen days after the notification of all these Appeals in English and Khmer. This Joint Response can be filed within a page limit equal to the combined number of pages of these three Appeals in English". Furthermore, the Chamber confirmed the "Civil Parties' right to file observations in support of the prosecution's responses to the Appeals against the Closing Order within five days of the filing of the prosecution's responses, and [e]ncourages the Civil Parties to do so jointly where possible."[5]

4. Considering the Co-Prosecutors' Joint Response dated 19 November 2010 and notified on 24 November 2010.[6]

5. The Lawyers for the Civil Parties request the Pre-Trial Chamber to:

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[1] Closing Order, 15 September 2010, *D427*.
[2] IENG Thirith Defence Appeal from the Closing Order, 18 October 2010, *D427/2/1*.
[3] Appeal against the Closing Order (NUON Chea), 18 October 2010, *D427/3/1*.
[4] IENG Sary's Appeal against the Closing Order, 25 October 2010, *D427/1/6* and Addendum to IENG Sary's Appeal against the Closing Order, 28 October 2010.
[5] Decision on Co-Prosecutors' Request to file a joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith against the Closing Order and Consequent Extension of Page Limit, Pre-Trial Chamber, 28 October 2010, *D427/1/8*.
[6] Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010, *D427/1/17*.

- Declare that the Civil Parties' Joint Observations on Mrs IENG Thirith, Mr NUON Chea and Mr IENG Sary's Appeals against the Closing Order are timely.

- Take into account the Observations now filed in support of the Co-Prosecutors' Response when determining the Appeals against the Closing Order.

SUBMISSIONS

6. Considering their right to submit Observations, the Civil Parties hereby present their joint Observations on Mrs IENG Thirith, Mr NUON Chea and Mr IENG Sary's Appeals ("the Accused Persons").[7]

I. The Accused Persons are incorrect in arguing that international law relating to the international crimes with which they are charged is not applicable before the ECCC

7. It will thus be established that international treaty law is applicable, on the one hand, because its adoption predates the commission of the crimes charged and, on the other, because customary international law is applicable. Lastly, it will be recalled, if need be, that the Trial Chamber of the ECCC held in the *Duch* Judgement that it could rely "[a]s regards relevant sources of international law applicable at the time [...] on both customary and conventional international law, including the general principles of law recognized by the community of nations".[8]

1) International treaty law is applicable before the ECCC

8. The Accused Persons are all wrong in submitting, in support of similar arguments, that the four Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") were not applicable to Cambodia during the Democratic Kampuchea period, and that they can therefore not be lawfully prosecuted and indicted for grave breaches of the Geneva Conventions and the crime of genocide.

[7] The expression "Accused Persons" refers to Mr NUON Chea, Mr IENG Sary and Mrs IENG Thirith. For the purpose of these joint Observations, and unless otherwise expressly indicated, the arguments of the three Accused Persons will be analyzed simultaneously.
[8] *Duch*, ECCC Trial Chamber Judgement, para. 30.

9. The Genocide Convention and Geneva Conventions were in force during the period of Democratic Kampuchea. Cambodia acceded to the Genocide Convention in 1950[9] and ratified the Geneva Conventions in 1958,[10] that is, well before the period of Democratic Kampuchea.

10. Although they are fully aware of this state of affairs, the Accused Persons argue that the fact that the Cambodian Government did not refer to the said international conventions during the 1975-1979 period is proof that it did not consider itself bound by them. Such reasoning cannot be upheld by the Pre-Trial Chamber, and for several reasons.

On the one hand, the Conventions were not denounced. No instrument of denunciation was deposited. The mere fact that no prior reference was made to these Conventions does not suffice to abrogate them.[11] Regarding the Geneva Conventions, for instance, *Commentary on the Geneva Conventions*, by Jean Pictet, points out that "a Power which denounced the Convention would nevertheless remain bound by the principles contained in it insofar as they are the expression of inalienable and universal rules of customary international law."[12] And this is even more so where the legislative authorities have not taken any steps to denounce the treaties in question.

On the other hand, since the said Conventions went into force before the period in question, the succession of governments does not affect their applicability. As Shaw points out, "the issue of state succession should also be distinguished from questions of succession of governments, particularly revolutionary succession."[13] As such, the takeover of power by the Khmer Rouge did not affect the maintenance of those treaties in force since the Khmer Rouge regime issued no official statement denouncing them.

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[9] Cambodia acceded to the Convention on the Prevention and Punishment of the Crime of Genocide on 14 October 1950 and did not express any reservation or objection thereto. See Status of States Parties, p. 1

[10] Cambodia acceded to the four Geneva Conventions on 8 December 1958 and did not express any reservations thereto. See *States party to the Geneva Conventions and their additional Protocols*, ICRC Annual Report 2009, p. 4.

[11] The author, Shaw, indeed explains how a treaty can be terminated: "A treaty may be terminated or suspended in accordance with a specific provision in that treaty, or otherwise at any time by consent of all the parties after consultation". On the contrary, a multilateral treaty's application cannot be terminated or suspended unilaterally by a State party, *a fortiori* when the treaty in question is related to human rights or international humanitarian law. See *International Law*, M.N. SHAW, 5th edition, Cambridge University Press, 2003, p. 851. See also the 1969 Vienna Convention on the Law of Treaties, Articles 42, 54 *et seq.*, regarding denunciation and suspension of treaties. Although this Convention went into force after the 1975-1979 period, its provisions can be a basis for interpreting rules governing the application of international treaties.

[12] *Commentary, Geneva Convention II*: Article 62, p. 287; *Geneva Convention III*: Article 142, pp. 682-684 and *Geneva Convention IV*: Article 158, pp. 669-670.

[13] *International Law*, M.N. SHAW, 5th edition, Cambridge University Press, 2003, p. 862.

Lastly, the conviction of IENG Sary in 1979 for genocide under Article 2 of Decree Law No. 01 of 15 July 1979, in the 1979 Judgement[14] and the fact that the said Judgement was not appealed show that the Cambodian judicial authorities and Mr IENG Sary considered the prohibition of the crime of genocide as part and parcel of their legal system and that it could serve as a legal basis for a criminal conviction.

11. Furthermore, it is submitted, in response to Mr IENG Sary, that human rights treaties constitute an exception to the "clean slate" principle, whereby newly independent States do not become parties to a convention solely because the convention was in force before the date of succession.[15] Mr IENG Sary himself acknowledges in his submission that there is a debate on whether or not the "clean slate" principle is applicable. However, the Civil Parties consider, consistent with the international approach, that the "clean slate" principle does not apply to human rights treaties. In this regard, they point out that the term "human rights" ought to be understood in its broad sense and also includes treaties relating to international humanitarian law, like the Geneva Conventions or treaties proscribing international crimes such as the Genocide Convention.

Moreover, it should be noted that the facts show that the Khmer Rouge did not practice the "clean slate" policy to the extent that, as earlier stated, not only did they not denounce the Conventions, in 1978, they, in fact, considered that they were entitled to appeal to the United Nations Security Council thereby request the application of international rules as they had been applicable before they took power.[16]

Thus, Shaw writes "there is no doubt that human rights treaties constitute a rather specific category of treaties. […] The very nature of international human rights treaties varies somewhat from that of traditional international agreements. The International Court in the *Reservations to the Genocide Convention* case emphasized that 'in such a Convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are *raison d'être* of the Convention'. […] In view of the importance of such rights, 'all states can be held to have a legal interest in their protection, they are obligations *erga omnes*'".[17] In other words,

[14] *Judgement*, People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, August 1979, in particular pp. 309-351.
[15] IENG Sary's Appeal against the Closing Order, 25 October 2010, *D427/1/6*, para. 117.
[16] Closing Order, 15 September 2010, *D427*, para. 154.
[17] *International Law*, M.N. SHAW, 5th edition, Cambridge University Press, 2003, p. 886.

the importance and even the *raison d'être* of these treaties transcends the question of State succession to treaties in general. Shaw goes on[18] to mention the example of Yugoslavia in the Case concerning *Application of the Genocide Convention (Bosnia-Herzegovina v. Yugoslavia)* before the International Court of Justice, citing the Separate Opinion of Judge Weeramantry who held in a paragraph titled "Necessary Exceptions to the Clean Slate Principle" that "[h]uman rights and humanitarian treaties involve no loss of sovereignty or autonomy of the new State, but are merely in line with general principles of protection that flow from the inherent dignity of every human being which is the very foundation of the United Nations Charter. […] These reasons apply with special force to treaties such as the Genocide Convention […], leaving no room for doubt regarding automatic succession to such treaties."[19]

12. As concerns the Geneva Conventions, in particular, Professor Cassese expressly points out that: "[TRANSLATION] treaties [such as the Geneva Conventions], include not only […] an affirmation of the obligation to punish crimes. It is paramount to note precisely that punishment is no longer an option for States […], it is no longer an authorization granted to States under international law. Punishment is no longer left to the goodwill of States; it is an obligation *imposed* on them. In this regard, it should be noted that, in accordance with the Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons* (1996, paras. 79-82), the fundamental rules of the Geneva Conventions have become part and parcel of customary law. Such rules also include those governing criminal punishment of 'grave crimes'"[20]

2) The Accused Persons are wrong in arguing that customary international law and, in particular, *jus cogens* are not applicable before the ECCC.

13. Each of the Accused Persons argued that international customary law was not directly applicable under Cambodian law and, therefore, could not be a basis for criminal proceedings,

[18] *International Law*, M.N. SHAW, 5th edition, Cambridge University Press, 2003, p. 888.

[19] Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide *(Bosnia-Herzegovina v. Yugoslavia)*, "Separate Opinion of Judge Weeramantry", International Court of Justice, 11 July 1996, pp. 640-655, in particular, p. 645. (emphasis added)

[20] "*L'incidence du droit international sur le droit interne*", A. CASSESE, in *Juridictions nationales et crimes internationaux, Presses Universitaires de France*, p. 557. See also, Direct Application of International Criminal Law in National Courts, W.N.FERDINANDUSSE, T.M.C. Asser Press, 2006, p. 260. The author observes that "[t]he provisions on grave breaches [of the Geneva Convention] clearly define the acts in question, and can also be said to criminalize them. […] In this regard, it is significant that the States Parties are not required to criminalize the grave breaches […] but merely to provide effective penal sanctions, which suggests that the acts are already criminalized under international law".

the more so as at the time of the events, the prohibitions were not yet customary international law norms.

14. They should be mindful that all the crimes charged (genocide, grave breaches of the Geneva Conventions and crimes against humanity) fall under customary international law in addition to being part and parcel of the limited body of *jus cogens*.[21]

15. NUON Chea is so unconvinced by his own argument regarding the status of crimes against humanity that he underscores his doubts in his own submission.[22] However, this is not true of international doctrine and international justice which agree that the prohibition of crimes against humanity falls under international customary law. The Trial Chamber, relying on international criminal jurisprudence and their recognition by the Statutes of the International Tribunals, held that "since the [Nuremberg] Charter, the customary status of the prohibition against crimes against humanity […] ha[s] not been seriously questioned." Furthermore, "[t]hese international criminal tribunals have reaffirmed the continued customary status of crimes against humanity under international law." Lastly, the Trial Chamber notes that the "the formulation of crimes against humanity adopted in Article 5 of the ECCC Law comports with that existing under customary international law during the 1975 to 1979 period." And it concludes that "[…] [i]t was thus foreseeable during the 1975 to 1979 period that the Accused could be held criminally liable for the offences with which he is charged pursuant to Article 5 of the ECCC Law. The law providing for the Accused's criminal responsibility was also sufficiently accessible considering its international customary basis."[23]

16. Thus, the ECCC Trial Chamber held that it could rely on customary international law. To uphold the principle of legality, it referred to a decision of the ICTY which considered that "[a]s to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without referring to any specific provision. As to accessibility […], accessibility does not exclude reliance being placed on a law which is based on custom." And in the Judgement, the Trial

[21] See in particular *Introduction to International Criminal Law*, M.C. BASSIOUNI, Transnational Publishers, p.701.
[22] Appeal against the Closing Order, 18 October 2010, *D427/3/1*, para. 11.
[23] *Duch*, ECCC Trial Chamber Judgement, para. 284-296.

Chamber indeed relied on customary rules, particularly those relating to crimes against humanity.[24]

17. Contrary to IENG Sary's contention, the status of *jus cogens* affects Cambodian municipal law since the nature of these norms lies in their applicability *erga omnes*. It is not simply a matter of a "privileged position",[25] but it also entails an obligation that supersedes the notion of State sovereignty. In this regard, the authors, De Than and Shorts, point out that "[TRANSLATION] on account of their status as *jus cogens*, [the norms] constitute *erga omnes* obligations which are inderogable."[26]

3) ***The Accused Persons are wrong in arguing that the exception under Article 15(2) of the ICCPR is not applicable before the ECCC***

18. The Accused Persons, in particular, NUON Chea[27] and IENG Sary[28] repeatedly reject the reasoning of the Co-Investigating Judges according to which they [the Co-Investigating Judges] can establish and justify the jurisdiction of the ECCC on the basis of the exception under Article 15(2) of the International Covenant on Civil and Political Rights ("ICCPR") by arguing, in particular, that the principle of legality is more restrictively formulated in the 1956 Cambodian Penal Code than in the ICCPR. This leads them to conclude that the principle of legality under Cambodian law takes precedence over what it means in international law.

19. However, the provision of the International Covenant setting forth the principle of legality states in its second paragraph that: "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."[29] In other words, "it [the exception] expressly permits the trial and punishment of people on charges of violations of general principles of international law, regardless of the

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[24] *Duch*, ECCC Trial Chamber Judgement, para. 290: "the formulation of crimes against humanity adopted in Article 5 if the ECCC Law comports with that existing under customary international law during the 1975 to 1979 period."

[25] IENG Sary's Appeal against the Closing Order, 25 October 2010, *D427/1/6*, para. 126.

[26] *International Criminal Law and Human Rights*, C. de THAN and E. SHORTS, Thomson, Sweet & Maxwell, 2003, p.10.

[27] Appeal against the Closing Order, 18 October 2010, *D427/3/1*, para. 36: "Criminalization of prior conduct in a subsequent legal order fails to satisfy the forseeability requirement of national *nullum crimen*. While the exception to the 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 forseen internationally-based criminality in a Cambodian court".

[28] IENG Sary's Appeal against the Closing Order, 25 October 2010, *D427/1/6*, paras. 107-109.

[29] International Covenant on Civil and Political Rights ("ICCPR"), 1966.

criminal status of such acts in a State's domestic law. Article 15(2) clearly targets those who have committed grave breaches of international humanitarian law, such as war crimes or crimes against humanity."[30] The Co-Investigating Judges are simply following the established precedents of the Pre-Trial Chamber and the Trial Chamber of the ECCC.

20. Thus, the Co-Investigating judges specified in their Closing Order that "in 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"[31]

21. The Trial Chamber thus deemed in the Judgement against *Duch* that it "must determine whether the offences and modes of participation charged in the Amended Closing Order were recognised under Cambodian **or** international law between 17 April 1975 and 6 January 1979."[32] The use of the coordinating conjunction "or" and not "and" proves that the existence of such a crime under international law, as the one the Accused Persons are charged with, is in itself sufficient to allow for the judgement to be pronounced.

II. *The alleged violation of the principle of legality*

22. The Accused Persons submit that the principle of legality has been violated on the grounds that:

a) there was no domestic law criminalising the international crimes being prosecuted;

b) neither the Geneva Conventions nor the Genocide Convention are directly applicable under Cambodian domestic law;

c) the ECCC Law may neither create law nor apply retroactively.

23. Two arguments may be advanced to challenge this.

On the one hand, the Trial Chamber has already indicated that "the fact that the ECCC was established and conferred with jurisdiction over offences after they were allegedly committed

[30] *The International Covenant on Civil and Political Rights,* S. JOSEPH, J. SCHULTZ, M. CASTAN, Oxford University Press, page 469, para. 15.11.
[31] The Closing Order, para. 1302.
[32] *Duch*, ECCC Trial Chamber Judgement in Case 001, para. 28 (emphasis added).

does not violate the principle of legality."[33] On the other hand, it is necessary to take into account the transposition into domestic law of international crimes falling under the 2001 Law, amended by the 2004 Law, and setting out the jurisdiction of the ECCC[34]. Indeed [TRANSLATION] "The Cambodian government and the United Nations consider that they are clearly authorized, as provided for in Article 15 of the International Covenant on Civil and Political Rights, to consider prosecuting international crimes as they were defined at the time of the facts, pursuant to a subsequent procedural law."[35] Hence, we must consider that the ECCC Law does not create law but only transposes international treaty and customary law existing at the time of Democratic Kampuchea into Cambodian domestic law.

24. International criminal jurisprudence and doctrine have reflected on this [TRANSLATION] "issue of whether the retroactive effect of a jurisdictional rule regarding international crimes violates human rights, in particular the principle of *nullum crimen nulla poena sine previa lega poenali* enshrined in Article 15 of the International Covenant on Civil and Political Rights. […] Hence, in *Delalic et al.*, the Trial Chamber of the [ICTY] held that its status 'does not create substantive law but a judicial authority and context for the application of international humanitarian law.' Thus, the retroactivity of a domestic jurisdictional rule does not violate Article 15 of the International Covenant […]. First of all, as jurisdictional rules do not affect the morality of human conduct, the principle of *nullum crimen* is not applicable here. Secondly, because paragraph 15(2) grants the contracting parties the choice to provide a retroactive effect to jurisdictional rules in relation to forms of conduct that constituted already, at the end of the Second World War, crimes according to international law."[36]

25. Hence and in view of the above, it appears that, pursuant to the ECCC Law, the applicability by the Court of international crimes having regard to the facts, does not infringe the principle of legality insofar as this Law does not retroactively create substantive law but merely transposes it, since the law existed already.

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[33] *Duch*, ECCC Trial Chamber Judgement in Case 001, para. 34.

[34] *Law On The Establishment Of Extraordinary Chambers In The Courts Of Cambodia For The Prosecution Of Crimes Committed During The Period Of Democratic Kampuchea*, adopted in January 2001. This law was then amended and promulgated on 27 October 2004.

[35] See in particular: D. BOYLE, *"Une Jurisdiction Hybride chargée de Juger les Khmers Rouges"*, in *Droits Fondamentaux, no1 juillet-décembre 200*, pages 213 to 227 and, in particular, pages 224 and 225.

[36] *"La place des critères traditionnels de compétence dans la poursuite des crimes internationaux"*, B. SWART, in *Juridictions nationales et crimes internationaux, Presses Universitaires de France*, pp. 585 – 586.

** The Charged Persons are erring in law by not taking into consideration the jurisprudence of the ECCC*

26. Although the Defence Teams refer to the Trial Chamber Judgement in Case 001, they fail to take into consideration the scope of this decision as well as the answers the Judges provide, in particular on the issues of the Court's jurisdiction. Indeed, the decisions of the Trial Chamber constitute a precedent in terms of international criminal law.

27. The Trial Chamber acknowledged without reservation the applicability in the context of the ECCC of crimes against humanity, whose existence in international customary law at the time of Democratic Kampuchea has been confirmed, as well as grave violations of the Geneva Conventions whose provisions codify fundamental principles of international customary law.

28. The findings of the Trial Chamber may also apply to the Convention on the Prevention and Punishment of the Crime of Genocide in a comparative manner to the Geneva Conventions.

III. ***The Accused Persons are wrong in assessing the facts by considering that they were not aware of the international crimes for which they are being prosecuted***

1) The Accused Persons were aware of the crimes for which they are being prosecuted by virtue of the particularly appalling nature of these crimes

29. On the basis of relevant jurisprudence, the Co-Investigating Judges acknowledged that "[t]he appalling nature of a crime may be taken into consideration in this respect."[37] The Co-Investigating Judges merely repeated an argument already put forth in international criminal jurisprudence. Thus, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), as quoted by the Trial Chamber of the ECCC[38], has held that "war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime. […] Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts." The

Comment [C1]: WHY do you retranslate ICTY decisions?

[37] Closing Order, para. 1302.

[38] *Duch*, ECCC Trial Chamber Judgement in Case 001, para. 32.

"heinous" nature of an act was already taken into account in assessing criminality by the Nuremberg International Tribunal.[39]

30. The ECCC Trial Chamber has noted that "the appalling nature of the offences charged [pursuant to Articles 5 and 6 of the ECCC Law] helps to refute any claim that the Accused would have been unaware of their criminal nature."[40] This reasoning is *a fortiori* applicable in the case of the Accused Persons, Mr Nuon Chea, Mr Ieng Sary, Ms Ieng Thirith, who each held senior positions within the hierarchy of Democratic Kampuchea, as will be specified *infra*.

31. In this case, given the magnitude of the crimes, their cruelty, the geographical and temporal context (3 years, 8 months and 21 days) or the number of victims, it would be wrong to consider that the crimes alleged against the Accused Persons do not reach the "appalling nature" threshold.

32. Moreover, it would be wrong to conclude that the Accused Persons were unaware of the atrocious nature of the treatment inflicted upon the population, regardless of whether Old People or New People. Just as a shockwave, the Terror created and disseminated by the atrocities and violence committed during the entire period of Democratic Kampuchea propagated itself throughout the entire country and did not spare anybody, neither the victims, nor the perpetrators of the crimes, nor the intellectual leaders of the regime.

2) The Accused Persons were aware of the crimes they are charged with by virtue of their positions as leaders of Democratic Kampuchea.

33. The Accused Persons base their appeal, in particular, on the violation of the Principle of Legality, according to which the provisions forbidding crimes of genocide, grave violations of the Geneva Conventions as well as crimes against humanity must be accessible and foreseeable.[41] Basing themselves on this principle, they thus, not only claim that they cannot be tried for international crimes, which were not noted and punishable under domestic

[39] *Ojdanic,* Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY, 21 May 2003, para. 42.
[40] *Duch*, ECCC Trial Chamber Judgement in Case 001, paras. 295 and 407.
[41] IENG Thirith Defence Appeal against the Closing Order, dated 18 October 2010, D427/2/1, para. 7 and following; Appeal against the Closing Order, dated 18 October 2010, D427/3/1, para. 24 and following; IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, para. 103 and following.

criminal law at the time of the facts, but also that they were simply unaware of the criminalisation of these acts.

34. Yet, the Civil Parties consider that it is entirely justified that, on the contrary, the Co-Investigating Judges, upon assessing the governing law in their Closing Order, concluded that the principle of legality was respected. They declared: "Furthermore, the international law provisions prohibiting genocide and grave breaches of the 1949 Geneva Conventions, which expressly provide for criminal liability, were legally binding on Cambodia (…), and thus can be considered to have been sufficiently accessible to the Charged Persons as members of Cambodia's governing authorities. 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".[42]

35. The Civil Parties also wish to add that in the wake of the last World War, the Charged Persons lived in France where a prolonged, heated debate about the notion of genocide and crimes against humanity received wide coverage in the press and other media. For example, the 11 November 1960 issue of *L'Humanité*, the French Communist Party newspaper, ran a headline: *"Deux déportés dans les camps de la mort allemands"* [Two Deportees in German Death Camps] with photos.[43] Moreover, in the film "Facing Genocide – Khieu Samphan and Pol Pot" by David Aronowitsch and Staffan Lindberg, which is set in Paris in 1976, SON Sann, former member of Prince Sihanouk's Government, tried to call KHIEU Samphan to his senses, saying that the policies followed were suicidal and incomprehensible, especially coming from Cambodian patriots.[44] The Charged Persons were all members of the Communist Party and took a keen interest in the press; moreover, as emphasised by the Co-Investigating Judges, they closely monitored international news reports and remarks by Cambodians living abroad.[45] Furthermore, by virtue of the posts they occupied within the Government of Democratic Kampuchea, they had a wealth of information about the laws in

[42] Co-Investigating Judges' Closing Order, paras. 1305 and 1306. (emphasis added).
[43] *Deux déportés dans les camps de la mort allemands*, the newspaper *L'Humanité*, 11 November 1960.
[44] "Facing Genocide – Khieu Samphan and Pol Pot", David Aronowitsch and Staffan Lindberg, 2010, 25:40 to 26:53: "[TRANSLATION] What they are doing currently won't help Cambodia develop, it won't help Cambodia become independent in the future. To me, it would be understandable if these policies were adopted by enemies of Cambodia. But coming from patriots, true patriots, like Khieu Samphan, the man I knew and the man I assume he still is, a staunch patriot, I think he is courting disaster. And I ask him, I once again call upon him, as his elder brother, I know him well, I am fond of him, he must look towards the future. What he is doing now will drive Cambodia towards disaster."
[45] Co-Investigating Judges' Closing Order, 15 September 2010, D427, para. 86.

force and applicable international conventions. This is especially true given that beginning in 1978, the members of Democratic Kampuchea did not hesitate to have the UN General Assembly condemn an alleged military invasion and aggression by Vietnam.[46]

36. All three Charged Persons, namely Mr NUON Chea, Mr IENG Sary and Mrs IENG Thirith, were among "Cambodia's governing authorities", notably in their capacities as full-rights members of the Central Committee (and in particular, as Central Committee Deputy Secretary, at least following the public announcement on 29 September 1977),[47] full rights member of the Central Committee and its Standing Committee, Vice-Prime Minister for Foreign Affairs,[48] and Minister of Social Affairs,[49] respectively.

37. Accordingly, contrary to her claim that *"the CIJ failed to make the fundamental distinction between international provisions 'prohibiting' the crime of genocide, which are therefore binding upon States Parties, and the international law provisions 'criminalizing' such crimes, which are binding upon the State Parties citizens"*,[50] Mrs IENG Thirith was not an "ordinary citizen". She held a high rank in society and grew up in a well-educated family. She therefore received a good education in both in Cambodia and in France, which gave her ample access to information concerning, *inter alia*, the major international trials in Nuremberg and Tokyo and the ratification of the Geneva Conventions and the Genocide Convention. She cannot plead ignorance about the unanimous condemnation of the particularly atrocious crimes committed during the Second World War and, by implication, the reactions to those crimes in society and in legal circles.

38. The foregoing applies to all three Charged Persons. This is evidenced by their titles and functions throughout the period of Democratic Kampuchea.

39. The fight against impunity knows no boundaries in time or space.

CONCLUSION

[46] IENG Sary's speech before the General Assembly, 33rd Session, D313/1.2.378, para. 90 *et seq.*
[47] Co-Investigating Judges' Closing Order, para. 869 *et seq.* regarding NUON Chea's Roles and Functions.
[48] *Ibid.*, para. 1001 *et seq.* regarding IENG Sary's Roles and Functions.
[49] *Ibid.*, para. 1207 *et seq.* regarding IENG Thirith's Roles and Functions.
[50] IENG Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, para. 36.

40. In conclusion, the conditions enunciated by the ICTY Appeals Chamber[51] and echoed by the Pre-Trial Chamber in the Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise,[52] and the arguments detailed *supra*, reveal that international crimes come under the jurisdiction of the ECCC, *inter alia*, for the following reasons:

- All the Charges Persons were in a position to foresee that they could be held criminally liable for their acts;

- All the crimes were set forth under conventional and/or customary international law at the relevant time;

- The laws prohibiting those crimes at the relevant time were sufficiently accessible to the Charged Persons;

- All the crimes were specifically set forth in the ECCC Law.

FOR THESE REASONS

41. To find the Civil Parties' observations admissible and with merit.

42. To find that the Charged Persons were aware of the particularly atrocious nature of the crimes committed.

43. To find that the Charged Persons were in a position to foresee that they could be held criminally liable.

44. To find that the Charged Persons had knowledge of the national and international laws at the relevant time.

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[51] *Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY, 21 May 2003, para. 21.

[52] Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise, Pre-Trial Chamber, 20 May 2010, D97/14/15, para. 43.

45. To find that each of the crimes was established under international conventional and/or customary law at the relevant time.

46. And therefore, reject all the Charged Persons' requests.

Without prejudice

29.11.10	LOR Chunthy Olivier BAHOUGNE	Phnom Penh	
Date	Name	Place	Signature