BEFORE THE TRIAL CHAMBER

OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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PRELIMINARY OBJECTIONS CONCERNING JURISDICTION

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Before:

The Trial Chamber

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MAY IT PLEASE THE TRIAL CHAMBER

I. PROCEDURAL BACKGROUND

1. On 13 January 2011, the Pre-Trial Chamber sent Mr Khieu Samphan for trial before the Trial Chamber[1] for crimes against humanity, genocide, grave violations of the Geneva Conventions of 12 August 1949 and violations of the 1956 Cambodian Penal Code.[2]

II. INTRODUCTION

2. By way of this preliminary objection, Mr Khieu Samphan challenges the jurisdiction of the Chamber pursuant to Rule 89(1)(a) of the ECCC Internal Rules (the "Rules"). He has also submitted a preliminary objection today concerning termination of prosecution pursuant to Rule 89(1)(b) of the Rules. In light of the page limit, these objections are being filed in summary form. Mr Khieu Samphan reserves the right to expand on them by way of additional submissions.

A. HYBRID NATURE OF THE ECCC

3. The hybrid nature of the ECCC according to which, the "Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court[3]" requires the Chambers to apply Cambodian domestic law.[4]

B. GENERAL PRINCIPLES OF LAW

a. Principle of legality: *nullem crimen sine lege, nullem poena sine lege*

4. The principle of legality of offences and penalties[5] guarantees that no crime or punishment can exist without a written law.[6] The law must define the crime and set out the

[1] Decision on Khieu Samphan's Appeal against the Closing Order.
[2] Closing Order, 16 September 2010, D427, para.1613.
[3] Article 2 (new) of the ECCC Law.
[4] Unlike the other international criminal courts, the ECCC was not established pursuant to a UN Security Council resolution or a multi-lateral treaty. As such, the ECCC is not an international tribunal. The only applicable law before the ECCC is the 1972 Constitution of the Khmer Republic (in force during the period from 17 April 1975 to January 1976), the Constitution of Democratic Kampuchea of 5 January 1976, the 1956 Penal Code, any more lenient criminal statute currently in force, and possibly international customary law in existence during the 1975-1979 period.
[5] This principle is enshrined in Article 8 of the Declaration of the Rights of Man and of the Citizen 1789, Article 11 of the Universal Declaration of Human Rights, and Article 15 of the International Covenant on Civil and Political Rights, Article 33(2) of the ECCC Law, Article 6 of the Cambodian Penal Code.
[6] Bernard Bouloc, *Droit pénal général, Précis Dalloz*, 20th edition (2007), pp. 101 and 125.

applicable punishment. This principle is premised on the fact that criminal law must be both accessible and foreseeable. As such, "[TRANSLATION] Any antisocial behaviour, regardless of its seriousness, is not necessarily subject to criminal punishment. An act is punishable only if it is criminalized by law. Only those acts which are specified and punished by law (felonies and misdemeanours) or by a regulation (petty offences) are considered punishable offences. Accordingly, a judge is not empowered to adopt a broad interpretation of a criminal provision, as this would amount to allowing him or her to create a norm."[7] Following this principle, the French Constitutional Council reiterated Parliament's duty "[TRANSLATION] to set out the constituent elements [of crimes] in clear and precise terms."[8]

5. Thus, it is not enough to establish the existence of a crime at the time it was committed; a detailed definition of the crime and the applicable punishment must have been established by law.

b. The strict construction rule of the criminal law: *poenalia sunt restringenda*

6. Criminal laws must be strictly construed; only the law "[TRANSLATION] can curtail personal freedom by prohibiting certain acts under pain of punishment; a judge cannot, under the guise of interpretation, expand the law and arbitrarily sanction acts that are neither expressly proscribed nor punishable by law."[9]

c. Non-retroactivity of harsher criminal laws[10]

7. The ECCC Law cannot create new offences and retroactively apply them to acts allegedly committed thirty years earlier.

d. Application of these principles by international tribunals

8. In his report to the Security Council on the establishment of the International Criminal Court for former Yugoslavia ("ICTY"), the UN Secretary General noted that the application of the principle *nullem crimen sine lege* "requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law."[11]

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[7] *Ibid.*, p. 135.
[8] *Conseil constitutionnel français, Decision No. 84-183 DC of 18 January 1985*
[9] Bernard Bouloc, *Droit pénal général, Précis Dalloz,* 20th edition *(2007), p. 126.*
[10] Article 72 of the Constitution of 10 May 1972; Article 6 of the 1956 Cambodian Penal Code
[11] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), 3 May 1993, para. 34 (emphasis added).

e. International treaties are not directly applicable

9. According to Cambodia's constitutional law, international treaties are not directly applicable.

C. FORMATION OF CUSTOMARY INTERNATIONAL LAW

10. Article 38(1) of the Statute of the International Court of Justice ("ICJ") defines "international custom, as evidence of a general practice accepted as law." The formation of customary international law is subject to very strict rules. A rule of customary international law can only come into being where two criteria are met: *usus* (State practice)[12] and *opinio juris sive necessatis*.[13] It follows that the Chamber cannot rely exclusively on the case-law of the *ad hoc* tribunals in establishing the existence of a rule of customary international law, especially considering that those tribunals, let alone their decisions, were not in existence during the 1975-1979 period.

III. PERSONAL JURISDICTION

11. Under Article 1 of the ECCC Law, the Chambers only have jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law. The term "leader" is defined as: "[TRANSLATION] one who leads (…); a person who actually governs a country (heads of State)."[14] The notion of effective leadership of a country limits the Chambers' jurisdiction to prosecuting those responsible for taking **actual**, **concrete and operational decisions at the government level**, in accordance with the **particular constitutional dipensation** of the political regime concerned.

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[12] Jean-Marie Henckaerts writes: "State practice must be looked at from two angles: firstly, what practice contributes to the creation of customary international law (selection of State practice); and secondly whether this practice establishes a rule of customary international law (assessment of State practice). (…) Although decisions of international courts are subsidiary sources of international law, they do not constitute State practice. This is because, unlike national courts, international courts are not State organs." To establish a rule of customary international law, State practice has to be "virtually uniform", "extensive and representative." Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, International Review of the Red Cross, Volume 87, Number 857, March 2005, pp. 175-212.

[13] ICJ, Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgement of 3 June 1985, ICIJ Reports, pp. 21-21, para. 27: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinion juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them".

[14] Gérard Cornu, *Vocabulaire juridique,* Presses universitaires de France, "Dirigeant, ante", pp. 312 and 313 (Annex)

12. The Co-Investigating judges stated that "[t]he Standing Committee was a smaller body than the Central Committee comprised of the highest tier of CPK cadre."[15] They also state that "[a]lthough it is clear from the evidence that Khieu Samphan **was not** a formal member of the Standing Committee whilst the CPK was in power, **there is evidence of** Khieu Samphan contributing to or assisting in the work of the Standing Committee".[16] This statement is completely false and not founded on fact. Mr Khieu Samphan is not one of the "senior leaders" because, in his capacity as Head of State, **he neither led the country nor took part in government or domestic affairs.** The Chamber cannot liken representative and diplomatic functions to the actual contributions of the Standing Committee.

13. In its report on Cambodia, the Group of Experts stated that it "[did] not believe that the term "leaders" should be equated with all persons at the senior levels of Government of Democratic Kampuchea or even of the Communist Party of Kampuchea. The list of top governmental leaders and party officials may not correspond with the list of persons most responsible for serious violations of human rights in that certain top governmental leaders may have been removed from knowledge and decision-making."[17] The group recommended that the "tribunal focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea".[18]

14. Lastly, it clearly emerges from the long negotiations (six years) leading up to the establishment of the ECCC that the negotiators focused entirely on the political decision-makers who exercised **effective executive power.** The language adopted by the drafters of the Law on the Establishment of the ECCC, which refers to "senior leaders and those who were most responsible", reflects the spirit of the Agreement between United Nations and the Royal Government of Cambodia (the "Agreement"). The Chambers, established by legislation, do not have the power to extend their own jurisdiction. Under the principle of the separation of powers, the judiciary does not enact laws; it applies them. As such, the Agreement must be strictly applied on condition that it does not breach the principle of legality or offend the principle of justice and search for the truth.

[15] Closing Order, 16 September 2010, Doc. D427, para. 41
[16] *Ibid*., para. 45.
[17] Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, A/53/580, S/1999/231, para. 109.
[18] *Ibid*., para. 110.

Status of the President of the State Presidium

15. Mr Khieu Samphan was President of the State Presidium, a function set out in Chapter VIII of the Constitution of Democratic Kampuchea.[19] Chapter VIII comes **last** under organization of power.[20] Moreover, the Presidium was required to act "in keeping with the political lines of the Assembly"; this shows his subordination and lack of autonomy. Lastly, it was provided that the State Presidium was to be under the control of the Kampuchean People's Representative Assembly.[21] Therefore, it was not an autonomous body.

IV. SUBJECT-MATTER JURISDICTION

A. GENERAL

16. There is no rule establishing a general obligation to prosecute international crimes,[22] moreover, customary international law cannot create international criminal law rules without violating the principle of legality. The Defence does not deny that crimes against humanity and genocide are criminal law crimes. However, these crimes must be dealt with in accordance with their definition under the applicable domestic law. For example, murder is criminalized under domestic law, but cannot be considered a crime against humanity or genocide, to the extent that the latter did not exist under the applicable domestic law during the relevant period.

17. Antonio Cassese writes: "Normally national courts do not undertake proceedings for international crimes only on the basis of customary international law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of implementing legislation enabling courts to

[19] Article 11 of the Constitution of Democratic Kampuchea of 1975, "The State Presidium is responsible for representing the State of Democratic Kampuchea inside and outside the country in keeping with the Constitution of Democratic Kampuchea and with the laws and political lines of the Kampuchean People's Representative Assembly. The State Presidium is composed as follows: a president, a first vice-president, and a second vice-president." See Raoul Jennar, "The Cambodian Constitutions (1953-1993)", White Lotus, Bangkok (1995), p. 85.

[20] It comes after Legislative Power (Chapter V), The Executive Body (Chapter VI) and Justice (Chapter VII).

[21] Draft Decision of the first conference of the first legislature of the People's Representative Assembly of Kampuchea in Document on Conference 1 of Legislature 1 of the People's Representative Assembly of Kampuchea 11-13 April 1976, *Document*, 13.13, p, 17. This document states that "The Peoples Representative Assembly of Kampuchea must convene a plenary conference once yearly to bring up the annual political line inside and outside the country and examine and monitor the activities of the Presidium of State."

[22] Cassese, p. 302. "Besides there being no customary rule with general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community."

fully apply the relevant treaty provisions."[23] The reason is that, "[t]he two inter-related principles of *nullum crimien sine lege* and legal certainty are generally considered to be so fundamental to the legal order, that they effectively present the inclusion into domestic criminal law – even by way of interpretation – of unwritten customary rules […] The adoption of implementing legislation is, therefore, a universal prerequisite for any application of international criminal law principles in the national legal order."[24]

B. JOINT CRIMINAL ENTERPRISE

18. Mr Khieu Samphan restates here the arguments he raised at paragraphs 13 to 26 of Document D97/16/9[25], and adopts all the arguments raised by Mr Ieng Sary in his motion of 28 July 2008.[26]

C. THE CRIME OF GENOCIDE

19. Even though Cambodia ratified the Convention on the Prevention and Punishment of the Crime of Genocide, in the absence of their incorporation into domestic law during the 1975-1979 period, the ECCC cannot declare that it has jurisdiction to prosecute this crime without offending the principle of legality. The crime of genocide was not an offence under the 1956 Cambodian Penal Code.

20. The Genocide Convention is not directly applicable under national law. Article 5 of the Convention requires the parties "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."[27] In the absence of any such provisions, the ECCC cannot exercise its jurisdiction with respect to this crime. Moreover, a study conducted by the Max Plank Institute has demonstrated that "in no country under examination [35 states] (…) is it an option to punish a perpetrator of genocide simply by applying customary

[23] Professor Antonio Cassese, International Criminal Law (Oxford University Press), 2003), p. 303. Ieng Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, D240, footnote 46.
[24] Simonetta Stirling-Zanda, The Determination of Customary International Law in European Courts (France, Italy, Germany, The Netherlands, Spain, Switzerland), NON STATE ACTORS AND INTERNATIONAL LAW, 3.6 (2004). Ieng Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, D240, footnote 47.
[25] Reply of Mr Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise, 25 March 2010, D97/16/9.
[26] Ieng Sary's Motion against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97.
[27] Convention on the Prevention and Punishment of the Crime of Genocide, entered into force 12 January 1951

international criminal law. In one way or another national criminal law provision is required as a basis for national prosecution."[28]

21. If the Chamber were to find that it has jurisdiction to prosecute the crime of genocide and joint criminal enterprise as a form of responsibility, it could not apply JCE III to crimes for which intent is part of the *mens rea* element. JCE III or common purpose involves pursuing a course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. This form of responsibility is founded on the concept of *dolus eventualis*. In *Stakic*, the ICTY held that the Prosecution confused modes of responsibility and the crimes themselves. Conflating the third variant of joint criminal enterprise and the crime of genocide would result in the *dolus specialis* being so watered down that it is extinguished. The Tribunal found that in order to commit genocide, the elements of that crime, including the *dolus specialis* must be met.

D. CRIMES AGAINST HUMANITY

a. Post-1975-1979 case-law is not applicable

22. The European Court of Human Rights ("ECHR") ruled on the definition of "crimes against humanity" in 1956. It found that "[it had to] nevertheless examine whether there was a sufficiently clear basis, having regard to the state of international law as regards this question at the relevant time, for the applicant's conviction on the basis of this offence", and held that the authorities which post-dated the incriminated events were inapplicable in the determining the meaning of the concept of "crimes against humanity" as it stood in 1956.[29]

b. Customary international law does not create criminal law

23. The Chamber held that "Cambodian law contained no provisions relevant to crimes against humanity, nor was Cambodia between 1975 and 1979 a party to any international treaty relevant to these crimes".[30] It held that it must "consider whether crimes against

[28] Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective*, International Criminal Law Review 5 (2005) 313-328, p. 320.). Ieng Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, D240, para. 28

[29] ICTY, *Prosecutor v. Milomir Stakic*, IT-97-24-I, Judgement, 31 July 2003, para. 530.

[30] ECHR, *Korbely v. Hungary*, Application No. 9174/02, 19 September 2008, para. 79, "The Constitutional Court furthermore relied on the judgment of the International Court of Justice in the case of *Nicaragua v. United States of America* and on a reference made to common Article 3 in the report by the Secretary-General of the United Nations on the Statute of the International Criminal Tribunal for the former Yugoslavia (see paragraph

humanity as defined in article 5 of the ECCC Law formed part of customary international law during this period."[31]

24. The purpose of customary international law is to govern relations between States[32] and cannot govern relations between the State and its citizens by establishing criminal law norms that are directly applicable in domestic law. In criminal matters, the application of customary international law violates the principle of legality, according to which the crime and applicable punishment must have been in existence at the time the crime was committed. As regards crimes against humanity, the French Court of Cassation has reaffirmed the principle of legality: "[TRANSLATION] international custom cannot compensate for the absence of a criminalizing an act under colour of crimes against humanity."[33]

c. Vagueness of the notion of crime against humanity

25. If the Chamber finds that customary international law can create criminal law norms, it has to demonstrate that a customary international law rule existed by showing that *usus* and *opinio juris sive necessatis* existed during the period from 17 April 1975 to 6 January 1979.

26. The mere fact that crimes against humanity were codified in the Charters of the Nuremberg and the Tokyo Tribunals is not adequate proof that customary international law already existed in 1945.[34] These tribunals had jurisdiction over crimes against humanity and war crimes, as well as the crime of aggression ("crimes against peace"). The International Criminal Court ("ICC") has demonstrated that there is no customary international law on aggression.[35] Even assuming that the Charters of the Military Tribunals reflected the

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18 above). The Court observes however that these authorities post-date the incriminated events."

[31] Judgement, Case 001, E188, para. 284.

[32] International Law Association (London Conference, Report of the 63rd Conference, 936) "*A rule of customary international law is one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.*" Cited in Kraim Khan and Rodney Dixon, Archbold International Criminal Courts practice, procedure and evidence, London Sweet and Maxwell (2005).

[33] Court of Cassation of France, Criminal Division, Appeal No. 02-80719, 17 June 2003.

[34] See ICTY, *Prosecutor v. Dusko Tadić*, IT-94-1, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995: "They [the crimes of serious violations of international law] were articulated in a highly emotional atmosphere in the various fora where such reverberations of revulsion could find a way to legal expression, by reaching for the proscribed acts and practices from all possible angles and by all conceivable legal ways and means. This led to relatively loose normative formulation and a large degree of overlap between these crimes."

[35] The States were unable to reach an agreement in 1998 in the Rome Statute and at the last Review Conference of the Rome Statute in 2010, the State Parties decided by consensus that the ICC may exercise jurisdiction over the crime of aggression only with respect to "'crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties'", Article 15*ter* of the Rome Statute adopted by resolution RC/Rec.6, 11 January 2010.

existence of customary international law, the reasoning that only some of the crimes therein stipulated reflected customary international law appears abstruse.

27. Furthermore, Article 9 of the draft Agreement stipulates that the ECCC shall have jurisdiction over crimes against humanity within the meaning of the ICC Statute. However, that Statute resulted from lengthy negotiations and extensive compromises among States.[36] During the Preparatory Conference of the Rome Statute, the Ad hoc Committee for the Establishment of an International Criminal Court pointed out that "there was no convention containing a generally recognized and sufficiently precise juridical definition of crimes against humanity."[37] In light of the principle of non-retroactivity, the ICC voluntarily chose to have jurisdiction only over crimes committed after the entry into force of the Statute[38] and allowed a State Party to declare that, for a period of seven years renewable after the entry into force of the Statute for the State concerned, it would defer that entry into force.[39]

E. Grave breaches of the Geneva Conventions of 1949

a. The Geneva Conventions of 1949

28. Cambodia ratified the four Geneva Conventions of 1949 on 8 December 1958. Vietnam ratified them on 28 June 1957. The Geneva Conventions do not constitute international criminal law, but are designed to remind States of their obligations in the conduct of war.

b. Existence of an international armed conflict

29. In the Closing Order, the Co-Investigating Judges (the "CIJ") stated that, "[a]lmost immediately following the entry into Phnom Penh of the Cambodian People's National Liberation Armed Forces (CPNLAF) on 17 April 1975, a state of international armed conflict came into existence between the Socialist Republic of Vietnam and Democratic Kampuchea. Protracted armed hostilities continued until the capture of Phnom Penh on 7 January 1979 by

[36] Ad Hoc Committee on the Establishment of an International Criminal Court, 23 August 1995, A/AC.244/CRP.6/Add.3: http://www.undemocracy.com/A-50-22.pdf.
[37] *Ibid*., para. 7[8].
[38] Article 11 of the Rome Statute of the ICC. For discussions regarding the principle of non-retroactivity during the negotiations leading up to the Rome Statute, see Press release: The Statute of the International Court must not be retroactive, say speakers in preparatory committee. 29 March 1999, L/2769: http/www/legal-tools.org.doc/8f3e43/.
[39] Article 124 of the Rome Statute of the ICC.

Vietnamese forces and beyond."[40] Yet the CIJs recognise that there had been no official recognition of an international armed conflict and that there had "been a number of lulls in the fighting"[41] The requirement to clearly and unequivocally establish that an international armed conflict existed is crucial to the exercise of the Chambers' jurisdiction. The existence or absence of an armed conflict will enable the Chamber to assert jurisdiction over grave breaches of the Geneva Conventions and crimes against humanity.[42] In this respect, it must be noted that there was no Security Council Resolution between 1975 and 1979 regarding the alleged armed conflict between Cambodia and Vietnam. The first UN General Assembly resolution which refers to an armed conflict in Kampuchea is dated 9 November 1979 and refers to the "foreign [Vietnam] armed intervention" in the internal affairs of Kampuchea.[43]

c. Nexus between the crimes and the armed conflict

30. Should the Chamber consider that it has jurisdiction over war crimes, Mr Khieu Samphan invokes the case-law of the ICTY, according to which, "[t]he existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal, a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law."[44]

d. *Mens rea*

31. Only crimes against "non-nationals" may be considered as grave breaches of the Geneva Conventions: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power **of which they are not**

[40] Closing Order, 16 September 2010, D427, para. 150.
[41] Ibid, D427, paras. 151 and 152.
[42] In fact, in its decision on Khieu Samphan's Appeal Against the Closing Order, the Pre-Trial Chamber added that, "the existence of a nexus between the underlying acts and the armed conflict" is added to the "Chapeau" requirements." D427/4/14.
[43] Resolution of the United Nations General Assembly, 34th session, *The Situation in Kampuchea*, 9 November 1979, A/RES/34/22.
[44] ICTY, *Prosecutor v. Tadić*, Judgement, IT-94-1-T, 7 May 1997, para. 572. The Trial Chamber also adopted the following reasoning: "to satisfy this nexus, the acts of the accused must have been "closely related" to the armed conflict as a whole." Judgement, Case 001, 26 July 2010, E188, para. 416 (footnote omitted).

nationals."[45] To adopt a different interpretation would be contrary not only to the very spirit of the text (Article 31 of the Vienna Convention on the Law of Treaties) and the intention of the contracting parties, but also to the purposes of international conventions (Article 32 VCLT).

32. Moreover, the Chamber has recognized that the inclusion of crimes against humanity "as a distinct category of crime in the Nuremburg Charter so that acts by perpetrators against their fellow nationals, which might not otherwise have been covered by traditional formulations of war crimes, would not escape prosecution by the Nuremberg Tribunal."[46] To consider that war crimes may be committed against "nationals" amounts to confusing the definition of war crime with that of crime against humanity. An Accused cannot be tried twice for the same acts. Only the more serious crime may be prosecuted. This reasoning is consistent with Article 14 of the 1956 Cambodian Penal Code.[47]

CONCLUSION

33. The purpose of preliminary objections is to determine the jurisdiction of the Chamber prior to the commencement of trial. Mr Khieu Samphan has the right to be informed of the charges against him[48] and to have adequate **time** and **facilities** for the preparation of his defence.[49] To the extent that he has very little time to file submissions (30 days after the Closing Order becomes final), the Chamber has no basis for deferring its response until the judgement. In Case File 001, the Trial Chamber ruled on the preliminary objection concerning termination of prosecution of domestic crimes raised by Duch on 26 July 2010, that is, when it issued its judgment on the merits (pursuant to Rule 89(3) of the Rules).[50] Mr Khieu Samphan submits that such a deferral impairs the substantive hearing. Had the Chamber found that there was a "barrier to the continuation of the prosecution against the Accused for domestic crimes" prior to the commencement of trial, it would have been in a position to focus the proceedings on the other charges against the Accused. Accordingly, Mr Khieu Samphan requests that the Chamber address these preliminary objections **prior** to the

[45] Article 4 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (emphasis added).
[46] Judgement, Case file 001, 26 July 2010, E188, para. 285.
[47] The article does not recognize a plurality of offences "[w]here the same facts are given several different criminal characterisations in such a way that the same fact may be prosecuted several times."
[48] Article 92.2 of the International Covenant on Civil and Political Rights.
[49] Article 14.3 of the International Covenant on Civil and Political Rights; Article 33 (new) of the ECCC Law.
[50] Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187, para. 56.

commencement of trial in order to clarify the proceedings and ensure the quality thereof.

FOR THESE REASONS

34. The Trial Chamber is requested to:

- FIND that this preliminary objection is admissible and that it has merit;
- FIND that Mr Khieu Samphan became the **second** Head of State of the Presidium of Democratic Kampuchea by directly succeeding H.M. King Sihanouk, and that in this capacity, he was not a political decision-maker, but only a State representative without any effective or operational power;
- DECLINE personal jurisdiction over Mr Khieu Samphan as Head of State, as for H.M. King Sihanouk, the first Khmer Rouge Head of State, of whom he was the chosen, direct successor;
- DECLINE subject-matter jurisdiction over genocide, crimes against humanity and grave breaches of the Geneva Conventions of 1949;
- RENDER its decision prior to the commencement of trial.

WITHOUT PREJUDICE,
AND JUSTICE SHALL BE DONE

for	SA Sovan	Phnom Penh	[signed]
	Jacques VERGÈS	Paris	[signed]
	Philippe GRÉCIANO	Paris	[signed]
Date	Name	Place	Signature