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

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# CO-PROSECUTORS' JOINT RESPONSE TO DEFENCE RULE 89 PRELIMINARY OBJECTIONS

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## I. INTRODUCTION

1. Pursuant to the Trial Chamber's orders of 14 February 2011 and 4 March 2011,[1] the Co-Prosecutors provide the following consolidated responses to the Rule 89 preliminary objections of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith.

2. As requested by the Trial Chamber, the Co-Prosecutors have endeavored to identify those preliminary objections raised by the Accused for which prior briefs have been filed, and for such objections to provide a summary of the Co-Prosecutors' position and reference to their previous filings. The preliminary objections that are responded to in this manner are: the ECCC's general jurisdiction over international crimes under the principle of legality (section II.A); whether National Crimes are barred by the statute of limitations (section II.B); whether Grave Breaches are barred by the statute of limitations (section II.C); the application of Joint Criminal Enterprise (section II.D) and Superior Responsibility as modes of liability (section II.E); the application of forced marriage, rape within forced marriage, enforced disappearance and forcible transfer as Other Inhumane Acts, as well as imprisonment and torture, as Crimes Against Humanity (section II.F); and Ieng Sary's objection that his prosecution is barred by the 1996 Royal Decree (section II.G) and the principle of double jeopardy (section II.H).

3. The Co-Prosecutors also respond to three new preliminary objections that have been raised by the Accused: Khieu Samphan's objection that he is not a senior leader or person most responsible subject to the personal jurisdiction of the Court (section II.I); and Nuon Chea's objections to the fairness of the judicial investigation (section II.J) and the legality of the ECCC Internal Rules and the Trial Chamber's Order to File Materials in Preparation for Trial (section II.K).

4. The Co-Prosecutors observe that, contrary to the Trial Chamber's orders, the Rule 89 filing of the Ieng Sary Defence fails to provide a sufficient summary or statement of his preliminary objections, and instead simply lists his previous filings. For example, one of his preliminary objections states merely that "[t]he ECCC does not have jurisdiction to apply international crimes and forms of liability," and then cites a total of 280 pages from six prior filings.[2] Ieng Sary's failure to adequately state his preliminary objections cannot be blamed on the Trial Chamber's page limits, as he only used 15 of the 35 pages he was

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1 Trial Chamber's Amended Procedures for the Filing of Preliminary Objections and Clarification of Envisaged Response Deadlines, 14 February 2011, E51; Order on Co-Prosecutors' and Civil Party Lead Co-Lawyers' Requests for Extension of Time and Page Limits, 4 March 2011, E51/5/3.

2 Summary of Ieng Sary's Rule 89 Preliminary Objections, 25 February 2011, E51/4, para 24.

allowed,[3] and chose to devote 9 of those 15 pages to complaints about the Chamber's filing procedure and orders. Because of the Ieng Sary Defence's failure to comply with the Chamber's order, in many cases it is impossible to ascertain the specific objections he is purporting to make. While the Co-Prosecutors have done their best within the available time and page limits to identify and respond to the Accused's preliminary objections, they nonetheless submit that the Trial Chamber should not consider any objections which have not been clearly stated and summarized in the Accused's Rule 89 filings.

## II. ARGUMENT

### A. ECCC JURISDICTION OVER INTERNATIONAL CRIMES

5. Common to the preliminary objections submitted by the four Accused is an argument based on the separation between the national and international legal systems, and the so-called national principle of legality.[4] The Accused submit that, even if genocide, crimes against humanity and grave breaches of the Geneva Conventions (the "international crimes") were recognised in international law during the period covered by the Closing Order ("DK period"), they were not applicable in Cambodia. According to the Accused, since no domestic legislation was enacted to incorporate these principles into Cambodian

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3 Trial Chamber Memorandum re Page Limits for Preliminary Objections, 22 February 2011; Order to Ieng Sary Defence on Filing of Preliminary Objections, 25 February 2011, E51/6.

4 Given the page limit, the Co-Prosecutors provide an overview of the arguments, and note that these common elements have been relied upon by each of the Accused, albeit in different terms. The arguments are contained in: Ieng Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, at paragraphs 103-137, and 180-231; Ieng Sary's Reply to the Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals Against the Closing Order, 6 December 2010, D427/1/23, at paragraphs 64-111; Ieng Sary's Motion Against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, at paragraphs 13-34; Ieng Sary's Motion Against the Application of Crimes Against Humanity at the ECCC, 13 April 2010, D378, at paragraphs 11-24; Ieng Sary's Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC, 23 June 2010, D378/2, at paragraphs 1-26; Ieng Sary's Motion Against the Application of Grave Breaches at the ECCC, 7 May 2010, D379, at paragraphs 1-28; Ieng Sary's Motion Against the Application at the ECCC of the Mode of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97, at paragraphs 1-33; Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, at paragraphs 29-70; Ieng Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), 14 February 2011, E43, at paragraphs 1-9; Ieng Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009, D180/4, at paragraphs 1-37; Ieng Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning Forced Marriage and Forced Sexual Relations, 11 August 2009, D188/3, at paragraphs 1-32; Consolidated Preliminary Objections, 25 February 2011, E51/3, at paragraphs 41-56; Appeal Against the Closing Order, 18 October 2010, at paragraphs 23-38; Reply to Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals Against the Closing Order, 6 December 2010, D427/3/11, at paragraphs 6-16; Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, at paragraphs 6-94; Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal Against the Closing Order, 6 December 2010, D427/2/11, at paragraphs 32-69; Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, at paragraphs 9-19; Exceptions Préliminaires Portant Sur la Competence, 14 February 2011, E46, at paragraphs 3-33; Exceptions Préliminaires Portant Sur léxtinction de l'action Publique (Crimes Nationaux), 14 February 2011, E47, at paragraphs 8-24.

law,[5] the only applicable law is the 1956 Penal Code. They further submit that the granting of jurisdiction over international crimes to the ECCC breaches the national principle of legality found in Article 6 of the Penal Code. They assert that this principle takes precedence over the international principle of legality found in Article 15 of the International Covenant on Civil and Political Rights (ICCPR), such that the exceptions found in the latter provision do not apply. A corollary to these arguments is the assertion that the ECCC is a domestic court that cannot apply international law that was not incorporated into the Cambodian jurisdiction during the DK period.

6. The Co-Prosecutors submit that these preliminary objections should be rejected on the following grounds:
   (a) The crimes formed part of international law during the DK period, which was accessible to the Accused. It was foreseeable to the Accused during the DK period that they could be prosecuted for these crimes.
   (b) The ECCC can validly exercise jurisdiction over these international crimes because: i) the ECCC Law, which vests this jurisdiction in the Court, is constitutionally valid and consistent with the human rights instruments applicable in Cambodia; and ii) the enactment and operation of the ECCC Law are in no way barred by the so-called national principle of legality found in Article 6 of the 1956 Penal Code.
   (c) Although the Co-Prosecutors maintain that the ECCC is an internationalised hybrid court, in light of the express language of the ECCC Law, the status of the Court is irrelevant for the purposes of determining which law is applicable before it.

7. In relation to Article 6, the Co-Prosecutors submit:
   (a) The Article should be read to apply only to the 1956 Penal Code itself – in the absence of specific language stating that all other laws are subject to the Code, there is no basis to conclude that the law was intended to have such effect.
   (b) In the alternative, even if Article 6 was intended to apply to other laws, it does not apply to the ECCC Law as the latter is not a "penal law," but rather a law providing jurisdiction in respect of crimes which were already in existence.[6]
   (c) Further and in the alternative, whatever the intended meaning and scope of Article 6, as a simple act of a legislative body, the 1956 Penal Code cannot restrict the ability of

[5] Ieng Sary also submits that international law may be applicable domestically if the constitution so provides, or in the case of self-executing conventions.

[6] Similarly, to the extent that international law may be considered a "penal law" insofar as it provides for genocide, crimes against humanity and grave breaches of the Geneva Conventions, it is not being applied with "retroactive effect" as the offences were already in existence in 1975.

the Cambodian government to enact other laws. In exercising its sovereign legislative power, the Cambodian legislature was free to adopt new laws departing from or amending the effect of Article 6. The ECCC Law, which is later in time and a *lex specialis* statute on the issue of international crimes, prevails over the 1956 Penal Code to the extent of any inconsistency.

8. In so far as the Accused are seeking to challenge the validity of the ECCC Law (or its vesting of jurisdiction in the ECCC), the Co-Prosecutors submit that the only vehicle for such a challenge is the Constitution, which is the supreme law of the land.[7] Neither of the applicable constitutions[8] (that of Democratic Kampuchea and the current Constitution) contains specific provisions dealing with the principle of legality. Article 31 of the current Constitution, which was promulgated in 1993 and was in force at the time of the enactment of the ECCC Law, states, in relevant part:

> "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women's rights and children's rights."

9. By the time this Constitution was promulgated, Cambodia was already a party to the ICCPR.[9] The drafters of the Constitution chose not to incorporate a specific provision on the principle of legality in the Constitution, but opted instead to commit to compliance with the ICCPR, which includes that principle. This is confirmed by the fact that several human rights are explicitly set out in the Constitution, while others are applicable by reference to Article 31.[10] Consistent with the Constitution, the ECCC Law requires the Trial Chamber to ensure compliance with the legality principle found in Article 15 of the ICCPR.[11] The Pre-Trial Chamber therefore correctly concluded that the principle of legality applicable to the international crimes over which the ECCC has jurisdiction is that found in the ICCPR.[12]

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7 Article 150 of the Constitution provides: "This Constitution shall be the Supreme law of the Kingdom of Cambodia. Laws and decisions by the State institutions shall have to be in strict conformity with the Constitution."

8 As the Co-Prosecutors pointed out in their response to the Closing Order appeals, the 1972 Constitution of the Khmer Republic ceased to have any effect with the collapse of the Khmer Republic regime on 17 April 1975. Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, D427/3/6, para. 165 ("Joint Response to Closing Order Appeals").

9 Cambodia ratified the Covenant in 1992: see status of ratifications at http://www.ccprcentre.org/doc/ICCPR/Status%20ICCPR.pdf.

10 For provisions containing specific rights, see Articles 32, 33, 34-New, 36, 37 and 40–46.

11 Article 33new of the ECCC Law.

12 Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/3/15, para. 99.

10. Having specifically considered the issue of "non-retroactivity," the Constitutional Council of Cambodia has ruled the ECCC Law constitutional.[13] Before this Chamber, as before the Pre-Trial Chamber, none of the Accused have questioned this finding.[14] Instead, they have effectively sought to raise the status of Article 6 of the 1956 Penal Code to that of a constitutional provision with primacy over other laws (such as the ECCC Law). Yet, as demonstrated above, there is no legal basis to apply the 1956 Penal Code in such a manner.[15]

11. In any event, arguments as to the supposed retroactive operation of the ECCC law are misplaced. As the Pre-Trial Chamber found in its first decision on the Closing Order Appeals, the ECCC Law simply provides a vehicle for the investigation of crimes which existed in the DK period, and which the Cambodian government was already obliged to prosecute.[16] The Trial Chamber found in Case 001 that the offences contained in Articles 5 and 6 of the ECCC Law (crimes against humanity and grave breaches of the Geneva Conventions) constituted crimes under international law during the relevant period and that their application before the Court was consistent with the principle of legality.[17] Therefore, there has been no retroactive criminalisation of any conduct, and the Accused have not been subjected to prosecution for criminal offences which were not in existence during the DK period. In conclusion, and as the Co-Prosecutors have previously argued, application of the international crimes before the ECCC is fully consistent with the principle of legality contained in Article 15 of the ICCPR. The Co-Prosecutors incorporate by reference their submissions on these issues in their Joint Response to the Closing Order Appeals, including their arguments that genocide, crimes against humanity and grave breaches of the Geneva Conventions were defined in the law and sufficiently accessible and foreseeable to the Accused between 1975 and 1979.[18]

### B. NATIONAL CRIMES – STATUTE OF LIMITATIONS

12. Nuon Chea, Khieu Samphan and Ieng Thirith all challenge the jurisdiction of the ECCC with respect to national crimes, on the grounds that the 2001 extension of the domestic

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[13] Constitutional Council Decision No. 040/002/2001, 12 February 2001.
[14] Indeed, the Council's decisions are final: Article 142 of the 1993 Constitution.
[15] Constitutional Council Decision No. 040/002/2001, 12 February 2001, at page 2.
[16] Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, 15 February 2011, D427/3/15, para. 103.
[17] Judgement, 26 July 2010, Case File No. 001/18-07-2007/ECCC/TC, E188, para. 283–296 and 402–408 ("Case 001 Judgement").
[18] Joint Response to Closing Order Appeals, para. 131–205, which specifically addresses genocide (para. 168-171), crimes against humanity (para. 172-199) and grave breaches (para. 200-205).

statute of limitations was retroactive and contravenes the principle of legality.[19] Khieu Samphan and Ieng Thirith argue in addition that the extension of the statute of limitations for ECCC cases violates the principle of equality before the law.[20] While Ieng Sary has merely asserted that the ECCC "does not have jurisdiction to apply national crimes" and not specified the basis for that preliminary objection, it appears that he intends to raise the same issues as the other Accused.[21]

13. In response, the Co-Prosecutors hereby incorporate by reference the arguments set out in paragraphs 83 to 130 of their Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order,[22] and summarize their arguments as follows. The Co-Prosecutors first contend that the principle of legality applies only to the substantive definition of crimes or their penalties, and not to a change in the applicable statute of limitations period. There is no question that the domestic crimes of homicide, torture and religious persecution were defined in the law and sufficiently accessible and foreseeable to the Accused during the 1975 to 1979 time period, and hence cannot be barred by the principle of legality. The Pre-Trial Chamber dismissed Ieng Thirith's appeal of the Closing Order on these grounds, holding that there was no basis to extend the principle of legality to a retroactive change in a statute of limitations period.[23]

14. In addition, the statute of limitations period contained in the 1956 Penal Code was tolled until at least the mid-1990's and thus never expired, as the country was in civil war and the Accused were leading the opposition forces and actively resisting the jurisdiction of the Cambodian government. The statute of limitations for each Accused thus did not begin to run until the time they surrendered to the national government: December 1998 for Nuon Chea and Khieu Samphan;[24] and September 1996 for Ieng Sary and Ieng

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19 Nuon Chea Consolidated Preliminary Objections, 25 February 2011, E51/3, para. 41; Khieu Samphan *Exceptions Preliminaires Portant sur L'Extinction de L'Action Publique (Crimes Nationaux)*, 14 February 2011, E47 [only available in French and Khmer as of this date]; Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, para. 22.

20 Khieu Samphan *Exceptions Preliminaires Portant sur L'Extinction de L'Action Publique (Crimes Nationaux)*, 14 February 2011, E47, para. 9; Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, para. 23.

21 Summary of Ieng Sary's Rule 89 Preliminary Objections, 25 February 2011, E51/4, para. 28. The other issues addressed in the prior filings cited by Ieng Sary in paragraph 28 do not appear to qualify as preliminary objections, and hence are not responded to by the Co-Prosecutors herein.

22 Joint Response to Closing Order Appeals, para. 83-130.

23 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, D427/3/15, para. 183.

24 Alexander Hinton, *Why did they Kill?*, D313/1.2.7 at ERN 00431457; Nic Dunlop, *The Lost Executioner*, D222/1.4, at ERN 00370203; David Chandler, *Voices from S-21*, D108/50/1.4.6, at ERN 00192858; AP, *Top Khmer Rouge Leaders to Defect*, 25 December 1998, D56-Doc. 477, at ERN 00132427; AFP, *Top Khmer Rouge Leaders Defect to Government*, 26 December 1998, D56-Doc. 478, at ERN 00132425.

Thirith.[25] The legislative extension of the limitation period in 2001 occurred before its expiry and was a change in the procedural law of Cambodia, not the substantive offences for which the Accused could be prosecuted.

15. In regards to equality before the law, the Co-Prosecutors assert that the prosecution of the Accused by the ECCC does not violate Articles 14 or 26 of the ICCPR, because the selection of those Accused was based on reasonable and objective criteria, and that the Cambodian Constitutional Council has conclusively determined that Article 3 of the ECCC Law is constitutional and does not violate the right to equality before the law.

16. In its Case 001 Judgment, the Trial Chamber failed to reach a decision on this issue. The majority opinion found that the commencement of the limitations period had been tolled until at least September 1993, and that the extension of the limitations period was constitutionally valid.[26] The minority opinion found that the Co-Prosecutors had failed to introduce sufficient evidence to prove that "no prosecution or investigation would have been possible from 1979-1993," and hence the statute of limitations had already expired before the 2001 adoption of the ECCC Law extending that period.[27] At the same time, the dissenting judges observed that there was "no express contradiction between the international fair trial standards applicable before the ECCC and retroactive amendment, by a national legislature, of a statutory limitation period."[28] Ieng Thirith's assertion that the Co-Prosecutors "acquiesced" to a "legal finding" on this matter by not appealing is nonsensical,[29] as the finding of the majority of judges was in favor of the Co-Prosecutors' position.

17. The Co-Prosecutors submit that the evidence that will be presented during trial in Case 002 will establish that there was no reasonable possibility to prosecute Ieng Sary, Ieng Thirith, Nuon Chea and Khieu Samphan until their surrender to the Cambodian government in 1996 and 1998, respectively, and that the statute of limitations was thus tolled until such time. The position of these Accused is fundamentally different than that

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25 Jiji Press English News Service, *Ieng Sary Announces Formal Negotiations with Govt.*, 9 September 1996, D56-Doc. 445, at ERN 00115846; Royal decree by Norodom Sihanouk, Pardon of Ieng Sary, 14 September 1996, D366/7.1.191, at ERN 00523598.

26 Decision on the Defence Preliminary Objection Concerning the Statute of Limitations on Domestic Crimes, 26 July 2010, Case No. 001/18-07-2007-ECCC/TC, E187, para. 19-20, 25, 38 ("Domestic Limitations Decision").

27 Domestic Limitations Decision, para. 31-32, 35 ["Based on the evidence before them, the international judges are unable to conclude ..."].

28 Domestic Limitations Decision, para. 43.

29 Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, para. 21.

of Duch in Case 001, and it is difficult to conceive how the statute of limitations could expire during a period in which the Accused could only have been tried *in abstentia,* because they were either outside the jurisdiction or hiding on the border with Thailand protected by their own army in the midst of a civil war. As the decision of this matter requires the hearing of evidence and adjudication of facts, the Trial Chamber should defer its decision until the judgment on the merits, as allowed by Internal Rule 89(3).

### C. GRAVE BREACHES – STATUTE OF LIMITATIONS

18. Ieng Sary challenges the jurisdiction of the ECCC with respect to Grave Breaches of the Geneva Conventions under Article 6 of the ECCC Law, which he claims is subject to the statute of limitations established in the 1956 Cambodian Penal Code.[30]

19. The Co-Prosecutors reiterate their prior arguments,[31] and submit that Ieng Sary's objection is not supported by ECCC law or international law. No statute of limitations for prosecution of Grave Breaches was established either by the Geneva Conventions themselves or the ECCC Law, and customary international law has confirmed that these crimes are not subject to any statute of limitations. Ieng Sary's assertion of a statute of limitations defence, when no limitation period even exists for such crimes, is a frivolous argument that should be summarily rejected.

20. It is well-established in customary international law that statutes of limitations do not apply to grave breaches.[32] Article 6 of the ECCC Law may not be interpreted so as to depart from that principle and impinge on the obligation to prosecute grave breaches, as established by the Geneva Conventions[33] and crystallized under customary international

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30 Ieng Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), 14 February 2011, E43, para. 1-9.

31 The Co-Prosecutors hereby incorporate by reference the arguments set forth in paragraphs 202 to 204 of their Joint Response to Closing Order Appeals.

32 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 160, pp. 614-618 ("Henckaerts and Doswald-Beck"): "State practice establishes this rule [Statutes of limitation may not apply to war crimes] as a norm of customary international law applicable in relation to war crimes committed in both international and non-international armed conflicts"; R. Bellelli., *International Criminal Justice*, 2010, p. 6; F. Bouchet-Saulnier, L. Brav, C.Olivier, *The practical guide to humanitarian law*, 2007, p. 484.

33 Geneva Convention I, article 49; Geneva Convention II, article 50; Geneva Convention III, article 129; Geneva Convention IV, article 146; Additional protocol I, article 85. Ieng Sary's overly narrow reading of Article 6 of the ECCC Law is inconsistent with both the letter and animating purposes of the Geneva Conventions.

law.[34] Prosecutions of crimes under international law, including grave breaches, must be enforced and "states must act to ensure that suspects do not enjoy impunity."[35]

21. Contrary to Ieng Sary's assertion, grave breaches are of such an exceptional nature that they cannot be assimilated into ordinary categories of crimes such as felonies under Cambodian law, nor subjected to the ordinary regime of criminal law.[36] The national law cited by Ieng Sary only pertains to ordinary crimes and is not material to determining the applicability of statutes of limitations to grave breaches.[37] In fact, national case law pertaining to the prosecution of war crimes confirms the non-applicability of statutory limitations.[38] All states have either ratified the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity or the Statute of the ICC,[39] or have applied the principle of the non-applicability of statutory limitations to grave breaches set forth in military manuals, official statements and national legislation.[40] Finally, the UN General Assembly has also adopted several resolutions upholding the non-applicability of such statutory limitations.[41]

### D. JOINT CRIMINAL ENTERPRISE

22. The Closing Order charges the Accused on the basis of, *inter alia*, the mode of liability of joint criminal enterprise (JCE) I.[42] Ieng Sary and Khieu Samphan challenge the applicability of JCE before the ECCC, while Ieng Thirith accepts that JCE I is applicable but challenges the applicability of JCE II.[43] The challenges are based on several grounds,

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34 Henckaerts and Doswald-Beck, Rule 158.

35 J.-M. Henckaerts, *The Grave Breaches Regime as Customary International Law*, JICJ 7 (2009), pp. 694, 697.

36 Cited in Henckaerts and Doswald-Beck, p.615: UN GA Resolution on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 25 Nov. 1968, XXIII Plenary Session, A/RES/2391, Statements of Bulgaria, United States, Czechoslovakia, France, Hungary, India, Israel, Poland, Romania, United Kingdom, Ukraine, USSR, Uruguay, Yugoslavia.

37 Ieng Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), para. 5-6.

38 *Priebke and Haas*, Italy, Military Tribunal at Rome (Rassegna Giustizia Militare), Sentenza del Tribunale Militare di Roma, 22 July 1997, available at: http://www.difesa.it/GiustiziaMilitare/RassegnaGM/Processi/Priebke+Erich/08_22-07-97.htm; Guido Acquaviva, 'Priebke and Haas', *in* Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice*, Oxford, 2009, p. 880; Chile, Appeal Court of Santiago, *Videla* case; Ethiopia, Special Prosecutor's Office, *Mengistu and Others* case; Italy, Military Appeals Court and Supreme Court of Cassation, *Hass and Priebke* case, quoted in Henckaerts and Doswald-Beck, pp. 4054-4056.

39 Rome Statute, Article 29 expressly provides that those crimes are not subject to any statute of limitation.

40 Henckaerts and Doswald-Beck, Rule 160, pp. 616-617.

41 UN General Assembly Resolutions 2391 (XXIII ), 2583 (XXIV), 2712 (XXV) and 2840 (XXVI).

42 Closing Order, 15 September 2010, D427, para. 1540-1542 ("Closing Order").

43 Ieng Sary's Motion Against the Application at the ECCC of the Mode of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97, para. 1-33; Ieng Sary's Supplemental Observations on the Application of Joint Criminal Enterprise at the ECCC, 24 November 2008, D97/7; Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, para. 33-38; Ieng Thirith Submissions on the Appliction at the ECCC of the Form of Liability Known as Joint Criminal Enterprise Pursuant to the Order of the Co-Investigating

the primary ones being that: i) JCE was not part of customary international law during the DK period; ii) even if it was, it was not part of Cambodian law and therefore is not applicable before the ECCC as a domestic Cambodian court; and iii) the application of JCE is barred by the principle of legality.

23. The Co-Prosecutors incorporate by reference their previous submissions on this issue and provide a brief overview of those submissions here.[44] Liability for participation in a common plan existed in some form in the national legislation or jurisprudence of many countries since at least the nineteenth century.[45] The inclusion of the "common plan" mode of liability in the Nuremberg Charter and the Control Council Law Number 10, its application in the post-World War II war crimes trials, and other state practice and *opinio juris* gave rise to the crystallisation of JCE as a principle of customary international law in the years immediately following World War II.[46]

24. JCE was subsequently recognised in the jurisprudence of several tribunals, including the ICTY/R and SCSL, which found that the word "committed" in their respective statutes included participation in the realisation of a common design or purpose.[47] Article 29 of the ECCC Law contains wording identical to those provisions, and the drafters of the ECCC Law therefore intended to incorporate JCE into the ECCC Law.

25. On the issue of legality, the Co-Prosecutors repeat the arguments set out above in section II.A relating to the ECCC's jurisdiction over international crimes. Given that JCE was considered a criminal mode of liability under firmly established customary international law in 1975, its application is consistent with Article 15 of the ICCPR. JCE was accessible and foreseeable during the 1975-1979 period. Article 82 of the 1956 Penal Code identified co-perpetration as a form of liability, stating that any person who

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Judges of 16 September 2008, 30 December 2008, D97/3/2; Exceptions Préliminaires Portant Sur la Competence, 14 February 2011, E46, para. 18; Response of Mr. Khieu Samphan's Defence to the Co-Prosecutors' Joint Response on Joint Criminal Enterprise, 25 March 2010, D97/16/9, para. 13-26.

44 Co-Prosecutors' Joint Response to Ieng Sary, Ieng Thirith and Khieu Samphan's Appeals on Joint Criminal Enterprise, 19 February 2010, D97/16/5; Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, 11 August 2008, D97/II; Co-Prosecutors' Supplementary Observations on Joint Criminal Enterprise, 31 December 2008, D97/8.

45 ICTY, *Tadic*, Appeal Judgment, 15 July 1999, para. 224-225.

46 *See,* Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May – 26 July 1996, Official Records of the General Assembly, Fifty-First Session, Supplemental No. 10, at paragraph 19, available online at: http://www.unorg/law.ilc/index.htm; Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), UN GAOR, 1st Sess., U.N. Doc A/236 (1946) pt. 2, at 1144.

47 Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 69; Case 001 Judgement, para. 504-510; ICTY, *Tadic*, Appeal Judgment, 15 July 1999, para. 193 and 187-226; ICTR, *Ntakirutimana & Ntakirutimana*, Appeal Judgment, 13 December 2004, para. 468; SCSL, *Brima et al.*, Appeal Judgment, 22 February 2008, para. 72-75.

willfully participates, directly or indirectly, in a crime is liable for the same penalties applicable to the principal perpetrator.[48]

26. The applicability of JCE has been litigated before this Court.[49] In Case 002, the Pre-Trial Chamber held that JCE I and II were recognised forms of liability in customary international law during the DK period, and were sufficiently accessible and foreseeable to the Accused during that period.[50] In Case 001, the Trial Chamber also found that JCE I and II were part of customary international law during the DK period, and that the requirements of accessibility and foreseeability were satisfied.[51]

### E. SUPERIOR RESPONSIBILITY

27. Ieng Thirith and Ieng Sary challenge the jurisdiction of the ECCC with respect to superior responsibility as an alternative form of liability. Ieng Thirith and Ieng Sary mainly argue that superior responsibility was not part of customary international law between 1975 and 1979 and would therefore be in contravention of the principle of legality.[52] Ieng Thirith further argues that superior responsibility would only be applicable to war crimes, not to crimes against humanity.[53] Ieng Sary also submits that superior responsibility would only be applied to international armed conflict and to military commanders, would not apply to specific intent crimes and would only apply where there is a causal relationship between the superior's actions and the crimes of his/her subordinates.[54]

28. The Co-Investigating Judges interpreted Article 29 (New) of the ECCC law, in respect of superior responsibility, as a mode of criminal responsibility described as follows: "A superior is responsible for the commission of a crime within ECCC jurisdiction by a

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48 Article 82 of the 1956 Cambodian Penal Code; *see also* Article 26 of the 2009 Cambodian Penal Code.

49 Duch Closing Order Appeal Decision, Section VII, Ground 2; Case 001 Judgement, para. 512-513; Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 69.

50 Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/15/9, para. 69, 72 and 77.

51 Case 001 Judgement, para. 512.

52 Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, paras 39-40 referring to: Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, paras. 84-89 and Defence Reply to Prosecution Joint response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, D427/2/11, paras 70-78; Summary of Ieng Sary's Rule 89 Preliminary Objections, 25 February 2011, E51/4, para 26, referring to a series of previous filings bearing the references D345/2; D345/3; D345/5/1; D390/1/2/1.3 at paras 25-27 and 127-143; D427/1/6 at paras 283-324; D427/1/23.

53 Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, paras. 90-92 and Defence Reply to Prosecution Joint response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, D427/2/11, paras 79-85;

54 Ieng Sary's Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010, D345/3, paras 5-21; These arguments are repeated in D345/5/1, paras 58-74 and D427/1/6, at paras 307-324.

subordinate, when he or she knew or had reason to know of the commission of the crime and, having effective control over such subordinates, failed to take necessary and reasonable measures to prevent such acts or to punish them."[55]

29. The Co-Prosecutors hereby incorporate by reference the arguments set out in paragraphs 206 to 257 of their Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order,[56] and summarize those arguments as follows:
    (a) Superior responsibility is an applicable mode of liability at the ECCC as (i) Article 29 (New) of the ECCC Law explicitly provides for the application of superior responsibility; (ii) superior responsibility was part of customary international law during the Democratic Kampuchea regime as it evolved from the principle of responsible command to the principle of superior responsibility in post-Second World War jurisprudence, national legislation and international instruments; and (iii) the application of superior responsibility at the ECCC satisfies the requirements of foreseeability and accessibility and conforms with the principle of legality;[57]
    (b) The Closing Order accurately reflects the doctrine of superior responsibility, which: (i) applies to crimes against humanity, not only war crimes, and also to specific intent crimes such as genocide; (ii) applies equally to military and civilian superiors; (iii) applies in internal and international armed conflicts; and (iv) does not require a causal link between the underlying crimes and the superior's actions.[58]

30. In its Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, the Pre-Trial Chamber concluded that: "the doctrine of superior responsibility as charged in the Closing Order with respect of (sic) Ieng Thirith existed as a matter of customary international law from 1975-1979. In light of the post-World War II international case law cited (...) and the serious nature of crimes against humanity, it was both foreseeable and accessible to Ieng Thirith that she could be prosecuted as a superior, whether military or non-military, for crimes against humanity perpetrated by her subordinates from 1975-1979."[59]

31. Further, this Trial Chamber in its Case 001 Judgement noted that "the Nuremberg-era tribunals found that the failure of a superior to carry out his duty to control his

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55 Closing Order, para. 1319.
56 Joint Response to Closing Order Appeals, para. 206-257.
57 Joint Response to Closing Order Appeals, para. 210-237.
58 Joint Response to Closing Order Appeals, para. 238-257.
59 Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 232.

subordinates' criminal conduct could lead to individual criminal responsibility," cited the ICTY Appeals Chamber ("command responsibility was part of customary international law relating to international armed conflicts before the adoption of [Additional] Protocol I") and found that "superior responsibility was not confined to military commanders under customary international law during the 1975 to 1979 period."[60]

### F. Other Inhumane Acts, Torture and Imprisonment as Crimes Against Humanity

32. Ieng Thirith contends that forced marriage, rape within forced marriage and enforced disappearance cannot be categorised as "other inhumane acts" and that enforced disappearance did not attain the status of a crime against humanity in 1975-1979.[61] Ieng Sary has not filed any specific preliminary objections regarding these crimes, but only a general objection that the ECCC has "limited jurisdiction to apply crimes against humanity" and a list of prior filings, some of which contested the applicability of "other inhumane acts" (including forced marriage, sexual violence, enforced disappearance and forcible transfer), torture and imprisonment as crimes against humanity.[62]

33. In response, the Co-Prosecutors hereby incorporate by reference the arguments set out in paragraphs 187-189 and 193-199 of their Joint Response to Closing Order Appeals, and summarize those arguments as follows.[63]

34. Article 5 of the ECCC Law enumerates the crimes against humanity for which the ECCC has jurisdiction, including "other inhumane acts."[64] The Pre-Trial Chamber has ruled that it is not necessary that each subcategory of "other inhumane acts" be a distinct crime against humanity,[65] and that the broad category of "other inhumane acts" as crimes

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60 Case 001 Judgement, para. 476-477.

61 Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, para. 25-32, referring to Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1, para. 61-62 and Defence for Ieng Thirith and Nuon Chea, Joint Defence Response to Civil Parties' Investigative Request Concerning the Alleged Crime of Enforced Disappearance, 24 July 2010, D180/2 ("Joint Defence Response Concerning Enforced Disappearance").

62 Summary of Ieng Sary's Rule 89 Preliminary Objections, 25 February 2011, E51/4, para. 27; Ieng Sary's Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC, 23 June 2010, D378/2, para. 13-17, 19, 21-23; Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/1/1.3, para. 46, 49, 60-63; Ieng Sary's Appeal against the Closing Order, 25 October 2010, D427/1/6, para. 205-206, 208, 220-231; Ieng Sary's Reply to the Co-prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 6 December 2010, D427/1/23, para. 94-97, 99-105.

63 Joint Response to Closing Order Appeals, para. 187-189, 193-199.

64 ECCC Law, article 5.

65 Decisions on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, D427/2/15, para. 156 ("Nuon Chea & Ieng Thirith Closing Order Appeal Decision").

against humanity was criminalised under customary international law by 1975.[66] Both the Trial Chamber and Pre-Trial Chamber agree that "other inhumane acts" are a residual category of offences, designed to avoid lacunae in the law, that constitute crimes against humanity under customary international law.[67] This residual category comprises offences which do not fit within one of the enumerated crimes, but are "sufficiently similar in gravity to the other enumerated crimes," namely murder, extermination, enslavement and deportation.[68] The Pre-Trial Chamber has stated that this threshold could be met by an offence which "(1) seriously affected the life and liberty of persons...or... (2) was otherwise linked to an enumerated crime against humanity."[69] The Pre-Trial Chamber also found that the "definition of the *actus reus* for 'other inhumane acts' under customary international law was sufficiently specific such that it was accessible and foreseeable to the Appellant that certain types of conduct outside of murder, extermination, enslavement or deportation would be criminalised as crimes against humanity."[70]

35. Ieng Thirith's arguments on the sufficiency of the Closing Order allegations regarding forced marriage and rape within forced marriage involve mixed questions of law and fact,[71] and are not valid preliminary objections concerning the jurisdiction of the Chamber.[72] The definition of the constituent elements of a crime, and the determination of whether the facts set forth in the Closing Order satisfy those elements, are not jurisdictional issues, but factual and legal questions that should be resolved at trial.[73]

36. The Co-Prosecutors reiterate their earlier submission that forced marriage, sexual violence (encompassing rape), forcible transfer and enforced disappearance meet the

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66 Nuon Chea & Ieng Thirith Closing Order Appeal Decision, para. 157; *see also* Case 001 Judgement, para. 367.

67 Nuon Chea & Ieng Thirith Closing Order Appeal Decision, para. 158.

68 Case 001 Judgement, para. 367 (citing ICTY, *Prosecutor v. Naletilic et al.*, Trial Chamber Judgement, IT-98-34-T, 31 March 2003, para. 636; ICTR, *Prosecutor v. Niyitegeka*, Trial Chamber Judgement, ICTR-96-14-T, 16 May 2003, para. 460).

69 Nuon Chea and Ieng Thirith Closing Order Appeal Decision, para. 164.

70 Nuon Chea and Ieng Thirith Closing Order Appeal Decision, para. 165.

71 See, e.g., Ieng Thirith Defence's Preliminary Objections, 14 February 2011, E44, para 27 (where the Defence discusses evidentiary findings by the Co-Investigating Judges) and para. 30-31 (where the Defence discusses the 'allegation' of mutual rape). The Pre-Trial Chamber concluded that "[w]ith respect of the final matter of whether the OCIJ erred in charging forced marriage, sexual violence and enforced disappearances under the aforementioned definition of 'other inhumane acts,' the Pre-Trial Chamber finds that this constitutes a mixed question of law and fact" and is "not a jurisdictional issue." Nuon Chea and Ieng Thirith Closing Order Appeal Decision, para. 166.

72 Internal Rule 89 (1).

73 *See* Joint Response to Closing Order Appeals, para. 22-28.

threshold required to constitute "other inhumane acts."[74] These crimes are of a similar nature and gravity to murder, extermination, torture, enslavement, deportation and imprisonment, and seriously affect the life and liberty of persons. Sexual violence, which encompasses acts of rape (within forced marriage or not), results in severe bodily harm and lifelong suffering. Acts of rape have been held to constitute torture.[75] Acts of rape and sexual violence have long been prohibited in customary international law, including the Geneva Conventions of 1949.[76] Forced marriage also seriously affects the life and liberty of persons, and was found before 1975 to be similar to slavery.[77]

37. The crime of forcible transfer is similar to the crime of deportation, the two only differing by the destination to which individuals are displaced,[78] and thus constitutes an "other inhumane act" within crimes against humanity.[79] Forced transfer was qualified as a crime under the Nuremberg Charter, the Charter of the IMTFE and the Control Council Law No. 10, and therefore constituted a crime in customary international law during the relevant period.[80]

38. The crime of enforced disappearance as an "other inhumane act" was also prohibited under customary international law during the relevant period. A number of early conventions were intended to deter enforced disappearance.[81] In 1978, the United Nations General Assembly called on governments to make authorities legally accountable for enforced disappearances.[82] Enforced disappearances have also entailed individual criminal responsibility in international criminal proceedings predating April 1975,

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74 Joint Response to Closing Order Appeals, para. 187, 191-199.
75 ICTY, *Prosecutor v. Kunarac et al.*, Appeal Judgment, 12 June 2002, para. 150-151.
76 Nuon Chea and Ieng Thirith Closing Order Appeal Decision, para. 151, 193.
77 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 UNTS 3, entered into force 30 April 1957, acceded by Cambodia on 12 June 1957. For further details regarding forced marriage, see Nuon Chea and Ieng Thirith Closing Order Appeal Decision, para. 195.
78 ICTY, *Prosecutor v. Brđanin*, Trial Chamber Judgement, IT-99-36-T, 1 September 2004, para 542.
79 ICTY, *Prosecutor v. Blagojevic et al.*, Trial Chamber Judgement, IT-02-60-T, 17 January 2005, para. 629-630; *Prosecutor v. Krstic*, Trial Chamber Judgement, IT-98-33-T, 2 August 2001, para. 523; *Prosecutor v. Stakic*, Trial Chamber Judgement, IT-97-24-T, 31 July 2003, para. 723.
80 *See* Joint Response to Closing Order Appeals, para. 191-192.
81 The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907, U.S.T.S. 539, article 14; Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, articles 26, 137.
82 UN Doc. A/RES/33/173, 20 December 1978.

including the *Justice Case* where secret deportations of prisoners were found to be inhumane acts.[83]

39. Torture constituted a crime against humanity as of 1975.[84] It was included in the definition of this crime in Control Council Law No. 10.[85] The prohibition of torture can be found in numerous international instruments, including the 1950 European Convention on Human Rights,[86] the 1966 ICCPR,[87] the 1969 American Convention on Human Rights,[88] the 1975 UN General Assembly Declaration against Torture,[89] the 1984 Convention Against Torture (CAT),[90] and the 1986 African Charter on Human and People's Rights.[91] The ICTY has found the definition in CAT, which mirrors that of the 1975 Declaration, to be declaratory of customary international law,[92] and has also held that the prohibition of torture has acquired the status of peremptory norm of international law.[93] Torture is listed as a crime against humanity in the International Law Commission's 1996 *Draft Code of Crimes against the Peace and Security of Mankind* ("ILC Draft Code").[94] Cambodia's 1956 Penal Code also contains the crime of torture.[95] The Trial Chamber held in Case 001 that torture was a crime against humanity in 1975.[96]

40. Finally, imprisonment also constituted a crime against humanity in 1975.[97] As with torture, imprisonment was included as a specific crime against humanity in Control

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83 *Justice Case*, Control Council No.10 Trials, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10 (1947, vol.3), para. 1057-1058, 1061; see also Indictment, The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany (1946, vol.22.), where enforced disappearance was held to be a war crime.

84 See Joint Response to Closing Order Appeals, para. 189.

85 William Schabas, The UN International Criminal Tribunals, The former Yugoslavia, Rwanda, Sierra Leone, Cambridge University Press, 2006, page. 206, with reference to Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Against Humanity, Article II(l)(c): Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and crimes against humanity, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 January 1946, 50-55, art. 2(a).

86 Article 3 of the European Convention on Human Rights.

87 Article 7 of the ICCPR.

88 Article 5(2) of the American Convention on Human Rights.

89 Declaration on the Protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment of punishments, UNGA Res. 3452, 9 December 1975.

90 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, 10 December 1984.

91 Article 5 of the African Charter on Human and People's Rights.

92 *Celebici* Trial Judgment, para. 459; *Prosecutor v. Furundzija*, IT-95-17/1-A, Appeals Chamber Judgment, 21 July 2000, para. 111.

93 ICTY, *Prosecutor v. Furundzija*, IT-95-17/1, Trial Chamber Judgment, 10 December 1998, para. 151-153; *Prosecutor v. Krnojelac*, IT-97-25-T, Trial Chamber Judgment, 15 March 2002, para. 182.

94 ILC Draft Code, Article 18(c).

95 Article 500 of the 1956 Penal Code.

96 Case 001 Judgement, para. 352-353.

97 See Joint Response to Closing Order Appeals, para. 188.

Council Law No. 10.[98] The prohibition of imprisonment, which is grounded in the right to liberty, is recognised in several international instruments, including the European Convention on Human Rights,[99] the ICCPR,[100] the 1969 American Convention on Human Rights,[101] and the 1986 African Charter on Human and People's Rights.[102] Relying primarily on pre-1975 developments in international law, the ICTY has found imprisonment to constitute a crime against humanity under customary international law.[103] The definition of crimes against humanity in the ILC Draft Code includes "Arbitrary imprisonment."[104] In Case 001, the Trial Chamber held that imprisonment constituted a crime against humanity as of 1975.[105]

### G. IENG SARY – AMNESTY & PARDON

41. Ieng Sary asserts as a preliminary objection that the ECCC does not have jurisdiction over him "due to his validly granted and applicable Royal Amnesty and Pardon."[106]

42. In response, the Co-Prosecutors incorporate by reference the arguments set out in paragraphs 58 to 67 of their Joint Response to Closing Order Appeals,[107] and summarize their arguments as follows. First, the Amnesty that was issued to Ieng Sary was only in relation to any future prosecution for violation of the 1994 Law on the Outlawing of the Democratic Kampuchea Group,[108] which made it a crime to be a member of the "political organization or the military forces of the Democratic Kampuchea Group,"[109] and not in relation to the crimes for which he has been indicted in the Closing Order. The Pardon granted to Ieng Sary in the Royal Decree was expressly limited to the death sentence and confiscation of property that had been ordered by the People's Revolutionary Tribunal of

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98 Joint Response to Closing Order Appeals, footnote 491 in para. 191, *citing* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace, and Against Humanity, 20 December 1945, Article II(l)(c), *reprinted in* Trials of War Criminal Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (Vol. I) pp. 16-17.

99 Article 5 of the European Convention on Human Rights.

100 Article 9 of the ICCPR.

101 Articles 5(2) and 7 of the American Convention on Human Rights.

102 Article 6 of the African Charter on Human and People's Rights.

103 ICTY, *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Trial Chamber Judgement, 15 March 2002, para. 109-111; see also *Kordić*, Trial Chamber Judgement, 26 February 2001, para. 295-303; *Simić*, Trial Chamber Judgement, 17 October 2003, para. 63-65.

104 ILC Draft Code, Article 18(h).

105 Case 001 Judgement, para. 347.

106 Summary of Ieng Sary's Rule 89 Preliminary Objections, 25 February 2011, E51/4, para. 22.

107 Joint Response to Closing Order Appeals, para. 58-67.

108 Law on the Outlawing of the Democratic Kampuchea Group promulgated by Reach Kram No. 01.NS.94 on 15 July 1994 ("Outlawing Law"), *available at* http://www.cambodia.gov.kh/krt/pdfs/Law%20to%20Outlaw%20DK%20Group%201994.pdf.

109 Outlawing Law, article 2. Article 7 of the Outlawing Law expressly empowered the King of Cambodia to grant an amnesty or a pardon to those who violated it.

Phnom Penh on 19 August 1979.[110] In any event, pardons or amnesty for *jus cogens* crimes, such as genocide, crimes against humanity and grave breaches of the Geneva Conventions, are invalid under international law and do not bind this Court.

43. The Pre-Trial Chamber has already considered and rejected Ieng Sary's argument twice. In its October 2008 decision on Ieng Sary's appeal of his provisional detention, the Pre-Trial Chamber determined that the amnesty for prosecution under the 1994 Outlawing Act contained in the Royal Decree "cannot be seen as having the possible effect of preventing a conviction by the ECCC."[111] In January 2011, the Pre-Trial Chamber dismissed Ieng Sary's appeal of the Closing Order that was based on the Amnesty and Pardon.[112]

## H. IENG SARY – DOUBLE JEOPARDY

44. Ieng Sary also asserts as a preliminary objection that the ECCC does not have jurisdiction over him "due to the principle of *ne bis in idem*."[113]

45. In response, the Co-Prosecutors incorporate by reference the arguments set out in paragraphs 68 to 82 of their Joint Response to Closing Order Appeals,[114] and submit that the prosecution of Ieng Sary is not barred by double jeopardy under either domestic or international law. Article 12 of the Cambodian Criminal Procedure Code ("CPC") limits the application of double jeopardy to cases where the accused has been "finally acquitted." Similarly, double jeopardy is not applicable under Article 14(7) of the ICCPR, because the PRT judgment resulted from an *in abstentia* trial and hence cannot be considered final under Cambodian law and procedure, which provides that convictions *in abstentia* are set aside once a defendant is arrested or surrenders and a retrial occurs.[115] In any event, international law provides that double jeopardy does not apply when an international tribunal conducts a second prosecution after a first national prosecution, such as the PRT trial, failed to conform to international fair trial safeguards. Among other problems, Ieng Sary was tried *in abstentia* by the PRT in a trial that lasted only 1 week and was not subject to appeal. He did not have competent counsel representing his

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110 Royal Decree, 14 September 1996, D366/7.1.191 at ERN 00523598.

111 Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/74, para. 61 ("Ieng Sary Detention Appeals Decision"). The Pre-Trial Chamber also concluded that the "validity of the amnesty is uncertain," though its analysis was confused by an incorrect translation of the Royal Decree that used the word "amnesty" instead of "pardon" in relation to the 1979 death sentence (*see* para. 55-58).

112 Decision on Ieng Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26, para. 4.

113 Summary of Ieng Sary's Rule 89 Preliminary Objections, 25 February 2011, E51/4, para 23.

114 Joint Response to Closing Order Appeals, para. 58-60, 68-82.

115 Code of Criminal Procedure of Cambodia, articles 410, 412, 489-493.

interests; to the contrary, his assigned counsel did not cross-examine witnesses, submitted written statements against Ieng Sary, and confessed his guilt and applauded his prosecution in his closing statement.

46. As with his arguments regarding Amnesty and Pardon, the Pre-Trial Chamber has already considered Ieng Sary's double jeopardy arguments twice. In October 2008, the Pre-Trial Chamber noted that the current prosecution appeared to include additional and different offences than the 1979 conviction for genocide, though the matter could not be fully addressed until such time as an indictment was issued.[116] In January 2011, the Pre-Trial Chamber dismissed Ieng Sary's appeal of the Closing Order based on *ne bis in idem*.[117]

## I. KHIEU SAMPHAN - PERSONAL JURISDICTION

47. In his preliminary objections, Khieu Samphan asserts that he is not within the personal jurisdiction of the Court because he was neither a senior leader of the DK regime nor one of those most responsible for crimes committed during the DK period.

48. Articles 1 and 2 of the ECCC Law and ECCC Agreement establish the personal jurisdiction of the court over "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, 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."[118]

49. The use of the conjunctive "and" in these provisions establishes that there are two separate categories of persons that fall within the jurisdiction of the ECCC: "senior leaders of Democratic Kampuchea" and "those who were most responsible" for the crimes committed during the DK period. An Accused does not have to be both a senior leader and a person most responsible to fall within the jurisdiction of the ECCC, as has been confirmed by the Trial Chamber. In its Case 001 Judgement, the Trial Chamber determined that the ECCC had personal jurisdiction over S-21 Chairman Kaing Guek Eav *alias* Duch as "one of those most responsible for crimes committed" during the DK

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[116] Ieng Sary Detention Appeals Decision, para. 51-54.
[117] Decision on Ieng Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26, para. 3. The full reasons for that decision have yet to be published by the PTC.
[118] ECCC Law, Articles 1 and 2; ECCC Agreement, Articles 1 and 2(1).

period, and consequently there was "no need to examine the issue of whether the Accused was a senior leader."[119]

50. Although the terms "senior leader" and those "most responsible" are not defined in the ECCC Law, ECCC Agreement or the Internal Rules of the Court, the Trial Chamber has interpreted the meaning of those terms relying on the legislative history of the ECCC and international jurisprudence interpreting similar terms.[120]

51. The legislative history of the ECCC Agreement and Law is reflected in documents such as the 1999 UN Group of Experts report[121] and the National Assembly debates.[122] The Group of Experts report concluded that the persons to be prosecuted should include "senior leaders with responsibility over the abuses as well as those at lower levels who are directly implicated in the most serious atrocities."[123] During the October 2004 National Assembly debates on the ECCC Law, in response to a question seeking clarification on the scope of persons to be prosecuted, H.E. Sok An, Deputy Prime Minister in Charge of the Office of the Council of Ministers and Chairman of the Khmer Rouge Trial Taskforce, explained that Article 2 of the proposed law was intended to allow the prosecution of "two types of targets": (i) "senior leaders," as opposed to persons who held "ordinary positions" and (ii) "those who were not the senior leaders, but who committed crimes as serious as the senior ones."[124]

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[119] Case 001 Judgement, para. 25. In paragraph 17 of the Judgement, the Trial Chamber stated that personal jurisdiction was "confined either to 'senior leaders of DK' or 'those who were most responsible ...'" (emphasis added).

[120] Case 001 Judgement, para. 19-22.

[121] Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135, UN Doc. Nos. A/53/850 and S/1999/231, dated 18 February 1999 ("Group of Experts Report"). In 1997, the Cambodian government requested the United Nations for assistance in "establishing the truth" about the DK period and "bringing those responsible to justice." U.N. Doc. No. A51/930 and S/1997/488, dated 24 June 1997 (attaching a letter to the Secretary-General from the Prime Ministers of Cambodia, Prince Norodom Ranariddh and Hun Sen). In February 1998, the UN General Assembly passed Resolution 52/135, which called upon the Secretary-General to establish a "group of experts" to address the Cambodian government's request. UN General Assembly Resolution 52/135 entitled *Situation of human rights in Cambodia*, U.N. Doc. No. A/RES/52/135, dated 27 February 1998, para. 16. A group of three experts was appointed by the Secretary-General to assess the feasibility and recommend legal options for bringing Khmer Rouge leaders to justice for crimes committed during the 1975-79 time period.

[122] Transcript: The First Session of the Third Term of Cambodian National Assembly, 4-5 October 2004, D288/6.9/8.22, ERN 00336414-18 ("National Assembly Debate").

[123] Group of Experts Report, para. 110; Case 001 Judgement, para. 20.

[124] National Assembly Debate, at ERN 00336417.

52. The statutes and decisions of other international tribunals also provide guidance as to the meaning of the terms "senior leaders" and persons "most responsible," and were relied upon by the Trial Chamber in ruling on the issue of personal jurisdiction in Case 001.[125]

53. The ICTY's jurisdiction includes all persons responsible for serious violations of international humanitarian law in the former Yugoslavia.[126] In order to complete its work as quickly as possible, however, the ICTY was instructed to concentrate on the prosecution of "the most senior leaders suspected of being most responsible" for crimes within the jurisdiction of the Tribunal[127] and to transfer cases that do not meet these criteria to national jurisdictions.[128] In evaluating whether an individual is a senior leader who is most responsible, the ICTY Referral Bench considers: (1) the gravity of the crimes charged, and (2) the level of responsibility of the accused.[129]

54. In assessing the level of responsibility of the accused, the ICTY Referral Bench has concluded that the category of "most senior leaders" is not restricted to individuals who are "architects" of an "overall policy" which forms the basis of alleged crimes.[130] Instead, the Bench considers individuals who, by virtue of their *de jure* and *de facto* position and function in the relevant hierarchy, are alleged to have exercised such a degree of authority that it is appropriate to describe them as "most senior" rather than "intermediate."[131] Relevant factors considered in determining this degree of authority include the permanency of the accused's position,[132] temporal scope,[133] rank of the accused within the hierarchical structure,[134] authority to negotiate, sign or implement agreements,[135] control of access to territory,[136] number of subordinates,[137] actual role of

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125 Case 001 Judgement, para. 22.

126 ICTY Statute, Art. 1.

127 *See* United Nations Security Council Resolution 1534, dated 26 March 2004, at paras. 5-6, UN Doc. No. S/Res/1534 (2004); United Nations Security Council Resolution 1503, dated 28 August 2003, UN Doc. No. S/Res/1503 (2003).

128 *See* ICTY Rules of Procedure and Evidence, Rule 11*bis* (describing the process for transferring cases to competent national courts). Rule 11*bis* references Security Council Resolution 1534 and states that the ICTY will consider the "gravity of the crimes charged" and the "level of responsibility of the accused" in deciding whether to transfer cases. *See also* ICTY, *Prosecutor v. Dragomir Milosevic*, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, 8 July 2005, paras. 1-3 (describing the transfer process) ("Milosevic Referral Decision").

129 ICTY, *Prosecutor v. Lukic*, Case No. IT-98-32/1-PT, 5 April 2007, para. 26 ("Lukic Referral Decision").

130 Milosevic Referral Decision, para. 22; Lukic Referral Decision, para. 28.

131 Milosevic Referral Decision, para. 22; Lukic Referral Decision, para. 28.

132 Milosevic Referral Decision, para. 23.

133 Milosevic Referral Decision, para. 23.

134 ICTY, *Prosecutor v. Ademi*, Case No. IT-04-78-PT, 14 September 2005, para. 29 ("Ademi Referral Decision"); ICTY, *Prosecutor v. Kovacevic*, Case No. IT-01-42/2-I, 17 November 2006, para. 20 ("Kovacevic Referral Decision"); Milosevic Referral Decision, para. 23; Lukic Referral Decision, para. 28.

135 Milosevic Referral Decision, para. 23; Ademi Referral Decision, para. 29.

the accused in the commission of the crimes,[138] and whether those more senior in rank than the accused have already been convicted for their role in such crimes.[139]

55. In assessing the gravity of the crimes charged, the ICTY Referral Bench considers a number of factors, including temporal scope,[140] geographic scope,[141] the number of victims[142] and the number of separate incidents with which an accused is charged.[143]

56. Applying these factors, the ICTY Referral Bench concluded that a military commander in charge of ten brigades and 18,000 personnel who reported to the highest echelon of the military and who was accused of shelling and sniping the city of Sarajevo for a fifteen-month period and killing and wounding thousands of civilians, qualified as one of "the most senior leaders suspected of being most responsible."[144] The ICTY Appeals Chamber has held that a top paramilitary leader accused of orchestrating multiple incidents of mass murder that resulted in the deaths of over 150 people must be considered a "most senior leader" and tried by the Tribunal.[145]

57. Persons whose level of seniority and responsibility were determined to be lower and thus appropriate for referral by the ICTY to national jurisdictions have included: a paramilitary leader and sub-commander of military police whose authority was limited to the "local level" (town of Foca);[146] the Assistant Warden of a prison, whose alleged crimes were limited to a specific region;[147] a brigade commander and the acting commander of a military district charged with the deaths of 34 people during a single military operation;[148]

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136 Milosevic Referral Decision, para. 23.
137 Milosevic Referral Decision, para. 23.
138 Ademi Referral Decision, para. 29; Lukic Referral Decision, para. 28.
139 Kovacevic Referral Decision, para. 20.
140 ICTY, *Prosecutor v. Jankovic*, Case No. IT-96-23/2-AR11bis.2, 15 November 2005, para. 22 ("Jankovic Referral Decision"); ICTY, *Prosecutor v. Todovic*, Case No. IT-97-25/1-AR11bis.1, IT-97-25/1-AR11bis.2, 4 September 2006, para. 13 ("Todovic Referral Decision"); ICTY, *Prosecutor v. Ljubicic*, Case No. IT-00-41-PT, 12 April 2006, para. 18 ("Ljubicic Referral Decision"); Ademi Referral Decision, para. 28; Kovacevic Referral Decision, para. 20; Lukic Referral Decision, para. 27.
141 Jankovic Referral Decision, para. 22; Todovic Referral Decision, para. 16; Ademi Referral Decision, para. 28; Ljubicic Referral Decision, para. 18; Kovacevic Referral Decision, para. 20; Lukic Referral Decision, para. 27.
142 Jankovic Referral Decision, para. 22; Kovacevic Referral Decision, para. 20; Lukic Referral Decision, para. 27.
143 Lukic Referral Decision, para. 27.
144 Milosevic Referral Decision, para. 8-10, 19, 21-24.
145 ICTY, *Prosecutor v. Lukic*, Case No. IT-98-32/1-AR11bis.1, 11 July 2007, para.21-22, 25 [reversing a decision of the Referral Bench].
146 Jankovic Referral Decision, para. 4, 19-22.
147 Todovic Referral Decision, para. 13, 16, 21-22, 25.
148 Ademi Referral Decision, para. 15-18, 28-31.

and a battalion commander accused of participating in a one-month military campaign to shell the town of Dubrovnik that injured or killed five people.[149]

58. The Statute of the Special Court for Sierra Leone ("SCSL") only references those who bear the "greatest responsibility,"[150] which language was intended to be more limited than "persons most responsible."[151] Nonetheless, Trial Chamber II of the SCSL concluded that "persons who bear the greatest responsibility" included an "array of individuals from military and political leaders down to individuals as young as 15."[152] The SCSL Appeals Chamber subsequently concluded that the phrase "greatest responsibility" was not a jurisdictional requirement that could be relied upon to review or challenge the Prosecutor's determination to bring charges against a particular person.[153]

59. In the Closing Order, the Co-Investigating Judges (CIJs) determined that Khieu Samphan and the other Accused were "senior leaders of Democratic Kampuchea during the period of ECCC temporal jurisdiction, due to their *de facto* and *de jure* hierarchical authority."[154] The CIJs also concluded that each of the Accused fell within the category of "those most responsible," based on "their personal participation in the implementation of the CPK's common purpose through criminal means."[155] The specific factual findings supporting the determination that Khieu Samphan was a senior leader and person most responsible are set forth below.

60. Khieu Samphan became a candidate member of the CPK Central Committee in 1971 and a full-rights member in 1976, and held that position through the remainder of the DK period.[156] He regularly attended Standing Committee and other high-level CPK meetings, and is alleged by the Co-Prosecutors to have been a *de facto* member of the Standing

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149 Kovacevic Referral Decision, para. 12-13, 20.

150 Article 1 of the Statute of the Special Court for Sierra Leone (16 Jan. 2002) reads: "The Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for violations of international humanitarian law" committed in Sierra Leone.

151 SCSL Trial Chamber II, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, para. 32 ("Brima Rule 98 Decision"); SCSL Trial Chamber II, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgment, 20 June 2007, para. 651 ("Brima Trial Judgment").

152 Brima Trial Judgment, para. 658-659; *see also* Brima Rule 98 Decision, para. 34, 36-37. Trial Chamber II also indicated that the court's jurisdiction over the accused is unaffected even if there is evidence of additional individuals who also bear the greatest responsibility. Brima Rule 98 Decision, para 39.

153 SCSL Appeals Chamber, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgment, 22 February 2008, paras. 280-284.

154 Closing Order, para. 1327.

155 Closing Order, para. 1328.

156 Closing Order, para. 1131.

Committee.[157] As President of the State Presidium, he was the Head of State from April 1976 through the end of the DK regime.[158] He was a leading cadre in Political Office 870,[159] and had responsibility for commerce matters such as the distribution of goods throughout the country.[160] He regularly gave speeches and conducted political education sessions disseminating CPK policies, including those relating to the identification and execution of perceived enemies.[161] He was found to have personally participated in the development and implementation of CPK criminal policies, including the forced movements of the population,[162] the enslavement of the Cambodian people in cooperatives and worksites,[163] the arrest, detention and execution of alleged enemies of the Party in re-education or security offices,[164] the targeting of Khmer Republic officials and the Buddhist, Cham and Vietnamese groups[165] and forced marriages.[166] The crimes for which Khieu Samphan has been indicted are of the gravest nature and affected hundreds of thousands of victims in all geographic areas of the country throughout the entire temporal jurisdiction of the ECCC.[167]

61. The Co-Prosecutors note that Khieu Samphan did not appeal the Closing Order's determination of personal jurisdiction. Moreover, a decision as to whether an Accused is a senior leader or person most responsible requires the Court to review evidence and make factual conclusions. In this case, Khieu Samphan has admitted that he was a member of the CPK Central Committee and that he regularly attended meetings of the Standing Committee. These facts alone are sufficient to support a conclusion that he was a senior leader of the DK regime subject to the Court's jurisdiction. To the extent there are additional contested facts that the parties wish to be considered, the Trial Chamber

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157 Closing Order, para. 1132-1134, 1151-1152; Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390, para. 1065-1071.
158 Closing Order, para. 1135-1138.
159 Closing Order, para. 1139-1141.
160 Closing Order, para. 1142-1144.
161 Closing Order, para. 1148-1150.
162 Closing Order, para. 1153-1163.
163 Closing Order, para. 1164-1171.
164 Closing Order, para. 1172-1190.
165 Closing Order, para. 1157-1158, 1191-1198.
166 Closing Order, para. 1199.
167 Closing Order, para. 158 (finding that the CPK criminal policies were in effect for the entire DK period, during which time they "evolved and increased in scale and intensity" and converted the entire country into a "prison without walls"), para. 178 (finding that 200 security centres were established "located in every Zone throughout Cambodia and at all levels of the CPK administrative structure"), para. 1360 (finding that the system implemented by the CPK "resulted in millions of victims, including 1.7 to 2.2 million deaths, of which some 800,000 were violent"), para. 1613 (indicting the Accused for Crimes Against Humanity, Genocide, Grave Breaches and Violations of the 1956 Penal Code).

would only be able to do so after hearing the evidence at trial.[168] Internal Rule 89(3) expressly allows the Trial Chamber to defer decisions on preliminary objections until the issuance of a judgment on the merits. The Co-Prosecutors submit that the evidence available on the Case File at this stage of the proceedings clearly establishes, on a *prima facie* basis, that Khieu Samphan was both a senior leader of Democratic Kampuchea and a person most responsible for the crimes.

### J. FAIRNESS OF JUDICIAL INVESTIGATION

62. By his Consolidated Preliminary Objection, Nuon Chea requests the Trial Chamber to order the termination of prosecution or a stay of proceedings on the basis that "fundamentally flawed and manifestly unfair, the judicial investigation of case 002 resulted in objective errors which...have resulted in irreparable harm to Nuon Chea's rights under Cambodian and applicable international law."[169] These flaws are alleged to include impermissible government interference, OCIJ bias against the Accused, as well as lack of transparency and OCIJ's use of a questionable methodology. Nuon Chea argues that, as a result of these alleged flaws in the investigation, he cannot receive a fair trial, and that rehabilitating the case to "an acceptable level of 'fairness' would prove impossible."[170]

#### *Applicable Legal Standard*

63. The Trial Chamber has an inherent power to order a permanent stay of proceedings where a serious and egregious breach of an accused's rights has been established.[171] However, due to the exceptional nature of a termination of criminal proceedings, the threshold which must be met for this form of relief is very high. The ICC Appeals Chamber has held that:

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[168] Other international tribunals have dismissed pre-trial jurisdictional motions and appeals that involve questions of fact that ultimately must be resolved at the trial stage. ICTY, *Prosecutor v. Krajišnik*, Decision on Motion Challenging Jurisdiction, IT-00-39, 22 September 2000, para. 25-26; ICTY, *Prosecutor v. Hadžihansanović*, Decision on Joint Challenge to Jurisdiction, IT-01-47-PT, 12 November 2002, para. 23, 202; ICTY Appeals Chamber, *Prosecutor v. Brđanin*, Decision on Interlocutory Appeal from Decision on Motion to Dismiss Indictment Filed under Rule 72, IT-99-36-A, 16 November 1999; ICTY, *Prosecutor v. Kordić and Čerkez*, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction based on the Limited Jurisdictional Reach of Articles 2 and 3, IT-95-14-2, 2 March 1999, para. 14-16; ICTY, *Prosecutor v. Milutinović*, Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, IT-05-87-PT, 22 March 2006, para. 23.

[169] Consolidated Preliminary Objection, 25 February 2011, E51/3, para. 3 ("Nuon Chea Preliminary Objections").

[170] Nuon Chea Preliminary Objections, para. 62.

[171] Co-Prosecutors' Combined Response to Defence's Appeals Against the 'Order Rejecting the request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process filed by Ieng Thirith' (D263/1 and D264/1) of 31 December 2009, 19 February 2010, D264/2/2, para. 16.

> "A stay of proceedings is a drastic remedy. It brings proceedings to a halt, potentially frustrating the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute. It is an exceptional remedy."[172]

64. As stated by the ICC Appeals Chamber, the high threshold for imposing a stay of proceedings requires that it be "impossible to piece together the constituent elements of a fair trial." In other words, "only when the breaches of the rights of the accused are such as to make it impossible for him to make his defence," and "a fair trial thus becomes impossible," can the proceedings be stayed.[173]

65. The same standard has been applied by the *ad hoc* tribunals. In *Barayagwiza*, the ICTR Appeals Chamber held that, to warrant a stay of proceedings, a violation of the rights of the accused must be "so egregious" that to continue the proceedings would "contravene the court's sense of justice and as such prove detrimental to the court's integrity."[174] This standard was followed by the *Nikolic* Trial Chamber,[175] whose decision was upheld by the Appeals Chamber, with the latter adding that a stay of proceedings is a remedy that must be reserved for the most "exceptional" of cases.[176] This standard has also been applied in more recent decisions of the ICTY.[177]

66. The PTC followed this international standard in its decision denying Ieng Thirith's request for a stay of proceedings in this case.[178] The Chamber held that a stay of proceedings is an "extreme measure" which should only be applied to "an exceptional

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[172] ICC, *Prosecutor v. Thomas Lubanga Dylio*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 8 October 2010, ICC-01/04-01/06 OA 18 ("Lubanga Decision of 8 October 2010"), para. 55.

[173] ICC, *Prosecutor v. Thomas Lubanga Dylio*, Judgment on the Appeal of Mr. Thomas Lubanga Dylio against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) of the Statute of 3 October 2006, 14 December 2006, Case No. ICC-01/04-01/06 (OA4) ("Lubanga Decision of 14 December 2006"), para. 39; Lubanga Decision of 8 October 2010, para. 55; ICC, *Prosecutor v. Thomas Lubanga Dylio*, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings, 7 March 2011, Case No. ICC-01/04-01/06 ("Lubanga Decision of 7 March 2011"), para. 165.

[174] ICTR, *Prosecutor v. Barayagwiza*, Decision, 3 December 1999, Case No. ICTR-97-19-AR72, para. 74 and 77.

[175] ICTY, *Prosecutor v. Nikolic*, Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, Case No. IT-94-2-PT, para. 111.

[176] ICTY, *Prosecutor v. Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, Case No. IT-94-2-AR73, para. 30.

[177] ICTY, *Prosecutor v. Karadzic*, Decision on Motion to Dismiss for Abuse of Process, 12 May 2009, Case No. IT-95-5/18-PT, ("Karadzic Decision"), para. 10-11; ICTY, *Prosecutor v. Seselj*, Decision on Oral Request of the Accused for Abuse of Process, 10 February 2010, Case No. IT-03-67-T, para. 22.

[178] Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6 ("Ieng Thirith Abuse of Process Decision").

and very serious case of violations of rights of the accused, which cannot be rectified or [which] contravene the court's sense of justice."[179] The Chamber correctly noted that international jurisprudence "does not allow the abuse of process doctrine to deploy a standard lower than this."[180]

67. The burden of proof on an application for a stay of proceedings rests with the Accused,[181] and the Court is given some discretion when determining whether the requisite threshold is met "based on its intimate understanding of the process thus far."[182] Even if a procedural irregularity is identified, the Court must ensure that the remedy ordered in response is proportionate to the harm suffered.[183] As ICC Trial Chamber I held recently, the "drastic remedy" of termination is to be reserved strictly for those cases that warrant "the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy)."[184] This analysis will often lead to the conclusion that a stay of proceedings is a disproportionate response.[185]

68. While it is beyond the scope of this response to deal separately with each prior filing referenced by Nuon Chea, the following summary response demonstrates that his objection is ill-conceived and must be rejected. The matters raised by the Accused have either already been adjudicated upon, or do not meet the legal standard described above. Nuon Chea has grouped his complaints into two broad categories: allegations of political interference;[186] and claims regarding the quality of the investigation.[187]

*Allegations of Political Interference*

69. ***Corruption***: Nuon Chea claims that, due to unresolved allegations of administrative corruption, the ECCC remains a tainted institution. The facts he cites, however, do not support his claim. In 2009, the OCIJ rejected Nuon Chea's request for investigative action into allegations of administrative corruption.[188] While ruling the appeal against this order inadmissible, the Pre-Trial Chamber also held that the allegations were insufficient to

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179 Ieng Thirith Abuse of Process Decision, para. 28.
180 Ieng Thirith Abuse of Process Decision, para. 24.
181 ICTR, *Prosecutor v. Akayesu*, Judgment, 1 June 2001, Case No. ICTR-96-4-A ("Akayesu Judgment"), para. 340.
182 Lubanga Decision of 7 March 2011, para. 167.
183 Lubanga Decision of 14 December 2006, para. 30.
184 Lubanga Decision of 7 March 2011, para. 168
185 Karadzic Decision, para. 10-11; see also Akayesu, Judgment, para. 340.
186 Nuon Chea Preliminary Objections, para. 5-14.
187 Nuon Chea Preliminary Objections, para. 15-19.
188 Order on Request for Investigative Action, 3 April 2009, D158/5.

demonstrate an interference with the judicial process.[189] No new facts of relevance have been put forward.[190]

70. ***Alleged government interference in Case 002***: Nuon Chea refers to the refusal of the Minister to the Royal Palace to accept a communication from the International Co-Investigating Judge to King Father Norodom Sihanouk as a proposed witness, as well as the actions of senior officials of the Royal Government of Cambodia in relation to other proposed witnesses. Nuon Chea's request for investigations into these matters was the subject of appeal proceedings before the PTC. In relation to the proposed interview of the King Father, the PTC held that the International Co-Investigating Judge's refusal to take further action was reasonable, and dismissed the appeal.[191] On the issue of government actions in relation to the remaining witnesses, the Chamber was unable to reach an affirmative decision, and the OCIJ's refusal to order an investigation remained unchanged.[192]

71. The Co-Prosecutors note that these individuals have been proposed as witnesses before the Trial Chamber by Nuon Chea,[193] and the matter has not been determined. In these circumstances, it cannot be argued that there has been a serious or egregious breach of Nuon Chea's fair trial rights that would warrant the extreme measure of a termination of proceedings. Contrary to the Accused's submission,[194] the PTC International Judges did not make a positive finding of fact that "Nuon Chea has been 'prevented from obtaining possible advantage'" that may emerge from the proposed testimonies.[195] Furthermore, the past statements of the proposed witnesses in the Case File are inculpatory, and do not

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189 Decision on Appeal Against the Co-Investigating Judges' Order on The Charged Person's Eleventh Request for Investigating Action', 18 August 2009, D158/5/1/15, para. 50.

190 In fact, since these decisions, the UN and the RGC have agreed on measures to ensure any complaints, including those alleging administrative corruption, can be investigated by an independent organ. *See* Joint Statement on Establishment of Independent Counsellor at Extraordinary Chambers in Courts of Cambodia, 12 August 2009, available at http://www.un.org/News/Press/docs/2009/l3146.doc.htm; The Court Report – December 2009, available at http://www.eccc.gov.kh/english/cabinet/fileUpload/148/The_Court_Report_[Dec_2009]_FINAL.pdf.

191 Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 8 June 2010, D314/2/7.

192 Two international judges agreed with Nuon Chea that public statements by a government spokesman warranted an investigation into whether the Government had interfered with the witnesses, while the three national judges disagreed with this finding: Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12.

193 List of Proposed Witnesses, Experts and Civil Parties, 15 February 2011, D9/4/4.

194 Nuon Chea Preliminary Objections, para. 57.

195 Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12, Opinion of Judges Catherine Marchi-Uhel and Rowan Downing, para. 12.

support a conclusion that the testimony of such witnesses would be favourable to Nuon Chea.

72. ***Alleged government interference in Cases 003 and 004.*** In support of his preliminary objection, Nuon Chea refers to Judge You Bunleng's decisions regarding investigative actions in Cases 003 and 004. As Nuon Chea himself acknowledges, his applications arising out of these allegations have been rejected as factually unsubstantiated: i) the PTC dismissed an application to disqualify Judge You, finding that the allegations did not give rise to an appearance that the judge had acted without independence or impartiality;[196] and ii) Nuon Chea's appeal against OCIJ's refusal to initiate an investigation into the actions of Judge You was also refused by the PTC on the merits.[197]

*Alleged Flaws in the Investigation*

73. ***Lack of transparency***: Nuon Chea claims that the OCIJ "consistently refused" to provide information regarding its methodology and other aspects of the investigation, thus placing a "veil of secrecy" over the proceedings.[198] This claim is misleading. Nuon Chea joined a request for information filed by Ieng Sary, to which the OCIJ provided a detailed response.[199] Since an appeal was filed prior to the issuance of this response, the matter was also dealt with by the PTC. The Chamber held that "the request made was not one falling within the right of the Charged Person to make."[200] Therefore, not only is Nuon Chea misrepresenting the facts as to OCIJ's response to his request, he also fails to acknowledge that, as ruled by the PTC, his request had no legal basis in the first place. The Co-Prosecutors further note that Nuon Chea has had access to the case file throughout the judicial investigation, and was able to see both inculpatory and exculpatory evidence as it was being gathered. No reasonable argument can therefore be made that a "veil of secrecy" was placed on the investigation.

74. ***Agency***: Nuon Chea argues that the flawed nature of the investigation is apparent from the OCIJ's rulings on his 26 requests for investigative actions (RIAs), and also asserts that witness interviews were marred by serious flaws for which the OCIJ was rebuked by

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196 Decision on Application for Disqualification of Judge You Bunleng, 10 September 2010, PTC10

197 Decision on Appeal Against the Order on Nuon Chea's Second Request for Investigating (Rule 35), 2 November 2010, D384/5/2.

198 Nuon Chea Preliminary Objections, para. 16.

199 Co-Investigating Judges' Response to 'Request for Investigative Action,' Concerning *inter alia*, the Strategy of the Co-Investigating Judges in Regard to Judicial Investigation, 11 December 2009, D171/5.

200 Decision on Ieng Sary's Appeal Against the Co-Investigating Judges' Constructive Denial of Ieng Sary's Third Request for Investigative Action, 22 December 2009, D171/4/5, para. 9.

the PTC.[201] This claim is also misleading. In the matter referred to by Nuon Chea, the PTC did not rebuke the OCIJ for its investigative methodology, nor did it conclude that the RIAs were wrongfully dismissed "in their entirety." The Chamber initially ruled that the OCIJ was required to provide more detailed reasons for their decision to refuse certain investigative actions, but otherwise refused the appeal.[202]

75. In any event, Nuon Chea's exercise of his rights during the investigation, as well as the OCIJ and Pre-Trial Chamber decisions, only serve to show that the proceedings have been fair.[203] For example, on appeal against OCIJ's order concerning the Shared Material Drive (SMD), the PTC agreed with the defence that the OCIJ had incorrectly interpreted their obligation to seek exculpatory evidence during the investigation.[204] However, the Chamber also found that a defence request for the OCIJ to search the entire SMD for unspecified exculpatory evidence did not satisfy the requirements of specificity and relevance, and that the OCIJ had therefore correctly rejected it.[205] Following this decision, Nuon Chea chose not to make any further more specific requests in relation to the SMD.

76. ***Biased approach to evidence***: In alleging bias against him, Nuon Chea again fails to point to any evidence that supports his assertions. Firstly, he refers to his unsuccessful application to disqualify Judge Lemonde.[206] The Pre-Trial Chamber found the facts alleged by the defence, and raised again in this preliminary objection, insufficient to prove a biased approach to the investigations.[207] Nuon Chea also refers to the internal distribution within the OCIJ of a document generated by an OCP staff member.[208] Again, this matter does not support the preliminary objection, as reflected by the PTC's recent decision resolving the matter.[209] No finding of bias was made in relation to Judge Lemonde or OCIJ in the course of these proceedings.

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201 Nuon Chea Preliminary Objections, para. 18.

202 Decision on Appeal Against Co-Investigating Judges' Order on Nuon Chea's Request for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340), 16 June 2010, D375/1/4; Decision on Appeal and Further Submissions in Appeal Against OCIJ Order on Nuon Chea's Request for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340), 20 September 2010, D375/1/8.

203 In fact, Nuon Chea recently pointed to the PTC's routine application of Rule 21 to safeguard his interests for "legal certainty, transparency and fairness of proceedings." Request to Trial Chamber to Order Resumption of Detention Interviews, 17 March 2011, E66, para. 9.

204 Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D-164/4/13, para. 38.

205 Ibid, para. 44.

206 Nuon Chea Preliminary Objections, para. 19.

207 Decision on Nuon Chea's Application for Disqualification of Judge Marcel Lemonde, 23 March 2010, PTC 04, para. 18-25.

208 Nuon Chea Preliminary Objections, para. 19.

209 Strictly Confidential Pre-Trial Chamber Decision, 7 March 2011, PTC 08, para. 8.

77. In conclusion, Nuon Chea's request for a termination of the prosecution must be rejected as the facts put forward have already been judicially considered and the claims of alleged flaws in the investigation rejected. The application does not raise new facts or warrant a re-examination of the existing facts. As the Pre-Trial Chamber stated in refusing Ieng Thirith's appeal against an order rejecting her request for a stay of proceedings:

> "The identical evidence adduced in the present case in support of the same allegations does not further satisfy the particular high threshold that applies in reviewing allegations of abuse of process. No new matters have been raised and the Pre-Trial Chamber will not reconsider its earlier decisions."[210]

78. As for the only issue which has not been finally determined (that of proposed witnesses), an application alleging fair trial infringements is premature. Nothing prevents Nuon Chea from exercising his rights before the Trial Chamber, including seeking appropriate relief where he can point to a legitimate procedural concern, by challenging the prosecution case, and by proposing his own evidence.[211]

79. More importantly, even if considered on the merits, Nuon Chea's preliminary objection fails to show that he has suffered a breach of his rights that would satisfy the high threshold applicable to his request. The facts discussed above clearly do not support the conclusion that the investigative process was fundamentally flawed or biased against Nuon Chea. While the Accused may be dissatisfied that the impartial investigation resulted in evidence that is overwhelmingly inculpatory, that does not entitle him to seek a termination of the prosecution.

### K. Legality of ECCC Internal Rules and Trial Preparation Order

80. In his Consolidated Preliminary Objections, Nuon Chea makes three preliminary objections pursuant to Rule 89(1)(c) that: (1) the adoption and amendment of the rules at ECCC "plenary" sessions is unconstitutional and ultra vires;[212] (2) the further application

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[210] Ieng Thirith Abuse of Process Decision, para. 36.

[211] As the Pre-Trial Chamber correctly held on Nuon Chea's appeal relating to allegations of administrative corruption: "the Charged Person may, during the trial proceedings, ask for cross-examination of witnesses if they have serious concerns regarding written evidence. When deciding on the admissibility of evidence before it, each Chamber has the inherent power to carry out additional investigation where issues of fair trial arise in relation to any piece of evidence." Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigating Action, 18 August 2009, D158/5/1/15, para.37.

[212] Nuon Chea Preliminary Objections, para. 66-69.

of the rules will infringe Nuon Chea's rights;[213] and (3) the Preparation Order[214] has been issued pursuant to ultra vires rules.[215]

81. First, the objections relating to the past adoption and amendment of the Internal Rules and the further application of those rules are inadmissible. This is because Rule 89(1)(c) only allows for preliminary objections which concern the "nullity of procedural acts made after the indictment is filed."[216] Rule 89(1)(c) thus does not provide a basis for Nuon Chea to have the entire Internal Rules declared null and void.

82. Although the objection to the validity of the Internal Rules is inadmissible, the Co-Prosecutors observe that the Pre-Trial Chamber has considered and affirmed the validity of the Internal Rules, holding that they "constitute the primary instrument to which reference should be made in determining procedures before the ECCC."[217] The Pre-Trial Chamber cited Article 12(1) of the ECCC Agreement, which authorizes the Court to incorporate procedural rules from international sources where "Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards." As concluded by the Pre-Trial Chamber, the ECCC was clearly authorized by Article 12(1) of the ECCC Agreement and Article 33 new of the ECCC Law to adopt a "self-contained regime of procedural law related to the unique circumstances of the ECCC."[218] In that proceeding, the Nuon Chea Defence itself acknowledged that "the adoption of additional rules is appropriate where existing Cambodian procedures fail to address a particular matter."[219]

83. Nuon Chea argues that the Preparation Order should be annulled because it has been issued pursuant to ultra vires rules. Annulment, however, is not determined by the Order's alleged foundation in ultra vires rules. Rather, annulment may exist where there is *no* lawful basis at all for the Preparation Order. In other words - the rules per se are not the source authority for the legality of a procedural act; it is the underlying ECCC Statute on which the ECCC procedural acts are based. Consequently, the purpose of this

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213 Nuon Chea Preliminary Objections, para. 70-71.
214 Trial Chamber's "Order to File Material in Preparation for Trial," 17 January 2011, E51/3 ("Preparation Order").
215 Nuon Chea Preliminary Objections, para. 72.
216 Internal Rule 89(1)(c).
217 Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 12-14 ("Nuon Chea Annulment Decision").
218 Nuon Chea Annulment Decision , para. 14.
219 Nuon Chea's Appeal Against Order Refusing Request for Annulment, 25 February 2008, D55/I/1, para. 10.

response is not to examine the legality of the rules; it is to examine if there is lawful authority for the procedural acts requested in the Preparation Order. However, if the Trial Chamber deems an examination of the legality of the Rules is necessary, the Co-Prosecutors request that they be given an opportunity to respond further to this issue.

84. The Preparation Order forming the subject of the objection entitled 'Order to File Material in Preparation for Trial' was issued on 17 January 2011. This Order required all parties to file: (1) a list of proposed witnesses; experts and Civil Parties not seeking protective measures; (2) a list of proposed new witnesses or Civil Parties seeking protective measures; (3) information required in relation to all proposed witnesses, Civil Parties and experts; (4) a list of uncontested facts, including those adjudicated by the Chamber in Case 001; and (5) lists of documents and exhibits.[220] The Preparation Order is consistent with international practice dealing with cases of this magnitude and complexity,[221] which practice forms the basis for Internal Rule 80. For example, the ICTY Rules of Procedure and Evidence provide similar requirements for the Prosecutor and the Accused to file witness lists, exhibit lists, witness summaries, admissions by the parties and contested and uncontested matters.[222]

85. Seeking guidance from procedural rules at the international level is authorised by Article 33 new of the ECCC Statute in cases where Cambodian procedure does not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding consistency with international standards. However, the overarching obligation of the Trial Chamber is to ensure they exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law as set out in Articles 14 and 15 of the ICCPR.[223]

86. Nuon Chea states the Preparation Order should be annulled. The criteria for annulment is provided for by Internal Rule 48, which states that: "Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application." The Pre-Trial Chamber has held that annulments of an investigative or judicial act may occur for a violation of a Charged person's right

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220 Preparation Order.

221 Similar pre-trial preparation procedures are found in Rules of Procedure and Evidence provisions in the other international courts and tribunals. For example see Rules 65 *ter* (E) and 65 *ter* (G) of the ICTY and Rules 73 *bis* and 73 *ter* of ICTR.

222 Rule 65 ter E (i) of the ICTY Rules of Procedure and Evidence.

223 Article 33 new of the ECCC Law.

recognised in the ICCPR as that violation would qualify as a procedural defect and would harm the interests of a Charged Person.[224]

87. In this case, for the annulment of the five procedural acts contained in the Preparation Order, Nuon Chea must therefore demonstrate that: (1) a procedural defect exists in the issuing of the Order; and (2) the defect infringes on his rights. Nuon Chea has not complained that the procedural act itself is defective. To the contrary, he agrees that the material filed so far such as witness lists and summaries (parts 1, 2 and 3 of the Order) as required by the Preparation Order is consistent with his obligations under Cambodian law.[225]

88. Nuon Chea provides contradictory reasoning for the submission of material under parts 1, 2 and 3 of the Preparation Order. On the one hand, he states that the Order has no legal basis; yet, on the other hand, he states that the Order is consistent with his obligations under Cambodian law. As shown above, the Preparation Order is more consistent with international standards than Cambodian law, which is acceptable due to the similarities with the cases at the international level and differences in the cases at a national level.

89. Regarding Part 5 of the Preparation Order requesting the filing of lists of documents and exhibits, there is no complaint in the Preliminary Objection that this act is defective. In fact, Part 4 of the Preparation Order is the only section specifically addressed by Nuon Chea in his Preliminary Objection through **Annex A**. This section requires parties to produce a list of uncontested facts.[226] Nuon Chea contends that this violates his right to silence, his presumption of innocence, and the burden on the Co-Prosecutors to prove the case against him.[227] These contentions are untrue. The Preparation Order does not demand that Nuon Chea agree on facts with the Co-Prosecutors (which would be a clear violation of the right to silence). Instead, it operates to require Nuon Chea and the Co-Prosecutors to provide uncontested facts only in the instance where they have agreed on

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224 Pre-Trial Chamber "Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment," 26 August 2008, D55/I/8, para. 40.

225 Nuon Chea "Summaries of Proposed, Witnesses, Experts and Civil Parties," 23 February 2011, E9/10 at para 2: "Additionally, the Defence reiterates that it has filed a preliminary objection regarding the legality of the Rules. *(footnote removed)* While that objection does not specifically mention Rule 80 (3) (a), it does suggest that such provision (and by extension, paragraph six of the Preparation Order) is without legal basis. *(footnote removed)* In any event, the Defence submits that the material filed to date is consistent with its obligations under Cambodian law and reserves its right to continue to challenge any Rule that unlawfully departs from such established domestic procedure. *(footnote removed)*."

226 Internal Rule 80(3)(e).

227 Nuon Chea Preliminary Objections, Annex A at A-1.

them. There is consequently no violation of any of the attested rights, and therefore the test of nullity is not satisfied.

90. Consequently, as Nuon Chea expressly acknowledges the legality of requests 1, 2 and 3 in the Preparation Order and makes no reference to request 5 being defective, the issue of harm to the Accused is irrelevant as no defect is alleged. As to request 4 in the Preparation Order, Nuon Chea has not demonstrated how it is a defect or how it has occasioned him harm. The harm Nuon Chea alleges to have suffered is completely unfounded, as he has misunderstood the purpose and effect of the request for filing the list of uncontested facts. In no way does such a request infringe on the Accused's rights, nor is it defective in the context of Article 33 new of the ECCC Law.

## III. CONCLUSION

91. For the reasons set forth above, the Co-Prosecutors respectfully submit that the preliminary objections of the Accused should be dismissed.

Respectfully submitted,

| Date | Name | Place | Signature |
|---|---|---|---|
| 21 March 2011 | CHEA Leang<br>Co-Prosecutor | Phnom Penh | |
| | Andrew CAYLEY<br>Co-Prosecutor | | |