

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

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**WRITTEN SUBMISSIONS CONCERNING THE DEFENCE PRELIMINARY  
OBJECTION**

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Filed before:

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## MAY IT PLEASE THE TRIAL CHAMBER

### I. INTRODUCTION

1. On 20 April 2009, the Trial Chamber directed all parties, including the Defence, to file detailed written submissions on the preliminary submission no later than 18 May 2009 at 2 pm. In particular, the Trial Chamber directed the parties to address five specific questions.<sup>1</sup> Below are the Defence's observations in response to each of the questions.

### II. DEFENCE'S SUBMISSIONS

#### 1. Submissions in response to the Chamber's first question

2. As far as the Defence knows, no prosecution or investigative action was initiated against Kaing Guek Eav alias Duch prior to the expiry of the Statute of Limitations set forth in the 1956 Penal Code, that is prior to 6 January 1989.
3. Moreover, no support can be found for the assertion that the Statute of Limitations was suspended during the period after 6 January 1979, notably because of the judicial system was non-functioning.
4. The fact of the matter is that Cambodia had a judicial system during this period<sup>2</sup> evidence a variety of laws on the organisation of the courts which were promulgated then.<sup>3</sup>
5. Further, it bears noting that persons accused of committing crimes during the Democratic Kampuchea regime were prosecuted in 1979 and that a trial was held before the People's Revolutionary Tribunal from 15 to 19 August 1979.<sup>4</sup>

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<sup>1</sup> "Direction Requesting Written Submissions on Preliminary Objection", 20 April 2009, E9/4.

<sup>2</sup> See "Introduction to the Cambodian Judicial process", by Koy Neam, The Asia Foundation, 1998, pp. 5-7 (Khmer version) and pp. 3-5 (English version).

<sup>3</sup> See, in particular, "*Law on the Organization of the Court and Prosecution Department*", Decree No. 02, 10 February 1982; "*Law on the Organization of the National Assembly and the Council of State of the People's Republic of Kampuchea*", Decree No. 04, 10 February 1982; Article 28; "*Law on the Organization of the Military Court*", Decree No. 05, 12 August 1981; "*Law on the Organization of the People's Supreme Court and the General Prosecution attached to the People's Supreme Court*", Decree No. 28 Kr, 31 July 1985.

6. This shows that already in 1979, the judicial system was functioning well enough to prosecute Kaing Guek Eav, had such a course of action been envisaged. The fact the fact that he was not prosecuted within the period prescribed in the 1956 Penal Code does not constitute ground to challenge him today.
7. Lastly, the Defence recalls that the first criminal proceedings against Kaing Guek Eav were instituted on 10 May 1999, more than 20 years after the facts. Accordingly, even if the Statute of Limitations were considered suspended for a certain period, such a suspension period should have been 10 years in total for domestic crimes to have been time-barred by 10 May 1999, which seems highly unlikely.

## **2. Submissions in response to the Chamber's second question.**

8. The Defence submits that according to Article 109 of the 1956 Penal Code, the Statute of Limitations had already expired on 6 January 1989 absent a suspension or interruption, as demonstrated *supra*.
9. The Defence notes that while Article 3 and Article 3 (new) of both versions of the ECCC Law<sup>5</sup> do not expressly provide for the right to reactivate or to reinstate the right to prosecute, they reflect the intention of the drafters to allow for prosecution of domestic crimes.
10. However, the Defence considers that in the absence of access to the official records on the drafting the ECCC Law, there is no indication as to whether the drafters of these provisions were aware that Statute of Limitations had already expired, and therefore, that the provisions could not be applied without violating the principles of legality and legal certainty.
11. Therefore, the Defence submits that there is no proof that in adopting these provisions, the drafters of the Law intended to reactivate or to reinstate the right to

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<sup>4</sup> See “Decree-Law on Establishment of People’s Revolutionary Tribunal at Phnom Penh to try the Pol Pot-Ieng Sary clique for the crime of genocide”, Decree-Law No. 1, 15 July 1979 and “Decree-Law on Punishment of Betrayers of the Revolution”, Decree-Law No. 2, 15 April 1980.

<sup>5</sup> In their relevant paragraphs, these articles provide that the Statute of Limitation for prosecution under the 1956 Penal Code in respect of the crimes referred to *supra* as falling under the jurisdiction of the Extraordinary Chambers “shall be extended for an additional 20 years” (Article 3 of the 2001 ECCC Law) and “for an additional 30 years” (Article 3 of the 2004 ECCC Law).



prosecute crimes which they knew were already time-barred under Article 109 of the 1956 Penal Code.

12. In any event, even if the Chamber were to consider that the drafters of the Law decided to reactivate or to reinstate the right to prosecute such crimes despite the extinction of the prescription period, it would have to declare this provision inapplicable, as we will demonstrate *infra*.

### **3. Submissions in response to the Chamber's third question**

13. The Defence submits that laws relating to the Statute of Limitations are considered substantive or procedural depending on the judicial system or doctrinal currents.
14. The Defence submits that the characterisation of such laws is of little import. In any event, any law that extends the Statute of Limitations cannot apply to a time-barred offence without violating the legality principle or the attendant non-retroactivity principle.<sup>6</sup>
15. The same conclusion was reached by the US Supreme Court, which also applies under French law, as explained *supra*.

#### US law

16. According to the US Supreme Court, the non-retroactivity principle applies to four categories of laws:
  - Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action,
  - Every law that aggravates a crime, or makes it greater than it was, when committed,

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<sup>6</sup> See Article 15.1 of the International Covenant on Civil and Political Rights (ICCPR): “*No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby*”. See also *infra*.

- Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,
- Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.<sup>7</sup>

17. The Supreme Court further stated that that a law that extends the Statute of Limitations is like one that aggravates a crime (and is thus a substantive law).

18. On this basis, the Court ruled that every law that extends the Statute of Limitations could apply without producing the kind of retroactivity that the Constitution forbids.<sup>8</sup>

### French law

19. French law distinguishes between substantive laws, to which the more stringent criminal law doctrine of non-retroactivity strictly applies, and procedural laws, which are immediately applicable to crimes committed before their promulgation.<sup>9</sup> However, immediate application of a new procedural law is prohibited where the prosecuted offender is entitled to an established right.<sup>10</sup>

20. Case-law considers laws relating to the Statute of Limitations as procedural laws,<sup>11</sup> and these laws are listed in the Code of Criminal Procedure.<sup>12</sup> They are therefore immediately applicable, in principle. However, Article 112-2 of the Penal Code<sup>13</sup> specifies that are immediately applicable only where the Statute of Limitations had not lapsed when the offences were committed.

<sup>7</sup> *Calder v. Bull*, 3 Dall. 386, 390-91 (1798).

<sup>8</sup> *Stogner v. California*, 539 U.S. 607 (2003).

<sup>9</sup> This distinction is made in Articles 112-1 and 112-2 of the French Penal Code. Article 112-1 sets forth the principle of non-retroactivity of laws relating to the offences and the applicable penalties while Article 112-2 states that the other laws are immediately applicable subject to certain conditions.

<sup>10</sup> *Crim. 24 oct. 1988, Bull. n° 361*.

<sup>11</sup> *Crim. 16 mai 1931, Gaz. Pal., 1931.2.178*.

<sup>12</sup> See Articles 6-9 of the French Penal Code.

<sup>13</sup> Article 112-2 of the French Penal Code provides: “The following are immediately applicable to the repression of offences committed before their coming into force: (...)”

4° where the limitation period has not expired, laws governing the limitation of the public prosecution and the limitation of penalties”.

21. In the event of expiry of the Statute of Limitations, the offender is entitled to an established right not to be prosecuted and any new law that extends the Statute of Limitations cannot deprive him of this right.<sup>14</sup>

### Conclusion

22. In both Cambodian and French law, the laws governing the Statute of Limitations are listed in the Criminal Procedure Code<sup>15</sup> and may therefore be considered as procedural rules.
23. To the extent that the Cambodian Code of Criminal Procedure is largely based on French criminal procedure, the Defence submits that the principle stated in Article 112-2 of the French Penal Code concerning the Statute of Limitations should apply to the present case.
24. Accordingly, the Defence submits that Article 3 and Article 3 new in both version of the ECCC Law which extend the Statute of Limitations are procedural rules, and do not apply to the present case, because the offences they proscribe were already time barred when these Articles were enacted.
25. Nonetheless, should the Chamber deem them to be substantive rules, they would not be applicable regard being had to the more stringent criminal law principle of non-retroactivity.

### **4. Submissions in response to the Chamber's fourth question**

26. It follows from Article 33 of the ECCC Law<sup>16</sup> that in terms of procedure, the Trial Chamber Judges may invalidate Cambodian law where it is incompatible with

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<sup>14</sup> The same solution was applied to laws relating to reviving the Statute of Limitations (*Crim. 3 nov. 1994, Bull. n° 349; Crim. 28 fév. 1995, Bull n° 87; Crim. 3 sept. 1997, Bull. n° 294*), or increasing the age of simple majority (*Crim. 2 déc. 1998, Bull n° 329; Crim. 17 nov. 1999, Bull. n° 266*).

<sup>15</sup> See Articles 7, 9, 10 and 11 of the new Code of Criminal Procedure.

<sup>16</sup> Article 33 of the ECCC Law reads as follows:

*“The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question Regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.*



international standards. The procedural rules contained in the ECCC Law, including Article 3(2), are obviously part of existing Cambodian law, and therefore do not form an exception.

27. Article 33(2) clearly states that the trial court judges exercise their jurisdiction in accordance with Article 15 of the ICCPR. The preemptory nature of Article 15<sup>17</sup> highlights the Trial Chamber's obligation to declare as inapplicable any provision of the Law that is inconsistent with the legality principle.
28. As stated *supra*, the applicable international standard is the legality principle as enshrined in the ICCPR. Applying an extended Statute of Limitations to time-barred offences has the effect of making punishable crimes that had ceased to be punishable, contrary to the criminal law principle of non-retroactivity. Also, the Trial Chamber must apply two other attendant principles to the legality principle, namely the judicial safety principle and the strict construction of criminal law, by which any doubt in the law must be interpreted in favour of the accused.
29. The Defence further observes that judges of international tribunals have accepted to examine the legality of the Statutes on the establishment of such tribunals, including provisions relating to the judges' jurisdiction, notably with regard to the legality principle.<sup>18</sup>

### **5. Submissions in response to the Chamber's fifth question**

30. The legal impact of the Constitutional Council's decision is confined to the constitutionality of the ECCC Law. The decision only asserts that the criminal law principle of non-retroactivity is not of equal value as the Constitution, and therefore that the Law is not inconsistent with the Constitution, which was the sole reason for examining it.

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*The Extraordinary Chambers of the trial court shall 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 1966 International Covenant on Civil and Political Rights. (...)*

<sup>17</sup> M. Nowak, *CCPR Commentary* (N.P. Engel, Kehl, 1993), at 275, quoted in Joseph, Schultz, Castan. *The International Covenant on Civil and Political Rights. Cases, Materials, and Commentary*. Oxford University Press, 2005, p. 340.

<sup>18</sup> See, *inter alia*, ICTY Appeals Chamber, *Prosecutor v. Dusko Tadic*, "Decision on Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995.

31. Therefore, the decision has no bearing on the question as to whether the ECCC Law is inconsistent with international principles or whether for this reason, the ECCC judges can disallow its application. Also, in 2007 the Constitutional Council decided that ordinary courts may disallow application of a provision that is deemed in conformity with the Constitution if it is inconsistent with the international treaties that Cambodia has recognised.<sup>19</sup>

**WITH ALL PROPER RESERVES**

	Co-Lawyers KAR Savuth	Phnom Penh	[ <i>Signed</i> ]
	François Roux		[ <i>Signed</i> ]
Date	Name	Place	Signature

<sup>19</sup> Decision No. 092/003/2007, 10 July 2007.