ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

លេខ/No: D427/1/30

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Criminal Case File No: **002/19-09-2007-ECCC/OCIJ (PTC75)**

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Greffiers: **SAR Chanrath**
Entela JOSIFI

Date: **11 April 2011**

PUBLIC
DECISION ON IENG SARY'S APPEAL AGAINST THE CLOSING ORDER

Co-Prosecutors

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Andrew CAYLEY
YET Chakriya
William SMITH
SENG Bunkheang

Accused

IENG Sary

Lawyers for the Civil Parties

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Emmanuel ALTIT
Emmanuel JACOMY
Julien RIVET
Barnabe NEKUIE
Nicole DUMAS
Daniel LOSQ
VEN Pov

The Co-Investigating Judges

YOU Bun Leng
Siegfried BLUNK

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of "Ieng Sary's Appeal against the [Co-Investigating Judges'] Closing Order" ("Ieng Sary Appeal"),[1] filed by the Co-Lawyers for Ieng Sary on 25 October 2010.

I. PROCEDURAL BACKGROUND:

1. On 14 January 2010, the Co-Investigating Judges filed and notified the Parties that they considered the investigation in Case 002/19-09-2007-ECCC/OCIJ ("Case File 002") to be concluded.[2] Case File 002 was forwarded to the Co-Prosecutors pursuant to Internal Rule 66.[3]

2. On 16 August 2010, the Co-Prosecutors issued their Rule 66 Final Submission,[4] which was notified to the Parties on 18 August 2010.

3. On 1 September 2010, the Co-Lawyers for Ieng Sary attempted to file their Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations ("Response to the Co-Prosecutors' Final Submission").[5] On 2 September 2010, the Office of Co-Investigating Judges issued a Notice of Deficient Filing in relation to the Co-Lawyers' attempt to file their Response to the Final Submission.[6] On 6 September 2010, the Co-Lawyers for Ieng Sary filed "Ieng Sary's Expedited Appeal Against the Co-Investigating Judges' Decision Refusing to accept the filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings", which was notified on 7 September 2010.[7] On 10

[1] Ieng Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6 ("Ieng Sary Appeal").
[2] Notice of Conclusion of Judicial Investigation, 14 January 2010, D317.
[3] Internal Rules (Rev. 4), 11 September 2009, ("Internal Rules"), Internal Rule 66.
[4] Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390.
[5] Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3.
[6] Office of the Co-Investigating Judges Greffier's Notice of Deficient Filing, 2 September 2010, D390/1/2.
[7] Ieng Sary's Expedited Appeal Against The Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Coprosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 6 September 2010, D390/1/2/1.

September 2010, the Pre-Trial Chamber ordered that the Co-Lawyers' Response to the Co-Prosecutors' Final Submission be placed in the Case File.[8]

4. On 16 September 2010, the Co-Investigating Judges issued the Closing Order,[9] indicting the Accused Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan with crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the 1956 Penal Code.[10] The Closing Order was notified to the Parties on the same day.

5. On 17 September 2010, the Co-Lawyers for Ieng Sary filed a Notice of Appeal against the Closing Order.[11] The Notice of Appeal was notified on 20 September 2010. On 1 October 2010, the Pre-Trial Chamber granted the Co-Lawyers' Request for an extension of the page limit for the Appeal to 180 pages in English.[12] Due to extraordinary circumstances caused by flooding around the ECCC building, the Pre-Trial Chamber granted an extension of the time limit for filing the Appeal until 26 October 2010. The Co-Lawyers for Ieng Sary filed their Appeal against the Closing Order on 25 October 2010. The Appeal was notified to the Parties in English on 26 October 2010 and in Khmer on 5 November 2010.

6. On 6 October 2010, the Co-Prosecutors filed a "Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith Against the

[8] Decision on Ieng Sary's Expedited Appeal Against the Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Respone to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 10 September 2010, D390/1/2/3; reasons provided in: Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4.
[9] Closing Order, 16 September 2010, D427 ("Closing Order").
[10] Closing Order, para. 1613.
[11] Appeal Register of Ieng Sary's Lawyers Against the Co-Investigating Judges' Closing Order, 20 September 2010, D427/1.
[12] Decision on Ieng Sary's Expedited Request for Extension of Page Limit to Appeal the Jurisdictional Issues Raised by the Closing Order, 1 October 2010, D427/1/3.

Closing Order and Consequent Extension of Page Limit."[13] The Co-Prosecutors' Request was notified to the Parties on 18 October 2010.

7. On 22 October 2010, the Civil Party Lawyers enquired whether they would be permitted to file a response or observations on the Appeals against the Closing Order.[14]

8. On 28 October 2010, the Pre-Trial Chamber issued an order permitting the Co-Prosecutors to file a Joint Response to the Appeals from Ieng Sary, Ieng Thirith and Nuon Chea against the Closing Order within 15 days of the notification of the last of those Appeals in English and Khmer.[15] The Pre-Trial Chamber considered that the Appeal from Khieu Samphan raised separate grounds of appeal and that it would be more appropriate for the Co-Prosecutors to respond to it separately.[16] The Pre-Trial Chamber also confirmed the Civil Parties' right to file observations in support of the Co-Prosecutors' response to the Appeals against the Closing Order within five days of the filing of the Co-Prosecutors' responses.[17]

9. On 19 November 2010, the Co-Prosecutors filed their Joint Response to the Appeals ("Co-Prosecutors' Response"),[18] and on 24 November 2010, the Co-Prosecutors' Response was notified to the Parties in Khmer and English.

10. On 19 November 2010, the Co-Lawyers for Ieng Sary filed a request for an extension of time and page limit in which to reply to the Co-Prosecutors' Response ("Ieng Sary's

[13] Co-Prosecutor's Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith Against the Closing Order and Consequent Extension of Page Limit, 6 October 2010, D427/1/5.
[14] Email dated 22 October 2010 from the Case Manager of the Civil Parties Unit to a Greffier of the Pre-Trial Chamber.
[15] Decision on Co-Prosecutors' Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith against the Closing Order and Consequent Extension of Page Limit, 28 October 2010, D427/1/8 (Decision on Co-Prosecutors' Request), p. 6.
[16] Decision on Co-Prosecutors' Request, para. 13.
[17] Decision on Co-Prosecutors' Request, p. 6.
[18] Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010, D427/1/17 (Co-Prosecutors' Response).

Request").[19] Ieng Sary's Request was notified to the Parties in Khmer and English on the same day. On 24 November 2010, the Pre-Trial Chamber issued instructions permitting the Defence Teams to file written Replies to the Co-Prosecutors Response within 10 days of its notification, and granting to Ieng Sary a 75 page limit in which to reply.

11. On 26 November 2010, a group of the Civil Party Lawyers filed their Observations on the Appeals ("Civil Party Lawyers' Observations I") in Khmer and French only. The Civil Party Lawyers' Observations I were notified to the Parties on 29 November in Khmer and French and on 8 December 2010 in English.[20]

12. On 29 November 2010, a second Group of Civil Party Lawyers filed their Observations ("Civil Party Lawyers' Observations II") in Khmer and French only.[21] The Civil Party Lawyers' Observations II were notified to the Parties on 30 November 2010 in Khmer and French only. The Civil Party Lawyers' Observations II were filed and notified in English on 28 December 2010.

13. On 29 November 2010, a third Group of the Civil Party Lawyers filed their Observations on the Appeals ("Civil Party Lawyers' Observations III") in Khmer only.[22] The Civil Party Lawyers' Observations III were notified to the Parties on 29 November 2010 in Khmer. The English version was notified on 7 December 2010.

[19] Ieng Sary's Expedited Request for Extension of Time and Page Limit to Reply to the Co-Prosecutors' Response to Ieng Sary's Appeal against the Closing Order if No Oral Hearing is Granted, 19 November 2010, D427/1/16.
[20] Combined Response by *Avocats Sans Frontières* France Co-Lawyers for the Civil Parties to the Appeals by IENG Sary, IENG Thirith and NUON Chea against Co-Invevstigating Judges' Closing Order, 26 November 2010, D427/1/18 ("Civil Party Lawyers Observations I").
[21] Joint Observations on Mr Nuon Chea, Mr Ieng Sary and Mrs Ieng Thirith's Appeals Against The Closing Order, 29 November 2010, D427/1/19 ("Civil Party Lawyers Observations II").
[22] Observations by Civil Party Co-Lawyers Regarding the Appeals by Nuon Chea, Ieng Sary and Ieng Thirith Against the Closing Order, 29 November 2010, D427/1/20 ("Civil Party Lawyers Observations III") .

14. On 1 December 2010, the Co-Lawyers for Ieng Sary filed an "Expedited Request for an extension of time to file the Khmer translation of Ieng Sary's Reply to the Co-Prosecutors' Response which was granted by the Pre-Trial Chamber.[23]

15. On 6 December 2010, the Co-Lawyers for Ieng Sary filed a Reply to the Co-Prosecutors' Response ("Ieng Sary Reply")[24] in English only, which was notified to the Parties on 7 December 2010. The Khmer translation of the Ieng Sary Reply was filed and notified on 28 December 2010.

16. On 13 December 2010, the Co-Lawyers for Ieng Sary filed a Reply to the Civil Party Lawyers' Observations I,[25] and on 4 January 2011, they filed a Reply to the Civil Party Lawyers' Observations II.[26] The Co-Lawyers for Ieng Sary did not file a reply to the Civil Party Lawyers' Observations III.

17. On 13 January 2011, the Pre-Trial Chamber announced, in writing, its determination of the final Disposition on the Appeal indicating that "the reasons for this decision shall follow in due course."

II. DISPOSITION

THE PRE-TRIAL CHAMBER DECIDES UNANIMOUSLY THAT:

1. The Appeal is admissible in its form;
2. Grounds one, two, three, five, seven (partially) and eleven (partially) are admissible. The rest of the grounds of this appeal are inadmissible;
3. Ground one is dismissed;

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[23] Expedited Request for an extension of time to file the Khmer translation of Ieng Sary's Reply to the Co-Prosecutors' joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 1 December 2010, D427/1/21.

[24] 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 ("Ieng Sary Reply").

[25] Ieng Sary's Reply to the Combined Response by *Advocats Sans Frontieres* France Co-Lawyers for the Civil Parties to the Appeals by Ieng Sary, Ieng Thirith and Nuon Chea against the Co-Investigating Judges' Closing Order, 13 December 2010, D427/1/24 ("Ieng Sary Reply to Civil Party Lawyers Observartions I").

[26] Ieng Sary's Reply to the Joint Observations on Mr. Nuon Chea, Mr. Ieng Sary and Mrs. Ieng Thirith's Appeals Against the Closing Order, 4 January 2011, D427/1/25 ("Ieng Sary Reply to Civil Party Lawyers Observartions II").

4. Ground two is dismissed;
5. Ground three is dismissed;
6. Ground five is dismissed;
7. Ground seven, as far as it is admissible, is granted in part as follows and is otherwise dismissed:
    1. This ground of Appeal is granted in so far as the Co-Lawyers assert that the Co-Investigating Judges erred by failing to consider that during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed conflict . The "existence of a nexus between the underlying acts and the armed conflict" is added to the "Chapeau" requirements in Chapter IV(A) of Part Three of the Closing Order.
    2. This ground of Appeal is granted in so far as the Co-Lawyers argue that rape did not exist as a crime against humanity in its own right in 1975-1979. Therefore, the Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g)) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts.
8. Ground eleven, as far as it is admissible, is dismissed;
9. The Appeal is otherwise dismissed;
10. The Accused is indicted and ordered to be sent for trial as provided in the Closing Order being read in conjunction with this decision;
11. The provisional detention of the Accused is ordered to continue until he is brought before the Trial Chamber.[27]

18. On 24 January 2011, the Pre-Trial Chamber notified, in writing, the reasons for its determination in point 11 of the disposition on the Appeal.[28]

19. The Pre-Trial Chamber hereby provides in full the reasons for its decision on Ieng Sary's Appeal against the Closing Order.

[27] Decision on Ieng Sary's Appeal against the Closing Order, 13 January 2011, D427/1/26.
[28] Decision on Ieng Sary's Appeal Against the Closing Order: Reasons for Continuation of Provisional Detention, 24 January 2011, D427/1/27 ("Reasons for Continuation of Detention").

III. REASONS FOR THE DECISION:

A. SUMMARY OF SUBMISSIONS:

SUMMARY OF THE APPEAL:

Relief Sought in the Appeal:

"[T]he Defence respectfully requests the Pre-Trial Chamber to:

a. DECLARE that the current appeal is admissible under [Internal] Rules 74(3)(a) and 21;

b. HOLD that the ECCC does not have jurisdiction to indict Mr. IENG Sary, due to the principle of *ne bis in idem;*[29]

c. HOLD that the ECCC does not have jurisdiction to indict Mr. IENG Sary, due to his validly granted and applicable Royal Pardon and Amnesty (RPA); or alternately:

d. HOLD that the ECCC does not have jurisdiction over genocide, crimes against humanity, grave breaches of the Geneva Conventions, or National Crimes; or alternatively FIND that these crimes may not be applied against Mr. IENG Sary due to the OCIJ's failure in defining and applying these crimes against Mr. IENG Sary and/or its lack of specificity in the indictment;

e. FIND that [Joint Criminal Enterprise] (JCE) as understood by the Pre-Trial Chamber to be applicable, may not be applied against Mr. IENG Sary;

f. STRIKE planning, instigating, aiding and abetting, and ordering from the Closing Order as they are applied to Mr. IENG Sary; and

g. HOLD the ECCC does not have jurisdiction over command responsibility; or alternatively STRIKE command responsibility with respect to Mr. IENG Sary from the Closing Order; or alternatively FIND the Defence's characterization of command responsibility applicable at the ECCC."[30]

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[29] The principle of *ne bis in idem* provides that a court may not institute proceedings against a person for a crime that has already been the object of criminal proceedings and for which the person has already been convicted or acquitted. This principle is known under different names in different legal systems, including the *res judicata* rule, the rule of *autrefois acquit/autrefois convict* and the protection against double jeopardy. Christine Van den Wyngaert and Tom Ongena, "Ne bis in idem Principle, Including the Issue of Amnesty", in Antonio Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court* ("Rome Statute"): *a Commentary*, vol. 1, Oxford, Oxford University Press, 2002, p. 705 at 706.

[30] Ieng Sary Appeal, p. 144.

Preliminary Issues raised in the Appeal:

20. These issues include: 1) Appeal is admissible;[31] 2) Request for oral hearing on Appeal;[32] 3) The Co-Investigating Judges failed to decide on certain issues;[33] 4) The Co-Investigating Judges used confessions and material which is subject to a pending annulment appeal;[34]and 5) The ECCC is a domestic court.[35]

21. The Appeal is submitted on the following grounds:

Ground One: The Co-Investigating Judges erred in law by holding that the principle of *ne bis in idem* does not bar Ieng Sary's current prosecution.[36]

Ground Two: The Co-Investigating Judges erred in law by holding that Ieng Sary's validly granted Royal Pardon and Amnesty does not bar the current prosecution. [37]

Ground Three: The Co-Investigating Judges erred in determining that the status of ECCC as a domestic or international court is irrelevant and erred in law by holding that the ECCC has jurisdiction to apply international crimes and forms of liability as doing so would violate the principle *nullum crimen sine lege* (principle of legality).[38]

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[31] Ieng Sary Appeal, paras 1-2. Note that these arguments are addressed fully in the Section on Admissibility of Appeal below in this decision.
[32] Ieng Sary Appeal, para. 4 and para 10 above in this decision.
[33] Ieng Sary Appeal, para. 5. Note that these arguments are addressed fully in the Section discussing the merits of Ground one of Appeal below in this decision
[34] Ieng Sary Appeal, paras 6-7. These arguments are now moot because they are addressed in Pre-Trial Chamber's decision on Appeal PTC72, Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order rejecting Ieng Sary's Application to seize the Pre-Trial Chamber with a Request for Annulment of all investigative acts performed by or with the assistance of Stephen Heder & David Boyle and Ieng Sary's Application to seize the Pre-Trial Chamber with a Request for Annulment of all evidence collected from the Documentation Center of Cambodia & Expedited Appeal against the Co-Investigating Judges' Rejection of a Stay of the Proceedings, 30 November, 2010, D402/1/4.
[35] Ieng Sary Appeal, paras 8-20. Note that these arguments are addressed fully in the Section discussing the merits of Ground three of Appeal below in this decision.
[36] Ieng Sary Appeal, paras 21–41.
[37] Ieng Sary Appeal, paras 42–102.
[38] Ieng Sary Appeal, paras 103–135. The principle of *nullum crimen sine lege* is also known as the principle of legality. For a detailed explanation on the meaning of this term please see Section discussing the merits of Ground three of Appeal below in this decision.

Ground Four: The Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply grave breaches of the Geneva Conventions despite the statute of limitations.[39]

Ground Five: The Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply Article 3 new (National Crimes).[40]

Ground Six: The Co-Investigating Judges erred in law in its application of genocide, should it be found to be applicable at the ECCC.[41]

Ground Seven: The Co-Investigating Judges erred in law in its application of crimes against humanity, should they be found to be applicable at the ECCC.[42]

Ground Eight: The Co-Investigating Judges erred in Law in its application of grave breaches, should they be found to be applicable at the ECCC.[43]

Ground Nine: The Co-Investigating Judges erred in law in its application of joint criminal enterprise.[44]

Ground Ten: The Co-Investigating Judges erred in law in its application of planning, instigating, ordering, and aiding and abetting.[45]

Ground Eleven: The Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply command responsibility and in its application of command responsibility should it be found to be applicable at the ECCC.[46]

SUMMARY OF CO-PROSECUTORS' RESPONSE AND CIVIL PARTY OBSERVATIONS:

22. The Co-Prosecutors submit in Response that the Appeal is, 1) inadmissible; 2) "substantially devoid of merit"; and, 3) not such as to require an oral hearing.[47] They submit in Response to each of the Accused's grounds of appeal that:

[39] Ieng Sary Appeal, paras 136–137.
[40] Ieng Sary Appeal, paras 138–179.
[41] Ieng Sary Appeal, paras 180–183.
[42] Ieng Sary Appeal, paras 184–231.
[43] Ieng Sary Appeal, paras 232–248.
[44] Ieng Sary Appeal, paras 249–272.
[45] Ieng Sary Appeal, paras 273–282.
[46] Ieng Sary Appeal, paras 283–324.
[47] Co-Prosecutors Response, paras 2-7.

1. Ground One: The principle of *ne bis in idem* does not prevent the current prosecution of the Accused,[48] and the Accused's appeal on this ground is barred by *res judicata*.[49]
2. Ground Two: The Royal Pardon and Amnesty granted to the Accused does not bar his prosecution by the ECCC.[50]
3. Ground Three: The ECCC has jurisdiction to apply international crimes and forms of liability.[51]
4. Ground Four: The ECCC has jurisdiction over grave breaches of the Geneva Conventions, and prosecution of grave breaches is not time barred.[52]
5. Ground Five: The ECCC has jurisdiction over national crimes.[53]
6. Ground Six: The ECCC has jurisdiction over genocide.[54]
7. Ground Seven: The ECCC has jurisdiction over crimes against humanity.[55]
8. Ground Eight: The argument that the Co-Investigating Judges erred in their application of grave breaches is inadmissible.[56]
9. Ground Nine: The ground of appeal with respect to the application of JCE is *res judicata* and inadmissible.[57]
10. Ground Ten: The ground of appeal in respect of planning, instigating, ordering and aiding and abetting, is inadmissible, as the Accused can appeal neither on defects in the form of the indictment nor on the constitutive elements of modes of responsibility.[58]
11. Ground Eleven: The ECCC has jurisdiction over superior responsibility and the Closing Order accurately reflects the doctrine of superior responsibility.[59]

23. In Civil Party Lawyers Observations I the Co-Lawyers, submit that the principle of legality is satisfied in respect of prosecuting the Accused for genocide, crimes against humanity and grave breaches of the Geneva Conventions.[60] They submit that prosecution of national crimes is not time-barred,[61] and that JCE and command responsibility are modes of liability within the jurisdiction of the ECCC.[62] They submit that neither any amnesty nor *ne bis in idem* prevents the prosecution of the Accused.[63]

[48] Co-Prosecutors' Response, paras 68-82.
[49] Co-Prosecutors' Response, paras 45-49.
[50] Co-Prosecutors' Response, paras 61-67.
[51] Co-Prosecutors' Response, paras 131-167.
[52] Co-Prosecutors' Response, paras 200-205.
[53] Co-Prosecutors' Response, paras 83-124.
[54] Co-Prosecutors' Response, paras 168-71.
[55] Co-Prosecutors' Response, paras 172-199.
[56] Co-Prosecutors' Response, paras 200-201.
[57] Co-Prosecutors' Response, paras 45-52.
[58] Co-Prosecutors' Response, paras 27-30.
[59] Co-Prosecutors' Response, paras 206-257.
[60] Civil Party Lawyers' Observaitons I, paras 8-36.
[61] Civil Party Lawyers' Observaitons I, paras 37-42.
[62] Civil Party Lawyers' Observaitons I, paras 43-59.
[63] Civil Party Lawyers' Observaitons I, paras 63-6.

24. In the Civil Party Observations II, the Co-Lawyers submit that international crimes are applicable before the ECCC;[64] that the prosecution of the Accused does not violate the principle of legality;[65] and that the Accused was aware of the crimes with which he is charged.[66]

25. In the Civil Party Observations III, the Co-Lawyers argue that the submissions of the Accused are "not acceptable"[67] and inadmissible.[68]

SUMMARY OF CO-LAWYERS' REPLIES:

26. The Co-Lawyers for the Accused submit in Reply to the Co-Prosecutors that the Appeal is admissible: it is an appeal in respect of jurisdictional issues, which include mixed issues of fact and law,[69] and which can relate to the definition of the elements of crimes or forms of liability.[70] Appeals on defects in the form of the indictment are also admissible.[71] The appeal is neither time barred,[72] nor barred by *res judicata*.[73] The Co-Lawyers for the Accused further submit that the ECCC lacks personal jurisdiction over the Accused due to his Royal Pardon and Amnesty[74] and the principle of *ne bis in idem*.[75] They submit that the ECCC lacks jurisdiction over national crimes,[76] as well as over international crimes,[77] crimes against humanity as defined in the closing order,[78] grave breaches of the Geneva Conventions[79] and the application of command responsibility.[80]

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[64] Civil Party Lawyers' Observations II, paras 7-21.
[65] Civil Party Lawyers' Observations II, paras 22-28.
[66] Civil Party Lawyers' Observations II, paras 29-38.
[67] Civil Party Lawyers' Observations III, para. 8.
[68] Civil Party Lawyers' Observations III, para. 11.
[69] Ieng Sary Reply, paras 2-9.
[70] Ieng Sary Reply, para. 10.
[71] Ieng Sary Reply, paras 15-18.
[72] Ieng Sary Reply, paras 20-23.
[73] Ieng Sary Reply, para. 24.
[74] Ieng Sary Reply, paras 26-32.
[75] Ieng Sary Reply, paras 33-40.
[76] Ieng Sary Reply, paras 41-63.
[77] Ieng Sary Reply, paras 64-84.
[78] Ieng Sary Reply, paras 86-105.
[79] Ieng Sary Reply, paras 106-111.
[80] Ieng Sary Reply, paras 112-134.

27. In their Reply[81] to the Civil Party Observations I, the Co-Lawyers for the Accused submit that the Closing Order violates the principle of legality,[82] that the prosecution of domestic crimes is time barred,[83] that the Civil Party Co-Lawyers have disregarded their submissions on JCE,[84] that command responsibility was not part of customary international law in 1975-79[85] and that the Accused's prosecution is barred by an amnesty and by *ne bis in idem*.[86]

28. In their Reply[87] to Civil Party Observations II, the Co-Lawyers for the Accused submit that international conventions may not be directly applied at the ECCC,[88] nor may customary international law be directly applied.[89] They add that the principle of legality bars the Accused's prosecution for international crimes[90] and that the Civil Party Co-Lawyers erred in their analysis of foreseeability and accessibility.[91]

B. ADMISSIBILITY OF APPEAL

1. Formal Admissibility:

29. On 15 September 2010, the Co-Investigating Judges issued their Closing Order which was notified to the parties on 16 September 2010. On 17 September 2010, the Co-Lawyers for Ieng Sary filed a Notice of Appeal against the Closing Order. Due to extraordinary circumstances caused by flooding around the ECCC building, the Pre-Trial Chamber granted an extension of the time limit for filing the Appeal until 26 October 2010 pursuant to Internal Rule 75(3). The Ieng Sary Appeal was filed on 25

[81] Ieng Sary Reply to Civil Party Lawyers Observartions I.
[82] Ieng Sary Reply to Civil Party Lawyers Observartions I, paras 2-13.
[83] Ieng Sary Reply to Civil Party Lawyers Observartions I, paras 14-17.
[84] Ieng Sary Reply to Civil Party Lawyers Observartions I, paras 18-19.
[85] Ieng Sary Reply to Civil Party Lawyers Observartions I, paras 20-24.
[86] Ieng Sary Reply to Civil Party Lawyers Observartions I, paras 26-29.
[87] Ieng Sary Reply to Civil Party Lawyers Observartions II.
[88] Ieng Sary Reply to Civil Party Lawyers Observartions II, paras 4-9.
[89] Ieng Sary Reply to Civil Party Lawyers Observartions II, paras 10-12.
[90] Ieng Sary Reply to Civil Party Lawyers Observartions II, paras 13-16.
[91] Ieng Sary Reply to Civil Party Lawyers Observartions II, paras 18-20.

October 2010 and therefore within the time limit granted by the Pre-Trial Chamber in accordance with the Internal Rules.

2. Admissibility under the Internal Rules:

i) Parties submissions on admissibility requirements:

30. The Pre-Trial Chamber observes that the Appeal is submitted pursuant to Internal Rules 74(3)(a) and 21. In this respect the parties submit as follows:

The Co-Lawyers for the Accused:

31. The Co-Lawyers submit that Rule 74(3)(a) explicitly states that a Charged Person may appeal against orders or decisions of the Co-Investigating Judges confirming the jurisdiction of the ECCC. They deem that the Closing Order is clearly an order confirming the jurisdiction of the ECCC and is thus appealable pursuant to Rule 74(3)(a).

32. The Co-Lawyers further submit that the Appeal is also admissible pursuant to Internal Rule 21(1). They note that the Pre-Trial Chamber has previously held that with respect to its jurisdiction, "Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded (....)"[92] and submit that Internal Rule 21 thus confers an inherent jurisdiction on the Pre-Trial Chamber to decide requests relating to the Charged Persons' fundamental fair trial rights. They suggest that Internal Rule 21 requires the Pre-Trial Chamber to accept this Appeal, because: a) a balance would not be preserved between the rights of the Parties if the Co-Prosecutors were allowed to appeal issues raised in the Closing Order while the Defence were prohibited

[92] Decision on Ieng Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing of Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13, quoted in Ieng Sary's Appeal, para. 2.

from doing so; b) Mr. Ieng Sary's fundamental right to adequate time and facilities to prepare his defence will be violated if the Closing Order lacks the necessary specificity to inform him in detail of the nature of the charges he faces; and c) it would not be in the interests of justice to delay a decision on such jurisdictional issues or to narrow their scope.[93]

The Co-Prosecutors submit as follows:[94]

33. The Co-Prosecutors submit that the Appeal is inadmissible. They contend that grounds of appeal 1, 4, 6, 7, 8, 9, 10 and 11 cannot be characterised as jurisdictional challenges. Noting that the Internal Rules do not define the meaning of jurisdiction, they invite the Pre-Trial Chamber to take guidance from the rules established at the international level which define a jurisdictional challenge exclusively as a motion challenging an indictment on the ground that it does not relate to the personal, territorial, temporal or subject matter jurisdiction of a court. They suggest that the scope of jurisdictional appeals allowed to the Pre-Trial Chamber should be interpreted in no broader manner than that prescribed in the International Criminal Tribunal for the Former Yugoslavia (ICTY) Rule 72(D) and provide examples of a number of issues held to be of a jurisdictional nature in the ICTY.

34. The Co-Prosecutors add that valid jurisdictional challenges have not been extended to include questions of fact, challenges to the definition of the constitutive elements of a crime or a mode of liability under a court's jurisdiction, defects in the form of indictment, or to procedural defects which are contemplated by Internal Rule 76. They then provide examples when purported jurisdictional challenges have been dismissed on the ground that they pertain to questions of fact which can be properly addressed at trial.

35. The Co-Prosecutors suggest in the alternative that to the extent any of the Appeal grounds are determined to be jurisdictional in nature, they should be rejected as the

[93] Ieng Sary's Appeal, paras 2-3.
[94] Co-Prosecutors Response, paras 8-52.

Accused is time barred from appealing the initial orders of this Court ruling on the same issues. They argue that the Co-Investigating Judges confirmed the jurisdiction of the ECCC over the Accused in their provisional detention orders issued between 19 September and 19 November 2007. The Co-Prosecutors say that by the failure to appeal those orders in the ten-day time limit provided in the Internal Rules, the Accused forfeited his right to challenge the ECCC's jurisdiction in pre-trial proceedings. The Co-Prosecutors conclude that the Accused cannot appeal against the Closing Order on those issues as no appeal against orders re-confirming ECCC's jurisdiction is allowed.

36. The Co-Prosecutors add that the Appellant is also barred from raising the applicability of Ieng Sary's pardon and amnesty and joint criminal enterprise as a mode of liability at the ECCC as the Pre-Trial Chamber has already heard and determined these arguments. On the ground of *res judicata*, the grounds 2 and 9 should, therefore, be dismissed.

37. The Co-Prosecutors further contend that the Appeal is not admissible under Rule 21. In relation to Ieng Sary's claim that Rule 21 creates a stand alone right of appeal, the Co-Prosecutors submit that this is a misconstruction of the Rules and the ECCC's decisions. They submit that Rule 74(3) exclusively embodies the Accused's rights of appeal and that Rule 21 does not create a new, separate ground of appeal for the Accused. They cite the words of the Pre-Trial Chamber[95] that Rule 21 requires that it adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded. It is significant, they add, that the Pre-Trial Chamber, in the same decision, noted, with reference to Rule 74(3)(a), that the Charged Persons "may appeal certain aspects of the Closing Order" and that "Co-Lawyers are limited in the matters that they may appeal from the Closing Order." As such, the Co-Prosecutors argue, while Rule 21 allows for an expansive reading of Rule 74, the requirements set out in Rule 74 remain".

[95] Co-Prosecutors Response, para. 18, ftn.s 51 and 52 referring to Pre-Trial Chamber's Decision on Ieng Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4, paras.13 and 18 and to the Khieu Samphan Translation Appeals Decision, para. 36.

38. Furthermore, the Co-Prosecutors submit, Ieng Sary's interpretation of Rule 21 amounts to a request to the Pre-Trial Chamber to amend the Internal Rules. The basic documents of the ECCC, like those of other international tribunals, do not envisage judicial chambers arbitrarily and unilaterally amending the procedural rules of the Court. This role of amending the Internal Rules is left to the plenary of the Judges. The Internal Rules provide an amendment process whereby any organ of the ECCC, including the Defence Support Section, can submit proposals to the Rules and Procedure Committee for consideration. The Accused, they say, could have suggested an amendment to the Internal Rules in order to expand appeal rights, although this has never been done previously.

39. The Co-Prosecutors further submit that extension of the scope of the appellate rights of the Accused pursuant to the Rules is not appropriate at this stage in the proceedings. The fact that the Co-Prosecutors have the right to appeal all orders of the Co-Investigating Judges while the Accused's appeal rights are more limited does not contravene the principle of equality of arms. Equality of arms does not require that the parties have equal rights at every stage of the process, particularly in the pre-trial stage where the Co-Prosecutors have a unique role. Indeed, the Accused's right to be heard is more than adequately protected by the Internal Rules. They have had the opportunity to be heard throughout the investigative stage and will have the opportunity to raise at the trial stage any issues that the Pre-Trial Chamber deems outside of the scope of this Appeal.

40. Referring to Ground one of Appeal, the Co-Prosecutors add that the Accused cannot appeal against issues not decided by the Closing Order because such does not represent a confirmation of jurisdiction.

The Co-Lawyers for the Civil Parties submit as follows:

41. The Co-Lawyers for the Civil Parties submit that the Appeal, is "filed not in appropriate circumstances and [is] not admissible",[96] accordingly should be declared inadmissible by the Pre-Trial Chamber.[97]

The Co-Lawyers for the Accused submit in Reply as follows:

42. The Co-Lawyers for the Accused submit in Reply to the Co-Prosecutors Response that the Appeal is one against an order or decision "confirming the jurisdiction of the ECCC" and thus admissible under Internal Rule 74(3)(a).[98] They submit that all of the grounds of appeal contended by the Co-Prosecutors not to be jurisdictional "relate, at a minimum, to an assessment of the legal capability of the ECCC to try" the Accused.[99] They submit that Ground Two, *ne bis in idem*, as an impediment to jurisdiction "is plainly jurisdictional",[100] while Grounds Five, Six, Seven, Eight, Nine and Ten raise issues considered by the ICTY to be jurisdictional.[101] The Co-Lawyers submit that jurisdictional issues include issues of mixed law and fact, which do not require an evaluation of evidence but only "an assessment of the law based on the facts as alleged in the Closing Order".[102] They submit that jurisdictional issues include the definition of constitutive elements of crimes or forms of liability.[103]

43. The Co-Lawyers for Ieng Sary further submit that Internal Rule 21 creates "a stand-alone right to appeal" under which the Appeal is admissible.[104] An appeal against defects in the form of the indictment must be heard before the trial stage.[105] The failure of the Co-Investigating Judges to determine the issue of *ne bis in idem* was still a

[96] Civil Party Lawyers Observations III, para. 1.
[97] Civil Party Lawyers Observations III, para. 11.
[98] Ieng Sary Reply, para. 2.
[99] Ieng Sary Reply, para. 4.
[100] Ieng Sary Reply, para. 5.
[101] Ieng Sary Reply, para. 6.
[102] Ieng Sary Reply, para. 9.
[103] Ieng Sary Reply, para. 10.
[104] Ieng Sary Reply, para. 11.
[105] Ieng Sary Reply, paras 15-18.

jurisdictional decision, for if the Co-Investigating Judges "considered that the ECCC did not have jurisdiction, [they] could not have left the matter to the Trial Chamber".[106] The Co-Lawyers submit that the Appeal is not time barred "because it was not until the Closing Order was issued that the jurisdiction of the ECCC was confirmed" by the Co-Investigating Judges.[107] As to the grounds of appeal said by the Co-Prosecutors to be *res judicata*, the Co-Lawyers submit that the issue of the Royal Pardon and Amnesty was determined only in so far as it related to provisional detention, and the Accused has since been charged with further crimes to which "the application of the RPA... has not been fully considered and decided upon by the Pre-Trial Chamber".[108] In addition the Co-Lawyers state that they raise "other issues in relation to JCE which have not been finally decided by the Pre-Trial Chamber".[109]

ii) Pre-Trial Chamber's General Considerations on Admissibility Requirements:

(a) Admissibility under Internal Rule 74:

44. The Pre-Trial Chamber notes that pursuant to Internal Rule 67(5), the Closing Order is subject to appeal as provided in Internal Rule 74.[110] Internal Rule 74 stipulates the grounds of appeal that may be raised by the parties before the Pre-Trial Chamber and, relevant to the present Appeal, Internal Rule 74(3)(a) states that "the Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges [. . .] confirming the jurisdiction of the ECCC."[111]

45. In interpreting Internal Rule 74(3)(a), the Pre-Trial Chamber has previously held that only jurisdictional challenges may be raised under that rule.[112] In determining what

[106] Ieng Sary Reply, para. 19.
[107] Ieng Sary Reply, para. 21.
[108] Ieng Sary Reply, para. 24.
[109] Ieng Sary Reply, para. 24 referring to Ieng Sary's Appeal, paras. 264-272.,
[110] Internal Rule 67(5).
[111] Internal Rule 74(3)(a).
[112] Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/14/15, ("JCE Decision"), para. 21.

constitutes a proper jurisdictional challenge, the Pre-Trial Chamber considered that the ECCC "is in a situation comparable to that of the *ad hoc* tribunals," as opposed to domestic civil law systems, where the terms of the statutes with respect to the crimes and modes of liability that may be charged are very broad, where the applicable law is open-ended, and where "the principle of legality demands that the Tribunal apply the law which was binding at the time of the acts for which an accused is charged. [. . .] [and] that body of law must be reflected in customary international law."[113] Consequently, the Pre-Trial Chamber adopted the approach that appeals that: 1) "challenge [. . .] the very existence of a form of responsibility or its recognition under [. . .] law at the time relevant to the indictment"; or 2) argue that a mode of responsibility was "not applicable to a specific crime" at the time relevant to the indictment; and 3) demonstrate that its "application would infringe upon the principle of legality" raise acceptable subject matter jurisdiction challenges that may be brought in the pre-trial phase of the proceedings.[114] However, "challenges relating to the specific contours of [. . .] a form of responsibility are matters to be addressed at trial."[115]

46. The Pre-Trial Chamber finds that the same approach applies with respect to grounds of appeal at the pre-trial phase contesting the substantive crimes charged under Articles 3 (new) – 8 of the ECCC Law.[116] Such appeals only raise admissible subject matter jurisdiction challenges where there is a challenge to the very existence in law of a crime and its elements at the time relevant to the indictment, which if applied would result in a violation of the principle of legality.[117] The Pre-Trial Chamber notes that "challenges relating to the specific contours of a substantive crime [. . .] are matters to be addressed

[113] JCE Decision, paras 23, 24 (quoting *Prosecutor v. Milutinović et al.,* Case No. IT-05-98, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, 21 May 2003, para. 10).
[114] JCE Decision, paras 23-24.
[115] JCE Decision, para. 23 (quoting *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, ICTY Appeals Chamber, 29 July 2004, paras 32-42 (ascertaining the contours of the mental element of "ordering" under Article 7(1) of the Statute); *Prosecutor v. Milutinović et al.,* Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction - Indirect Co-Perpetration, ICTY Trial Chamber, 22 March 2006, para. 23.
[116] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), ("ECCC Law").
[117] *Prosecutor v. Ante Gotovina et al.,* Case No. IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction, ICTY Appeals Chamber, 6 June 2007 ("*Gotovina et al.* Decision on Jurisdiction"), paras 15, 18.

at trial."[118] For instance, challenges to the specific definition and application of elements of crimes charged are inadmissible at the pre-trial phase.[119] Furthermore, challenges as to whether the elements of a charged crime actually existed in reality as opposed to legally at the time of the alleged criminal conduct are inadmissible.[120] This is because such challenges often involve factual or mixed questions of law and fact determinations to be made at trial upon hearing and weighing the relevant evidence.

47. Finally, with respect to challenges alleging defects in the form of the indictment, the Pre-Trial Chamber finds that they are clearly non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings in light of the plain meaning of Internal Rule 74(3)(a) and Chapter II of the ECCC Law, which outlines the personal, temporal and subject matter jurisdiction of the ECCC.[121] Nothing in the ECCC Law or Internal Rules suggests that alleged defects in the form of the indictment raise matters of jurisdiction. As such, these arguments may be brought before the Trial

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[118] JCE Decision, para. 23 (citing *Prosecutor v. Delalic et al.,* Case No. IT-96-21-AR72.5, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), ICTY Appeals Chamber, 6 December 1996, para. 27 (holding that any dispute as to the substance of the crimes enumerated in Articles 2, 3, 4 and 5 of the Statute, "is a matter for trial, not for pre-trial objections"); *Prosecutor v. Furundžija,* Case No. IT-05-17/1-T, Judgement, ICTY Trial Chamber, 10 December 1998, paras 172-186; *Prosecutor v. Kunarac et al.,* Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, ICTY Trial Chamber, 22 February 2001, paras 436-460 (Trial Judgements ascertaining the contours of rape as a crime against humanity under Article 5(g) of the Statute).

[119] *Gotovina et al.* Decision on Jurisdiction, paras 15, 18 (finding inadmissible grounds of appeal challenging the definition of certain elements of deportation and forcible transfer as crimes against humanity and of violations of common Article 3 of the 1949 Geneva Conventions and arguing that they should be interpreted narrowly).

[120] *Gotovina et al.* Decision on Jurisdiction, para. 21 (rejecting as inadmissible a ground of appeal contesting whether a state of armed conflict actually existed with respect to the alleged violations of international humanitarian law as charged). *See also Prosecutor v. Ljube Boškoski and Johan Tarčulovski,* Case No. IT-04-82-AR72.1, Decision on Interlocutory Appeal on Jurisdiction, ICTY Appeals Chamber, 22 July 2005, paras 11-13; *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR72, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, ICTY Appeals Chamber, 8 December 2005, para. 11(holding that "[t]o the extent that the Appellant's argument concerns not the sufficiency of the indictment, but the sufficiency of the supporting evidence, the Appeals Chamber agrees with the Trial Chamber that this is an issue to be resolved at trial."); *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, ICTY Appeals Chamber, 31 August 2004, para. 14 (holding that whether the Prosecution can establish a connection between alleged Article 5 crimes in Vojvodina and an armed conflict in Croatia and/or Bosnia and Herzegovina is a question of fact to be determined at trial).

[121] *Gotovina et al.* Decision on Jurisdiction, paras 21, 24 (finding that arguments alleging that the Prosecution failed to plead an element of a mode of liability properly; that provisions in the joint indictment were inconsistent; and that the Prosecution failed to plead any facts in support of the existence of an element of a crime constituted inadmissible allegations of defects in the form of the indictment); *Prosecutor v. Jadranko Prlić et. al,* Case No. IT-04-74-AR72.1, Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, ICTY Appeals Chamber, 16 November 2005, para. 13.

Chamber to be considered on the merits at trial and such do not demonstrate the ECCC's lack of jurisdiction.

(b) Admissibility under Internal Rule 21:

48. The Pre-Trial Chamber, as noted above, finds that pursuant to Internal Rule 67(5), the Closing Order is subject to appeal as provided in Rule 74. No other Internal Rule is listed under Internal Rule 67 as providing a basis for an appeal against a Closing Order. Furthermore, unlike Internal Rule 74, Rule 21 does not specifically lay out grounds for pre-trial appeals; rather it sets the fundamental principles governing proceedings before the ECCC. Accordingly, under the express terms of the Internal Rules, the Pre-Trial Chamber finds that no appeals against the Closing Order are admissible pursuant to Internal Rule 21.Where appeals filed against an Indictment under Internal Rule 74 raise matters which cannot be rectified by the Trial Chamber, and not allowing the possibility to appeal at this stage would irreparably harm the fair trial rights of the accused, Internal Rule 21 may, on a case by case basis, warrant application to broaden the scope of Internal Rule 74. It will not otherwise be applied.

49. The Pre-Trial Chamber has previously held that in light of Article 33 (new) of the ECCC Law, which provides that "trials are fair" and conducted "with full respect for the rights of the accused", and of Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"),[122] which is "applicable at all stages of proceedings before the ECCC, [. . .] [t]he overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a)."[123] Therefore, where the facts and circumstances of an appeal require it, the Pre-Trial Chamber has found that it has competence to consider grounds raised by the Appellants that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a Charged

[122] International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by UN General Assembly resolution 2200A(XXI) of 16 December 1966, entered into force on 23 March 1976 ("ICCPR").
[123] 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, 10 August 2010 ("Decision on Abuse of Process"), paras 13-14.

Persons' right to appeal in light of Internal Rule 21. The Pre-Trial Chamber has found that it had competence to consider an appeal against the Office of the Co-Investigating Judges' denial of Ieng Thirith's request for a stay of proceedings on the basis of the abuse of process because it "raises a serious issue of fairness".[124] Similarly, in the JCE Decision, the Pre-Trial Chamber found that it had competence to consider appeals raising the issue of whether the Charged Person received sufficient notice of the charges of JCE as a mode of liability in light of the stipulation in Internal Rule 21(1)(d) that "[a]ny [suspected or prosecuted] person has the right to be informed of any charges brought against him/her [. . .]" and of the fact that "both international standards and Article 35 (new) of the ECCC Law require specificity in the indictment."[125] That being said, the Pre-Trial Chamber emphasises that in both decisions, it did not hold that as a general rule it will automatically have competence under Internal Rule 74(3) or Internal Rule 21 to consider any grounds of appeal in which an Appellant raises matters implicating the fairness of the proceedings. Rather, the Pre-Trial Chamber carefully considered, on a case by case basis, whether, on balance, "the facts and circumstances" of the appeals required a broader interpretation of the right of appeal.[126] For instance, in the Decision on Abuse of Process, it considered whether the seriousness and egregiousness of the issues of fairness raised under the abuse of process doctrine and their impact on the proceedings warranted admitting the appeal.[127] Similarly, in the JCE Decision, the Pre-Trial Chamber considered whether, on balance, the "interests in the preservation of judicial resources and acceleration of legal and procedural processes" outweighed the fairness interests that would be met by declaring admissible those grounds of appeal pertaining to the right to specification in the indictment.[128] In other decisions, the Pre-Trial Chamber considered whether the need to ensure that "proceedings during the investigation were fair and that a balance is preserved between the rights of the parties" would warrant it admitting appeals filed against an order on Charged Persons' translation rights, a type of order against which there is no right of

[124] Decision on Abuse of Process, para. 15.
[125] JCE Decision, paras 30-34.
[126] Decision on Abuse of Process, para. 14; JCE Decision, para. 30.
[127] Decision on Abuse of Process, para. 14.
[128] JCE Decision, paras 34, 35.

appeal enumerated under the Internal Rules.[129] In its decision on the eleventh request appeals, the Pre-Trial Chamber had to examine whether its duty to ensure that "the interests of the Charged Person for legal certainty, transparency and fairness of proceedings are safeguarded" would warrant admission of appeals filed on unusual grounds.[130] In its decision on the Application for Disqualification of staff members of the Office of the Co-Investigating Judges, the Pre-Trial Chamber considered whether an application filed on unusual grounds had to be allowed in order to "ensure fairness of the proceedings during the investigations."[131] In its decision on the "torture appeals," the Pre-Trial Chamber had to examine whether its duty to ensure that "proceedings are fair and expeditious" warranted admissibility of an appeal filed during the investigative phase of the proceedings in relation to issues of admissibility of evidence.[132] In another decision the Pre-Trial Chamber had to consider whether its duty to ensure fairness of proceedings would make it consider admitting an appeal related to requests that by their nature did not amount to requests for investigation allowed under the Internal Rules.[133]

50. In the circumstances of this Appeal, the Pre-Trial Chamber does not find that the facts and circumstances require that it should find the appeal admissible under a broad interpretation of Internal Rule 74(3)(a) or under Internal Rule 21. The Pre-Trial Chamber recalls that Article 33 (new) of the ECCC Law states that "[t]he Extraordinary Chambers of the trial court shall ensure that trials are fair *and expeditious* [. . .]."[134] Furthermore, Internal Rule 21(4) provides that a fundamental principle applied by the ECCC is that "[p]roceedings shall be brought to a conclusion within a reasonable

[129] Decision on Khieu Samphan's Appeals Against the Order on Translation Rights and Obligations of the Parties, 20 Feb. 2009, A190/I/20, ("Translation Rights Appeal I") paras. 32-50; see also Decision of Ieng Sary's Appeal Against the OCIJ's Order on Translation Rights and Obligations of the Parties, 20 Feb. 2009, A190/II/9, ("Translation Rights Appeal II"), paras 27-44.
[130] Decision on Appeal against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action , 18 August 2009, D158/1/15, ("Eleventh Request Appeals"), paras 30-51.
[131] Decision on the Charged Person's [Ieng Sary] Application for Disqualification of Stephen Heder and David Boyle, 22 September 2009, Doc. no. 3, PTC no number, 00378097-00378103 , paras 16-22.
[132] Decision on Admissibility of the Appeal against Co-Investigating Judges' Order on Use of Statements which were or may have been Obtained by Torture , 18 December 2009, D130/9/21, ("Torture Appeal"), paras. 24-31.
[133] Decision on Appeal against OCIJ Order on Nuon Chea's Sixteenth (D253) and Seventeenth (D265) Requests for Investigative Action, D253/3/5, para. 11.
[134] ECCC Law, Art. 33 (new) (emphasis added).

time."[135] Similarly, Article 14(3) of the ICCPR, which is reflected in Internal Rule 21,[136] states that "[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees [. . .] to be tried without undue delay."[137] These provisions highlight that one of the rights enjoyed by the Appellants is the right to an expeditious trial. As such, the "duty to ensure the fairness *and* expeditiousness of trial proceedings entails a delicate balancing of interests."[138]

51. The Co-Lawyers raise issues touching upon alleged defects in the form of the indictment[139] similar to those considered in the JCE Decision, which was rendered in response to alleged deficiencies in the Introductory Submissions filed by the Co-Prosecutors.[140] At that stage the judicial investigations were ongoing and an indictment had not yet been issued. In light of the charged persons' right to be informed promptly of the charges against them, had the Appellants successfully argued that the Introductory Submissions were defective, the Chamber would have been in a position to require more details about the charges forwarded by the Co-Prosecutors outlining the course of the investigation. At this stage, the Co-Investigating Judges have concluded their extensive investigations carried out over the course of three years, have issued the Closing Order indicting the Accused, and forwarded the case against him, as laid out in the indictment, to the Trial Chamber. As such, the "interests in acceleration of legal and procedural processes"[141] are greater and outweigh the interests to be gained by considering these grounds of appeal at this stage as allegations of defects in the indictment may be raised by Ieng Sary at trial.

[135] Internal Rule 21(4) of the Internal Rules.
[136] Decision on Abuse of Process, para. 13.
[137] ICCPR, Art. 14(3).
[138] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, ICTR Appeals Chamber, 21 August 2007, para. 24 (emphasis added).
[139] JCE Decision, paras 31-33.
[140] JCE Decision, paras 6, 31.
[141] JCE Decision, para. 35.

(c) Whether the jurisdictional challenges in the Appeal are time barred:

52. The Pre-Trial Chamber does not find convincing the Co-Prosecutors' argument that the Closing Order is such that it re-confirms the jurisdiction of ECCC and that therefore the Appellants cannot raise jurisdictional challenges at this stage of the proceedings. The Pre-Trial Chamber notes that it is not clear whether the provisional detention order for the Accused represents an order confirming ECCC's jurisdiction with respect to the crimes charged. The primary purpose of a provisional detention order is to "set out the legal grounds and factual basis for detention".[142] As such, the provisional detention orders at issue noted the crimes and factual allegations submitted by the Co-Prosecutors in their Introductory Submissions, determined that there were well-founded reasons to believe that the Appellant may have committed the alleged crimes and found that, for various reasons, detention would be necessary in the course of the investigations.[143] While it may be argued that in so doing, the Co-Investigating Judges implicitly confirmed the subject matter jurisdiction of the ECCC with respect to the crimes alleged to have been committed and those challenged on jurisdictional grounds in this Appeal, this argument is not persuasive and in no way determinative.

53. The Pre-Trial Chamber observes that under Internal Rule 67, at the conclusion of their investigations and issuance of the Closing Order, the Co-Investigating Judges make their final determinations with respect to the legal characterization of the acts alleged by the Co-Prosecutors and determine whether they amount to crimes within the jurisdiction of the ECCC.[144] In doing so, "[t]he Co-Investigating Judges are not bound by the Co-Prosecutors' submissions" in the course of the investigations.[145] As such, it was not clear at the time of the rendering of the provisional detention orders that the crimes alleged by the Co-Prosecutors would be crimes for which the Appellant would eventually be indicted at the conclusion of the judicial investigations. Under the terms

[142] Internal Rule 63(2)(a).
[143] Provisional Detention Order for Ieng Sary, 14 November 2007, C22 ("Provisional Detention Order").
[144] Internal Rule 67(1)-(3).
[145] Internal Rule 67(1).

of Internal Rule 67, it would have been reasonable for the Appellant to assume that the provisional detention orders did not confirm jurisdiction, and that it would be proper to raise any subject matter jurisdiction objections following the final conclusions on jurisdiction by the Co-Investigating Judges in the Closing Order.

54. In addition, as submitted in the Reply, the Appellant attempted to "raise many jurisdictional challenges during the judicial investigation and was repeatedly informed by the Co-Investigating Judges that they would 'take due consideration' of the challenges when they issued the Closing Order'."[146]

55. In the event that the Pre-Trial Chamber is persuaded that the Co-Investigating Judges did confirm the ECCC's subject matter jurisdiction in the provisional detention orders within the meaning of Rule 74(3)(a), the Pre-Trial Chamber recalls that it may, at the request of a concerned party or on its own motion, "recognise the validity of any action executed after the expiration of a time limit prescribed in these Internal Rules on such terms, if any, as [it sees] fit."[147] In the circumstances of the current Appeal, the Pre-Trial Chamber finds that, for the following reasons, it would be in the interests of justice to allow the Appellant's jurisdictional objections, if any, to the Closing Order even though one may argue that he should have appealed the provisional detention orders on these grounds "within 10 (ten) days from the date that notice of the decision or order was received."[148]

56. As noted above, it may not have been clear to the Appellants that the provisional detention orders confirmed jurisdiction under the terms of Internal Rules 63 and 74(3)(a). In addition, it is also not made explicit by the Internal Rules or in any other applicable law at the ECCC that the phrase "confirming the jurisdiction" in Internal Rule 74(3)(a) precludes appealing the Co-Investigating Judges' orders or decisions "re-confirming" ECCC jurisdiction as alleged by the Co-Prosecutors. Furthermore, as noted

[146] Ieng Sary Reply, para 21, ftn. 82.
[147] Internal Rule 39(4)(b).
[148] Internal Rule 75(1).

by the Co-Prosecutors, objections to jurisdiction are fundamental.[149] This is reflected in the fact that jurisdictional appeals, unlike appeals alleging breaches of fair trial rights, are expressly singled out as one of the limited grounds of appeal available to appellants in pre-trial proceedings pursuant to Internal Rule 74(3)(a). The Pre-Trial Chamber agrees that the ECCC Law and Internal Rules stipulate that proceedings before the ECCC shall be conducted expeditiously and that such a fundamental matter as jurisdiction should be disposed of as early in the proceedings as possible. The Pre-Trial Chamber finds that considering the Appellant's jurisdictional objections at the close of the judicial investigation and prior to the commencement of trial would not undermine expedition. Rather, such consideration at this time supports the expeditious conduct of proceedings by providing a safeguard against an outcome in which "[s]uch a fundamental matter as [. . .] jurisdiction [. . .] [is] kept for decision at the end of a potentially lengthy, emotional and expensive trial".[150]

57. Finally, in light of the lack of any provision in the Internal Rules on the effect of a provisional detention order or pertaining to re-confirmation, the nature of jurisdictional objections, and the early stage of the proceedings, the Pre-Trial Chamber considers that it is in the interests of justice to consider the merits of any grounds of appeal raising admissible jurisdictional challenges against the Closing Order at this time.

iii) Pre-Trial Chamber's Examination of Admissibility for each Ground of Appeal:

(a) Ground One:

58. The Co-Lawyers for Ieng Sary submit that ECCC's jurisdiction to prosecute Ieng Sary for the acts mentioned in the Closing Order is barred by the principle of *ne bis in idem,* as he was tried and convicted *in absentia* for having committed genocide, in addition to a number of other offences, by the People's Revolutionary Tribunal in 1979 ("1979

[149] Co-Prosecutors' Response, para. 37.
[150] *Prosecutor v Dusko Tadić*, Case No. IT-94-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICYT Appeals Chamber, 2 October 1995, para. 6

Trial").[151] They argue that the Co-Investigating Judges' decision to send Ieng Sary to trial without first deciding on the *ne bis in idem* issue violates his fundamental right to be presumed innocent[152] and amounts to an order confirming jurisdiction despite the fact that the Co-Investigating Judges did not fulfill their judicial functions.[153]

59. The Co-Prosecutors argue that this ground of appeal is inadmissible on the basis that it does not relate to an order confirming jurisdiction as the Co-Investigating Judges did not decide on the matter, but rather referred the issue to the Trial Chamber.[154]

60. The Pre-Trial Chamber notes that in their Closing Order, the Co-Investigating Judges "hold the view that the question as to whether the 1979 judgment still applies and prevents further prosecution of Ieng Sary for genocide warrants a public adversarial hearing before the Trial Chamber".[155] Although not taking a definitive stand on the *ne bis in idem* issue, the Co-Investigating Judges decided that "Ieng Sary may be sent for trial in relation to all the charges with which he currently stands charged."[156]

61. The Pre-Trial Chamber has previously stated that "[t]he principle of *ne bis in idem* provides that a court may not institute proceedings against a person for a crime that has already been the object of criminal proceedings and for which the person has already been convicted or acquitted" and that "[t]he principle of *ne bis in idem* has been interpreted as meaning that the accused 'shall not be tried twice for the same crime'".[157] As such and in the context of an appeal against provisional detention, the Pre-Trial Chamber has previously considered the principle of *ne bis in idem* as being a jurisdictional issue.[158]

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[151] Ieng Sary Appeal, para. 23.
[152] Ieng Sary Appeal, para. 41.
[153] Ieng Sary Reply, para. 19.
[154] Co-Prosecutors' Response, para. 33.
[155] Closing Order, para. 1333 (emphasis added).
[156] Closing Order, paras. 1334 and 1613.
[157] Decision on Appeal against Provisional Detention of Ieng Sary, 17 October 2008, C22/I/73, ("Decision on Provisional Detention"), para. 41 (citing *Prosecutor v Tadić*, IT-94-1, "Judgement", Appeals Chamber, 15 July 1999, section X, per Judge Nieto-Navia) (emphasis added).
[158] Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 3 March 2008, C22/I/15.

62. This conclusion is only reinforced at the current stage of the proceedings where the Accused is being indicted and sent for trial. In this regards, the Pre-Trial Chamber emphasises that in the civil law system, the extinguishment of a criminal cause of action due to *res judicata*, a concept closely related to the principle of *ne bis in idem*,[159] shall normally lead to the issuance of a dismissal order by the investigating judge.[160] By sending Ieng Sary to trial, the Co-Investigating Judges implicitly rejected his request to ascertain the extinguishment of the criminal action against him[161], thus confirming the jurisdiction of the ECCC to try him. Concluding otherwise would deprive Ieng Sary from exercising his right of appeal on a jurisdictional issue that was properly raised before the Co-Investigating Judges but upon which the latter failed to make a judicial determination.

63. The Pre-Trial Chamber finds that the First Ground of Appeal is "an appeal against an order confirming jurisdiction of the ECCC" and falls within the ambit of Internal Rule 74(3)(a).

(b) Ground Two:

64. The Co-Lawyers for Ieng Sary assert that the Co-Investigating Judges "determined that the ECCC had jurisdiction over Ieng Sary despite the RPA" issued by the King in 1996 which, in their view, constitutes a bar to the ECCC's jurisdiction over Ieng Sary.[162] In particular, they argue that the amnesty protects Ieng Sary from prosecution at the ECCC and the pardon ensures that he cannot serve any sentence for a conviction based upon the acts at issue in the 1979 trial.[163] They further submit that the applicability and scope

[159] Decision on Provisional Detention, para. 47.
[160] Christian Guéry, *Instruction préparatoire*, Rép. pén. Dalloz, janvier 2008, no. 747 (saying that if the investigating judge considers that the public action is extinguished ("extinction de l'action publique"), he shall issue a dismissal order). Article 7 of the Criminal Procedure Code of the Kingdom of Cambodia (CPC) suggests a similar approach by stating that "[w]hen a criminal action is extinguished a criminal *charge can no longer be pursued or shall be terminated*" (emphasis added).
[161] François-Louis Coste, *Chambre de l'instruction*, Rép. pén. Dalloz, décembre 2006, para. 455.
[162] Ieng Sary Appeal, para. 50.
[163] Ieng Sary Appeal, para. 58.

of the RPA was never fully decided upon by the Pre-Trial Chamber and that this issue is now ripe for resolution.[164]

65. The Co-Prosecutors respond that this ground of appeal is inadmissible on the basis of *res judicata* as, they argue, the Pre-Trial Chamber has made a final determination of the issue in its Decision on the Appeal against Provisional Detention.[165]

66. The Pre-Trial Chamber considers, as asserted by the Co-Lawyers, that amnesty is perceived as a potential "bar to prosecution"[166], akin to the issue of *ne bis in idem.*[167] A pardon can potentially have a similar effect. As it has previously considered[168], the Pre-Trial Chamber therefore finds that these issues are jurisdictional. By deciding that the RPA have no effect on the current proceedings before the ECCC[169] and sending Ieng Sary to trial, the Co-Investigating Judges have confirmed the jurisdiction of the ECCC to try Ieng Sary. The Pre-Trial Chamber considers that the second Ground of appeal falls within the ambit of Internal Rule 74(3)(a).

67. As pointed out by the Co-Prosecutors, the Pre-Trial Chamber has, to a limited extent, previously examined the issues of amnesty and pardon while being seised of Ieng Sary's Appeal against the Provisional Detention. The Pre-Trial Chamber considered, in the light of the fundamental right of the Charged Person not to be arbitrarily detained guaranteed by Article 9 of the ICCPR, that "the issuance of an arrest or detention order would not be lawful if any circumstance could be foreseen which would evidently or

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[164] Ieng Sary Appeal, paras 43-46.
[165] Co-Prosecutors' Response, paras 45-49.
[166] Article 10 of the Statute of the Special Court for Sierra Leone ("SCSL"); Article 6 of the Statute of the Special Tribunal for Lebanon ("STL"). Similarly, the International Committee of the Red Cross ("ICRC") in its commentaries to Article 6 of Additional Protocol II considers amnesty as an act "which eliminates the consequences of certain punishable offences, stops prosecutions and quashes convictions.": Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentaries, Part II: Humane Treatment, Article 6 – Penal Prosecutions, para. 4617.
[167] Article 7 of the CPC.
[168] Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 3 March 2008, C22/I/15. See also: *Prosecutor v. Kallon,* SCSL-2004-15-AR75E, "Decision on Challenge to Jurisdiction: Amnesty Lomé Agreement", Appeals Chamber, 13 March 2004 (where the issue as been treated as a jurisdictional challenge).
[169] Closing Order, para. 1331.

manifestly prevent a conviction by the Trial Chamber".[170] It thus made a preliminary determination of these issues to determine the legality of the arrest warrant, with the limited information available at the time, on the basis of the initial charges and by using a substantially higher threshold of review, namely "circumstances which would evidently or manifestly prevent a conviction". In addition, considering the fact that the discussion on these issues was brought at the time by the Co-Prosecutors and that Ieng Sary had wanted that these be addressed at a later stage, the Pre-Trial Chamber made it clear that Ieng Sary would not be prevented to raising the issues at a later stage of the proceedings.[171] In these circumstances, it cannot be considered, as argued by the Co-Prosecutors, that a final determination as to whether the Royal Decree would bar prosecution of Ieng Sary before the ECCC has previously been made by the Pre-Trial Chamber. As the matter has not reached finality, Ieng Sary is not barred by *res judicata* from raising the issues of amnesty and pardon before the Pre-Trial Chamber.

(c) Ground Three:

68. The Co-Lawyers for Ieng Sary submit in Ground Three of the Appeal that the Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply international crimes and forms of liability as doing so would violate the principle of legality.[172]

69. The Pre-Trial Chamber notes that the paragraphs of the Closing Order to which this ground of Appeal refers, deal with the requirement of the principle of legality and its impact upon the jurisdiction of the ECCC in respect of the international crimes and modes of liability enumerated in the ECCC Law. The Co-Investigating Judges found 'that the crimes and modes of responsibility defined in this section of the Closing Order comply with the legality principle.'[173] As compliance with the principle of legality is a

[170] Decision on Provisional Detention, para. 16.
[171] Decision on Provisional Detention, para. 20 ("The Pre-Trial Chamber observes in this respect that submissions made before the Pre-Trial Chamber in the current Appeal cannot result in the waiver of the right to raise at a later stage of the proceeding any arguments pursuant to Internal Rule 74(3)(a) and 89(1)").
[172] Ieng Sary Appeal, paras 103–135.
[173] Closing Order, para. 1299.

prerequisite for establishing ECCC's jurisdiction over the crimes and modes of liability provided in ECCC Law, the Pre-Trial Chamber finds that these findings, read in conjunction with paragraph 1613 of the Closing Order, of the Co-Investigating Judges amount to a confirmation of jurisdiction and the Co-Lawyers challenge is found to be admissible pursuant to Internal Rule 74(3)(a). The principle of legality must be satisfied as a logical antecedent to establishing whether certain crimes and modes of liability existed at the time the crimes were allegedly commited. Therefore, those grounds of appeal alleging errors in relation to the standard of the principle of legality applied, amount to jurisdictional challenges.

(d) Ground Four:

70. The Co-Lawyers for Ieng Sary submit that the Co-Investigating Judges erred in law by deciding that ECCC has jurisdiction to apply Grave Breaches of the Geneva Conventions ("Grave Breaches") despite, as they submit, a statute of limitations.[174] They submit that the absence of provisions for lack of statutory limitation for Grave Breaches in Article 6 of the ECCC's Law denotes that a statute of limitations is applicable to Grave Breaches and suggest that the limitation period of ten years foreseen by domestic legislation should apply and that it has expired.

71. The Co-Prosecutors submit that the statute of limitations is not applicable to Grave Breaches.[175] They submit that the omission of the words "no statute of limitations" in the Grave Breaches provision of the ECCC Law is not sufficient reason to apply a domestic statutory limitation period to an international crime. [176] The Co-Prosecutors submit that if the Court considers that the Statute of Limitations and Cambodia's international obligations conflict, the Court should disregard the statute of limitations in favour of upholding Cambodia's international obligations. [177]

[174] Ieng Sary Appeal, paras 136-137.
[175] Co-Prosecutor's Response, para. 202.
[176] Co-Prosecutor's Response, para. 202.
[177] Co-Prosecutor's Response, para. 205.

72. In their reply to the Co-Prosecutor's Response the Co-Lawyers argue that the issue is a jurisdictional one and may be appealed as "an applicable statute of limitations is a bar to prosecution."[178]

73. At the outset, the Pre-Trial Chamber observes that the Co-Investigating Judges' Closing Order indicted the Charged Person for Grave Breaches,[179] which amounts to a confirmation of ECCC's jurisdiction to try the Charged Person for such crimes. The Co-Lawyers' challenge against this confirmation of jurisdiction is based on an assertion that the domestic statutory limitation period applies also to international crimes. The Geneva Conventions, which are the applicable law under Article 6 of the ECCC Law, provide that war crimes are not subject to any statute of limitations, which indicates that there is no statute of limitations applicable. The submission to the contrary is without merit. As the Appellant makes no jurisdictional challenge, the ground is inadmissible.

(e) Ground Five:

74. The Co-Lawyers for Ieng Sary submit in Ground Five of the Appeal that the "Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply Article 3 new (National Crimes)"[180] and ask the Pre-Trial Chamber to hold that ECCC does not have jurisdiction over these crimes.[181]

75. The Pre-Trial Chamber observes that in paragraph 1576 of the Closing Order, the Co-Investigating Judges say that they "will order the sending of the Charged Persons before the Trial Chamber for charges of murder, torture and religious persecution, crimes defined and punishable by the Penal Code 1956." By so doing, the Co-Investigating Judges have confirmed ECCC's jurisdiction over national crimes.

[178] Ieng Sary Reply, para. 8.
[179] Closing Order, para. 1613.
[180] Ieng Sary Appeal, paras 138–179.
[181] Ieng Sary Appeal, Relief Sought.

76. The Pre-Trial Chamber considers, based on the submissions made by the Co-Lawyers, that this ground of appeal falls within the requirements of Internal Rule 74(3)(a) whereby the accused is entitled to appeal against an order or decision that confirms the jurisdiction of the ECCC. The issue of the ability of the ECCC to prosecute national crimes, which are subject to a statute of limitations, is a jurisdictional matter. The Closing Order confirms the subject-matter jurisdiction of the ECCC over the Appellant for national crimes. As such, any question concerning the ability of the Trial Chamber to commence proceedings against her for national crimes should be resolved at this stage.

(f) Ground Six:

77. The Co-Lawyers for Ieng Sary, referring to paragraph 1312 of the Closing Order, argue in Ground Six of the Appeal that, notwithstanding that the Co-Investigating Judges defined genocide correctly, they erred by applying the definition incorrectly which, as the Co-Lawyers put it, led the Co-Investigating Judges to reach the wrongful conclusion that ECCC has jurisdiction to charge Ieng Sary with genocide.[182]

78. Furthermore, referring to paragraphs 1320-1326, 1340, 1341, 1347 and 1348 of the Closing Order, the Co-Lawyers argue that the Co-Investigating Judges erred in finding that genocidal intent was inferred without finding that this was the only reasonable inference available on the evidence. They argue that there is no *prima facie* case for applying a charge of genocide against Ieng Sary and this must be struck out from the Closing Order.[183]

79. Finally, referring to paragraph 1527 of the Closing Order, the Appellants argue that the Co-Investigating Judges erred in failing to set out which punishable act of genocide Ieng Sary has been indicted for and ask that "the Closing Order should be amended to

[182] Ieng Sary Appeal, para. 180.
[183] Ieng Sary Appeal, paras 180-182.

make clear that Ieng Sary is not charged with attempt to commit genocide or conspiracy to commit genocide."[184]

80. The Pre-Trial Chamber observes that the Co-Lawyers in this ground of the Appeal do not contest ECCC's jurisdiction over genocide, they do not question the very existence in law of the crime at the time of ECCC's temporal jurisdiction, either, they rather argue that an allegedly erroneous definition of the crime may have made the Co-Investigating Judges to wrongfully assume jurisdiction. The Pre-Trial Chamber finds that these complaints are arguments relating to the pleading practice and the form of the indictment and do not represent admissible jurisdictional challenges.[185]

(g) Ground Seven:

81. The Co-Lawyers for Ieng Sary submit, in introduction to this ground of Appeal, that should crimes against humanity be found to be applicable at the ECCC, the Co-Investigating Judges erred in law in its application of crimes against humanity.[186] They refer to paragraph 43 of Pre-Trial Chamber's JCE Decision which notes that the ICTY Appeals Chamber has identified four preconditions that any form of responsibility must satisfy in order for it to come within the tribunal's jurisdiction. These are summarized as follows for the purpose of ECCC proceedings: a) it must be provided for in the Establishment Law, either directly or indirectly; b) it must have existed under customary international law at the relevant time; c) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and, d) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.

82. Axiomatically, the Co-Lawyers say, these criteria must equally apply to any international crimes within the jurisdiction of the ECCC. They conclude that where the

[184] Closing Order, paras 1340-1341.
[185] See *Gotovina et al.* Decision on Jurisdiction, para. 15 and *Cf. Prlić et al.* [Interlocutory] Decision on Jurisdiction, para. 13.
[186] Ieng Sary Appeal, G (Title of Ground Seven).

Co-Investigating Judges *adopted* in the Closing Order *definitions* of crimes against humanity which do not conform to these criteria, it assumed jurisdiction on the basis of an incorrect assessment of the applicable law. Consequently, the Co-Lawyers submit that the Co-Investigating Judges' application of these erroneous definitions of crimes against humanity are subject to appeal pursuant to Rule 74(3)(a).[187]

83. The Co-Lawyers develop their argument in sub-grounds as follows:

1. Definition of crimes against humanity should have been considered pursuant to the principle *lex mitior*[188] and therefore the contemporary definition and not that under the customary international law of 1975-79 should have been applied;[189]
2. The Co-Investigating Judges define crimes against humanity citing sources that violate the ban on analogy, therefore it has assumed jurisdiction on basis of an incorrect assessment of the applicable law.[190]
3. The Co-Investigating Judges failed to explain that a *nexus*[191] or link between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC. From the 1950s to 1979, there is little evidence of a general practice among states and opinion juris that the *nexus* was no longer a necessary element.[192]
4. The Co-Investigating Judges failed to include the existence of a state or organizational policy as an element of crimes against humanity at the ECCC, therefore it assumed jurisdiction on the basis of an incorrect assessment of the applicable law.[193]
5. The Co-Investigating Judges have inappropriately characterised the legal nature of the facts allegedly proving the existence of an "attack,"[194] establishing a

[187] Ieng Sary Appeal, para. 184.
[188] The principle by which a person is to benefit from the lighter penalty where there has been a change in the law is known by the Latin phrase "*lex mitior*".
[189] Ieng Sary Appeal, para. 185.
[190] Ieng Sary Appeal, paras 186-187 referring to para. 1470 and fn.5276 of the Closing Order.
[191] The Latin term '*nexus*' means 'a connection or link, often a causal one': Black's Law Dictionary
[192] Ieng Sary Appeal, paras 188-189.
[193] Ieng Sary Appeal, para. 190.
[194] Ieng Sary Appeal, para 191 referring to para. 1351 of the Closing Order.

"widespread and systematic attack"[195] and have assumed jurisdiction on the basis of an incorrect assessment of the applicable law.

6. In considering acts which fall outside the temporal jurisdiction of the ECCC to constitute evidence of an attack directed against a civilian population, the Co-Investigating Judges exceeded their jurisdiction.[196]
7. In considering acts which fall outside the temporal jurisdiction of the ECCC to constitute evidence of an attack on discriminatory grounds, the Co-Investigating Judges exceeded their jurisdiction.[197]
8. The Co-Investigating Judges have incorrectly characterised the facts allegedly proving elements of crimes against humanity and have therefore wrongly assumed jurisdiction;[198]
9. The Co-Investigating Judges indicted on the basis of the application of an allegedly erroneous definition of several elements of the crimes against humanity;[199]
10. The Co-Investigating Judges erred by holding imprisonment to be an enumerated act constituting a crime against humanity. Imprisonment was not an enumerated act constituting a crime against humanity in customary international law in 1975-79;[200]
11. The Co-Investigating Judges erred by holding torture to be an enumerated act constituting a crime against humanity. Torture was not an enumerated act constituting a crime against humanity in customary international law in 1975-79;[201]
12. The Co-Investigating Judges failed to particularize the material facts of the alleged criminal conduct;[202]
13. The Co-Investigating Judges' pleading lacks sufficient specificity;[203]

[195] Ieng Sary Appeal, paras 192-194 referring to paras 1352, 1353, 1355, 1357 and 1358 of the Closing Order.
[196] Ieng Sary Appeal, paras 195-197 referring to paras 1363, 1364 of the Closing Order.
[197] Ieng Sary Appeal, paras 197-199 referring to paras 1365 seen in conjunction with paras 1371, 1366, 1367, 1368 and 1396 of the Closing Order.
[198] Ieng Sary Appeal, para 200.
[199] Ieng SaryAppeal, paras 201-204 and 210.
[200] Ieng Sary Appeal, paras 205-207.
[201] Ieng SaryAppeal, paras 208-209.
[202] Ieng Sary Appeal, paras 211-213.
[203] Ieng Sary Appeal, paras 214-217.

14. The Co-Investigating Judges erred by holding rape to be an enumerated act constituting a crime against humanity. Rape was not an enumerated act constituting a crime against humanity in customary international law in 1975-79;[204]
15. The Co-Investigating Judges erred by holding "other inhumane acts" to be an applicable underlying offence constituting crimes against humanity. They add that as a Cambodian court based on the civil law system, the ECCC only has jurisdiction over crimes explicitly pronounced by the law. They argue that the notion of "other inhumane acts" "has been judged on the one hand to violate the principle of certainty and on the other to form part of customary international law."[205]
16. The Co-Investigating Judges erred by holding forced marriage to constitute an applicable "other inhumane act." Forced marriage was not an enumerated act constituting a crime against humanity in customary international law in 1975-79;[206]
17. The Co-Investigating Judges erred by holding sexual violence to be constitute an "other inhumane act." Sexual violence was not an enumerated act constituting a crime against humanity in customary international law in 1975-79;[207]
18. The Co-Investigating Judges erred by holding forced transfers of population to constitute an "other inhumane act." Article 4 of ECCC Law enumerates forcible transfers as an act of genocide and not as an "other inhumane act," therefore as ECCC can only have jurisdiction over crimes explicitly pronounced by law, "forcible transfer" cannot be prosecuted as an "other inhumane act",[208]
19. The Co-Investigating Judges erred by holding enforced disappearances to constitute an "other inhumane act." Enforced disappearances were not an enumerated act constituting a crime against humanity in customary international law in 1975-79.[209]

[204] Ieng Sary Appeal, paras 218-219.
[205] Ieng Sary Appeal, para. 220.
[206] Ieng Sary Appeal, para. 223.
[207] Ieng Sary Appeal, para. 225.
[208] Ieng Sary Appeal, para. 226.
[209] Ieng Sary Appeal, para. 230.

84. The Pre-Trial Chamber observes that in a number of the sub-grounds of this Ground of Appeal, mentioned in the paragraph above, including: sub-ground 3 ("*nexus* argument")[210]; sub-ground 10 ("imprisonment argument")[211]; sub-ground 11 ("torture argument")[212]; sub-ground 14 ("rape argument")[213]; sub-ground 15 ("other inhumane acts argument")[214]; sub-ground 16 ("forced marriage argument")[215]; sub-ground 17 ("sexual violence argument")[216] and sub-ground 19 ("enforced disappearances argument"),[217] the Co-Lawyers argue upon the very existence in law in 1975-79 of certain categories of the crimes against humanity, which represent arguments that go to the very essence of the test for compliance with the principle of legality and, as such, represent admissible jurisdictional challenges.

85. In sub-grounds 1, 2 and 9 the Co-Lawyers allege that the Co-Investigating Judges made an erroneous definition of crimes or elements of crimes. The Pre-Trial Chamber finds that these arguments relate to the pleading practice and do not represent jurisdictional challenges.

86. In sub-ground 4 the Co-Lawyers' argument is related to the contours of elements of the crime and therefore to the pleading practice and does not represent a jurisdictional challenge.

87. The Co-Lawyers allegation, in sub-grounds 5 and 8, that the Co-Investigating Judges made an incorrect characterization of facts allegedly proving elements of a crime does not represent a jurisdictional challenge either. These arguments are related to issues of fact and law and to the pleading practice, issues which should be dealt with at trial.

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[210] Ieng Sary Appeal, paras 188-189.
[211] Ieng Sary Appeal, paras 205-207.
[212] Ieng Sary Appeal, paras 208-209.
[213] Ieng Sary Appeal, paras 218-219.
[214] Ieng Sary Appeal, para. 220.
[215] Ieng Sary Appeal, para. 223.
[216] Ieng Sary Appeal, para. 225.
[217] Ieng Sary Appeal, para. 230.

88. In sub-grounds 6 and 7 the Co-Lawyers complain about the Co-Investigating Judges considering acts that fall outside the temporal jurisdiction of the ECCC, which represents an argument related to issues of fact and law that are better addressed at trial. Having thus observed, the Pre-Trial Chamber notes, that discussion of issues outside of the time of indictment can be relevant as to the context and continuation of conduct.[218]

89. Sub-grounds 12 and 13 where the Co-Lawyers argue that the Co-Investigating Judges' pleading lacks sufficient specification do not represent jurisdictional challenges either as they relate to issues of fact and law.

90. In relation to sub-ground 14 ("the rape argument"), the Pre-Trial Chamber shall not examine or take a position on Co-Lawyers arguments in paragraph 219 of the Appeal as these arguments relate specifically to the way how Co-Investigating Judges defined rape rather than to its very existence in law in 1975-79.

91. In sub-ground 18 ("forcible transfers argument")[219], the Co-Lawyers do not challenge the existence in law of "forcible transfers," they rather challenge its wrong classification by the Co-Investigating Judges as an element of one or another crime, which is an argument that goes to the pleading practice and therefore does not represent an admissible jurisdictional challenge.

(h) Ground Eight:

92. The Co-Lawyers for Ieng Sary submit that the Co-Investigating Judges erred in law in their application of Grave Breaches, should these be found to be applicable at the ECCC. Referring to paragraph 1317, and footnote 5202 of the Closing Order, the Co-Lawyers submit that the Co-Investigating Judges erred in failing to set out the

[218] *See* Decision on Reconsideration of Co-Prosecutors' Appeal Against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File Which Assists in Proving the Charged Persons' Knowledge of the Crimes, 28 September 2010, D365/2/17, para. 91.
[219] Ieng Sary Appeal, para. 226.

requirements for an international armed conflict.[220] Referring to paragraph 1482 of the Closing Order, the Co-Lawyers submit that the Co-Investigating Judges erred in failing to clearly set out the definition of a protected person and because of its temporal jurisdiction the definition of "protected persons" in ECCC includes only persons who are protected due to their nationality.[221] Referring to paragraph 1483 of the Closing Order, the Co-Lawyers submit that the Co-Investigating Judges erred in failing to clearly set out the necessity of a *nexus* between the international armed conflict and the crimes and that this failure may have caused the Co-Investigating Judges to assume jurisdiction "without finding that all elements of grave breaches have been met."[222] Referring to paragraphs 1493 and 1492 of the Closing Order, the Co-Lawyers submit that the Co-Investigating Judges erred in applying the incorrect *mens rea*[223] for willful killing. They submit that "reasonable knowledge alone that death was likely, absent the intent to kill or cause serious bodily harm, does not amount to wilful killing."[224] The Co-Lawyers submit that the Co-Investigating Judges erred in not setting out the requirements of torture.[225] Referring to paragraph 1501 of the Closing Order, the Co-Lawyers submit that the Co-Investigating Judges erred in failing to fully set out the requirements of inhumane treatment. [226] The Co-Lawyers submit that the Co-Investigating Judges erred in applying the incorrect *mens rea* for willfully causing suffering or serious injury to body or health.[227] Referring to paragraphs 1509, 1513 and 1510 of the Closing Order, the Co-Lawyers submit that the Co-Investigating Judges erred in failing to fully set out the requirements of deprivation of a fair and regular trial.[228]

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[220] Ieng Sary Appeal, para. 235, footnote 371 cites Geneva Conventions, Common Art. 2.
[221] Ieng Sary Appeal, para. 236-237.
[222] Ieng Sary Appeal, para. 238.
[223] The Latin term *mens rea* means in English "guilty mind" or "the state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime; criminal intent or recklessness." Black's Law Dictionary.
[224] Ieng Sary Appeal, paras 239-240.
[225] Ieng Sary Appeal, para. 241.
[226] Ieng Sary Appeal, paras 242-243.
[227] Ieng Sary Appeal, paras 244-246.
[228] Ieng Sary Appeal, paras 247-248.

93. The Pre-Trial Chamber observes that these submissions of the Co-Lawyers do not contest ECCC's jurisdiction over Grave Breaches; rather, the submissions contest the way in which the Co-Investigating Judges define, apply or set out the requirements for the crimes or elements of the crimes. The Pre-Trial Chamber finds that these are challenges related to alleged defects in the indictment or the pleading practice which can be properly advanced and argued during the course of the trial.

(i) Ground Nine:

94. The Co-Lawyers for Ieng Sary submit that the Co-Investigating Judges erred in law in its application of JCE.[229] In paragraphs 249 to 263 of the Appeal, the Co-Lawyers do not refer to anything in the Closing Order, they rather refer to the Pre-Trial Chamber's JCE Decision saying that they are not asking for a reconsideration of that decision but reserve the right to raise this issue before the Trial Chamber. The Pre-Trial Chamber does not consider this to be a ground of appeal but merely a notification of defence strategy.

95. From paragraph 264 onwards in this ground of Appeal, noting the Pre-Trial Chamber's previous conclusion regarding JCE I, the Appellants argue that, even if JCE is found applicable, specifically in the case of Ieng Sary, the ECCC does not have jurisdiction to apply JCE I because the Co-Investigating Judges erred in its application by applying the incorrect *mens rea*[230] concerning Ieng Sary's participation in a common criminal plan and in finding that the common criminal plan expanded to include genocide, absent a showing of specific intent.[231] The Pre-Trial Chamber observes that in this sub-ground of ground nine of the Appeal, the Co-Lawyers allege an error on mixed issues of fact and law by the Co-Investigating Judges. They do not challenge the confirmation of ECCC's jurisdiction over JCE I, but rather the way in which the Co-Investigating Judges reach their conclusion. The Pre-Trial Chamber does not find this ground to fall within the ambit of Internal Rule 74(3)(a).

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[229] Ieng Sary Appeal, paras 249–272.
[230] Ieng Sary Appeal, paras 265-269 referring to paras 1524-1525, 1534, of the Closing Order.
[231] Ieng Sary Appeal, paras 270-272 referring to para. 1527 of the Closing Order.

(j) Ground Ten:

96. The Co-Lawyers for Ieng Sary submit that the Co-Investigating Judges erred in law in its application of planning, instigating, ordering, and aiding and abetting.[232] The Co-Lawyers, quoting paragraphs 1545, 1548, 1551, 1554 of the Closing Order, allege that the Co-Investigating Judges erred in law in the application of these modes of responsibility:

1. In failing set out a sufficient legal characterization of the facts (sub-ground one);[233]
2. In stating and applying the incorrect mens rea (sub-ground two);[234]
3. In holding that these modes of responsibility could be applied additionally or in the alternative to JCE (sub-ground three);[235]
4. In not mentioning that planning 'must be a substantially contributing factor', and in applying the wrong standard for aiding and abetting (requiring incorrect 'important effect' rather than correct 'substantial effect'.) (sub-ground four).[236]

97. The Pre-Trial Chamber observes that the submissions of Co-Lawyers under Ground Ten are not a challenge to the existence of any of these modes of responsibility, or their recognition under national or international law at the relevant time. Rather the Co-Lawyers argue that the Co-Investigating Judges erred in applying these modes of responsibility to the facts set out in the indictment, or that the elements of these modes of liability were improperly defined. These do not amount to jurisdictional challenges but are rather allegations for defect in pleading of the indictment. No challenge to an indictment under Internal Rule 67(2) claiming it to be void for procedural defect (for failure to set out a description of the material facts and their legal characterisation) may be brought before the Pre-Trial Chamber. Internal Rules 80*bis* and 89 set out the

[232] Ieng Sary Appeal, paras 273–282.
[233] Ieng Sary Appeal, paras 273-274.
[234] Ieng Sary Appeal, paras 275-280.
[235] Ieng Sary Appeal, para. 281.
[236] Ieng Sary Appeal, para. 282.

procedure for such a challenge. These are matters solely in the jurisdiction of the Trial Chamber.

(k) Ground Eleven:

98. The Co-Lawyers for Ieng Sary submit that the Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply command responsibility and in its application of command responsibility should it be found to be applicable at the ECCC.[237] The Co-Lawyers develop their argument in the following sub-grounds:

1) Command responsibility did not exist in customary international law 1975-79[238] because:
   a. Post WWII cases did not clearly define the elements;[239]
   b. State practice does not show custom existed pre-1975;[240]
   c. Additional Protocol I to the Geneva Conventions did not codify customary international law related to command responsibility.[241]
2) The Closing Order is defective with regard to command responsibility and is void for lack of particulars;[242]
3) The Co-Investigating Judges erred in its application of command responsibility because:
   a. The Co-Investigating Judges should have limited its application only to international armed conflicts;[243]
   b. The Co-Investigating Judges should have found it only applies to military commanders; There was no consistent state practice to hold non-military superiors accountable for the acts of their subordinates in 1975-79;[244]

[237] Ieng Sary Appeal, paras 283 – 324.
[238] Ieng Sary Appeal, paras 283-284.
[239] Ieng Sary Appeal, paras 285-292.
[240] Ieng Sary Appeal, paras 293-297.
[241] Ieng Sary Appeal, paras 298-302.
[242] Ieng Sary Appeal, paras 303-306.
[243] Ieng Sary Appeal, paras 307-313.
[244] Ieng Sary Appeal, paras 314-315.

c. The Co-Investigating Judges should have found there must be a causal relationship between superior's actions and subordinate's crimes and where the civilian superior had a pre-existing legal duty to prevent and punish;[245]

d. The Co-Investigating Judges should have found it cannot apply to specific intent crimes such as genocide.[246]

99. The Co-Lawyers explicitly refer only to paragraphs 1319 and 1558 of the Closing Order. The Pre-Trial Chamber observes that other parts of the Closing Order which are related to these arguments but are not referred to by the Co-Lawyers in the Appeal are paragraphs 1307, 1318, 1557, 1559, 1560 and 1613. The Pre-Trial Chamber observes that the Closing Order indicts the Accused "by virtue of superior responsibility"[247] for the crimes of genocide, grave breaches of the Geneva Conventions, and crimes against humanity, therefore, the Closing Order constitutes an order or decision confirming the jurisdiction of the ECCC for this mode of liability.

100. The Pre-Trial Chamber finds that sub-ground one of Ground Eleven challenging the existence of command responsibility as a mode of liability under customary international law at the time of commission of the crimes enumerated in the Closing Order represents a jurisdictional challenge.

101. Sub-ground two of Ground Eleven, referring to lack of specificity in the indictment, does not raise a jurisdictional challenge under Rule 74(3)(a).

102. Sub-ground three of Ground Eleven, as far as it relates to the argument that there was no consistent state practice to hold non-military superiors accountable for the acts of their subordinates in 1975-79, represents an admissible jurisdictional challenge. The rest of this sub-ground raises mixed issues of fact and law and such issues of the contours of

[245] Ieng Sary Appeal, paras 316-322.
[246] Ieng Sary Appeal, paras 323-324.
[247] Closing Order, para. 1613.

modes of liability, as opposed to their very existence, do not represent jurisdictional challenges.[248]

Conclusion on Admissibility:

103. The Pre-Trial Chamber finds that grounds four, six, seven (partially), eight, nine, ten and eleven (partially) are inadmissible. The rest of the grounds are admissible and will be discussed on the merits in the paragraphs below.

C. STANDARD OF REVIEW

Scope of review for Closing Order appeals:

104. In its decision on the appeal against the Closing Order in Case 001, the Pre-Trial Chamber in the general remarks related to the scope of review for "Closing Order appeals" found:

> "Considering the Internal Rules dealing with the role of the Pre-Trial Chamber as an appellate instance and more specifically the time limits set out, the Pre-Trial Chamber finds that the scope of its review is limited to the issues raised by the Appeal."[249]

Standard of review:

105. The Pre-Trial Chamber notes that the Appeal before it is filed by the Accused for whom the law foresees only limited rights of appeal against the Closing Order as is the case for challenges to confirmation of ECCC's jurisdiction, as specifically provided in Internal Rule 74(3)(a).

106. The Accused asks the Pre-Trial Chamber to amend the Closing Order by holding that ECCC has no jurisdiction over certain crimes and modes of liability and therefore by

[248] *Gotovina et al.* Decision on Jurisdiction, paras 23-24.
[249] Decision on Ieng Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26, para.29.

reducing the number of charges against the Charged Person.[250] In its decision on the appeal against the Closing Order in Case 001, the Pre-Trial Chamber found:

> Internal Rule 79(1) suggests that the Pre-Trial Chamber has the power to issue a new or revised Closing Order that will serve as a basis for the trial: "The Trial Chamber shall be seized by an indictment from the Co-Investigating Judges or the Pre-Trial Chamber." In the Glossary of the Internal Rules, the word "Indictment" is defined as "a Closing Order by the Co-Investigating Judges, or the Pre-Trial Chamber, committing a Charged Person for trial.[251]

107. The Pre-Trial Chamber also notes that Internal Rule 67 (4) reads:

> A Closing Order may both send the case to trial for certain acts or against certain persons and dismiss the case for others.

108. The Pre-Trial Chamber finds that in the case it grants a jurisdictional challenge, it can consequently reduce the number of charges against the Charged Person and send him for trial, when it is just to do so. Where necessary, the Pre-Trial Chamber may add reasons to those provided by the Co-Investigating Judges in the Closing Order.

109. The Pre-Trial Chamber observes that the Cambodian Code of Criminal Procedure does not provide anything that would assist the Pre-Trial Chamber in finding what are its powers when deciding on an appeal such as the one before it. This is because such an appeal right in respect of a Closing Order is not provided for in the usual practice in the Cambodian system. This appeal is filed by the Defence against the Indictment and the unusual grounds of jurisdictional challenges. This circumstance is understandable given

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[250] Ieng Sary Appeal, Section IV. (Hold that the ECCC does not have jurisdiction to indict Ieng Sary due to *ne bis in idem;* Hold that the ECCC does not have jurisdiction to indict Ieng Sary due to *Royal Pardon and* Amnesty; In the alternative: Hold that ECCC does not have jurisdiction over genocide, crimes against humanity, grave breaches or national crimes or In the alternative: find that these crimes are inapplicable to Ieng Sary due to the Co-Investigating Judges' failure in defining and applying these crimes and/or lack of specificity of these crimes. Find that JCE, as understood by the PTC to be applicable, may not be applied against Ieng Sary. Strike planning, instigating, aiding and abetting, and ordering from the Closing Order as they are applied to Ieng Sary Hold that ECCC does not have jurisdiction over command responsibility; In the alternative: Strike command responsibility from the Closing Order as it is applied to Ieng Sary; In the alternative: Find the Defence's characterization of command responsibility applicable.)

[251] Decision on Appeal against the Closing Order indicting Kaing Guek Eav alias "Duch", 5 December 2008, D99/3/42, para.40.

the fact that ECCC has been vested with powers of an extraordinary nature in comparison with regular Cambodian courts.

110. As far as the type of error it has to examine for the purposes of this appeal, the Pre-Trial Chamber has previously found in a decision on an appeal filed on similar grounds:

> The Pre-Trial Chamber notes that insofar as the Impugned Order addresses jurisdictional matters, it involves no discretion for the [Co-Investigating Judges].[252]

111. The Pre-Trial Chamber further observes that in the Appeal before it, where a jurisdictional challenge is grounded on the basis of an alleged violation of the principle of legality, it may also be required to examine errors of fact as far as such concern the objective test for issues of foreseability and accessibility of crimes or modes of liability by the Accused. The Pre-Trial Chamber acknowledges that clarity, accessibility and foreseeability are elements of the principle of legality and that there may be aspects of the Appeal that may cause the Pre-Trial Chamber to consider issues beyond those relating to bare jurisdiction. The Pre-Trial Chamber finds that it can, only to that extent, review the Closing Order for any specific error of fact. Where the Co-Lawyers invite consideration of the subjective knowledge of the Accused as to the state of international law, their request would require a factual determination which is outside the jurisdiction of the Pre-Trial Chamber. Such factual determinations are within the jurisdiction of the Trial Chamber, any such issues can be challenged at trial.

112. The Pre-Trial Chamber finds that this standard of review is in line with the practice followed at international level. In the ICTY, for instance, in the *Gotovina* Decision of 6 June 2007, the ICTY Appeals Chamber, referring to previous case-law, summarized the standard of review for jurisdictional challenges as follows:

> When reviewing a Trial Chamber's decision on jurisdiction under Rule 72(B)(i) of the Rules, the Appeals Chamber will only reverse the decision "if the Trial Chamber committed a specific error of law or fact invalidating the

[252] JCE Decision, para 36.

decision or weighed relevant considerations or irrelevant considerations in an unreasonable manner."[253]

113. The Pre-Trial Chamber finds that it is well-established in international jurisprudence that, on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal decisions are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.[254]

D. CONSIDERATION OF MERITS

1. Ground One (*ne bis in idem*)

Submissions of the Parties

114. The Co-Lawyers for Ieng Sary submit that the ECCC's jurisdiction to prosecute Ieng Sary for the acts mentioned in the Closing Order is barred by the principle of *ne bis in idem* as he was tried and convicted *in absentia* for having committed genocide, in addition to a number of other offenses, by the People's Revolutionary Tribunal ("PRT") in 1979 ("1979 trial").[255] Relying on Articles 7 and 12 of the Criminal Procedure Code of the Kingdom of Cambodia ("CPC"), which the Co-Lawyers say provides Ieng Sary a greater protection than Article 14(7) of the ICCPR, they submit that Ieng Sary cannot be tried twice for the same conduct.[256] They further submit that the CPC provides no exception to the principle of *ne bis in idem.* In any event, they submit that neither of the two exceptions previously stated by the Co-Investigating Judges in their Provisional

[253] *Gotovina et al.* Decision on Jurisdiction, para.7 quoting also *Prosecutor v. Jadranko Prlić et. al*, Case No. IT-04-74-AR72.1, Decision on Petkovi}'s Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction, 16 November 2005 ("*Prlić et al.* Interlocutory Appeal on Jurisdiction"), para. 11 quoting *Prosecutor v. Slobodan Milo{ević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para. 10.
[254] *Prosecutor v. Ramush Hardinaj et al.*, Case No. IT-04-84-A, Judgement, ICTY Appeals Chamber, 19 July 2010, paras 11, 12.
[255] Ieng Sary Appeal, para. 23.
[256] Ieng Sary Appeal, paras 29-31.

Detention Order,[257] namely that the previous proceedings i) were for the purpose of shielding the person concerned from criminal responsibility or ii) were not conducted independently or impartially in accordance with the norms of due process and were conducted in a manner inconsistent with an intent to bring the person concerned to justice, apply to Ieng Sary's case as he was indeed sentenced to death and all his property was ordered to be confiscated.[258]

115. The Co-Prosecutors submit in response that Ieng Sary's prosecution and conviction in 1979 does not prevent further prosecution before the ECCC as i) the CPC limits the application of the principle of *ne bis in idem* to cases where the accused has been acquitted and ii) Article 14(7) of the ICCPR is not triggered as the 1979 judgment, rendered *in absentia*,[259] was not final nor issued in accordance with the law and procedure in Cambodia. They further argue that in any event, international law provides that the principle of *ne bis in idem* does not apply when an international tribunal conducts a second prosecution after a first national prosecution failed to conform with international fair trial safeguards, as was the case with the 1979 trial.[260] They submit that it is unnecessary to compare the acts and crimes prosecuted in 1979 with those for which Ieng Sary has now been indicted as "an accused's second prosecution for different crimes based on the same criminal act does not violate the principle of double jeopardy so long as any unfairness emanating from dual convictions is accounted for in sentencing."[261]

116. The Co-Lawyers for the Civil Parties (Group ASF France) submit that the principle of *ne bis in idem* is not applicable if i) the trial was not conducted in accordance with fair trial principles, ii) the trial was aimed at shielding an individual from criminal liability or iii) the trial did not meet international standards.[262] The other Co-Lawyers did not present specific observations in relation to this ground of appeal.

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[257] Provisional Detention Order, para. 8.
[258] Ieng Sary Appeal, paras 34-37.
[259] The Latin term "*in absentia*" means in English "in the absence of."
[260] Co-Prosecutors' Response, para. 60.
[261] Co-Prosecutors' Response, para. 81.
[262] Civil Party Lawyers' Observations I, para. 64.

117. The Co-Lawyers for Ieng Sary reply that Article 12 of the CPC needs to be interpreted as covering a person who has been convicted as the *ne bis in idem* principles in international law aims at sparing an individual from being prosecuted twice.[263] They submit that the 1979 judgment must be considered as a final judgment considering that the CPC did not apply in 1979, there was no Supreme Court at that time and Ieng Sary has no possibility of being retried by the PRT. They reiterate that the exception invoked by the Co-Prosecutors for national trials not conducted in accordance with international fair trial safeguards has not crystallised in international law, as shown notably by the Rome Statute of the International Criminal Court ("Rome Statute") which departs from the provisions of the *ad hoc* tribunals. They also argue in this regards that "rights set out in Article 14 of the ICCPR are meant to protect the rights of the Accused and would not require that he be retried if he did not seek a retrial."[264] They finally assert that the issue of cumulative convictions raised by the Co-Prosecutors does not apply here as the two proceedings are separated by 30 years.[265]

Discussion

118. The Pre-Trial Chamber notes that the Agreement,[266] the ECCC Law and the Internal Rules do not afford protection against double jeopardy nor do they address the effect of a previous conviction on the proceedings before the ECCC. In accordance with Article 12 of the Agreement and Article 33 new of the ECCC Law, the Pre-Trial Chamber examines the CPC which, in the views of the Co-Lawyers, contains provisions resolving the issue at hand.

[263] Ieng Sary Reply, para. 33.
[264] Ieng Sary Reply, para. 37.
[265] Ieng Sary Reply, para. 40.
[266] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003 ("Agreement").

The CPC

119. Article 7 of the CPC, adopted on 10 August 2007, provides:

> Article 7 Extinction of Criminal Actions
>
> The reasons for extinguishing a charge in a criminal action are as follows:
>
> (...)
>
> 5. *Res judicata*
>
> When a criminal action is extinguished a criminal charge can no longer be pursued or must be terminated.

120. Article 12 further provides:

> Article 12 *Res judicata*
>
> In applying the principle of *res judicata*, any person who has been finally acquitted by a judgment cannot be prosecuted once again for the same act, even if such act is subject to a different legal qualification.

121. The Co-Lawyers argue that Article 12 must be interpreted as covering not only those acquitted but also those who have been convicted.

122. The Pre-Trial Chamber notes that the text of Article 12 of the CPC provides that it applies to a person who has been "acquitted". Pursuant to recognized principles of interpretation, "in construing statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity or inconsistency, but not farther."[267]

[267] *Grey v. Pearson* (1857) 10 ER 1216, 1234. See also: *Becke v. Smith* (1836) 2 M&W 195; *Caminetti v. United States*, 242 U.S. 470 (1917), at 485 ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain [...] the sole function of the courts is to enforce it according to its terms." And if a statute's language is plain and clear, the Court further warned that "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."); Article 31 and 33 of the *United Nations Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 ("Vienna Convention").

123. The Pre-Trial Chamber finds that the Co-Lawyers have not shown that the ordinary sense of Article 12 was in any way inconsistent with the rest of the CPC. On the contrary, the Pre-Trial Chamber considers that expending the scope of Article 12 to include convicted person, as suggested by the Co-Lawyers, would conflict with other provisions of the CPC, which allow proceedings to be reopened in cases of convictions. In particular, the CPC provides for the possibilities to i) review the proceedings in case of a conviction[268] and ii) for a person convicted *in absentia* to make opposition to the judgment and be tried again.[269] Applying Article 12 to convictions would rule out these two possibilities of reopening the proceedings as, pursuant to Article 5 of the CPC, the criminal charge could no longer be pursued or would have to be terminated. It is further noted that convicted persons are not left without protection as they benefit from the right set out in Article 14(7) of the ICCPR to which Cambodia as acceded on 26 May 1992, which is discussed below.

124. Absent any absurdity or inconsistency with the rest of the CPC, the Pre-Trial Chamber shall adhere to the ordinary sense of Article 12, finding that it does not apply to convictions.

125. Considering that the CPC does not allow a resolution of the issue at hand, the Pre-Trial Chamber refers to Article 12 of the Agreement and Article 33 new of the ECCC Law which provide, in their first paragraph, that it shall seek guidance in procedural rules established at the international level and, in their second paragraph, that "[t]he Extraordinary Chambers 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, to which Cambodia is a party."

[268] Articles 443-445 of CPC.
[269] Articles 365, 370 and 371 of the CPC.

126. In the current case, the Pre-Trial Chamber shall first look at Article 14(7) of the ICCPR and, if the issue remains unresolved, refer to the procedural rules established at the international level.

The ICCPR

127. The principle of *ne bis in idem* is enshrined as a fundamental right in Article 14(7) of the ICCPR, which reads:

> No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

128. The Pre-Trial Chamber finds that the protection offered by Article 14(7) of the ICCPR has solely a domestic effect. The Human Rights Committee has consistently held that Article 14(7) "does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more states – this provision only prohibits double jeopardy with regard to an offence adjudicated in a given State".[270] In *Prosecutor v. Tadić*, the Trial Chamber of the ICTY also concluded that Article 14(7) has not received broad recognition as a mandatory norm of transnational application.[271] This position is certainly shared by the European states, most of which are parties of the ICCPR, who have adopted a provision in Article 4 of the Protocol No. 7 to the European Convention on Human Rights ("ECHR"),[272] which explicitly states that *ne bis in idem* principle applies solely to proceedings within the domestic legal orders.[273]

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[270]Human Rights Committee, *A.R.J. v. Australia*, CCPR/C/60/D/692/1996, 11 August 1997, para 6.4; *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32 ("General Comment no. 32"), para. 57. See also: *A.P et al. v. Italy*, Communication No. 204/1986, 2 November 1987, para 7.3 ("this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State").

[271] *Prosecutor v. Tadić* , IT-94-1-T, "Decision on the Defence Motion on the Principle of Non Bis In Idem", Trial Chamber, 14 November 1995, para 19.

[272] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, ETS 5; 213 UNTS 221, entered into force 3 September 1953 ("ECHR").

[273] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as Amended by Protocol No. 11, 22 November 1984 ("Protocol No. 7 to the ECHR"). Article 4(1) provides: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

129. The limit of the protection offered by Article 14(7) is explained by the fact that a State has no obligation to recognize a foreign judgment unless it has agreed to do so through an international convention specific to this effect.[274] The absence of such obligation under international law is reflected by the very complex regime of international cooperation in criminal matters that has emerged through the adoption of bilateral and multilateral conventions. Acknowledging the limit of Article 14(7), the Human Rights Committee said in this respect that this should not "undermine efforts by States to prevent retrial for the same criminal offence through international conventions."[275]

130. For this reason, Article 14(7) does not apply before the *ad hoc* tribunals and the International Criminal Court ("ICC") whereby an international *ne bis in idem* protection which takes into account the particularities of the interaction between domestic and international proceedings for the prosecution of international crimes has been introduced, as further discussed in the next section. In this respect, it is further noted that the scope of Article 14(7) is very limited as it applies to the same "offence", namely the same legal characterization of the acts, while the international protection focuses on the "conduct" of the accused, thus taking into account for the application of the *ne bis in idem* principle the fact that international proceedings might trigger legal characterisation that differ from the domestic ones.

131. The Pre-Trial Chamber finds that no international *ne bis in idem* protection exists under the ICCPR. Taking into account its finding below that the ECCC is an internationalised court functioning separately from the Cambodian court structure,[276] the Pre-Trial Chamber finds that the "internal *ne bis in idem* principle"[277] as enshrined in Article 14(7) of the ICCPR does not apply to the proceedings before the ECCC. In these circumstances, the Pre-Trial Chamber will seek guidance in the procedural rules established at the international level to determine if Ieng Sary's previous conviction by

[274] Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press: 2005, p. 386; Antonio Cassese, *International Criminal Law,* Oxford University Press, 2003 ("Cassese 2003"), pp. 319-320.
[275] General Comment No. 32, pp. 16-17.
[276] See Section discussing the merits of Ground three of Appeal below in this decision.
[277] Cassese 2003, p. 319.

a national Cambodian court shall prevent the ECCC from exercising jurisdiction against him for the offences charged in the Closing Order.

Procedural Rules Established at the International Level

132. The first comprehensive mention of the principle of *ne bis in idem* in the constitutive document of an international tribunal is to be found in Article 10 of the Statute of the ICTY[278], which provides:

> Article 10
> *Non-bis-in-idem*
> 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
>
> 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
>
> (a) the act for which he or she was tried was characterized as an ordinary crime; or
> (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
>
> 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

133. The substance of this provision has been reproduced in similar terms in Article 9 of the International Criminal Tribunal for the Rwanda ("ICTR") Statute, Article 9 of the

[278] The London Charter creating the Nuremberg Tribunal only provided for the "downward effect" of the *ne bis in idem* principle, i.e. procedures conducted by national courts after a judgement has been delivered by the international tribunal: *Charter of the International Military Tribunal, annexed to the London Agreement*, 8 August 1945, 82 U.N.T.S. 280 ("Nuremberg (IMT) Charter"), Art. 11 ("Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.")

Special Court for Sierra Leone ("SCSL") Statute and Article 5 of the Special Tribunal for Lebanon ("STL") Statute.[279]

134. The Rome Statute creating the ICC also includes a provision on *ne bis in idem* in its Article 20:

> Article 20
> *Ne bis in idem*
> 1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
> 2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
> 3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[280]

135. The Pre-Trial Chamber notes that these rules all indicate that international tribunals would refrain from exercising jurisdiction against an individual who has already been tried before a national court on the basis of the *ne bis in idem* principle, as long as the domestic proceedings meet certain requirements. The exceptions to the *ne bis in idem* are, however, formulated in different terms in, on the one hand, the statutes of *ad hoc* tribunals, and, on the other hand, the Rome Statute.

136. First, the statutes of the *ad hoc* tribunals contain an exception that has not been reproduced in the Rome Statute, namely the "ordinary crime exception", mentioned in paragraph 2(a) of the ICTY, ICTR and SCSL Statutes, which allows the *ad hoc* tribunals to conduct a new trial on the same acts if the acts for which the person has

[279] Apart from some slight variations in the wording, the only distinction is that Article 10(2)(a) of the ICTY Statute is not reproduced in the STL Statute, which is easily explained by the fact that the STL has jurisdiction only over Lebanese domestic crimes.
[280] Rome Statute, Article 20.

been tried were not legally characterised as international crimes in the national proceedings. This exception is not at issue in the current proceedings.

137. As to the second exception, which touches upon the standard that national proceedings shall uphold to prevent a further prosecution before international courts, the Pre-Trial Chamber notes that the language used in the Rome Statute departs in some respects from the one used in the Statute of all the *ad hoc* tribunals, which were adopted both before and after the Rome Statute.

138. The Pre-Trial Chamber notes that both the statutes of the *ad hoc* tribunals and the Rome Statute contain exceptions to the *ne bis in idem* principle for proceedings:

i) conducted for the purpose of shielding the person concerned from criminal liability for crimes within the jurisdiction of the international tribunal (Article 10(2)(b) of the ICTY Statute and Article 20(3)(a) of the Rome Statute);

ii) not conducted independently or impartially in accordance with the norms of due process recognized by international law (Article 10(2)(b) of the ICTY Statute and Article 20(3)(b) of the Rome Statute). In the case of the ICC, Article 20(3)(b) adds "and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

139. The Co-Lawyers for Ieng Sary argue that this last part of Article 20(3)(b) entails that the ICC can only try an individual who has already been tried for the same acts if the national proceedings were intended to help the individual escaping justice.[281] The Co-Lawyers argue that "this variation from the Rome Statute demonstrates that the exception to the principle is not crystallized in international law as the [Co-Prosecutors] also assert."[282]

[281] Ieng Sary Appeal, para. 37.
[282] Ieng Sary Reply, para. 37.

140. The Pre-Trial Chamber notes that absent any international *ne bis in idem* protection in Article 14(7), its task is not to determine whether an exception to the principle of *ne bis in idem* has crystallised in international law but whether the procedural rules established at the international level are sufficiently uniform for the Pre-Trial Chamber to seek guidance in them in order to resolve the issue at hand, namely whether the ECCC can exercise jurisdiction to try Ieng Sary for the indicted offences charged in the Closing Order.

141. As of the date of this decision, the Pre-Trial Chamber has not identified any case law from the ICC that interprets Article 20(3)(b) of the Rome Statute and the Co-Lawyers have not identified any case to support their interpretation of this provision. In these circumstances, the Pre-Trial Chamber will look at the rationale behind the adoption of the statutes of the *ad hoc* tribunals, the *travaux préparatoires* of the Rome Statute and the academic commentaries[283] to determine whether the Rome Statute constitutes a departure from the rules of the *ad hoc* tribunal resulting in an inconsistency which shall be taken into consideration by the Pre-Trial Chamber in seeking guidance in these rules.

142. The rationale for the adoption of a specific provision on *ne bis in idem* in the statutes of the *ad hoc* tribunals stems from the fact that the creation of international or internationalised tribunals increase the risk of putting the accused under double jeopardy as, by definition, these tribunals have jurisdiction over international crimes which are subject to universal jurisdiction. Absent any existing international *ne bis in idem* protection, there was therefore a need for recognition of such principle which is recognized under various forms in different legal systems[284] and traditionally serves a dual purpose of protecting the individual against the harassment of the state and being an important guarantee for legal certainty. In particular, from a human rights perspective, the underlying idea of the prohibition of double jeopardy is that "the State

[283] Article 32 of the Vienna Convention; Article 38(1)(d) of the *Statute of the International Court of Justice*.
[284] Christine Van den Wyngaert and Tom Ongena, "Ne bis in idem Principle, Including the Issue of Amnesty", in Antonio Cassese, Paola Gaeta and John R.W.D Jones (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, 2002, p. 705 ("Van den Wyngaert and Ongena"), at p. 706 ("This principle is known under different names in different legal systems, including the *res judicata* rule, the rule of *autrefois acquit/autrefois convict* and the protection against double jeopardy.")

with all its resource and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing sense of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty," as stated by the Supreme Court of the United States in *Green v. United States*.[285] From the perspective of legal certainty, the doctrine plays a role in upholding the public confidence in the justice system and respect for judicial proceedings. It also reinforces the need for diligent prosecution.[286]

143. However, these interests have to be balanced with the interest of the international community and victims in insuring that those responsible for the commission of international crimes are properly prosecuted.[287]

144. A compromise solution was thus found, as Cassese explains:

> [International crimes] breach values that transcend individual States and their communities; they affect and involve all States. Hence, any State is entitled to prosecute and punish them. It follows that, as long as the court of the State where those crimes are tried conforms to some fundamental principles on fair trial and acts independently, impartially, and with all due diligence, other States, including the State where the crimes have been committed, as well as international courts, must refrain from sitting in judgment on the same offence.[288]

145. In this respect, the Secretary-General of the United Nations stated in his report to the Security Council on the adoption of the ICTY Statute that:

> According to the principle of *non-bis-in-idem,* a person shall not be tried twice for the same crime. In the present context, given the primacy of the

[285] *Green v. United States*, 355 U.S. 184 (1957), paras 187-188.
[286] Stefan Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, 2005, pp. 383-384; Lorraine Finlay, "Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute", 15 *U.C. Davis Int'l L & Pol'y* 221 at 224.
[287] Yasmin Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes*, The Hague, TMC Asser Press, 2010 ("Naqvi"), p. 288; Lorraine Finlay, "Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome Statute", 15 *U.C. Davis Int'l L & Pol'y* 221 at 224.
[288] Cassese 2003, p. 320

> International Tribunal, the principle of *non-bis-in-idem* would preclude subsequent trial before a national court. However, the principle of *non-bis-in idem* should not preclude a subsequent trial before the International Tribunal in the following two circumstances:
>
> (a) the characterization of the act by the national court did not correspond to its characterization under the statute; or
>
> (b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts.[289]

146. In the case of *Prosecutor v. Tadić*, a Trial Chamber of the ICTY also stated that it "views the special circumstances set out in Article 10(2) of the Statute as a limited exception to its principle of *ne bis in idem*."[290]

147. Fairness to the accused, in the case of a previous conviction, is preserved by applying the "deduction of sentence principle", which means that the time served will be deducted from any further sentence pronounced in relation to the same conduct.[291]

148. The International Law Commission proposed in its Draft Statute for an International Criminal Court ("ILC Draft Statute") a provision on *ne bis in idem* that drew "heavily" on Article 10 of the ICTY Statute,[292] as it previously did for the Draft Code of Crimes against the Peace and Security of Mankind. The exceptions in Article 42(2)(b) ILC Draft Statute were substantially similar to Article 10(2)(b) of the ICTY Statute.[293] According to the International Law Commission, Article 42(2)(b) applied "where the first trial was a sham, i.e. was intended to protect the accused from international

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[289] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 66(b).
[290] *Prosecutor v. Tadić*, IT-94-1-T, "Decision on the Defence Motion on the Principle of ne-bis-in-idem", Trial Chamber, 14 November 1995, para. 33.
[291] ICTY Statute, art. 10(3); ICTR Statute, Art. 9(3); SCSL Statute, Art. 9(3), STL Statute, Art. 5(3). *See also*: Van den Wyngaert and Ongena, p. 720.
[292] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, UN Doc. A/49/10,Yearbook of the International Law Commission, 1994, vol. II, Part Two, p. 57, para. 2.
[293] Article 42(2)(b) stated: "the proceedings in the other court were not impartial or independent or were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted."

criminal responsibility."[294] The remainder of the International Law Commission's commentary on Article 42(2)(b) is as follows:

> [P]aragraph 2 (b) reflects the view that the Court should be able to try an accused if the previous criminal proceeding for the same acts was really a 'sham' proceeding, possibly even designed to shield the person from being tried by the Court. The Commission adopted the words 'the case was not diligently prosecuted' on the understanding that they are not intended to apply to mere lapses or errors on the part of the earlier prosecution, but to a lack of diligence of such a degree as to be calculated to shield the accused from real responsibility for the acts in question. Paragraph 2 (b) is designed to deal with exceptional cases only.[295]

149. In its commentary on Article 12(2)(a)(ii) in its Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission had also stated:

> In such a case, the individual has not been duly tried or punished for the same act or the same crime because of the abuse of power or improper administration of justice by the national authorities in prosecuting the case or conducting the proceedings. The international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process.[296]

150. A view was expressed in the Ad Hoc Committee set out to discuss the draft Rome Statute that Article 42 of the ILC Draft Statute "came close to undermining the principle of 'complementarity'" contained in Article 17 of the Rome Statute, according to which the ICC will only try cases that fall within its jurisdiction if States are not willing or able to try the cases themselves.[297] According to the report of the Ad Hoc Committee, "[t]he appropriateness of empowering the court to pass judgment on the impartiality or independence of national courts was seriously questioned" and "[s]ubparagraph (b) [of

[294] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, *Yearbook of the International Law Commission,* 1994, vol. II, Part Two, p. 58, para. 5.
[295] Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, *Yearbook of the International Law Commission,* 1994, Vol. II, Part Two, p. 59, para. 7.
[296] Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, *Yearbook of the International Law Commission*, Vol. II, Part 2, p. 38, para. 11.
[297] Rome Statute, Art. 17.

Article 42(2) of the ILC Draft Statute] was considered by some delegations as too vaguely formulated and as involving subjective assessments."[298]

151. At the Preparatory Committee in 1996:

> [M]any delegations voiced their concern about the vagueness and the subjectivity of the criteria [in Article 42(2)(b) of the ILC Draft Statute]. It was pointed out that several core crimes could not effectively be tried in national courts because of their very nature and the circumstances of their commission. Several delegations felt that this wording would grant the Court an excessive right of control over national jurisdictions and would even undermine the principle of complementarity. According to this view, the Court should not be considered as an appellate court. However, several other delegations considered the article as drafted by the [International Law] Commission sufficiently clear and comprehensive.[299]

152. At its last session in 1998, the Preparatory Committee adopted a Draft Statute for the ICC, Article 18(3)(b) of which is very close in wording to Article 20(3)(b) of the Rome Statute.[300] At the Rome Conference where the draft Article 18(3)(b) was discussed by State delegations, the comments made reflected the view that States perceived this provision as allowing the ICC to assess the guarantees of independence and impartiality provided for by national jurisdictions when deciding upon the admissibility of a case that has already been heard by the latter. This interpretation led some States to emphasize that the principle of *ne bis in idem* has to be seen in the light of the principle of complementarity and, for some of these, to express concerns about the fact that the proposed *ne bis in idem* provision could undermine it.[301] Other States, like Belgium,

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[298] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, General Assembly Official Records, Fiftieth Session, Supplement No. 22 paras. 177, 180. *See also* paras. 43, 92, 109.

[299] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), 13 September 1996, UN Doc. A/51/22, para. 172. *See also* Draft Statute, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1 (14 April 1998), p. 41, ftn. 42, and Report of the International Law Commission on the work of its forty-sixth session, 2 May-22 July 1994, UN Doc. A/49/10, p. 25, para. 72.

[300] Draft Statute, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, UN Doc. A/CONF.183/2/Add.1, 14 April 1998, pp. 45-46. At the Rome Conference, only the words "in accordance with the norms of due process recognized by international law" were added to what would become Article 20(3)(b) of the Rome Statute (Committee of the Whole, Bureau Discussion Paper, UN Doc. A/CONF.183/C.1/L.53, 6 July 1998, p. 18, Art. 18(3)(b)).

[301] *E.g.*, Plenary meetings: United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 15 June – 17 July 1998, Official Records, Vol. II, UN Doc. A/CONF.183/SR.3, para. 13 (Indonesia); Meetings of the Committee of the Whole: Official Records, Vol. II,

Bosnia and Herzogovina and Finland, voiced their support to the proposed exceptions and expressed the view that *ne bis in idem* "should not be used to conceal situations or prevent the Court from exercising its jurisdiction in cases where an accused was the subject of a fake trial at the national level."[302] In the end, only the words "in accordance with the norms of due process recognized by international law" were added at the Rome Conference to what would become Article 20(3)(b) of the Rome Statute, giving no clear indication that the concerns expressed by some States in relation to the principle of complementarity led to the adoption of a provision that departs in substance from the one contained in the statutes of the *ad hoc* tribunals. Indeed, the final wording of the provision, requiring for the Court to exercise jurisdiction if the national proceedings "were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice" does not suggest that an intent from the State to make it more difficult to convict the accused is required. This requirement of shielding the accused from criminal liability is already mentioned in Article 20(3)(a) so interpreting 20(3)(b) as also including it would make the provision redundant and therefore useless.

153. Most academic commentaries make no distinction between the provision of the Rome Statute and that of the *ad hoc* tribunals when it comes to this specific exception, stating that international tribunals would not refrain from exercising jurisdiction if the previous national proceedings were not conducted independently and impartially in accordance with the norms of due process.[303] The Inter-American Court of Human Rights ("IACtHR") has also relied upon both the Statutes of the *ad hoc* tribunals and the Rome Statute to conclude that the *ne bis in idem* principle does not apply in these circumstances.[304] Although a few commentators opine that the question is open[305] and

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A/CONF.183/C.1/SR.9, para. 37 (Indonesia); UN Doc. A/CONF.183/C.1/SR.11, para. 22 (Canada, Coordinator), para. 32 (El Salvador), para. 37 (Turkey); UN Doc. A/CONF.183/C.1/SR.12, para. 3 (Cuba), para. 5 (Indonesia), para. 8 (Pakistan); UN Doc. A/CONF.183/C.1/SR.30, para. 63 (Cote d'Ivoire); UN Doc. A/CONF.183/C.1/SR.31, para. 22 (Iraq); UN Doc. A/CONF.183/C.1/SR.35, para. 34 (Indonesia), para. 63 (Ethiopia), para. 65 (Iraq); and UN Doc. A/CONF.183/C.1/SR.36, para. 43 (Cameroon).

[302] UN Doc. A/CONF.183/C.1/SR.11, para. 28 (Belgium). See also comments made by Finland and Bosnia and Herzegovina, reported in paras 40 and 44.

[303] *E.g.*, Cassese, 2003, p. 320; Naqvi, pp. 315-18;

[304] *Carpio-Nicolle et al. v. Guatemala*, Judgement (Merits, Reparations and Costs), 22 November 2004 ("*Carpio-Nicolle* Judgement"), para. 131. In footnote 137 the IACtHR cites the following authorities: "Rome

one argues that Article 20(3) only applies where the lack of independence or impartiality in the national proceedings made the defendant more difficult to convict,[306] the latter position appears to be marginal.

154. Interpreting Article 20(3)(b) of the Rome Statute in line with the provisions of the statutes of the *ad hoc* tribunals is consistent with the purposes for which the ICC was established, including "to guarantee lasting respect for and the enforcement of international justice."[307] It is also in line with the views expressed by the human rights bodies, notably the IACtHR, that the exception for *ne bis in idem,*[308] in the case of previous proceedings that were not conducted impartially and independently, is necessary to ensure that states fulfill their obligation to investigate and punish serious violations of human rights, thus giving an effective remedy to the victims.

155. In particular, the IACtHR has coined the term "'apparent' or 'fraudulent' *res judicata* case"[309] to refer to judgments produced where "i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human

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Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), Art. 20; Statute of the International Tribunal for Rwanda, UN Doc. S/Res/955 (1994), Art. 9; and Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/Res/827 (1993), Art. 10."

[305] Van den Wyngaert and Ongena,, p. 725 ("Does it [Article 20(3)(b)] mean that the Court may also intervene in situations where the accused was the victim of partisan justice?"); Immi Tallgren and Astrid Reisinger Coracini, "Article 20 *Ne bis in idem*" in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed., 2008, p. 695, ftn. 148 ("[T]he same result can be achieved by the ICC interpreting the Statute").

[306] Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process" 17 *Crim. L. F.* 255 (2006) at 261-62 and 263, fn. 26 (the phrase "bring the person concerned to justice" in Article 17(2)(c) of the Rome Statute, and therefore the same phrase in Article 20(3)(b), "is synonymous with the intent to obtain a conviction"), and 268-69 ("[T]he only logical interpretation of article 20 is that it functions unidirectionally: the Court can re-try a defendant previously convicted or acquitted in a national proceeding only if that proceeding was not independent or impartial *and* its lack of independence or impartiality made the defendant more difficult to convict").

[307] Rome Statute, Preamble, para. 11.

[308] The principle of *ne bis in idem* is enshrined in Article 8(4) of the American Convention of Human Rights, which provides: "An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause."

[309] IACtHR, *Almonacid-Arellano et al v. Chile*, Judgement (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006 ("*Amonacid-Arellano* Judgement"), para. 154. *See also La Cantuta v. Perú*, Judgement (Merits, Reparations and Costs), 29 November 29 2006, para. 153 ("A judgment issued in the circumstances described above only provides 'fictitious' or 'fraudulent' grounds for double jeopardy"); *Carpio-Nicolle* Jugdgment, para. 131 (where the IACtHR coined the term "fraudulent *res judicata*," which results "from a trial in which the rules of due process have not been respected, or when judges have not acted with independence and impartiality").

rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice."[310] In the views of the Court, a "State cannot invoke the judgment delivered in proceedings that did not comply with the standards of the American Convention, in order to exempt it from its obligation to investigate and punish. The basic rule on interpretation contained in Article 29 of this Convention dispels any doubts in this regard".[311] In such circumstances, "the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle"[312] and it is considered that the first judgment has no legal effect for the purpose of the application of the *ne bis in idem* principle. In this respect, Judge Sergio Garcia-Ramirez, in *Gutiérrez-Soler v. Colombia*,[313] provided the following description of the expression "sham double jeopardy", another expression used by the IACtHR, and its effects:

> This expression stresses the "sham" that is rooted in some judgments, as a result of the machinations – whether their outcome be an acquittal *or a conviction* – of the authorities who investigate the facts, bring charges, and render judgment. The process has been "like" a process, and the judgment serves a specific design rather than the interests of justice.
>
> [...]
>
> [F]lawed proceedings are not an actual proceedings and that the (apparent) judgment rendered therein is not a genuine judgment. Should this be accepted, the subsequent trial on the same facts and against the same persons would not amount to a second trial nor would it disregard the *ne bis in idem* principle.[314]

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[310] IACtHR, *Almonacid-Arellano* Judgement, para. 154

[311] IACtHR, *Carpio-Nicolle* Judgement, para. 132. *See also Gutiérrez-Soler v. Colombia*, Judgement (Merits, Reparations and Costs), 12 September 2005, para. 98. From the IACHR, *see*: *Santos Mendivelso Coconubo*, IACHR, Report N° 62/99, Case 11.540, Colombia, April 13, 1999, paras. 54-55, and *Jose Alexis Fuentes Guerrero et al*, IACHR, Report N° 61/99, Case 11.519, Colombia, April 13, 1999, paras. 62-63 ("[W]hile the principle of legality is enshrined in the American Convention, its provisions should not be invoked so as to suppress the enjoyment or exercise of other rights also recognized in the American Convention [Article 29(a)], in this case, access to justice").

[312] IACtHR, *Almonacid-Arellano*, Judgement, para. 154.

[313] IACtHR, *Gutiérrez-Soler v. Colombia* , Judgement (Merits, Reparations and Costs), 12 September 2005 ("*Gutiérrez-Soler* Judgement").

[314] IACtHR, *Gutiérrez-Soler* Judgement paras. 17, 21 (emphasis added). See also IACtHR, *La Cantuta v. Perú*, Judgement (Merits, Reparations and Costs), 29 November 2006, para. 130(1) and 153 ("the requirement of a previous acquittal is not met when said judgment lacks legal effects for standing in open contradiction to international duties") and Separate Opinion of Judge Sergio Garcia-Ramirez, para. 11 ("[W]ithout due process,

156. In the European context, a specific provision has been adopted to provide that the principle of *ne bis in idem* "shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, [...] if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."[315] The Explanatory Report of Protocol No. 7 explains that a fundamental defect in the proceedings, could affect the outcome of the case either in favour of the person or to his detriment.[316]

157. The Pre-Trial Chamber finds that the procedural rules established at the international level provide constituent guidance that an international or internationalised tribunal shall not exercise jurisdiction in respect of individuals that have already been tried for the same acts by national authorities unless it is established that the national proceedings were not conducted independently and impartially with regard to due process of law. The ECCC being in a similar position as these tribunals and considering that the reasons underlying the principle set out above are also relevant in the context of its proceedings, it will apply the same standard to determine the issue at hand.

158. The Pre-Trial Chamber further finds that only fundamental defects in the national proceedings would justify the ECCC to exercise jurisdiction.

159. In his report to the Security Council, the Secretary-General of the United Nations stated that Article 10(2)(b) of the ICTY Statute applies when "conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts."[317] In *Prosecutor v. Tadić*, Judge Nieto-Navia summarised this provision as "the national court proceedings did not conform to the fundamental

there is no real judgment, no *res judicata* and no room for the principle of *ne bis in idem* to come into operation either").

[315] Protocol No. 7 to the ECHR, Art. 4(2). The Pre-Trial Chamber notes that there are no relevant reservations, declarations, or other communications to Art. 4(2) of Protocol No. 7.

[316] Explanatory Report of Protocol No. 7 to the ECHR, para. 30 (emphasis added).

[317] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 66(b). The Security Council subsequently approved the Secretary-General's report and adopted the draft ICTY Statute: Resolution 827 (1993), UN Doc. S/Res/827(1993), 25 May 1993.

principles of criminal law."[318] Cassese also considers that this exception applies where "the court did not fully comply with the fundamental safeguards of a fair trial, or did not act independently or impartially."[319]

160. The European Court of Human Rights ("ECtHR") considers that, in the context of Article 4 of the Seventh Protocol, fundamental defects in the proceedings are associated with "jurisdictional errors or serious breaches of court procedure, abuses of power, manifest errors in the application of substantive law or any other weighty reasons stemming from the interests of justice." In the views of the Court, "the mere consideration that the investigation in the applicant's case was 'incomplete and one-sided' or led to an 'erroneous' acquittal" are not sufficient.[320]

The 1979 Trial

161. The Pre-Trial Chamber examines whether the 1979 Trial was conducted independently and impartially with regard to due process of law.

162. The chronology of events surrounding the 1979 trial *in absentia* of Ieng Sary can be summarized as follows:

a. On 10 January 1979, Heng Samrin was appointed as head of state in the new People's Republic of Kampuchea (PRK).[321]
b. On 15 July 1979, the Decree Law No.1 titled "Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot – Ieng Sary Clique for

[318] *Prosecutor v. Tadić*, IT-94-1-A," Judgement", 15 July 1999, Declaration of Judge Nieto-Navia, para. 2.
[319] Cassese 2003, p. 321.
[320] ECtHR, *Radchikov v. Russia*, Application no. 65582/01, Judgement, 12 November 2007, para. 48. Similarly, the ECtHR stated in *Chistyakov v. Russia*, "[T]he mere consideration that the trial and appeal courts had not had regard to all relevant instructions cannot in itself, in the absence of jurisdictional errors or serious breaches of court procedure, abuses of power or any other weighty reasons stemming from the interests of justice, indicate the presence of a fundamental defect in the previous proceedings" (*Chistyakov v. Russia*, Application no. 15336/02, Judgement, 9 July 2009, para. 26).
[321] Evan Gottesman, *Cambodia After the Khmer Rouge, Inside the Politics of Nation Building*, Bangkok, Silkworm Books, 2004 ("Gottesman"), p. 11.

the Crime of Genocide" was signed by the President of the People's Revolutionary Council of Kampuchea, Heng Samrin.[322]

c. On 20 July 1979, Keo Chanda (Minister of Information, Press and Culture) is appointed as Presiding Judge and Chim Chandara as Alternate Presiding Judge.[323]

d. On 20 July 1979, 10 People's Assessors and 4 Alternate People's Assessors are appointed as members of the PRT.[324]

e. On 25 July 1979, Prosecutor Mat Ly opened an investigation against Pol Pot and Ieng Sary for genocide.[325]

f. On 26 July 1979, the Prosecutor issued an arrest warrant against Pol Pot and Ieng Sary.[326]

g. On 30 July 1979, the Prosecutor issued an indictment against Pol Pot and Ieng Sary for genocide.[327]

h. On 4 August 1979, the trial procedure was established by the Presiding Judge.[328]

i. On 5 August 1979, the Presiding Judge issued an Order to Hold a Trial.[329]

j. On 6 August 1979, Mr. Dith Munthy and Yuos Por were appointed by the President of the PRT as defense lawyers.[330] Orders for Pol Pot and Ieng Sary to appear at trial were also issued.[331]

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[322] Decree Law No.1 : Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot – Ieng Sary Clique for the Crime of Genocide, 15 June 1979, English translation reproduced in Howard J. De Nike, John Quigley and Kenneth J. Robinson, *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary*, University of Pennsylvania Press, 2000, p. 45 ("*Genocide in Cambodia*").

[323] Decree Law No. 4: Appointment of Presiding Judge and Alternate, 20 July 1979, English translation reproduced in *Genocide in Cambodia*, p. 49.

[324] Decree Law No. 25: Appointment of Members of the Tribunal, 20 July 1979, English translation reproduced in *Genocide in Cambodia*, pp. 50-51.

[325] Decision No. 2: Prosecutor of the People's Revolutionary Tribunal at Phnom Penh, Decision to Open an Investigation, English translation reproduced in *Genocide in Cambodia*, pp. 51-52.

[326] Decision No. 3: Prosecutor of the People's Revolutionary Tribunal at Phnom Penh, Arrest Warrant, 26 July 1979, English translation reproduced in *Genocide in Cambodia*, p. 52.

[327] Indictment by the Prosecutor of the PRT, 30 July 1979, English translation reproduced *Genocide in Cambodia*, 2000, pp. 463-488.

[328] Decision on Trial Procedure at the Session on the Crime of Genocide of the Pol Pot – Ieng Sary Clique, 4 August 1979, English translation reproduced in *Genocide in Cambodia*, pp. 53-56.

[329] Order No. 1: Presiding Judge, Order to Hold a Trial, 5 August 1979, English translation reproduced in *Genocide in Cambodia*, p. 59.

[330] Decision No. 25: Presiding Judge, Appointment of Defence Lawyers, 6 August 1979, English translation reproduced *Genocide in Cambodia*, pp. 59-60.

[331] Order No. 3: Presiding Judge, Order to Appear at Trial (to Ieng Sary), 6 August 1979, English translation reproduced in *Genocide in Cambodia*, p. 65.

k. On 7 August 1979, a list of 54 witnesses (from four provinces) who were to testify at the PRT was published.[332]

l. On 8 August 1979, a six day broadcast of the summons for both Pol Pot and Ieng Sary began on National Radio of Kampuchea.[333]

m. From 15 to 19 August 1979, the trial proceedings took place, from 7.30am until 11.30am and from 2.00pm until 5.30pm.[334] The Working Schedule had planned a five day trial, with the delivery of the judgment being done in the afternoon of the last day, immediately after the closing arguments, which were to be made the same morning. Witnesses' statements and reading of reports of field investigations were part of the program, together with closing arguments by the representatives of the parties. Receptions and a "cocktail party" for foreign guests were included in the Working Schedule, as well as visits to Siem Reap.

Independent and Impartial Tribunal

163. The guarantee of an independent tribunal entails that the judges shall be free from external pressures and interference.[335] In particular, it is generally understood as comprising the following requirements, as expressed by the Human Rights Committee in its Observation no. 32 pertaining to Article 14 of the ICCPR:

> The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, *and the actual independence of the judiciary from political interference by the executive branch and legislature.* [...] *A situation where the functions and competencies of the judiciary and the*

[332] Names of Witnesses Who Are to Testify at the PRT at Phnom Penh, 7 August 1979, English translation reproduced in *Genocide in Cambodia*, pp. 63-64.
[333] Bailiff, Record of Notification of Summons to the Fugitive Suspect Ieng Sary, signed by Hul Sam Ol, English translation reproduced in *Genocide in Cambodia*, p. 66.
[334] Working Schedule for the PRT During its Present Session, English translation reproduced in *Genocide in Cambodia*, pp. 67-68 ("Working Schedule").
[335] *See e.g. Prosecutor v. Kanyabashi,* ICTR-96-15-A, "Decision on the Defense Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I", Appeals Chamber, 3 June 1999, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35; *Prosecutor v. Barayagwiza,* ICTR-97-19-AR72, "Decision on Prosecutor's Request for Review or Reconsideration", Appeals Chamber,31 Mar 2000, Declaration of Judge Rafael Nieto-Navia, paras 9, 10-14.

executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.[336]

164. In respect of the guarantee of impartiality, the jurisprudence of the ECCC and other international tribunals has consistently held that the requirement of impartiality is violated if a Judge is actually biased or where there is an appearance of bias. An appearance of bias is established if "(a) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if a Judge's decision will lead to the promotion of a cause in which he or she is involved; or (b) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." The reasonable observer in this test must be "an informed person, with knowledge of all of the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties that Judges swear to uphold."[337]

165. The PRT was created by a decree adopted by an executive body, the People's Revolutionary Council of Kampuchea,[338] rather than by a legislation adopted by the legislative branch of the government. As such, the Decree has the value of a regulation,

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[336] General Comment No. 32, para. 19 (emphasis added). *See also*: Human Rights Committee, *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/1991, 20 October 1993, para. 9.4 ("A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control the former is incompatible with the principle of a independent tribunal"); *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985; *Prosecutor v. Delalic*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, para. 689 ("*Separation of powers:* [...] The fundamental importance of the independence of the judiciary has been emphasised in the jurisprudence of the Appeals Chamber. This jurisprudence has also recognised that the principle of judicial independence in domestic and international systems generally demands that those persons or bodies exercising judicial powers do not also exercise powers of the executive or legislative branches of those systems."); ECtHR, *Incal v. Turkey*, (41/1997/825/1031) , Judgement, 9 June 1998, para. 65 ("The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence".)

[337] Public decision on the Co-Lawyers' Urgent Application for Disqualification of Judge Ney Thol pending the Appeal against the Provisional Detention Order in the case of Nuon Chea, 4 February 2008, C11/29, paras 20-21, referring to *Prosecutor v. Furundzija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000, paras 189-190.

[338] Decree Law No. 1: Establishment of PRT at Phnom Penh to Try the Pol Pot – Ieng Sary Clique for the Crime of Genocide, adopted on 15 July 1979 ("Decree No. 1"), English translation reproduced in *Genocide in Cambodia*, pp. 45-47.

an act that would normally put into effect a law previously adopted by the legislative branch. As a regulation is not a method of expressing a law and considering that it is generally recognized that a tribunal shall be established by the law,[339] the very basis of the establishment of the PRT is questionable in the light of generally accepted principles of law.

166. The text of the Decree, in and of itself, expresses the views of the executive branch of the government as to the guilt of the only two individuals who were submitted to the jurisdiction of the PRT when it notably provides, in its preamble, that the accused "massacred millions of persons" and that the tribunal was established to try acts of genocide "committed" by the Pol Pot-Ieng Sary clique.[340]

167. Various members of the PRT, appointed to decide on the guilt of the accused as judges or people's assessors, were connected to the executive branch of the government. In particular, the Presiding Judge, Keo Chanda, was also the Minister of Information, Press and Culture, hence an actual member of the government. Two of the people's assessors were also government employees.[341]

168. Considering that the PRT was created by the executive branch, which i) named members or employees of the government in positions of judges and ii) asserted the guilt of the only two accused to be tried in the Decree creating the tribunal, the Pre-Trial Chamber finds that the PRT did not present sufficient guarantees of the separation of powers to ensure that judges would be free from external pressure and interference. The circumstances of the creation of the PRT and the appointment of its members are indeed indicative of a lack of separation of power between the executive, legislative and judiciary branches in Cambodia in 1979, at the end of the Khmer Rouge era, which resulted in the creation of a tribunal that did not meet the required guarantee of independence.

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[339] Article 14(1) of the ICCPR, Art. 8 of the American Convention on Human Rights and Art. 6(1) of the ECHR.
[340] Decree No. 1, Art. 1.
[341] Composition of the PRT at Phnom Penh to Try the Pol Pot – Ieng Sary Clique for the Crime of Genocide, English translation reproduced in *Genocide in Cambodia*, pp. 56-57.

169. Examining the impartiality of the members of the PRT, the Pre-Trial Chamber notes that the President of the Court, Keo Chanda, declared on 28 July 1979 in a press conference the Pol Pot-Ieng Sary clique guilty before the trial had even began:

> "It is clear that Pol Pot –Ieng Sary clique committed the crime of genocide [...]
>
> [...] Pol Pot and Ieng Sary where the leaders and committed many criminal acts. Therefore, they must be tried. [...]
>
> The Pol Pot-Ieng Sary clique has committed the crime of genocide against our whole people."[342]

170. At least two of the people's assessors, who had powers equal to those of the presiding judge pursuant to Article 3 of the Decree, had a particular interest in the case: one had provided incriminating evidence as a victim during the pre-trial stage[343] and one had filed an expert report.[344]

171. The Defence Counsel appointed by the Presiding Judge to represent the accused *in absentia* also showed bias against and acted improperly towards their own client, as evidenced by the following:

a. Mr. Dith Munty, appointed as a Defence Counsel[345] who was himself a victim of the Khmer Rouge, having "lost 38 family members" made a witness statement for the prosecution during the investigation.[346]
b. There was no cross-examination of witnesses, even though this right was specifically enumerated beforehand.[347]

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[342] Press Conference of Keo Chanda, 28 July 1979, English translation reproduced in *Genocide in Cambodia,* p. 47, at 48-49.
[343] Witness Statement of Mr. Pen Nauvuth, 25 June 1979 and Decree Law No. 25, Appointment of Members of the Tribunal, 20 July 1979, English translation reproduced in *Genocide in Cambodia:* pp. 94-96 and 49-50.
[344] Future Physical and Intellectual Devolpment of Phnom Penh Children After the Fall of the Khmer Capital in 1975 as Seen by a Pediatrician: A Report, Dr. Nouth Savoeun, and Appointment of Members of the Tribunal, 20 July 1979, English translations reproduced *Genocide in Cambodia*, pp. 335-337 and 50-51.
[345] Decision No. 25: Presiding Judge, Appointment of Defence Counsel, 6 Aug 1979, reproduced in *Genocide in Cambodia*, pp. 59-60.
[346] Witness Statement by Dith Munty, 22 May 1979, reproduced in *Genocide in Cambodia*, pp. 134-38. *See also*: Suzannah Linton "Putting Cambodia's Extraordinary Chambers into Context," (2007) XI *The Singapore Year Book of International Law* 211 ("Linton").

c. No evidence was offered in Pol Pot's or Ieng Sary's defence.[348] The defence counsel did not present any meaningful argument during their closing statements. On the contrary, they explicitly acknowledged that the accused had the specific intent to commit genocide[349] and made other various statements detrimental to the accused. For instance:

   i. Hope Stevens, who allegedly made submissions on behalf to the accused, said in his closing statement that Pol Pot and Ieng Sary were "dangerous abettors" and "criminally insane monsters carrying out a program the script of which was written elsewhere."[350]

   ii. Yuos Por, who was appointed as Cambodian counsel, declared during the trial that "behind the defendants are unacknowledged forces that incited, encouraged, pressured and protected them. These unacknowledged forces, despite all their efforts to conceal themselves, have shown their ugly face on the immense crime scene that is our country."[351] He also stated that "through a blind, virtually mad, obedience to the dogma of Maoism, [they] perpetrated acts which any person having a conscience and a normal state of mind would never commit."[352]

172. Witness statements relied upon during the trial were at the time and could still be criticised for the following reasons:

a. alleged "stage managing" of witnesses;[353]
b. witness statements using similar wording or jargon, notably referring to the "Pol Pot-Ieng Sary clique" and identifying the two individual as "traitors";[354]

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[347] *Genocide in Cambodia*, p. 16. *See also*: William Schabas, "Book Review, Cambodia: Was it Really Genocide? 23 (2001) *Human Rights Quarterly* 475-476.
[348] David Chandler, *A History of Cambodia*, 4th ed., Silkworm Books, 2008, p. 280.
[349] Judgement of the PRT, 19 August 1979, English translation reproduced in *Genocide in Cambodia*, p. 523, at p. 542.
[350] Closing Argument of Hope R. Stevens, Defence Counsel, reproduced in *Genocide in Cambodia*, p. 504.
[351] Closing Argument of Attorney Yuos Por for Pol Pot and Ieng Sary, English translation reproduced in *Genocide in Cambodia*, p. 508, at p. 510.
[352] Closing Argument of Attorney Yuos Por for Pol Pot and Ieng Sary, Accused of Crimse of Genocide, English translation reproduced in *Genocide in Cambodia*, p. 508, at 510.
[353] Linton, pp. 209-210

c. witnesses stating that "Pol Pot' or 'Ieng Sary' did x y or z, equating them with the movement itself or any individual within it," despite those witnesses not having ever met the accused;[355]

d. witness statements being written in the third person;[356]

e. victims and witnesses statements expressed an appreciation and loyalty to the new government.[357]

173. The length of the proceedings (20 days from the opening of the investigation to the commencement of the *in absentia* trial, 5 days for the trial and the delivery of judgment on the day of the closing arguments) and the Working Schedule indicate that the guilt of the accused was predetermined. The schedule of the trial prematurely stated that the PRT would render its judgment the same day the closing statements would be made, showing no intention to hold thorough deliberations. Indeed, the 31 page judgment (English translation) was delivered a few hours after the closing arguments.

174. In the light of these facts, the Pre-Trial Chamber finds that several members of the PRT were not impartial. Through their statements, either out of court or by presenting evidence against the accused, some members of the PRT showed actual bias. In addition, the way PRT members conducted the proceedings, notably by allowing the types of witnesses statements mentioned above in the absence of cross-examination, by allowing the proceedings to continue *in absentia* with defence counsel who not only failed to ensure effective representation of the accused but also acted against them, and by pronouncing the guilt of the accused, for alleged crimes of such magnitude, after a five day trial and a few hours deliberations, demonstrate a failure of the judiciary to maintain a balance between the rights of both parties. In the circumstances described above, the failure of the members of the PRT to fulfil their obligation to ensure that the

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[354] Witnesses Statements by Mr. Ung Pech, Pech Tum Kravel, Ung Sam On, and So Sam Ol English translation reproduced in *Genocide in Cambodia,* pp. 75, 102-103, 120, 122, 127.
[355] Linton, pp. 209-210. See also the witnesses' statements quoted above in the precedent footnote..
[356] William Schabas, "Book Review, Cambodia: Was it Really Genocide? 23 (2001) *Human Rights Quarterly* 470, at 475-476.
[357] *Genocide in Cambodia,* p. 15; Witness Statement by. Chea Ponlok, OUM Parany, Chean Phanna and Yi Thon, English translations reproduced in *Genocide in Cambodia*, pp. 112, 123, 114, 120, 132.

proceedings were conducted fairly and that the rights of the parties were respected[358] contributes to demonstrate a lack of impartiality.

175. On the basis of the above facts of the 1979 trial *in absentia* against Ieng Sary, the Pre-Trial Chamber finds that although there might have been the intention to prosecute, convict, and sentence Ieng Sary, the 1979 trial was not conducted by an impartial and independent tribunal with regard to due process requirements. Consequently, the prosecution, conviction, and sentencing of Ieng Sary in 1979 by the PRT bar neither the jurisdiction of the ECCC over Ieng Sary, nor any of the charges in the Closing Order.

176. Ground One of Ieng Sary's appeal is dismissed.

2. Ground Two (Royal Pardon and Amnesty)

Submissions of the Parties

177. The Co-Lawyers for Ieng Sary submit that the Co-Investigating Judges erred in deciding that the Royal Pardon and the Amnesty ("RPA")[359], whereby the King granted Ieng Sary a pardon for his sentence to death and confiscation of property pronounced in 1979 by the PRT and an amnesty for prosecution under the Law on the Outlawing of the "Democratic Kampuchea" Group[360] ("1994 Law"), does not bar Ieng Sary's current prosecution.[361]

178. They initially submit that the RPA is legally valid in Cambodia as it has been granted by the King in accordance with Article 27 of the Cambodian Constitution.[362] They submit that the RPA is applicable at the ECCC as the latter is a domestic court, which

[358] *Basic Principles on the independence of the Judiciary*, 1985, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59, Principle 6.
[359] Royal Decree, NS/RKT/1996/72, 14 September 1996 ("Royal Decree").
[360] Law on the Outlawing of the 'Democratic Kampuchea' Group, Reach Kram No. 1, NS 94, 15 July 1994 ("1994 Law").
[361] Ieng Sary Appeal, para. 50.
[362] Ieng Sary Appeal, para. 63.

must uphold and abide by valid and binding Cambodian law. In this regard, they submit that domestic amnesties may apply to *jus cogens*[363] crimes, as confirmed when the authority of the Sierra Leonean Government to grant an amnesty for purportedly *jus cogens* crimes was accepted by the international community.[364] Even if the ECCC were to consider international standards of justice, the Co-Lawyers argue that there is no such standard prohibiting the application of amnesties to *jus cogens* crimes.[365] In the Co-Lawyers' view, the fact that the SCSL did not upheld an amnesty granted by the Sierra Leonean government in the Lomé Agreement for supposedly *jus cogens* crimes does not prevent the ECCC from upholding the amnesty since it does not exercise universal jurisdiction.[366]

179. They submit that the scope of the RPA covers the offences for which Ieng Sary is accused before the ECCC and therefore constitutes a bar to his prosecution. They first submit in this regard that the amnesty from prosecution under the 1994 Law granted to Ieng Sary covers the crimes charged in the Closing Order as the 1994 Law was meant to cover all the crimes committed by the members of the Democratic Kampuchea group, becoming a *lex specialis*[367] for the prosecution of crimes committed by the Khmer Rouge. They further submit that the Preamble and articles 1 to 4 of the Decree as well as the jurisprudence of Cambodian courts support this interpretation.[368] Insofar as the pardon for the 1979 sentence is concerned, they submit that as the death penalty had already been abolished by the time the pardon was granted, the King must have intended to ensure that Ieng Sary cannot serve *any* sentence in relation to the acts that were tried in 1979, otherwise the Decree would be redundant.[369] They finally submit

[363] The latin expression "*jus cogens*" refers to a peremptory norm of general international law, namely a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (Vienna Convention, Art. 53.
[364] Ieng Sary Appeal, para. 70.
[365] Ieng Sary Appeal, para. 74.
[366] Ieng Sary Appeal, para. 75.
[367] The latin expression "lex specialis" refers to a doctrine relating to the interpretation of laws according to which a law governing a specific subject matter (*lex specialis*) overrides a law which only governs general matters (*lex generalis*).
[368] Ieng Sary Appeal, paras 84-95.
[369] Ieng Sary Appeal, para. 96.

that the ECCC does not have jurisdiction to determine whether the RPA is valid but only to determine its scope.[370]

180. The Co-Prosecutors respond that Ieng Sary's pardon and amnesty from 1996 do not prevent further prosecution at the ECCC. First, the Co-Prosecutors argue that the 1994 Law does not include the offences with which Ieng Sary is charged in the Closing Order as this law "prospectively criminalizes membership of the Khmer Rouge from six months after its enactment on 15 July 1994."[371] Second, they submit that the scope of the pardon is limited to the non-execution of the death sentence and the confiscation of property.[372] Third, the Co-Prosecutors assent that pardons and amnesties are not permitted for *jus cogens* crimes[373] and that an absolute pardon for genocide would violate the international obligations of Cambodia under the Genocide Convention and therefore be invalid.[374] Alternatively, the Co-Prosecutors argue that a domestic pardon shall not apply in respect of the prosecution of an international *jus cogens* crime before the ECCC, considering that the latter is "[a]s a special internationalised tribunal, bound by international law."[375]

181. The Co-Lawyers for the Civil Parties (Group ASF France) respond that the offences criminalized under the 1994 Law differ from those in the Closing Order so the amnesty does not apply to the current proceedings.[376] They also submit that the scope of the pardon is limited to the sentence pronounced in 1979.[377]

182. The Co-Lawyers for Ieng Sary reply to the Co-Prosecutors Response that the amnesty applies to all crimes committed by members of the "Democratic Kampuchea Group" as the interpretation proposed by the Co-Prosecutors would have the effect of giving group

[370] Ieng Sary Appeal, para. 100.
[371] Co-Prosecutors Response, para. 61.
[372] Co-Prosecutors Response, para. 62.
[373] Co-Prosecutors Response, para. 64.
[374] Co-Prosecutors Response, para. 65.
[375] Co-Prosecutors Response, para. 67.
[376] Civil Party Lawyers Observations I, para. 66.
[377] Civil Party Lawyers Observations I, para. 66.

members a blank cheque (carte blanche) to commit crimes during a 6 months period.[378] They argue that the amnesty must be interpreted broadly, in light of Article 6(5) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977* ("Additional Protocol II")[379], as it reflects the intention of the government to end the Cambodian civil war.[380] Additionally, they repeat their view that the RPA is applicable to *jus cogens* crimes and add that the "punishment" of these crimes cannot be seen as *jus cogens*.[381]

183. The Co-Lawyers for Ieng Sary reply that the Observations of the Co-Lawyers for the Civil Parties are unsubstantiated.[382]

Discussion

184. On 7 July 1994, the National Assembly of the Kingdom of Cambodia in Phnom Penh approved the 1994 Law, which provides, in its relevant part:

> *The National Assembly of the Kingdom of Cambodia*
>
> Understanding that the Agreements on a Comprehensive Political Settlement of the Cambodian Conflict of 23 October 1991, which the "Democratic Kampuchea" Group signed together with the three other Khmer signatories, required the "Democratic Kampuchea" group like the other signatories to implement all the provisions of the agreement to bring peace and national reconciliation.
>
> Seeing that the "Democratic Kampuchea" Group clearly did not agree to implement the most important provisions of the agreement, in particular violating the articles which called for respect of a ceasefire, the permission to officials and staff of the UN to enter the zones it controlled, for assembly to cantonment, disarmament and demobilization of armed forces, and for respect for the human rights of the Cambodian population.

[378] Ieng Sary Reply, para. 26
[379] Ieng Sary Reply, para.28.
[380] Ieng Sary Reply, paras 28-29.
[381] Ieng Sary Reply para. 30.
[382] Ieng Sary Reply to the Civil Parties Observations I, paras 28-29.

Seeing that, in addition to not respecting the most important provisions of the agreement which it had signed, the "Democratic Kampuchea" group made armed attacks on the officials and staff of the UN Transitional Administration, on the officials of the Royal Cambodian Government, and indiscriminately on the lives of the Cambodian people.

[...]

Seeing that throughout the period since the election in 1993 to the present the "Democratic Kampuchea" group has continually committed criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in April 1975 [...]

Seeing that "Democratic Kampuchea" group has violated the Constitution of the Kingdom of Cambodia, in particular [...]

Realizing that the leadership of the "Democratic Kampuchea" group can not take the Paris Peace Agreement as a legal shield to conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78. The crime of genocide has no statute of limitations.

The National Assembly of the Kingdom of Cambodia hereby approves the following law:

Article 1: To declare the "Democratic Kampuchea" group and its armed forces as outlaws.

Article 2: From the time this Law comes into effect, all people who are members of the political organization or military forces of the "Democratic Kampuchea" group shall be considered as offenders against the Constitution and offenders against the laws of the Kingdom of Cambodia.

Article 3: Members of the political organization or the military forces of the 'Democratic Kampuchea' group or any persons who commit crimes of murder, rape, robbery of people's property, the destruction of public and private property, etc. shall be sentenced according to existing criminal law.

Article 4: Members of the political organization or the military forces of the "Democratic Kampuchea" group or any persons who commit

- seccession [*sic.*],
- destruction against the Royal Government,
- destruction against organs of public authority, or
- incitement or forcing the taking up of arms against public authority

shall be charged as criminals against the internal security of the country and sentenced to jail for 20 to 30 years or for life.

Article 5: This Law shall grant a stay of six months after coming into effect to permit people who are members of the political organization of military forces of the "Democratic Kampuchea" group to return to live under the control of the

Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed.

Article 6: For leaders of the "Democratic Kampuchea" group the stay described above does not apply.

Article 7: The King shall have the right to give partial or complete amnesty or pardon as stated in Article 27 in the Constitution.

Article 8: From the time this law comes into effect all property which is under the control of the "Democratic Kampuchea" group or other offenders and which derives from the illegal division of the territory of the Kingdom of Cambodia, from the violation of law or from exploitation of the people's natural resources shall be confiscated as state property, whether they are in the Kingdom of Cambodia or any other country.

Article 9: Any persons who use this law to violate the rights of the people by incorrectly threatening, charging, arresting, detaining, jailing, torturing or violating their homes shall be punished and be jailed from two to five years.

Any persons who give false information, false witness, or false evidence in order to serve his or her interests by using this law to violate the rights of people shall be punished and jailed from two to five years.

Victims of injustice have the right to appeal for damages arising from the above mentioned violations.

185. On 14 September 1996, the Royal Decree was proclaimed, which states:

We, Preah Bat Norodom Sihanouk Varma, King of Cambodia
[...]
hereby proclaim
Article 1: An amnesty to Mr Ieng Sary, former Deputy Prime Minister in charge of Foreign Affairs in the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994;
Article 2: This Royal Decree will take effect on the day of its signature;
Article 3: The Council of Ministers, the Ministry of Interior and the Ministry of Justice shall fully implement this Royal Decree."[383]

[383] Royal Decree No. NS/RKT/0996/72, 14 September 1996, English translation from the original Khmer version by the Pre-Trial Chamber, with the assistance of a translator assigned to the Chamber. This translation, which was used by the Pre-Trial Chamber in its Decision on Provisional Detention is different from the English version of the document in the Case File and to which the Co-Lawyers for Ieng Sary refer in the Appeal.

186. The Agreement contains the following provision on the application of "amnesty" before the ECCC:

> Article 11
> Amnesty
>
> 1. The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in the present Agreement.
>
> 2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers."[384]

187. The ECCC Law promulgated on 27 October 2004, also provides in Article 40 (new) that "the scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."[385]

188. The Pre-Trial Chamber notes that the Co-Lawyers for Ieng Sary rely upon an English translation of the Decree that is different from the one used by the Pre-Trial Chamber in its Decision on Appeal against Provisional Detention of Ieng Sary dated 17 October 2008[386] and reproduced above. The translation used by Ieng Sary, an unofficial translation published on the ECCC website, uses the word "pardon" in the first sentence instead of the word "amnesty". The Pre-Trial Chamber has previously publically noted in a decision that in the original Khmer version, the word "amnesty" is used in both the first sentence and the second part of the Decree, which lead the Pre-Trial Chamber to adopt the literal translation reproduced above.[387] As to the meaning of the word "amnesty", the Pre-Trial Chamber found:

> The meaning of the word "amnesty" cannot necessarily be found by applying a grammatical interpretation. In this respect, the Pre-Trial Chamber notes that

[384] Agreement, Ar. 11(2).
[385] ECCC Law, Art. 40 (new).
[386] Decision on Provisional Detention.
[387] Decision on Provisional Detention, para. 57.

> the use of the (sic.) Khmer word for amnesty is used inconsistently. The word "amnesty" in the first sentence of Article 1 is used as "amnesty from a sentence" while in the second part of the article it is used as "amnesty from prosecution". Both amnesties mentioned in the Royal Decree are inconsistent with the provision on amnesty in Article 27 of the Constitution of Cambodia of 1993.[388]

189. The Co-Lawyers did not make any submission justifying the Pre-Trial Chamber to review its translation of the Decree and the interpretation of the terminology employed therein, so it will address the current ground of appeal on the basis of its previous finding reproduced above.

190. The Co-Lawyers submit in their Appeal that both amnesties constitute in themselves a bar to the prosecution of Ieng Sary by the ECCC in relation to the charges set out in the Closing Order. The Pre-Trial Chamber will first look at the amnesty from the 1979 sentence, before turning to analyzing the amnesty from prosecution under the 1994 Law.

Amnesty from the 1979 sentence

191. Although the exact meaning of the term "amnesty" remains unclear under Cambodian Law, the text of the Decree indicates that the amnesty that was granted to Ieng Sary, assuming it was legally valid, is attached to his sentence to death and confiscation of properties pronounced by the PRT in 1979. Contrary to the Co-Lawyers' submissions, there is no indication that the amnesty covered "any sentence related to a conviction based on the acts at issue in the 1979 trial."[389]

192. The fact that the death penalty had been abolished by the time[390] the RPA was granted does not support this interpretation either. Indeed, the Co-Lawyers for Ieng Sary did not demonstrate or explain how the abolition of the death penalty would necessarily result

[388] Decision on Provisional Detention, para. 57.
[389] Ieng Sary Appeal, para. 96.
[390] Report of the Secretary General to the Economic and Social Council, 'Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty', 8 June 1995, UN doc. E/1995/78 at para. 33: Cambodia abolished the death penalty in 1989.

in the individuals sentenced to death walking free, without serving any term in prison. Logic dictates that a death sentence would be converted to a term in prison, otherwise all the individuals sentenced to death for having committed the most serious crimes would suddenly walk free. The Co-Lawyers also overlook the fact that the sentence for confiscation of Ieng Sary's property was still in force, which, in itself, contradicts their assertion that the amnesty would be "redundant" if it only applied to the sentence pronounced by the PRT. Indeed, the interpretation proposed by the Co-Lawyers amounts to reading the amnesty for the 1979 sentence as an amnesty from prosecution for the acts that were tried in 1979. This is not the meaning of the Decree, which, when referring to an amnesty from future prosecution, is clear, as it is for the amnesty from prosecution under the 1994 Law.

193. Absent any inconsistency or absurd result having been demonstrated, the Pre-Trial Chamber shall adhere to the grammatical and ordinary sense of the words used in the Decree, concluding that the amnesty granted to Ieng Sary was confined to the specific sentence pronounced in 1979. In the context where it is related to a sentence, the sole effect of the amnesty was to "abolish" and "forget" the 1979 sentence,[391] thus ensuring that it would not be put into effect. It had no effect on the possibility to institute future prosecutions as the amnesty was not related to the "acts" allegedly committed.

194. The Pre-Trial Chamber has previously found that the 1979 trial and the resulting conviction and sentence are not a bar to the present proceedings against Ieng Sary on the basis of the *ne bis in idem* principle. Considering that the amnesty is solely attached to the invalid sentence pronounced in 1979, it bears no effect on the jurisdiction of the ECCC to try Ieng Sary for the crimes charged in the Closing Order.

[391] To determine the effect of the amnesty on the sentence, the Pre-Trial Chamber sought guidance in the decision of the Special Court for Sierra Leone in the case of *Prosecutor v. Kallon*, where the Appeals Chamber considered that amnesty is "[a] sovereign *act of oblivion* for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict [...]" and *"[a]mnesty is the abolition and forgetfulness of the offence"* (*Prosecutor v. Kallon*, SCSL-04-15-AR72 (E), *and Kamara*, SCSL-04-16-AR72 (E), "Decision on Challenge to Jurisdiction: Lomé Accord Amnesty", Appeals Chamber, 13 March 2004, para. 66 (emphasis added)).

Amnesty from prosecution under the 1994 Law

195. The Pre-Trial Chamber previously found in its Decision on Provisional Detention that the second amnesty "can be interpreted as meaning that the Charged Person 'will not be proceeded against' in respect of the sentence given or breach of the [1994 Law]". It also found, on a preliminary basis, that "the offences mentioned in this Law are not within the jurisdiction of the ECCC".[392] For the reasons set out below, the Pre-Trial Chamber reiterates its initial conclusion.

196. The 1994 Law was adopted following an alleged failure of the "Democratic Kampuchea" group to respect the Agreements on a Comprehensive Political Settlement of the Cambodian Conflict of 23 October 1991, also known as the "Paris Agreement", which was meant to bring peace and national reconciliation in the context of the civil war that continued to wage after the overthrow of the Khmer Rouge regime by the Vietnamese forces.[393] This Law declares the "Democratic Kampuchea" group and its armed forces as "outlaws"[394] and orders the confiscation of its properties where obtained under certain circumstances.[395] Upon the assumption that the Democratic Kampuchea group violated the Constitution,[396] the 1994 Law criminalizes a specific category of offences, namely offences against the internal security of the country, characterized as "secession", destruction against the Royal Government, destruction against organs of public authority, or incitement or forcing the taking up of arms against public authority, for which it provides specific penalties.[397]

197. While it is not totally clear whether an offence of being a member of the political organization or military forces of the "Democratic Kampuchea" group is criminalized as such under the 1994 Law (Articles 1 and 2), there is no indication that prosecution

[392] Decision on Provisional Detention, para. 61.
[393] 1994 Law, Preamble.
[394] 1994 Law, Art. 1. Art. 2 further declares that members of the Democratic Kampuchea are "considered as offenders against the Constitution and offenders against the laws of the Kingdom of Cambodia".
[395] 1994 Law, Art. 8.
[396] 1994 Law, Preamble, para. 6.
[397] 1994 Law, Art. 4.

for other crimes would cease to be conducted under existing criminal law, as notably confirmed by Article 3. In other words, the 1994 Law created new offences and penalties to take into account the specific context mentioned above but did not create an autonomous criminal law regime to prosecute members of the Democratic Kampuchea group for any criminal act under existing criminal law. Any prosecution of an offence not criminalized under the 1994 Law, be it committed by members of the Democratic Kampuchea group or not, would therefore continue to be subject to existing law.

198. The judgment of the Cambodian Court of Appeal, in the case of Rin Chhouk, does not support a different interpretation, as argued by the Co-Lawyers. Contrary to the Co-Lawyers' assertion, the Court of Appeal did not decide that the 1994 Law, as a whole, applies to any crime committed by the members of the Democratic Kampuchea group irrespective of its source and solely to crimes committed before the adoption of the law. What it did say is that the amnesty provision, namely Article 5 of the 1994 Law, did not apply to the case at hand as this provision solely covered offences committed before the entry into force of the law.[398]

199. The crimes charged in the Closing Order, namely genocide, crimes against humanity, grave breaches of the Geneva Conventions, and homicide, torture and religious persecution as national crimes, are not criminalised under the 1994 Law and would therefore continue to be prosecuted under existing law, be it domestic or international criminal law, even if perpetrated by alleged members of the Democratic Kampuchea group.

200. A plain reading of the text of the Decree in conjunction with the 1994 Law leads the Pre-Trial Chamber to conclude that the amnesty, in the case of Ieng Sary, only prevented his prosecution for the offences against State security set out in Article 4 and, arguably, for the offence of being a member of the Democratic Kampuchea group, assuming that such an offence was criminalised under Articles 1 and 2. There is no indication that the Decree was to cover any offence whatsoever committed by Ieng

[398] Appeals Court of Phnom Penh, Criminal Case No. 463/17.10.2000, "Judgement of Appeals Court", 6 September 2002, p. 23.

Sary, irrespective of its source. There is no indication either that it intended to cover acts of genocide, crimes against humanity and grave breaches of the Geneva Conventions.

201. The interpretation of the Decree proposed by the Co-Lawyers for Ieng Sary, which would grant Ieng Sary an amnesty for all crimes committed during the Khmer Rouge era, including all crimes charged in the Closing Order, not only departs from the text of the Decree, read in conjunction with the 1994 Law, but is also inconsistent with the international obligations of Cambodia. Insofar as genocide, torture and grave breaches of the Geneva Conventions are concerned, the grant of an amnesty, without any prosecution and punishment, would infringe upon Cambodia's treaty obligations to prosecute and punish the authors of such crimes, as set out in the Genocide Convention[399], the Convention Against Torture[400] and the Geneva Conventions[401].[402] Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy.[403] This obligation would generally require the State to prosecute and punish the authors of

[399] Genocide Convention, Articles I and V (ratified by Cambodia on 1950).
[400] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85 (opened for signature on 10 December 1984, entered into force on 26 June 1987) ("Convention Against Torture")Articles 4 and 5 (ratified by Cambodia on 15 October 1992).
[401] *Convention (III) relative to the Treatment of Prisoners of War*, 19 August 1949, 75 U.N.T.S. 135 (opened for signature on 12 August 1949, entered into force on 21 October 1951) (ratified by Cambodia on 8 December 1958) ("Geneva Convention III"), Art. 129; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 19 August 1949, 75 U.N.T.S. 287 (opened for signature on 12 August 1949, entered into force on 21 October 1950) (ratified by Cambodia on 8 December 1958) ("Geneva Convention IV"), Article 146. *See also*: Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949, Commentary, IV Geneva Convention relative to the protection of civilian persons in time of war*, International Committee of the Red Cross, 1958, p. 160 (The obligation to prosecute grave breaches is "absolute", meaning that States parties may under no circumstances avoid fulfilling this obligation by providing immunity by way of an amnesty law.)
[402] *See e.g. Prosecutor v. Kallon*, SCSL-04-15-AR72 (E), *and Kamara*, SCSL-04-16-AR72 (E), "Decision on Challenge to Jurisdiction: Lomé Accord Amnesty", Appeals Chamber, 13 March 2004, para. 73 ("It is not difficult to agree with the submissions made by the amici curiae, Professor Orentlicher and Redress that, given the existence of a treaty obligation to prosecute or extradite an offender, the grant of amnesty in respect of such crimes as are specified in Articles 2 to 4 of the Statute of the Court is not only incompatible with, but is in breach of an obligation of a State towards the international community as a whole.")
[403] Art. 2(3) of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity" (emphasis added).

violations.[404] The grant of an amnesty, which implies abolition and forgetfulness of the offence[405] for crimes against humanity, would not have conformed with Cambodia's obligation under the ICCPR to prosecute and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims.[406] As there is no indication that the King (and others involved) intended not to respect the international obligations of Cambodia when adopting the Decree, the interpretation of this document proposed by the Co-Lawyers is found to be without merit.

202. The second ground of appeal is dismissed.

3. Ground Three (Principle of Legality)

Summary of Co-Lawyers for Ieng Sary's submissions:

203. The Co-Lawyers argue that the Co-Investigating Judges erred in holding that the ECCC may apply international crimes and forms of liability simply because the ECCC Law

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[404] IACtHR, *Case Velázquez Rodríguez*, "Decisions and Judgements", 29 July 1988, para. 176 ("The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention." (emphasis added); Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," 100 *Yale L.J.* 2537 (1990-1991) at 2568-2582. See also the reference quoted in the following footnote.

[405] *Prosecutor v. Kallon*, SCSL-04-15-AR72 (E), *and Kamara*, SCSL-04-16-AR72 (E), "Decision on Challenge to Jurisdiction: Lomé Accord Amnesty", Appeals Chamber, 13 March 2004, para. 66, quoting the Black's Law Dictionary.

[406] *Prosecutor v. Furundžija*, IT-95-17/1-T, "Judgement", Trial Chamber, 10 December 1998, para. 155 (where the ICTY Trial Chamber held that a state granting an amnesty for torture, as a *jus cogens* crime, would violate its international obligations); Human Rights Committee, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 10 March 1992, para. 15 ("The Committee has noted that some States have granted amnesty in respect of acts of torture. *Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy,* including compensation and such full rehabilitation as may be possible." (emphasis added)); IACtHR, *Barrios Altos Case*, "Judgement", 14 May 2001, paras 41-44 (where the IACtHR found that amnesties for serious violations of human rights were incompatible with the Convention); ECtHR, *Ould Dah c. France* , Application no. 13113/03, "Judgement", 17 March 2009, pp. 16-17 (where the ECtHR found that amnesties are generally incompatible with the duty of States to investigate acts of torture); Cassese 2003, p. 313 (arguing that States' general obligation to ensure the enjoyment of fundamental rights is incompatible with impunity or blanket amnesties for international crimes).

provides for their application and in determining that the status of the ECCC as a domestic or international court is irrelevant in this regard. The ECCC Law, they state, violates the principle of legality[407] by retroactively criminalising conduct which was not criminal in Cambodia in 1975-79.[408]

204. The Co-Lawyers submit that the status of the ECCC as a domestic or international court is relevant because the standard for the principle of legality to be applied differs accordingly.[409] They elaborate that since genocide, crimes against humanity, Grave Breaches of the Geneva Conventions and the forms of liability set out in the ECCC Law did not exist in Cambodian law in 1975-79, "it becomes necessary to determine whether international conventions or customary international law could be directly applied as Cambodian law in 1975-79."[410] The Co-Lawyers then argue that international law is not directly applicable in Cambodian courts because "Cambodia adheres to a dualist as opposed to a monist system in its approach to implementing international law in its domestic legal order" and therefore international law applies only when its direct application is explicitly authorised by the Constitution or by another incorporating national law. In respect of conventions, the Co-Lawyers assert, where it is not incorporated into the domestic system by national incorporating legislation, the Convention has to be self-executing to be directly applicable.[411] They then submit that because Cambodia did not have any implementing legislation in place at the time of the alleged crimes and nothing in the Constitution allows direct applicability, the Genocide Convention and the Geneva Conventions cannot be the basis for domestic prosecution in Cambodian courts, including the ECCC, since such prosecutions would violate the principle of legality as genocide and grave breaches were not considered criminal offences over which Cambodian courts had jurisdiction in 1975-79.[412]

[407] Note that the term "principle of legality" is also known as the principle of "*nullum crimen sine lege.*"
[408] Ieng Sary Appeal, para. 103.
[409] Ieng Sary Appeal, paras 106, 109.
[410] Ieng Sary Appeal, para. 110,
[411] Ieng Sary Appeal, paras 111-114.
[412] Ieng Sary Appeal, 115-120.

205. The Co-Lawyers then submit that customary international law is not directly applicable in Cambodian courts because Cambodia adheres to a dualist system in its approach to implementing international law in its domestic legal order.[413] They add that the *jus cogens* status of international crimes does not alter the fact that customary international law is not directly applicable in Cambodian courts.[414]

206. In the alternative, the Co-Lawyers submit that, even if Cambodia could directly apply conventions or customary international law there are two additional requirements necessary to comply with the principle of legality: a) the law criminalising the relevant conduct must have been accessible to the Charged Person; and b) any criminal liability must have been sufficiently foreseeable to the Charged Person.[415] Referring to paragraphs 1305-1307 of the Closing Order, the Co-Lawyers submit:

> The OCIJ erred, however, in finding that liability for genocide and grave breaches would have been accessible to Mr. IENG Sary due to his position as a member of the governing authority, and that liability for crimes against humanity would be sufficiently accessible "with particular regard to the World War II trials held in Nuremberg and Tokyo." [OCIJ] further erred in finding that:
>
> > The modes of criminal responsibility set out in the ECCC Law were partly incorporated in the 1956 Cambodian Penal Code as set out below, and as such these modes of liability were sufficiently accessible to the Charged Persons. The remaining modes of liability, namely joint criminal enterprise, instigation and superior responsibility, were also set out under international law through sources such as the trials following World War II and as such can be considered sufficiently accessible to the Charged Persons.
>
> It would not be foreseeable to Mr. IENG Sary that he could be tried in a domestic court for genocide, crimes against humanity, grave breaches, and forms of liability which did not exist in Cambodian domestic law at the relevant time. These crimes and forms of liability would also not have been accessible to him simply because they may have existed in some post-World War II jurisprudence.[416]

[413] Ieng Sary Appeal, paras 121-125.
[414] Ieng Sary Appeal, paras 126-129.
[415] Ieng Sary Appeal paras 130-135.
[416] Ieng Sary Appeal, paras 130-131.

207. The Co-Lawyers assert that the lack of foreseeability and accessibility of the forms of liability is apparent when considering command responsibility, the concept of which was not defined with sufficient clarity in 1975-79. This is evident, the Co-Lawyers submit, from the lack of clarity with regard to the requisite *mens rea* and whether it may apply to non-international conflicts and to civilian superiors.[417]

Quotes from the Closing Order paragraphs referred to in this Ground of Appeal:

208. Paragraphs 1301 to 1307 of the Closing Order, which are placed under the heading "ECCC Jurisdiction," read:

> The question whether the ECCC are Cambodian or international "in nature" has no bearing on the ECCC's jurisdiction to prosecute such crimes, provided that the principle of *nullum crimen sine lege* is respected.
>
> Under this principle, as set out in Article 33(2) (new) of the ECCC Law, which references Article 15 of the International Covenant on Civil and Political Rights, 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. Accordingly, in order to be applied before the ECCC, where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly and it must have existed under international law applicable in Cambodia at the relevant time. Relevant sources of international law include customary and conventional international law, as well as the general principles of law recognized by the community of nations. In addition, the law must have been sufficiently accessible at the relevant time and the persons under investigation must have been able to foresee that they could be held criminally liable. The appalling nature of a crime may be taken into consideration in this respect.
>
> The principles set out above also apply to the modes of criminal responsibility.
>
> As to whether international law is directly applicable in Cambodia, it must be recalled that Articles 1, 2 and 29 (new) of the ECCC Law set out as Cambodian law the violations of international law within its subject matter jurisdiction (genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, the destruction of cultural property during armed conflict and crimes against internationally protected persons), as well as the applicable modes of criminal responsibility (supplementing them with a sentencing regime in accordance with the principle of *nulla poena sine lege*). By virtue of these

[417] Ieng Sary Appeal, para. 134.

provisions, the issue whether international law is directly applicable in Cambodian domestic law has no bearing on ECCC jurisdiction.

Furthermore, the international law provisions prohibiting genocide and grave breaches of the 1949 Geneva Conventions, which expressly provide for criminal liability, were legally binding on Cambodia as set out below, and thus can be considered to have been sufficiently accessible to the Charged Persons as members of Cambodia's governing authorities.

With respect to crimes against humanity, their prohibition under customary law is considered to have been sufficiently accessible to the Charged Persons, with particular regard to the World War II trials held in Nuremberg and Tokyo.

The modes of criminal responsibility set out in the ECCC Law were partly incorporated in the 1956 Cambodian Penal Code as set out below, and as such these modes of liability were sufficiently accessible to the Charged Persons. The remaining modes of liability, namely joint criminal enterprise, instigation and superior responsibility, were also set out under international law through sources such as the trials following World War II and as such can be considered sufficiently accessible to the Charged Persons.

209. The Pre-Trial Chamber notes that the paragraphs of the Closing Order set out above deal with the requirement of the principle of legality and its impact upon the jurisdiction of the ECCC in respect of the international crimes and modes of liability enumerated in the ECCC Law. The Co-Investigating Judges found 'that the crimes and modes of responsibility defined in this section of the Closing Order comply with the principle of legality.'[418] As compliance with the principle of legality is a pre-requisite for establishing the ECCC's jurisdiction over the crimes and modes of liability provided in the ECCC Law, this finding of the Co-Investigating Judges, read together with paragraph 1613 of the Closing Order, amounted to a confirmation of jurisdiction.

210. The principle of legality must be satisfied as a logical antecedent for the establishment of whether certain crimes and modes of liability existed at the relevant time. The Pre-Trial Chamber acknowledges that accessibility and foreseeability are elements of the principle of legality. The Pre-Trial Chamber provides a full analysis of the test for accessibility and foreseeability in paragraphs 229-237 below. Where the Co-Lawyers for Ieng Sary invite consideration of the subjective knowledge of Ieng Sary as to the

[418] Closing Order, para. 1299.

state of international law,[419] their request would require a factual determination which is not within the Pre-Trial Chamber's jurisdiction

211. Similarly, Ieng Sary's submission of lack of clarity concerning the requisite *mens rea* for command responsibility in 1975-79[420] imports detailed consideration of the elements or contours of the mode of liability, rather than its bare existence. It therefore does not fall within the ambit of Internal Rule 74(3)(a) as a jurisdictional challenge. Determinations as to the existence of armed conflict are factual in nature and not within the Pre-Trial Chamber's jurisdiction to examine.

212. The Pre-Trial Chamber agrees with the Co-Investigating Judges finding in paragraph 1301 of the Closing Order that the nature of the ECCC as a court has no bearing on the ECCC's jurisdiction over the crimes and modes of liability enumerated in the ECCC Law, because this law grants such jurisdiction to the ECCC. This Law is carefully crafted and clearly provides that the ECCC can apply such crimes and modes of liability provided that such must have existed in law at the relevant time. Even if the ECCC were considered to be a simply domestic court, jurisdiction is not in question as long as a law that grants it exists and related requirements are met.

213. The ECCC was established by a joint agreement[421] between the Royal Government of Cambodia and the United Nations, and Cambodia accepted the ECCC Agreement as the law of the land.[422] The ECCC Law explicitly gives the Chambers jurisdiction to apply treaties recognised by Cambodia and customary international law, as long as the principle of legality is respected.[423] Given its express reference to Article 15 of the ICCPR, there is no doubt that, insofar as international crimes are concerned, the principle of legality envisaged by the ECCC Law is the international principle of legality which allows for criminal liability over crimes that were either national or

[419] Ieng Sary Appeal, paras 130, 131, 135; Closing Order, para. 1305.
[420] Ieng Sary Appeal, para. 134.
[421] Agreement.
[422] Article 47*bis* (new) of the ECCC Law.
[423] Article 33(2) (new) of the ECCC Law.

international in nature at the time they were committed.[424] As the international principle of legality does not require that international crimes and modes of liability be implemented by domestic statutes in order for violators to be found guilty, the characterisation of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC. Consequently, the Pre-Trial Chamber agrees with the Co-Investigating Judges and the Co-Prosecutors[425] that the nature of the ECCC as a court is irrelevant to its jurisdiction in light of the clear terms of the ECCC Law. The ECCC Law did not empower the Royal Government of Cambodia to prosecute senior leaders of the Democratic Kampuchea or those alleged to be mostly responsible for such international crimes. This was not necessary.[426] The Royal Government of Cambodia was not only free to prosecute such crimes which occurred within its territorial jurisdiction, as a basic exercise of its jurisdiction, it was its obligation under international law to do so.[427] Rather than using its pre-existing court structure, the Royal Government of Cambodia agreed with the United Nations to establish the ECCC for its international expertise and delegated its jurisdiction to hear these cases.

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[424] Article 15(1) of the ICCPR.

[425] Co-Prosecutors Response, para. 137.

[426] See e.g. *Kononov* Grand Chamber Judgement, para. 207 (where the ECtHR recalled that the Nuremberg (IMT) Charter was not *ex post facto* criminal legislation as there was agreement in contemporary doctrine that international law had already defined war crimes and required individuals to be prosecute.)

[427] Genocide Convention, Arts I and V; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Cambodia on 15 October 1992, Arts 4 and 5; Convention (IV) relative to the Protection of Civilian Persons in Time of War, ratified by Cambodia on 8 December 1958 ("Geneva Convention IV"), Art 146. Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. In this respect, Article 2(3) of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity". (emphasis added) This obligation would generally require the State to prosecute and punish the authors of violations. See IACtHR, *Case Velázquez Rodríguez*, "Decisions and Judgements", 29 July 1988, para. 176 ("The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention." (emphasis added)); *Kononov* Grand Chamber Judgement, para. 213 (where the ECtHR found that by May 1944, even before the adoption of the Human Rights instruments, that "States were at least permitted (if not required) to take steps to punish individuals for [war] crimes, including on the basis of command responsibility.")

214. Pursuant to the ECCC Law, the ECCC is required to directly apply treaty law and custom criminalising the core international crimes and to exercise jurisdiction regarding these crimes in accordance with the international principle of legality, Cambodia has followed the approach adopted by a number of States which, following the language of ICCPR and the ECtHR,[428] have included an exception for international crimes in their formulation of the principle of legality in national law.[429] Also, even if this does not reflect a uniform or constant practice, a number of domestic courts have rendered decisions applying a different standard of the principle of legality for ordinary crimes and international crimes.[430] As such, various States have applied directly international

[428] Article 7 of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* adopted at Rome on 4 November 1950 by the Council of Europe ("ECHR"), contains a similar provision to Article 15 of the ICCPR ("1. No one shall be held guilty of any criminal offence on account of any act or commission 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 the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.")

[429] See for instance, Article 42 (1) of the Polish Constitution of 1997 according to which the principle of legality "shall not prevent punishment of any act which, at the moment of its commission, constituted and offence within the meaning of international law". Similar provisions are found in Article 11 (g) of the 1982 Canadian Charter of Rights and Freedoms, which has the constitutional rank and determines that "any person charged with an offence has the right not to be found guilty on account of any act or omission, unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations: According to the Report of the Commission of Inquiry on War Criminals (Deschenes Commission), this interpretation of the principle of legality supersedes any inconsistent legislation. See also the Criminal Code of Bosnia and Herzegovina (Art. 3 (2)). Along the same lines, the Special Panel for Serious Crimes in East Timor interpreted Sections 9.1 and 31 of the Timor Leste Constitution as allowing a person to be convicted and punished for an act or omission which at the time when it was committed, "was criminal according to general principles of law recognized by the community of nations," as provided for in Art. 15(2) of the ICCPR. (*Prosecutor v. Mondonca et al.*, Case No. 18a/2001, "Decision on the Defence (Domingos Mendonca) motion for the Court to order the Public Prosecutor to amend the indictiment", 24 July 2003, para. 18). This decision has reversed the previous finding of the Court of Appeal of East-Timor (*Armando dos Santos*, "Applicable Subsidiary Law decision", 15 July 2003, p. 14.

[430] See for example, in Hungary, the finding by the Constitutional Court in 1993, referring to Article 14(2) of the ICCPR and 7(2) of the ECHR, that prosecutions for crimes against humanity and war crimes are not governed by the national principle of legality (Hungary, Constitutional Court, "Decision No. 53/1993 on War Crimes and Crimes against Humanity", 13 October 1993, English translation in Sólyom and Brunner 2000, p. 273-283, at 279; See also, interpretations by Argentinean courts of the principle of legality in an international manner, Argentina, Federal Court of Buenos Aires, *Videla*, Ruling on Pre-Trial Detention, 9 September 1999, pointing out that the principle of legality as laid down in Article 15 of the ICCPR was binding on Argentina and that it could not disregard laws established by the international legal system which takes precedence over internal laws "even if this implies assigning a significance to the principle of legality distinct from that which has traditionally been accorded it by internal courts and by the Argentine government, whose reserves in the matter can in no way modify the internal regulations and the weight of the obligations arising from the other sources of international legal norms", pp. 39-40; Argentina, Supreme Court, *Arancibia Clavel, Enrique Lautaro s/ homicidio alificado y asociación illićita y otros*, 24 August 2004, majority decision refusing to find a violation of the principle of legality since at the time of the acts in question, customary international law regulated both the criminality of the acts in question and the prohibition of statutes of limitations, para. 22, 23, 28 and 33. Both decisions are cited in

law based on treaty and/or custom without a specific provision in the domestic law specifically criminalizing the conduct, or in some cases, generally incorporating international law.[431] This approach is also in line with the jurisprudence of the ECtHR which, like these national courts, makes a clear distinction between international crimes and ordinary crimes.[432] Similarly, the *ad hoc* tribunals conduct prosecution of

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Ward N. Ferdinadusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Presse, 2006, pp. 74-75. See also the finding of the Colombian Constitutional Court, in its 2002 judgement on the constitutionality of the Rome Statute that the standards of the principle of legality are not identical for international and national criminal law (Colombia, Corte Constitcional, Sala Plena, *Sentencia C-578 (In re Corte Penal Internacional),* 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2292). In *Barbie* (1984), the French Court de Cassation rejected the extraordinary remedy launched by Barbie (*pourvoi*), by reference to Art. 15(2) of the ICCPR and 7(2) of the ECHR, finding that crimes against humanity are exempted from the principle of legality as formulated in French law (France, Cour de Cassation, *Barbie* (No. 2), 26 January 1984, Bull. Crim. no. 34 at p. 92, citing and affirming the Court of Appeal: "qu'en définitive; l'incrimination de crimes contre l'humanité est conforme aux principes généraux de droit reconnus par les nations civilisées; qu'à ce titre ces crimes échappent au principe de la non rétroactivité des lois de répression..."). But see also France, Tribunal de Grande Instance de Paris, Juge d'Instruction, *In re Javor*, "Ordonnance", 6 May 1994, (where the Investigating Judge found that universal principles defining crimes against humanity as an international crime are not sufficient to establish jurisdiction of the French courts) and, more importantly, in Aussaresses (2003), the rejection by the French Court de Cassation of the direct application of custom and the prosecution of a French general for self-confessed acts of torture and summary execution of civilians in the Algerian war, on the basis that "international customary rules cannot make up for the absence if a provision which criminalises the acts denounced by the civil petitioner as crimes against humanity" (France, Court de Cassation, *Aussaresses*, 17 June 2003, 108 RGDIP 754). For more examples of practice to the contrary, see: Oslo District Court, *Public Prosecutor v. Misrad Repak*, Case No 08-018985MED-OTIR/08, 2 December 2008, paras 6-9 (where the Court dismissed the charges involving crimes against humanity because at the time the offences were committed there were no provisions in Norwegian legislation criminalizing the conduct in the same terms as used in the current relevant law and the Constitution of Norway prohibits legislation from having retroactive effect); *Re Habre*, Appeal Decision, Cassation No 14, ILDC 164 (SN 2001), para. 33 (where the Court found that it could not prosecute a foreigner for acts of torture committed abroad at a time when the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had not been incorporated into Senegalese domestic law.); Netherlands Supreme Court, *In re Bouterse,* 18 September 2001, English translation in the Netherlands Yearbook of International Law, para. 4.5 (where the Dutch Supreme Court found that the principle of legality as formulated in Dutch law does not make an exception for international crimes); Australia, Federal Court, *Nulyarimma v. Thompson*, [1999] FCA 1192, paras 20-26, 32 (The 2 judges majority found that in the absence of any enabling legislation, the offence of genocide was not cognizable in Australian Courts, notably as it would violate the principle of legality (para. 26). Dissenting Justice Merkel considered that the application of a crime of universal jurisdiction under international law did not entail such violation and emphasized the need for national courts to take into account developments of international law (paras 161 and 178): "It would be anomalous for the Municipal Courts not to continue their longstanding role of recognizing, by adoption, the changes and developments in international law." (para. 181).)

[431] In addition to the references quoted in the preceding footnote, see: Ward N. Ferdinadusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Presse, 2006, p. 85.

[432] ECtHR, *Naletilic v. Croatia*, Application no. 51891/99, Admissibility Decision, 4 May 2000. See also: *Kononov v. Latvia,* Application no. 36376/04, Judgement, Grand Chamber, 10 May 2010, ("*Kononov* Grand Chamber Judgement"), paras 185, 196 (The ECtHR recalls that "the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner" and that "the *travaux préparatoires* to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Art. 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws" . It

international crimes on the sole basis of customary law, under the condition that the international principle of legality is respected.[433] This approach recognises the role of both domestic and international jurisdictions to prosecute international core crimes which, having gone through a slow process of codification, have traditionally required reliance on international law.[434]

215. The Pre-Trial Chamber recalls its recurring conclusion that the ECCC is an internationalised court. Thus, in its decision of 4 December 2007 on Duch's detention appeal in Case 001 the Pre-Trial Chamber, examining the extent of the ECCC's relationship with domestic Cambodian courts and taking guidance from the jurisprudence of other internationalised courts, reached a reasoned conclusion that the ECCC is an internationalised court:

> The ECCC is distinct from other Cambodian courts in a number of respects. The judiciary includes both national and foreign judges. The foreign judges would not normally qualify for appointment within the Cambodian court structure as they have no general training in Cambodian law, but rather are chosen for their "experience [...] in criminal law or international law, including international humanitarian law and human rights law". The ECCC is entirely self-contained, from the commencement of an investigation through to the determination of appeals. There is no right to have any decision of the ECCC reviewed by courts outside its structure, and equally there is no right for any of its Chambers to review decisions from courts outside the ECCC. In the structure of the Cambodian criminal courts, appeals from the Military Court may be made to the Appeals Court and from there to the Supreme Court.
>
> For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure and therefore has no jurisdiction to judge the activities of other bodies. The Co-Prosecutors have

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emphasizes that the Applicant's conviction for war crimes was based on international rather than domestic law and must, in the Court's view, be examined chiefly from that perspective.)

[433] See *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-AR72, "Decision on Interlocutory Appeal challenging Jurisdiction in relation to Command Responsibility", Appeals Chamber, 16 July 2003, paras. 35, 44-46 and 55. Ieng Thirith acknowldges in her appeal that the ad hoc tribunals prosecute individuals on the basis of customary law (Ieng Thirith Appeal, para. 24).

[434] *Kononov* Grand Chamber Judgement, para. 208 (The ECtHR recalls that "throughout the period of codification of war crimes, the domestic criminal and military tribunals were the primary mechanism for the enforcement of the laws and customs of war [...] and the International prosecution through the IMTs was the exception." As such, "where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning, without infringing the principles of *nullum crimen* and *nulla poena sine lege*.) See also: Section 13 of the Lieber Code, which, in 1863 provided that "military offenses which do not come within the statute must be tried and punished under the common law of war."

> submitted that this independence, which makes the ECCC a "special internationalised tribunal", is demonstrated by a number of factors that are summarised in the Report.
>
> In reaching its conclusion, the Pre-Trial Chamber also refers to the decision of the Appeals Chamber of the Special Court for Sierra Leone in the case of *Taylor*, where it considered the indicia of an international court included the facts that the court is established by treaty, that it was "an expression of the will of the international community", that it is considered "part of the machinery of international justice" and that its jurisdiction involves trying the most serious international crimes.[435]

216. The Pre-Trial Chamber maintained this position in its decision of 4 February 2008 on the request for disqualification of one of its Judges in case PTC01:

> The Pre-Trial Chamber notes that the ECCC, although it is part of the Cambodian court system, is a separate and independent court with no institutional connection to any other court in Cambodia. A judge of the ECCC is selected upon the basis of internationally agreed criteria and takes a separate and distinct judicial oath. In this respect the ECCC is a new internationalized court applying international norms and standards.[436]

217. The Pre-Trial Chamber,in its JCE Decision of 20 May 2010 adopted the approach of the ad hoc Tribunals in determining what constitutes a proper jurisdictional challenge. It considered that the ECCC "is in a situation comparable to that of the *ad hoc* Tribunals" as opposed to domestic civil law systems, where the terms of the statutes with respect to the crimes and modes of liability that may be charged are very broad, where the applicable law is open-ended, and where "the principle of legality demands that the Tribunal apply the law which was binding at the time of the act for which an accused is charged...[and] that body of law must be reflected in customary international law."[437]

218. The Pre-Trial Chambers' conclusions quoted above are consistent with the analysis and conclusions reached by other judicial authorities such as the ECCC's Trial Chamber and

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[435] Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", 4 December 2007, C5/45, paras 18-20.
[436] Decision on Nuon Chea Co-Lawyers Application for the Disqualification of Judge Ney Thol, 4 February 2008, C11/29, para. 30.
[437] JCE Decision, paras 23, 24 (quoting *Prosecutor v. Milutinović et al.*, Case No. IT-05-98, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ICTY Appeals Chamber, 21 May 2003, para. 10).

the Appeals Chamber of the Special Tribunal for Lebanon. Thus, in its decision of 15 June 2009 on Duch's request for release the Trial Chamber noted:

> The structure of the ECCC is distinct from the structure of other Cambodian courts. While its procedure is in accordance with Cambodian law, the ECCC is entitled to adopt its own Internal Rules in compliance with international standards, which take into account the specific mechanisms necessary to adjudicate mass crimes. It is composed of Cambodian and international staff and judicial officers, who have no competence to appear before or to sit in judgment over a decision by a domestic Cambodian court. Further, Cambodian judges before the ECCC have privileges and immunities additional to those possessed by other Cambodian judges.[438]

219. The Trial Chamber in its Judgment of 26 July 2010 in Case 001 ("Judgment in Case 001"), although it does not directly remark upon the ECCC's nature as a court, applied the international principle of legality to matters before it.[439]

220. The Appeals Chamber of the Special Tribunal for Lebanon in its recent decision of 10 November 2010 found that courts and tribunals that are set up through agreements between States and the United Nations, are courts of an international and not of a simply domestic nature:

> Things are different at the international level. In this field there is no judicial system. Courts and tribunals are set up individually by States, or by intergovernmental organizations such as the United Nations, or through agreements between States and these organizations, but they do not constitute a closely intertwined set of judicial institutions. Indeed, each tribunal constitutes a self-contained unit, or has been said, "a monad that is very inward-looking" or "a kind of unicellular organism."[440]

221. There are no compelling reasons put before the Pre-Trial Chamber from the Co-Lawyers to reconsider such conclusions about the nature of the ECCC as an internationalised court, the Pre-Trial Chamber confirms its previous findings as

[438] Decision on Request for Release, 15 June 2009, E39/5, para. 11.
[439] ECCC Trial Chamber's Judgment in Case 001, 26 July 2010, E188 ("Judgment in Case 001"), paras 26-34.
[440] CH/AC/2010/02, "Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing", Appeals Chamber, 10 November 2010, para. 41.

mentioned. The Pre-Trial Chamber will not go into the more subsidiary submissions by the Co-Prosecutors or Civil Party Lawyers in this respect.

222. The extraordinary and specific nature of the ECCC as an internationalised court established by mutual agreement between the United Nations and the Cambodian authorities directs the Pre-Trial Chamber to examine the standard for the principle of legality to be applied before it by looking explicitly at its establishing instruments, the ECCC Law and Agreement.

223. Article 33(new) of the ECCC Law provides:

> 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.

224. Article 15 of the ICCPR provides:

> 1. 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.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

225. These are the only provisions referred to in the ECCC Law in relation to the principle of legality to be applied by the ECCC Chambers. The ECCC Law does not direct the ECCC Chambers to look at any other legal provisions in this respect, therefore the Co-Lawyers' arguments suggesting the application of a principle of legality other than the one quoted above[441] shall not be considered.[442]

[441] Ieng Sary Appeal, para. 106-110.

226. The Pre-Trial Chamber finds that the test to be applied for the standard of the principle of legality to be met before the ECCC is:

1) The criminal act or form of liability must be provided for in the ECCC law;
2) The criminal act or form of liability must have existed, by the time it was commited, under:
   a) national law, or
   b) international law, or
   c) it was criminal according to the general principles of law recognized by the community of nations at the time it was committed;
3) The penalty to be imposed for the criminal act or form of liability shall be the same or lighter (if subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty) than the one that was applicable at the time when the offence was committed.

227. The Pre-Trial Chamber finds, in relation to point (2) above, that in the ECCC, for the principle of legality to be met, it is sufficient to find that the criminal act or form of liability existed under one of the three sub points (a), (b) or (c). The Pre-Trial Chamber finds that, as also found by the ECCC's Trial Chamber, "the 1956 Penal Code was the applicable national law governing during the 1975 to 1979 period"[443] and that the term "international law" in Article 15(1) of the ICCPR is to mean both international treaty law and customary international law.[444] If it is found that the crime or mode of liability existed only in treaty law, the conditions to be met are that (i) the treaty was binding at the time of the alleged offence, and (ii) the treaty was not in conflict with or derogating from peremptory norms of international law.[445] A finding that a State is already treaty-bound by a specific

[442] The PTC rejected similar arguments by the Co-Lawyers for Ieng Sary in its JCE Decision as well, see para. 44: "The Pre-Trial Chamber is not convinced by IENG Sary's argument that the [Co-Investigating Judges] should have applied a stricter test than the one applied at the international level and required that JCE liability be established in Cambodian law because the ECCC "is a domestic court."
[443] *See* Judgment in Case 001, para. 29.
[444] *See* Judgement in Case 001, para. 30 and Nowak, Manfred, *U.N. Covenant on Civil and Political Rights CCPR Commentary*, N.P.Engel, p. 276, para. 5 ("ICCPR Commentary").
[445] *Prosecutor v. Tadić*, IT-94-1-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995, para. 143; Judgement in Case 001, para 33.

convention, and a tribunal applies a provision of that convention, irrespective of whether it is part of customary international law, would result in the conclusion that the principle of legality is satisfied.[446] For a treaty to be binding on a State party, it is sufficient to find that the State party has ratified that treaty.[447]

228. The Pre-Trial Chamber finds that the principle of legality applies to both "the offences as well as to forms of responsibility" charged in a Closing Order issued by the [Co-Investigating Judges]"[448] and that "the scope of application of the principle of [legality, as enshrined in the ICCPR,] relates to all criminal offences, that is, to acts and omissions alike."[449]

229. The Pre-Trial Chamber also notes, as it is also expressed in the Closing Order,[450] and is not contested by the parties, that the principle of legality requires compliance with the test for foreseability and accessibility. At issue is the nature of the test to be applied for such requirement to be met at this stage of proceedings and for the purposes of the current appeal. The Co-Lawyers submissions in this respect are summarised in paragraphs ...4 and 5.. above. They submit that for the foreseeability and accessibility test to be met the crimes must have existed in Cambodian domestic law and the Charged Person could not foresee such simply because they may have existed in "some post-World War II jurisprudence." The rest of the submissions related to this argument are summarised in the paragraphs that follow.

230. In their Response to the Appeal, the Co-Prosecutors, referring to jurisprudence from the ICTY, submitted:

> The ICTY has consistently applied the "accessibility and foreseeability" test to determine whether the principle of legality has been violated. Under this test,

[446] *Prosecutor v. Kordić et al.*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004, para. 44.
[447] Vienna Convention on the Law of Treaties, 23 May 1969, Article 14.
[448] Judgement in Case 001, para 28.
[449] Judgement in Case 001, para. 479 and CCPR Commentary, p. 276, para. 7.
[450] The Co-Investigating Judges have recognized this in paragraph 1302 of the Closing Order where they say: "In addition, the law must have been sufficiently accessible at the relevant time and the persons under investigation must have been able to foresee that they could be held."

> prosecution is not in violation of the principle of legality if the law that forms the basis for prosecution was sufficiently accessible to the accused and prosecution for violations of the law was sufficiently foreseeable. Provided that those conditions are met, a rational actor can adjust his or her actions to conform to the law and the prosecution is not unfair. In order to assess the requirements of foreseeability and accessibility, the ICTY laid out the following criteria, which the Trial Chamber relied on in Duch:
>
> As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.
>
> Considerations relevant in an assessment of the foreseeability and accessibility requirements, include the following:
>
> (1) The appalling nature and immorality of an act may play a role in refuting a claim by the accused that he or she did not know of the criminal nature of the acts.
>
> (2) The fact that a crime or mode of liability has customary status is a strong and possibly conclusive indication that the requirements of forseeability and accessibility are satisfied.
>
> A state practice of tolerating or encouraging certain acts will not operate as a bar to perpetrators being brought to justice and punished where those acts are crimes under national or international law.
>
> In Duch, the Trial Chamber held that it was foreseeable between 1975 and 1979 that Duch could be held criminally liable for the offences with which he was charged. It also held that the law providing for Duch's criminal responsibility was sufficiently accessible considering its international customary basis. The Trial Chamber took into account, inter alia, the recognition of the underlying offences in international law since the Nuremberg-era tribunals, as well as the appalling nature of the offences charged. Clearly, this is also the case with respect to the crimes with which the Appellants have been charged in this case.[451]

231. The Civil Parties submit that the law providing for the Accused's criminal responsibility was sufficiently accessible considering its international customary basis. They add that the fight against impunity knows no boundaries in time or space and that the Accused were aware of the crimes for which they are being prosecuted by virtue of the particularly appalling nature of these crimes. The Civil Parties also add that in the wake of the last World War, the Accused lived in France where a prolonged, heated debate

[451] Co-Prosecutors Response, paras 156-158.

about the notion of genocide and crimes against humanity received wide coverage in the press and other media. For instance, they submit, "the 11 November 1960 issue of L 'Humanite, the French Communist Party newspaper, ran a headline: "*Deux deportes dans les camps de la mart allemands*" [Two Deportees in German Death Camps] with photos. Moreover, they submit, in the film "Facing Genocide - Khieu Samphan and Pol Pot" by David Aronowitsch and Staffan Lindberg, which is set in Paris in 1976, SON Sann, former member of Prince Sihanouk's Government, tried to call Khieu Samphan to his senses, saying that the policies followed were suicidal and incomprehensible, especially coming from Cambodian patriots." The Civil Parties submit that by virtue of the posts they occupied within the Government of Democratic Kampuchea, the Accused had a wealth of information about the laws in force and applicable international conventions. This is especially true, they submit, given that beginning in 1978, the members of Democratic Kampuchea did not hesitate to have the UN General Assembly condemn an alleged military invasion and aggression by Vietnam. The Civil Parties also submit that the Accused "were all members of the Communist Party and took a keen interest in the press; moreover, as emphasized by the Co-Investigating Judges, they closely monitored international news reports and remarks by Cambodians living abroad." The Civil Parties aver that all Accused were not "ordinary citizens" and that they were among "Cambodia's governing authorities", and therefore had ample access to information concerning, inter alia, the major international trials in Nuremberg and Tokyo and the ratification of the Geneva Conventions and the Genocide Convention. The Civil Parties insist that the Accused cannot plead ignorance about the unanimous condemnation of the particularly atrocious crimes committed during the Second World War and, by implication, the reactions to those crimes in society and in legal circles.[452]

232. The Co-Lawyers submitted in their Reply to the Co-Prosecutor's Response:

> In paragraph 156, the OCP asserts that the ICTY has consistently applied an accessibility and foreseeability test to determine whether the principle of legality has been violated and that the *Duch* Trial Chamber followed this

[452] Civil Party Observations II.

approach. ICTY jurisprudence must not simply be adopted by the Pre-Trial Chamber without independent analysis of whether this would be appropriate. The *Duch* Judgment carries little weight with regard to the applicable law, as this issue - as with virtually all other jurisdictional legal issues - was unchallenged by the Defence.

In paragraph 157, the OCP asserts that considerations relevant in assessing foreseeability and accessibility include: the appalling nature and immorality of an act and the fact that a crime or form of liability existed in customary international law. It asserts that State practice of tolerating or encouraging an act will not operate as a bar to perpetrators being punished where those acts are crimes under national or international law. Regarding the appalling nature or immorality of an act, it may be the case that if an Accused personally commits an act that would amount to genocide, crimes against humanity, or grave breaches, that he could foresee that such conduct is criminal. When forms of liability such as JCE and command responsibility are involved, however, it is much more difficult to assume that criminality is foreseeable.

> Perhaps no concept stretches traditional notions of individual criminal responsibility as far as superior or command responsibility for criminal conduct by underlings. Superior responsibility is omissions liability, in that offenders are punished for not acting. But it goes much further. The superior is held liable for a particular crime not because his conduct falls within its definition, but because he failed to prevent its commission by others. What is significant is that the superior is held liable for the actual crime of the subordinate -- not for a separate offense focused upon the commander's dereliction of duty.

It is not enough therefore to state that criminal liability would have been foreseeable based on the nature of the crimes alleged. The Pre-Trial Chamber should continue its previous practice of determining whether an Accused could actually foresee liability, rather than simply exploring whether liability existed in customary international law.

In paragraph 158, the OCP asserts that the Duch Trial Chamber held that it was foreseeable in 1975 to 1979 that Duch could be held criminally liable for the offenses for which he was charged. The Pre-Trial Chamber should exercise caution in relying on the Duch Judgment in this regard; these issues were not challenged by the defence. The Pre- Trial Chamber must determine whether the crimes and forms of liability applied were actually foreseeable to Mr. IENG Sary.[453]

233. In reply to the Civil Party Observations, the Co-Lawyers submit that they do "not dispute that the appalling nature of crimes has been considered to be a factor in determining foreseeability. However, they submit, "the immorality or appalling

[453] Ieng Sary Reply, paras 76-78.

character of an act is not a sufficient factor to warrant its criminalization under customary international law." The Co-Lawyers also contend that the Accused's "position of leadership during Democratic Kampuchea does not lead to a conclusion that he could have foreseen criminal liability for crimes which did not exist in Cambodian law at the time" and that "it may be the case that if an Accused personally commits an act that would amount to genocide, crimes against humanity, or grave breaches, he could foresee that such conduct is criminal. When forms of liability such as JCE and command responsibility are involved, however, it is much more difficult to assume that liability is foreseeable."[454]

234. In relation to the parties' submissions suggesting reliance or caution in relying to the Trial Chamber Judgment in Case 001, the Pre-Trial Chamber notes that it may rely, where it finds it appropriate, on such findings and that the validity of some of the findings of the Trial Chamber's have not been challenged.

235. The Pre-Trial Chamber notes that it has already addressed arguments related to foreseeability and accessibility in a previous decision on an appeal submitted on similar grounds where it found as follows:

> The Pre-Trial Chamber considers that some ICTY decisions seem to imply that if a form of responsibility existed in customary international law at the relevant time, foreseeability and accessibility can be presumed. However, the Pre-Trial Chamber considers it safer to ascertain not only whether JCE existed under customary international law at the relevant time, thus being punishable under international criminal law, but also whether it was sufficiently accessible and foreseeable to the Charged Persons. As to the requirement of foreseeability, a charged person must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, reliance can be placed on a law which is based on custom. Contrary to what some of the Appellants assert, the question of whether JCE is a form of responsibility recognized in domestic law may be relevant when determining whether it was foreseeable to the Charged Person that his/her alleged conduct may entail criminal responsibility. However, it is not necessary that JCE also be punishable in domestic law in addition to being a recognized form of liability under customary international law for it to apply before the ECCC.[455]

[454] Ieng Sary Reply to Civil Party Lawyers Observartions II, paras 18 and 19.
[455] *See* JCE Decision, para. 45. *See also* paras 43 and 44 of the same decision.

236. The Pre-Trial Chamber notes that the requirements of accessibility and forseeability are in line with those asserted by other international courts of a regional nature such as the European Court of Human Rights.[456] The principle of legality in the ECtHR is enshrined in the European Convention on Human Rights.[457] In *Kononov*, the ECtHR found that:

> When speaking of "law", Article 7 alludes to the same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written and unwritten law and which implies qualitative requirements, notably those of accessibility and foreseeability. As regards foreseeability in particular, the Court recalls that however clearly drafted a legal provision may be in any system of law including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in certain Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (*Streletz, Kessler and Krenz v. Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, § 50, ECHR 2001-II; *K.-H.W. v. Germany* [GC], no. 37201/97, § 85, ECHR 2001-II (extracts); *Jorgic v. Germany*, no. 74613/01, §§ 101-109, 12 July 2007; and *Korbely v. Hungary* [GC], no. 9174/02, §§ 69-71, 19 September 2008).[458]

237. The Pre-Trial Chamber considers that as far as the requirements of foreseeability and accessibility are concerned, at this stage of the proceedings, it shall only examine whether they pass the objective test as an examination of the subjective test would require a factual determination which is not within the Pre-Trial Chamber's jurisdiction. An objective test of accessibility and foreseeability is consistent both with the Pre-Trial

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[456] The Pre-Trial Chamber finds that it can seek guidance from the jurisprudence of the ECHR in relation to the principle of legality because Article 7 of the ECHR served as a model for the drafting of Article 15 of the ICCPR (*See ICCPR Commentary, page 275*) and as can be seen from the texts of both articles, they are almost identical.

[457] ECHR, art 7; ECtHR, *Sunday Times v United Kingdom*, Application no. 6538/74, 26 April 1979, para 49; ECtHR, *X Ltd and Y v. United Kingdom*, Application no. 8710/79, 1982, para 9; ECtHR, *G v Federal Republic of Germany*, Application no. 13079/87, 6 March 1989, para 1; ECtHR, *Kokkinakis v Greece*, Application no. 14307/88, 25 May 1993, para 52; ECtHR, *C.R. v. United Kingdom*, Application no. 87 Kb20190/92, 22 November 1995, paras 32 - 34; ECtHR, *S.W. v. United Kingdom*, Application no. 92 Kb20166/92, 22 November 1995, paras 34-36.

[458] ECtHR, *Kononov v. Latvia*, Application no. 36376/04, 17 May 2010, para. 185 (emphasis added).

Chambers' previous decisions and with the systemic division between the competencies of the Pre-Trial Chamber and the Trial Chamber as envisaged by the Internal Rules. Without applying the facts to the current case, the Pre-Trial Chamber shall examine merely whether the Co-Investigating Judges have adduced evidence that the Charged Persons were reasonably likely to have been aware of the state of law in relation to the crimes and modes of liability in question at the relevant time.

238. The Pre-Trial Chamber finds that for the standard of the principle of legality to be met in the ECCC the requirement for existence of the crime in domestic law is not absolute, it is rather optional. It is sufficient to find that the crime or mode of liability existed in one of the other bodies of law mentioned in point (2) in paragraph 226 above.

239. The Pre-Trial Chamber finds, as also explained below, that the Co-Investigating Judges summary in paragraphs 1301 – 1304 of the Closing Order on the principle of legality applied before the ECCC is correct.

240. The Pre-Trial Chamber examines in the paragraphs that follow, within the limits of the issues raised in this Ground of Appeal, whether the Co-Investigating Judges in the Closing Order found that the criminal acts or forms of liability with which Ieng Sary is indicted existed in law under one of the three options counted in point (2) under paragraph 226 above and whether the Co-Investigating Judges have shown that the Accused was reasonably likely to have been aware of the state of law at the relevant time.

241. The Pre-Trial Chamber first notes that the Co-Investigating Judges in the Closing Order indict Ieng Sary with: Crimes Against Humanity; Genocide and Grave Breaches of the Geneva Conventions of 12 August 1949 ("Grave Breaches"). The forms of liability Ieng Sary is indicted with include: joint criminal enterprise; planning, instigating, ordering, or aiding and abetting ("planning and instigating"); and superior responsibility.

Genocide:

242. Paragraph 1310 of the Closing Order provides:

> Cambodia acquired sovereign autonomy to accede to the Genocide Convention upon joining the "French Union" in 1949. The United Nations accepted Cambodia's accession and there is no record of any legal challenge with respect to this accession. The Genocide Convention received the twenty ratifications and accessions required for its entry into force in 1951. Thus, the crime of genocide was part of international law applicable in Cambodia at the relevant time.

243. The Pre-Trial Chamber, having examined the sources used by the Co-Investigating Judges to support their finding in paragraph 1310 of the Closing Order finds that their conclusion that the crime of Genocide existed in law at the relevant time is substantiated. The Genocide Convention was treaty law which was unquestionably binding on Cambodia, by its accession, at the time of the alleged offences in 1975-79. This finding by the Co-Investigating Judges fulfills one of the requirements of the principle of legality enumerated above.

244. Although the Genocide Convention was not implemented in Cambodian law during the period 1975-1979, it is governed by the principle of *pacta sunt servanda*.[459] As *Avocats Sans Frontières* noted in their brief, Article 27 of the 1969 Vienna Convention on the Law of Treaties prohibits parties to a treaty from invoking internal law as justification for failure to perform their obligations.[460] In addition, the *jus cogens* nature of the crime of genocide alleged in the Closing Order is sufficient to justify prosecution, regardless of the specific provisions of Cambodia's domestic law.[461] All these clearly indicate that individuals may incur criminal liability for committing genocide.

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[459] Art. 26 of the Vienna Convention on the Law of Treaties: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."
[460] Civil Party Lawyers Observations I, para. 15.
[461] *See, e.g., Advisory Opinion on the Reservations to the Genocide Convention*, ICJ Reports, 1951 (n.114) 52 (advising that the provisions of the Genocide Convention should be seen as "binding upon the [other states], even though they have not expressly accepted them: such conventions establish a kind of binding custom, or rather principles which must be observed by all states by reason of their interdependence and of the existence of an international organization.

245. The Pre-Trial Chamber notes that, in this ground of appeal, the Co-Lawyers do not challenge the very existence in law of genocide, they take issue with the fact that genocide did not exist in Cambodian law and that liability for genocide was not accessible to Ieng Sary at the relevant time. The Pre-Trial Chamber notes that the fact that Cambodia did not enact enabling legislation pursuant to its obligation under Article V of the Genocide Convention does not relieve the Accused of liability.[462] The enactment of enabling legislation is not a condition for a convention to become binding on its State parties, it is rather an obligation placed upon each State party to complete certain actions subsequent to the adoption of the treaty which has already become through the actions of the State by becoming a Party to the convention. The Pre-Trial Chamber notes that it is a recognised[463] principle of international customary law that:

> The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.[464]

246. As far as the other requirements of the principle of legality are concerned, the Pre-Trial Chamber finds that the Co-Investigating Judges' conclusion in paragraph 1305 of the Closing Order, that because the Genocide Convention was "legally binding on Cambodia" it "can be considered to have been sufficiently accessible to the Charged Persons as members of Cambodia's governing authorities" is correct and complies with the objective test for accessibility. The fact that genocide was criminal was also accessible to the Accused because of the pre-existing customary nature of the rule which the Genocide Convention codified and because of the nature of the rights allegedly infringed. In this respect, the Pre-Trial Chamber notes that the Genocide Convention was preceded in 1946 by a Resolution of the General Assembly of the United Nations recognising genocide as an international crime and agrees that it would

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[462] Genocide Convention, Art. V: The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Art. III.

[463] See: *Attorney General of Israel v Eichmann*, Israel Supreme Court (1962), *reprinted in* 36 *ILR* 28, ("Eichmann case"), p. 296-297 and also Machteld Boot, "Genocide, crimes against humanity, war crimes: *nullum crimen sine lege* and the subject matter jurisdiction of the International Criminal Court, *School of Human Rights Research Series*, V. 12), 14.

[464] *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, International Law Commission: 1950, ("Nuremberg Principles"), Principle II.

have been putting individuals on notice that they would be subject to prosecution and could not invoke their own domestic laws in defence to such charge.[465] In its advisory opinion on reservations to the Convention, the International Court of Justice wrote:

> [the] origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by the civilized nations as binding on states, even without any conventional obligations.[466]

247. The Pre-Trial Chamber notes that the General Assembly Resolution and the International Court of Justice (ICJ) decision, in addition to the Genocide Convention, put individuals on notice that genocide was an international crime, which would expose violators to prosecution regardless of the deficiencies of a government's domestic laws, for more than twenty years preceding the commission of the alleged crimes in this case.

248. Furthermore, the definition of this crime of genocide has been universal, predictable and constant, being defined identically in the Genocide Convention and the ECCC Law.

249. The Pre-Trial Chamber finds that the Co-Investigating Judges correctly applied the standard of the principle of legality in relation to the charge of genocide and this part of the appeal ground is dismissed.

Crimes Against Humanity

250. Paragraph 1313 of the Closing Order provides: "[c]rimes against humanity were part of the international law applicable in Cambodia at the relevant time."

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[465] *The Crime of Genocide*, UN G.A. Res. 96(I), adopted on 11 December 1946.
[466] "Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)", *ICJ Reports* 16, 28 May 1951 quoted in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), ICJ Reports* 226, 8 July 1996, para. 31.

251. The Pre-Trial Chamber notes that, in this ground of appeal, the Co-Lawyers do not challenge the existence in law of the crimes against humanity at the relevant time. They argue that the Co-Investigating Judges erred in finding that "liability for crimes against humanity would be sufficiently accessible with particular regard to the World War II trials held in Nuremberg and Tokyo."[467]

252. The Pre-Trial Chamber observes that as far as accessibility and foreseeability are concerned, the Co-Investigating Judges' reason in paragraph 1306 of the Closing Order "[w]ith respect to crimes against humanity, their prohibition under customary law is considered to have been sufficiently accessible to the Charged Persons, with particular regard to the World War II trials held in Nuremberg and Tokyo."

253. Without applying the facts to the current case, the Pre-Trial Chamber shall examine merely whether the Co-Investigating Judges have adduced evidence that shows that the Charged Persons were reasonably likely to have been aware of the state of international law in relation to crimes against humanity at the relevant time. The Pre-Trial Chamber, reading the paragraphs of the Closing Order 1306 and 1313 together, finds that the Co-Investigating Judges have met the objective test. Thus, an examination of the sources used in support of paragraph 1313 of the Closing Order shows that in 1946, the United Nations General Assembly unanimously affirmed the Nuremberg principles[468] and in 1950 the International Law Commission codified the Nuremberg Principles pursuant to the General Assembly's Direction of 1947.[469] These facts show that crimes against humanity, which are enumerated in the Nuremberg principles, had, by 1950, attained customary status, which is a strong indication that the requirements of accessibility and foreseeability are met.[470] The Pre-Trial Chamber notes that Principle I of the Nuremberg Principles reads: "any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment." In addition,

[467] *See* summary of Co-Lawyers arguments in para 206 above.
[468] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236, 11 December 1946.
[469] Formulation of the Principles Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, U.N. G.A. Res. 177(II), 123rd Pl. Mtg., 21 November 1947, ("Formulation of the Nuremberg Principles")
[470] Formulation of the Nuremberg Principles.

in late 1950, the General Assembly resolved that the Nuremberg Principles be sent to the governments of Member States, and that any comments and observations made as a result would assist in the preparation of a future draft code of offences against the peace and security of mankind.[471] The Pre-Trial Chamber notes that the definition of crimes against humanity in the Nuremberg Principles, which is similar to that in the ECCC Law, was sufficiently specific by 1975 under customary international law. The Pre-Trial Chamber finds that such circumstances, as the ones mentioned in the Closing Order, combined with the appalling nature of such crimes, would have been putting individuals on notice that they would be subject to prosecution for crimes against humanity.

254. The Pre-Trial Chamber finds that the Co-Investigating Judges correctly applied the standard of the principle of legality in relation to the charge of crimes against humanity and this part of the appeal ground is dismissed.

Grave Breaches:

255. Paragraph 1316 of the Closing Order reads:

> "Grave Breaches" of the Geneva Conventions provisions of 12 August 1949 were part of the international law applicable in Cambodia at the relevant time. These Conventions entered into force on 21 October 1950. Cambodia acceded thereto on 8 December 1958 as a sovereign State and there is no record of any legal challenge with respect to that accession.

256. The Pre-Trial Chamber, having examined the sources used by the Co-Investigating Judges to support their finding in paragraph 1316 of the Closing Order finds that their conclusion that Grave Breaches existed in law at the time of the indictment is substantiated. It is clear that the Geneva Conventions were treaty law which was unquestionably binding on Cambodia, by its accession, at the time of the alleged offences in 1975-79. This Co-Investigating Judges' finding is sufficient to fulfill one of the requirements of the principle of legality.[472] The Pre-Trial Chamber also notes that

[471] Formulation of the Nürnberg Principles, U.N. G.A. Res. 488(v), 320th Pl. Mtg., 12 December 1950.
[472] *See* in addition Pre-Trial Chamber's observations in para. 244 above in this decision.

all of the four Geneva Conventions contain a provision explicitly providing that grave breaches of the Conventions merit universal, mandatory criminal jurisdiction among the contracting states.[473] In addition, the *jus cogens* nature of crimes of grave breaches of the Geneva Conventions alleged in the Closing Order is sufficient to justify prosecution, regardless of the specific provisions of Cambodia's domestic law.[474]

257. As far as accessibility and foreseeability are concerned, the Pre-Trial Chamber finds that the Co-Investigating Judges' conclusion in paragraph 1305 of the Closing Order that because the grave breaches Conventions were "legally binding on Cambodia" it "can be considered to have been sufficiently accessible to the Charged Persons as members of Cambodia's governing authorities" is also correct. The Pre-Trial Chamber notes that the Geneva Conventions explicitly prohibit and identify offences listed in Article 6 of the ECCC Law and the Closing Order as criminal offences.[475] The fact that Grave Breaches were criminal was also accessible to the Accused because of the pre-existing customary nature of the rule which the Geneva Conventions codified and the nature of the rights allegedly infirged.

258. The Pre-Trial Chamber finds that the Office of the Co-Investigating Judges correctly applied the standard of principle of legality in relation to the charge of Grave Breaches and this part of the appeal ground is dismissed.

Modes of criminal responsibility:

259. Paragraph 1318 of the Closing Order reads:

> All of the modes of criminal responsibility set out in Article 29 (new) of the ECCC Law were part of international law applicable in Cambodia at the relevant time. This article provides that any suspect who committed (including

[473] Geneva Convention III, Article 129; Geneva Convention IV, Article 146.
[474] *See, e.g., Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ (ICJ Reports 1996), 8 July 1996, p. 226, para. 79 (holding that the Geneva Conventions "are to observed by all states whether or not they have ratified the conventions [...] because they constitute intransgressible [sic] principles of international customary law.").
[475] Geneva Convention III, Article 130; Geneva Convention IV, Article 147.

> by way of a joint criminal enterprise: JCE I or II); ordered; instigated; planned; or aided and abetted any of the crimes provided for in the ECCC Law shall be individually responsible for the crime.

260. The Pre-Trial Chamber, having examined the sources used by the Co-Investigating Judges to support their finding in paragraph 1318 of the Closing Order finds that their conclusion that all modes of liability existed in law at the time of the alleged offences is substantiated.[476]

261. As far as accessibility and foreseability are concerned, the Pre-Trial Chamber notes that paragraph 1307 of the Closing Order reads:

> The modes of criminal responsibility set out in the ECCC Law were partly incorporated in the 1956 Cambodian Penal Code as set out below, and as such these modes of liability were sufficiently accessible to the Charged Persons. The remaining modes of liability, namely joint criminal enterprise, instigation and superior responsibility, were also set out under international law through sources such as the trials following World War II and as such can be considered sufficiently accessible to the Charged Persons.

262. The Pre-Trial Chamber observes that in this Ground of Appeal, the Co-Lawyers do not challenge the existence of the modes of liability in law at the relevant time, they rather complain that "it would not be foreseeable to Mr. Ieng Sary that he could be tried in a domestic court for [...] forms of liability which did not exist in Cambodian domestic law at the relevant time. These [...] forms of liability would also not have been accessible to him simply because they may have existed in some post-World War II jurisprudence."

263. The Pre-Trial Chamber reiterates that for the foreseeability and accessibility test to be complied with in the ECCC it will apply the international standard for the principle of legality, therefore the fact that the notion of command responsibly existed in customary international law is a strong indication thereof. The Pre-Trial Chamber provides more

[476] For more details on Pre-Trial Chamber's findings in this respect, see Section discussing the merits of Ground eleven of Appeal below in this decision.

detailed reasoning in this respect in the Section discussing the merits of Ground eleven of Appeal below in this decision.

264. The Pre-Trial Chamber finds that the Co-Investigating Judges correctly applied the standard of the principle of legality in relation to the modes of liability and this part of the appeal ground is dismissed.

265. This Ground of Appeal is dismissed.

4. Ground Five (National Crimes)

Summary of submissions:

266. The Co-Lawyers submit that the Co-Investigating Judges erred in law by holding that the ECCC has jurisdiction to apply Article 3 (new) of the ECCC Law (national crimes). The errors alleged by the Co-Lawyers include:

a. The application of Article 3 (new) of the ECCC Law violates Ieng Sary's right to be treated equally before the law, guaranteed in Article 31 of the Cambodian Constitution, Article 3 of the CPC, Article 7 of the Universal Declaration of Human Rights ("UDHR") and Article 14(1) of the ICCPR, as said provision only applies when the crimes are charged before the ECCC;
b. The application of Article 3 (new) of the ECCC Law violates the principle of non-retroactivity enshrined in Article 6 of the 1956 Penal Code, Article 11(2) of the UDHR and Article 15(1) of the ICCPR;
c. It was an error for the Co-Investigating Judges to apply Article 3 (new) of the ECCC Law despite a disagreement between them;
d. The Co-Investigating Judges did not set out the facts which support the application of Article 3 (new) of the ECCC Law and failed to state which form of liability is applied to each of the crimes listed.

267. The Co-Prosecutors responded that "the extension of the statute of limitation does not violate the principle of legality because the crimes that [...] Ieng Sary [is] indicted with at the ECCC are exactly the same that were in existence between 1975 and 1979".[477] In any event, the criminalisation of these crimes belongs to the general principles of law recognized by the community of nations; hence, pursuant to Article 15(2) of the ICCPR, the principle of legality cannot bar their prosecution.[478] They argue that the statute of limitation had not expired when it was extended for the first time in 2001 as it was tolled[479] until the establishment of the State of Cambodia in 1993[480] and, in addition, Cambodia has an international obligation to prosecute these crimes which also constitute crimes against humanity, grave breaches of the Geneva Convention and violations of the Torture Convention.[481] They further argue that "[t]he decision to prosecute [Ieng Sary] before an extraordinary procedure conforms to [his] right to equality before the law as this prosecution is based on internationally recognized reasonable and objective criteria"[482] and that the Cambodian Constitutional Council has already confirmed the constitutionality of the extension of the statute of limitations, notably in the light of Article 31 of the Cambodian Constitution, which enshrines the right to be equal before the law.[483]

268. The Co-Lawyers for the Civil Parties (Group ASF France) responded along the same lines as the Co-Prosecutors, arguing that the statute of limitation was tolled until 1993 and had therefore not expired in 2001 when it was extended[484] and that the Trial Chamber's decision did not prevent the Co-Investigating Judges from sending Ieng Sary to trial for national crimes.[485] They add "the Accused ought to be indicted for the domestic crimes in order to avoid the risk of acquittal at trial on all other charges".[486]

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[477] Co-Prosecutors Response, para. 87. *See also* paras 90-94.
[478] Co-Prosecutors Response, paras 95-97.
[479] *Tolling* is a legal doctrine which allows for the pausing or delaying of the running of the period of time set forth by a statute of limitations.
[480] Co-Prosecutors Response, para. 87. *See also* paras 107-114.
[481] Co-Prosecutors Response, para. 87. *See also* paras 119-121.
[482] Co-Prosecutors Response, para. 88. *See also* paras 125-130.
[483] Co-Prosecutors Response, paras 100-102.
[484] Civil Party Lawyers Observations I, paras 38-39.
[485] Civil Party Lawyers Observations I, para. 41.
[486] Civil Party Lawyers Observations I, para. 42.

269. The Co-Lawyers for Ieng Sary reply that "the scope of international fair trial principles is broader than what is expressly stated in the ICCPR" and include the prohibition of retroactive application of the law, as part of the right to legal certainty.[487] They argue that Cambodia's position as to whether the statute of limitation can be extended before its expiry is uncertain[488] and that the Decision of the Constitutional Council does not mean that the ECCC has jurisdiction to apply Article 3 (new) of the ECCC Law.[489] They further submit that the statute of limitation has not been tolled by the Cambodian legislature and, indeed, that the Cambodian justice system was "functioning" since 1979.[490] In the Co-Lawyers' view, "there is no customary international obligation not to recognize statutes of limitations" and the issue here is whether "jurisdiction exists to try analogous offences as domestics crimes on the basis of the underlying domestic legal framework".[491] Finally, they argue that the issue pertaining to the right to equal treatment "is not who may be tried at the ECCC, but what law may be applied", referring to the fact that the ECCC is applying a law which is no longer applicable in other Cambodian Court.[492]

270. The Co-Lawyers for Ieng Sary replied to the observations filed by the Co-Lawyers for the civil party by essentially reiterating the arguments raised in response to the Co-Prosecutors and emphasising that "[i]f valid law with which to charge an accused does not exist or no longer exists, law may not be created or reactivated to fill the gap".[493]

Discussion:

271. The Pre-Trial Chamber considers first the third argument raised by the Co-Lawyers, namely whether the Co-Investigating Judges committed an error by sending Ieng Sary to trial for the national crimes despite a disagreement between them, before determining

[487] Ieng Sary Reply, para. 41. *See also* para. 43.
[488] Ieng Sary Reply, para. 44.
[489] Ieng Sary Reply, paras 48-51.
[490] Ieng Sary Reply, paras 54-57.
[491] Ieng Sary Reply, paras 58-59.
[492] Ieng Sary Reply, paras 62-63.
[493] Ieng Sary Reply to the Civil Party Lawyers Observations I, para. 17.

whether the application of Article 3 (new) of the ECCC Law would violate the principle of legality or the accused's right to be treated equally before the law and, finally, whether the indictment sufficiently states the facts and modes of liability applicable to these crimes.

Whether the Co-Investigating Judges erred by sending Ieng Sary to trial for national crimes despite a disagreement between them

272. The Pre-Trial Chamber observes that in the section of the Closing Order dealing with the national crimes, the Co-Investigating Judges gave a chronological statement of facts in relation to the treatment of the issue in Case 001 whereby the various ECCC instances seised of the case have adopted different views. They emphasised that the Trial Chamber, in the absence of an affirmative majority, could not consider the guilt or innocence of the accused for these crimes as the international judges were unable to conclude that the limitation period applicable to domestic crimes had been suspended between 1979 and 1993 and they found that prosecution was no longer possible after the promulgation of Articles 3 and 3 (new) of the ECCC Law, i.e. in 2001 and 2004 respectively.[494] In these circumstances, the Co-Investigating Judges, who were requested by the Co-Prosecutors to send the accused for trial for the national crimes, found themselves "in a procedural stalemate, which is partly due to the hybrid structure of the ECCC".[495] They therefore adopted the following approach:

> They [the Co-Investigating Judges] have endeavoured to issue a common text on the questions of being tried twice for the same facts, the limitation period for the relevant national crimes, and on the effect of the Constitutional Council decision of 12 February 2001, but have not been able to. In this context, in order to resolve the stalemate, without having recourse to the procedure contained in the rules regarding disagreements, which would put into peril the entire legal process, the Co-Investigating Judges, taking into account their obligation to make a ruling within a reasonable time under the terms of the Rule 21.4 and the waiting of the victims who wish that there be an end to the investigation as soon as possible they have decided by mutual agreement to

[494] Closing Order, para. 1570.
[495] Closing Order, para. 1574.

> grant the Co-Prosecutors' requests, leaving it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956.[496]

273. The Co-Investigating Judges conclude that "[i]n view of all of these elements, they will order the sending of the Charged Persons before the Trial Chamber for charges of murder, torture and religious persecution, crimes defined and punishable by the Penal Code 1956."[497]

274. The Pre-Trial Chamber observes that the Co-Investigating Judges could not agree on a legal reasoning on the issue as to whether the accused can be send for trial for the national crimes. However, they "have decided by mutual agreement to grant the Co-Prosecutors' requests"[498] and did agree on the conclusion to send the accused for trial for the national crimes.[499] This course of action, contrary to the Co-Lawyers' assertion, does not amount to a violation of the accused's right to be presumed innocent nor to an *ultra vires*[500] decision for failure to have followed the disagreement procedure provided for in Internal Rule 72. The Co-Investigating Judges are under no obligation to seise the Pre-Trial Chamber when they do not agree on an issue before them, the default position being that the "investigation shall proceed" which is coherent with the approach taken by the Co-Investigating Judges in the current case.

275. The Pre-Trial Chamber recalls that in the case of requests for investigative action made to the Co-Investigating Judges and as appealed to the Pre-Trial Chamber, actions taken or requests granted by only one investigating judge have been upheld. In the Decision on Nuon Chea's and Ieng Sary's Appeal Against the Co-Investigating Judges Order on Requests to Summons Witnesses[501], the Pre-Trial Chamber considered and dismissed the submissions made by the Charged Persons Nuon Chea and Ieng Sary that the request to interview the former King of Cambodia and six government officials could

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[496] Closing Order, para. 1574.
[497] Closing Order, para. 1576.
[498] Closing Order, para. 1574.
[499] Closing Order, para. 1576.
[500] The meaning in English of the Latin term *ultra vires* is: "Unauthorized; beyond the scope of power allowed or granted [..] by law"; Black's Law Dictionary.
[501] Decision on Nuon Chea's and Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8.

not be properly granted if not agreed to by both Investigating Judges. Since only one Investigating Judge signed the invitation or summons to the specified persons, the Pre-Trial Chamber had to consider whether this course was permissible. The Pre-Trial Chamber concluded that it would not concern itself with the disagreement between the Co-Investigating Judges because it was not a factor that had prevented investigative action from taking place.[502]

276. The Pre-Trial Chamber further recalls its previous determination regarding the disagreement between the Co-Prosecutors pursuant to Internal Rule 71(2) whereby the Pre-Trial Chamber was seised with a disagreement between the national and international Co-Prosecutors concerning the submissions of two new Introductory Submissions to the Co-Investigating Judges for judicial investigation. The Pre-Trial Chamber found that the scope of review in that case was limited to settling the specific issues upon which the Co-Prosecutors disagreed.[503] The Pre-Trial Chamber noted that the law applicable before the ECCC contemplates disagreements and that it was foreseen that this extended to disagreements between the Co-Prosecutors.[504] In addition, the Pre-Trial Chamber considered that the law applicable before the ECCC "clearly indicate[s] that one Co-Prosecutor can act without the consent of the other Co-Prosecutor if neither one of them brings the disagreement before the Pre-Trial Chamber within a specific time limit".[505] As such, the fact that there was a disagreement did not render the recommendation of the international Co-Prosecutor invalid.

277. Although the argument raised by the Co-Lawyers must fail, the Pre-Trial Chamber finds that the situation described above led the Co-Investigating Judges to issue an order that lacks reasoning. The Pre-Trial Chamber shall therefore, in the light of the arguments raised by the Co-Lawyers, conduct its own analysis to determine whether the ECCC has jurisdiction over the national crimes and thus if the Co-Investigating Judges erred in

[502] Decision on Nuon Chea's and Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Requests to Summons Witnesses, 8 June 2010, D314/1/8, para. 23
[503] Considerations of the Pre-Trial Chamber Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, ("Considerations Regarding the Disagreement Between the Co-Prosecutors") para. 24.
[504] Considerations Regarding the Disagreement Between the Co-Prosecutors, para. 16.
[505] Considerations Regarding the Disagreement Between the Co-Prosecutors, para. 16.

sending the accused for trial for these crimes. As a result, it shall substitute its reasoning to that of the Co-Investigating Judges.

Whether the application of Article 3 (new) of the ECCC Law violates the principle of non-retroactivity

278. The Pre-Trial Chamber recalls that under Article 3 (new) of the ECCC Law, the ECCC has jurisdiction to try accused persons for homicide, torture and religious persecution under the 1956 Penal Code.[506] During the period of the temporal jurisdiction of the ECCC, namely 17 April 1975 to 6 January 1979, the 1956 Penal Code was in effect.[507] "Article 109 of the 1956 Penal Code establishes a ten year limitation period for felonies, five years for misdemeanours and one year for petty offences. These run from the date of the commission and are interrupted by judicially-ordered investigations."[508] "On a plain reading of Articles 109 to 114 of the 1956 Penal Code [...], in the absence of any act of investigation or prosecution which interrupted the limitations period in relation to the domestic crimes",[509] this period expired ten years after the indictment period, namely between 17 April 1985 to 6 January 1989.[510] Finally, "Article 3 and Article 3 (new), which were promulgated in 2001 and 2004 respectively, added an initial 20 years and subsequently 30 years to the limitation period, thus extending this total period to 40 years".[511]

279. By Article 3 and 3 (new) of the ECCC Law, the National Assembly of Cambodia has extended the statute of limitations for the national crimes of murder, torture and religious persecutions as defined in the 1956 Penal Code, applicable during the temporal jurisdiction of the ECCC, of 20 and then 30 years. The legality of this

[506] Article 3 (new) of the ECCC Law.
[507] Case File No. 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection concerning the Statute of Limitations for Domestic Crimes, 26 July 2010, E187 ("Decision on Statute of Limitations for Domestic Crimes"), para. 12.
[508] Decision on Statute of Limitations for Domestic Crimes, para. 10.
[509] Decision on Statute of Limitations for Domestic Crimes, ftn. 13 ("Articles 112-114 of the 1956 Penal Code providing that any act of investigation or of prosecution interrupts the time limit, which resumes after the last such act (in the case of a felony), for a new period of 10 years.")
[510] Decision on Statute of Limitations for Domestic Crimes, para. 12.
[511] Decision on Statute of Limitations for Domestic Crimes, para. 13; Article 33 (new) (2) of the ECCC Law.

extension under Cambodian law was confirmed by the Constitutional Council on 12 February 2001.[512]

280. The ECCC has no authority to review the legality, with regards to Cambodian law, of the extension of the statutes of limitations by the National Assembly, nor the decision of the Constitutional Council.[513] Hence, Article 3 (new) of the ECCC Law in principle gives the ECCC jurisdiction over national crimes. However, as emphasised in the reasoning of Ground Three above, the ECCC "shall exercise their jurisdiction in accordance with international standard 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". Therefore, the Pre-Trial Chamber shall, in the light of the arguments raised by the Co-Lawyers, determine whether the application of Article 3 (new) violates the principle of legality enshrined in Article 15(1) of the ICCPR.

281. The Pre-Trial Chamber has previously found that the principle of legality is respected where the charged crimes are provided for under the ECCC Law as well where they have existed in national or international law at the time of the alleged criminal conduct. Here, the Co-Lawyers acknowledge that the indicted crimes of homicide, torture and religious persecution set out in Article 3 (new) were criminalised in 1975-1979 and do not dispute that prosecution for these crimes was foreseeable in 1975-1979.[514] They submit that "the issue is that the possibility of prosecuting these crimes more than thirty years into the future did not exist in Cambodian law at the relevant time".[515] In their view, the principle of legality enshrined in Article 15(1) of the ICCPR forbids the retroactive application of law and thus encompasses a protection against the extension of a statute of limitation that had expired. Hence, the Co-Lawyers invite the Pre-Trial Chamber to extend the strict sense of the principle of legality as defined above to

[512] Constitutional Council, Decision No. 040/002/2001, 12 February 2001.
[513] Case File No. 001/18-07-2007-ECCC/OCIJ(PTC01), Decision on Appeal Against Provisianl Detention Order of Kaing Guek Eav alias "Duch", Pre-Trial Chamber, 3 December 2007, C5/45 (where the Pre-Trial Chamber hold that there is "no right for any of its Chambers to review decisions from courts outside the ECCC"). See also the view of the Cambodian Judges in the Decision on Statutes of Limitation, para. 38.
[514] Ieng Sary Appeal, para. 159.
[515] Ieng Sary Appeal, para. 159.

conclude that the period during which a crime can be prosecuted shall also be foreseeable and accessible to an accused at the time of the commission of such crime.[516]

282. As noted by the international Judges in the Trial Chamber in Case 001, the principle of legality under Article 15(1) of the ICCPR does not "refer directly to limitation periods. [It does] not unequivocally interpret the scope of international fair trial principles in relation to the retroactive consideration or repeal of statutes of limitations."[517] The Pre-Trial Chamber notes however that the ECtHR has considered that the reactivation of a criminal action which had already become subject of limitation might violate the principle of foreseeability inherent to the principle of legality enshrined in Article 15(1).[518] This is not the case however, where the extension of the statute of limitations occurs before its expiry.[519] Indeed, the Co-Lawyers do not argue that such extension would violate the principle of legality. As pointed out by the Trial Chamber and further developed below, national practice further supports the position that statutes of limitations can be extended before their expiry[520]. The Pre-Trial Chamber considers that the extension of the statute of limitation before its expiry is a matter of State policy and does not trigger any issue with regards to the principle of legality.

283. The Pre-Trial Chamber will now turn to determine whether the national crimes were time barred when the statute of limitation was extended in 2001 by the adoption by the National Assembly of the ECCC Law.

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[516] Ieng Sary Appeal, para. 164. The Pre-Trial recalls that it is separately seised of the appeal against the Closing Order of the accused Ieng Thirith who also challenges the ECCC's jurisdiction over national crimes, notably on the basis that the extension of the statute of limitation by Article 3 (new) of the ECCC Law violates the principle of legality. Considering that Ieng Thirith did not present any argument to explain that the principle of legality shall be seen in a broader sense than its common acceptation, the Ground of Appeal was addressed, in the Decision on Ieng Thirith Appeal against the Closing Order, in the light of the strict sense of the principle of legality, as described in the Section discussing merits of Ground three of Appeal above in this decision.

[517] Decision on Statute of Limitations for Domestic Crimes, para. 42.

[518] ECtHR, *Kononov v. Latvia*, Application no. 36376/04, Judgement (Referral to the Grand Chamber), 24 July 2008, paras 144-146. This conclusion has been undisturbed by the Grand Chamber: Judgement, 17 May 2010, paras 228-233.

[519] ECtHR, *Coëme and others v. Belgium*, Applications nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, Judgement, 22 June 2000, paras 149-151.

[520] Decision on Statute of Limitations for Domestic Crimes, para. 17.

284. The Pre-Trial Chamber observes that the 10 year period prescription for the national crimes provided for in the 1956 Penal Code had elapsed by the time the ECCC Law was adopted, in 2001. The ECCC Law only provides for an extension of the statute of limitation for the future, without explicitly addressing the issue of whether the crimes were time-barred at the time and thus the law had the effect of reopening cases after the expiry of the statute of limitation or whether the prescription has been tolled. The Pre-Trial Chamber, which is asked to apply Article 3 (new) of the ECCC Law, shall therefore make such determination, in the light of its obligation to ensure respect of the principle of legality.

285. The underlying principle of statutes of limitations is to provide for a time frame within which criminal proceedings must be instituted. As such, it presupposes that judicial institutions operate effectively, so proceedings can be instituted.[521] State practice contains several examples where statutes of limitation were suspended on the basis that the judicial institutions were not functioning, notably as a result of an ongoing conflict or a dictatorship regime.[522] Suspension of statutes of limitations when judicial

[521] *See e.g.:* Czech Republic, 1993 Act on the illegality of the Communist Regime, English translation in N.J. Kritz, *Transitional Justice: How emerging democracies reckon with former regimes*, United States Institute of Peace Press, 1995, vol. III, (stating that "the statute of limitations period for crimes shall not include the period from 25 February 1948 to 25 December 1989 if a legally effective conviction or acquittal from an accusation did not take place due to political reasons incompatible with the basic elements of the legal order of a democratic state"); *Brown v. Hiatts,* 82 U. S. 177 (1872) (stating that "Statutes of Limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor.")

[522] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 20 1945, 3 Official Gazette Control Council for Germany 50-55 (1946), Art. II(5) (which provides that "[i]n any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945"); Official Journal for the British Occupied Zone (*Verordnungsblatt für die Britische Zone),* 23 May 1947, p. 65, Art. 3. ("The provisions on statutory limitations, with respect to the timeframe from 30 January 1933 until 8 May 1945, do not bar prosecution and punishment. The prescription is deemed to be suspended for that period.); Official Journal for the American Occupied Zone, 31 May 1946, containing four statutes which all have an identical provision on statutes of limitations in their Art. 2(3) ("In criminal proceedings (...) with regard to the crimes of one of the crimes mentioned above, the defendant is not entitled to benefit from the statute of limitation during the period from 30 January 1933 until 1 July 1945. For that period of time, the statute of limitation is deemed to be suspended."); Official Journal for the French Occupied Zone, 23 December 1946, p. 151 ("When, as a consequence of measures indicated in paragraph 5 have not taken place or have been postponed, or have not taken place or have been postponed because the perpetrator was protected by the NSDAP or one of its allied sections or related associations, the expiration of the prescription periods on these grounds until the entering into force of this decree, do not impede criminal prosecution, provided that criminal prosecution will be initiated within six month after the entering into force of this statute."); United States, An act in relation to the limitation of actions in certain cases, 11 June 1864 (stating that "[w]henever, after such action –

institutions are not functioning is also perceived as being necessary to protect the victims' right to reparation of serious violations of human rights resulting from crimes such as the ones subject to the jurisdiction of the ECCC, through prosecution of the authors of the crimes.[523] The Pre-Trial Chamber therefore agrees with and adopts the

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civil or criminal – such have accrued, and such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action") reproduced and applied in *Stewart v. Kahn*, 78 U.S. 11 (1870) E9/8.5; US Supreme Court, *Hanger v. Abbott,* 73 U.S. 532, 1867 WL 11246, E9/7.14 (finding that the statute of limitations (for a civil claim) did not run while the courts in Arkansas were closed on account of a three-years rebellion); US Supreme Court, *Brown v. Hiatts,* 82 U. S. 177 (1872) 34; US Court of Appeal, *Jean v. Dorelien*, US 11th Circuit, No. 04-15666, 1 December 2005 ("We note that every court that has considered the question of whether a civil war and a repressive authoritarian regime constitute 'extraordinary circumstances' which toll the statutes of limitations of the [Alian Tort Claim Act] and the [Torture Victim Protection Act] has answered in the affirmative."); Czech Republic, 1993 Act on the illegality of the Communist Regime, English translation in N.J. Kritz, *Transitional Justice: How emerging democracies reckon with former regimes*, United States Institute of Peace Press, 1995, Vol. III, p. 620; Czech Constitutional Court, Decision on 1993 Act on the illegality of the communist regime, 21 December 1993, English translation in N.J. Kritz, *Transitional Justice: How emerging democracies reckon with former regimes*, United States Institute of Peace Press, 1995, Vol. III, p. 620 (confirming the validity of the law, notably in the light of the principle of legality); Netherlands, 1943 Decree on criminal law in exceptional circumstances, adopted in 1947, Art. 27(a) (which retroactively tolled the prescription for war crimes from the time of their commitment until the entering into force of the Decree).

[523] Art. 2(3) of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity" (emphasis added); IACtHR, *Case of Myrna Mack Chang v. Guatemala*, Judgement (Merits, Reparations and Costs), 25 November 2003, paras 276-277 (stating that " the State must ensure that the domestic proceeding to investigate and punish those responsible for the facts in this case attains its due effects and, specifically, it must abstain from resorting to legal concepts such as amnesty, extinguishment, and the establishment of measures designed to eliminate responsibility."); IACtHR, *Barrios Altos Case*, Judgement, 14 March 2001, para. 41 (stating that "provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."). *See also*: Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/1179*, UN Doc. E/CN.4/Sub.2/1996/17, 24 May 1996, Annex, para. 9 ("Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations".); Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Question of the impunity of perpetrators of human rights violations (civil and political) – Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997, Annex 1, Principle 24 ("Prescription - of prosecution or penalty - in criminal cases shall not run for such period as no effective remedy is available.").

Trial Chamber unanimous finding that statutes of limitation do not run where the judicial institutions are not functioning.[524]

286. The Pre-Trial Chamber further agrees with and adopts the finding of the three-Judge majority of the Trial Chamber Cambodian Judges that "from 1979 until 1982, the judicial system of the People's Republic of Kampuchea did not function at all" and, "until the Kingdom of Cambodia was created by the promulgation of its Constitution on 24 September 1993, a number of historical and contextual considerations significantly impeded domestic prosecutorial and investigative capacity".[525] It is observed that the Trial Chamber majority Judges attributed the lack of national judicial capacity between 1979 until 1982 to "the destruction of the judicial system by the Democratic Kampuchea regime" of which the accused is alleged to be one of the senior leaders and acknowledged that "a lengthy period was needed to re-establish a judicial system and to educate lawyers, prosecutors and judges".[526] They further state that domestic prosecution and investigation of the crimes allegedly committed by the Democratic Kampuchea regime was impeded between 1982 and 1993 by the ongoing civil war waged by the Khmer Rouge, who were occupying part of the country and still considered as one of its representative by the international community, and the resulting difficulty in achieving peace while bringing the responsible of crimes committed during the DK era to justice.[527] The Pre-Trial Chamber agrees with and adopts the consequent conclusion of the Cambodian Judges in the Trial Chamber in their opinion that "the limitation period with respect to the domestic crimes [...] started to run, at the earliest, on 24 September 1993".[528] It further notes that the accused cannot benefit from the passage of time for such period where he is alleged to be in part responsible for the incapacity of the judicial system to conduct investigation and prosecution.

[524] Decision on Statute of Limitations for Domestic Crimes, paras 14, 16-17 (opinion of the three Cambodian judges), paras 27 and 29 (opinion of the two international judges).
[525] Decision on Statute of Limitations for Domestic Crimes, paras 19, 20.
[526] Decision on Statute of Limitations for Domestic Crimes, para. 19.
[527] Decision on Statute of Limitations for Domestic Crimes, para. 20. The Co-Lawyers for Ieng Sary themselves argue that Ieng Sary's defection to the government in 1996 largely contributed to bring an end to the civil war: Ieng Sary Appeal, para. 59.
[528] Decision on Statute of Limitations for Domestic Crimes, para. 25.

287. The Pre-Trial Chamber finds that the 10 year statute of limitation of the 1956 Penal Code, which started to run on 24 September 1993, had not expired in 2001. Therefore, the extension by the National Assembly in 2001 and 2004, respectively for 20 and then 30 years, did not violate the principle of legality.

Whether Article 3 (new) of the ECCC Law violates Ieng Sary's right to be treated equally before the law

288. The Pre-Trial Chamber does not find that the Co-Investigating Judges' decision to confirm jurisdiction with respect to domestic crimes charged under the 1956 Penal Code is in violation of Ieng Sary's right to equality before the law because the extension of the statute of limitations under Article 3 (new) of the ECCC Law only applies when those crimes are charged at the ECCC.[529]

289. In the context where Article 3 (new) of the ECCC generally applies to all individuals falling within the jurisdiction of the ECCC, the Pre-Trial Chamber considers that Ieng Sary's challenge to the ECCC's subject matter jurisdiction with respect to domestic crimes under the 1956 Penal Code on the basis of an alleged unequal treatment amounts to challenging the ECCC's limited personal and temporal jurisdiction with respect to those crimes. Under Article 2 (new) of the ECCC Law, the ECCC has jurisdiction over "*senior leaders of Democratic Kampuchea and those who were most responsible*" for the crimes and serious violations of Cambodian laws related to crimes [. . .] that were committed during the period *from 17 April 1975 to 6 January 1979.*"[530] Thus, the question before the Pre-Trial Chamber is whether this subscribed jurisdiction results in the ECCC being out of compliance with its obligations under Article 33 (new) of the ECCC Law, which stipulates that the exercise of jurisdiction by the ECCC shall be "in accordance with international standards of justice, fairness and due process of law, as set out in Article 14" of the ICCPR. Specifically, whether it violates Article 14(1) of the

[529] Ieng Sary Appeal, para. 155.
[530] Article 2 (new) of the ECCC Law (emphasis added).

ICCPR which requires that "[a]ll persons shall be equal before the courts and tribunals",[531] and unfairly discriminates against the accused.

290. The Pre-Trial Chamber does not so find. The Chamber notes that although the Human Rights Committee has determined that "[e]quality before courts and tribunals [. . .] requires that similar cases are dealt with in similar proceedings",[532] it has not found that "extraordinary" or "special" courts with limited or selective jurisdiction are therefore, by their very nature, in violation of Article 14(1) of the ICCPR.[533] Rather, as with any other courts, the important question has been "whether they ensure compliance with the fair trial requirements of Article 14."[534] An examination of the ECCC Law and the Internal Rules leads to the conclusion that the ECCC does ensure such compliance. For example, the fair trial guarantees in Article 14 have been adopted almost verbatim in Article 35 (new) of the ECCC Law. In addition, other fair trial guarantees appear in Internal Rule 21, which highlights the "fundamental principles" that apply before the ECCC to safeguard the interests of charged persons.

291. Furthermore, there are objective and reasonable grounds for the ECCC's limited personal and temporal jurisdiction as "Extraordinary Chambers" in the Cambodian legal system. The Human Rights Committee has stated that under Article 14(1) of the ICCPR, "[i]f [...] exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction."[535] The Pre-Trial Chamber finds that the decision to limit the ECCC jurisdiction was not made arbitrarily or by the Government of Cambodia alone, but was based on the recommendation of a Group of Experts and was affirmed by the United Nations. That decision was in line with a basic principle underlying international criminal law that those responsible for

[531] Article 14(1) of the ICCPR.
[532] General Comment No. 32, para. 14.
[533] *Prosecutor v. Tadić*, IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995 ("*Tadić* Decision on Jurisdiction"), para. 45 (citing General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988); *Cariboni v. Uruguay,* H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40).
[534] *Tadić* Decision on Jurisdiction, para. 45; *Prosecutor v. Milosevic*, IT-99-37-PT, "Decision on Preliminary Motions", Trial Chamber, 8 November 2001, paras 9-10.
[535] General Comment No. 32, para. 14.

the most serious violations of individual human rights resulting in mass atrocities that amount to international crimes must be held accountable. In light of the nature of these crimes requiring mass mobilisation, planning and execution, it was reasonable for retribution and deterrence reasons to limit jurisdiction to punishment of senior leaders and those most responsible for the mass atrocities committed in a specific, short period of Cambodia's history. It is reasonable to set up a specially constituted court such as the ECCC to try alleged senior-level perpetrators for these types of crimes where the normal court system may not have the capability or resources for doing so in a fair and unbiased manner, or where there is a significant risk that such local trials could result in post-conflict instability. Finally, in light of the limited resources available to the ECCC, it was reasonable to devote this court's energies towards trial of those most responsible for the mass atrocities committed from 1975-1979.

292. The Pre-Trial Chamber finds that the ECCC Law, including Article 3 (new) applies equally to any individual who meets the requirements, established on objective and reasonable criteria, to fall under the personal and temporal jurisdiction of the ECCC. Hence, the argument of the Co-Lawyers shall be dismissed.

Whether the Co-Investigating Judges did not set out the facts which support the application of Article 3 (new) of the ECCC Law and failed to state which form of liability is applied to the national crimes.

293. The Pre-Trial Chamber observes that the Co-Investigating Judges did not explicitly state the facts and modes of liability underlying the charges for the national crimes as they did for the international ones.[536] However, the Pre-Trial Chamber shall not address issues pertaining to defects in the indictment[537] but limits its analysis to determine if the lack of specification in the indictment in relation to national crimes shall prevent the

[536] In paragraphs 1336 to 1520 of the Closing Order, the Co-Investigating Judges states in details, for each international crimes, the factual basis leading them to conclude that the legal elements for each of these have been established. In the section on modes of responsibility (paras 1521-1563), the Co-Investigating Judges detail, for each mode of liability, which crimes are being charged.
[537] *See* Section on Admissibility of Appeal above in this decision.

ECCC from exercising jurisdiction and thus prevent the accused from being sent to trial for these crimes.

294. The Co-Investigating Judges' decision to indict the accused for the national crimes implies that they considered that the acts mentioned in "Part Three: Legal Findings", sections "III. Genocide, "IV. Crimes against Humanity" and V. Grave Breaches of the Geneva Conventions 1949"[538] can also be legally characterised as murder, torture and religious persecution under Articles 209, 210, 500, 501, 503 and 508 of the 1956 Penal Code and that there is sufficient evidence that the accused is responsible for these crimes.

295. The accused is, by virtue of the indictment, put on notice of the acts with which he is charged but there is an uncertainty about which specific fact can be legally characterised as a national crime. The situation is the same for the modes of liability. The Co-Investigating Judges state the facts supporting their finding that there is sufficient evidence that the accused have participated in the commission of the crimes charged, and state, for each international crime, the applicable modes of liability.[539] However, they do not state which specific mode of liability is applicable to the national crimes.

296. Reading the Closing Order as a whole, the Pre-Trial Chamber understands that the charges for the national crimes are based on the facts set out in the paragraphs dealing with the corresponding underlying crime as genocide, crimes against humanity or grave breaches of the Geneva Convention.[540] The same holds true for the modes of liability[541],

[538] Corresponding to paragraphs 1336 to 1520 of the Closing Order.
[539] Closing Order, paras 1521-1563.
[540] Facts supporting the charge of murder under the 1956 Penal Code shall be seen as the same as those supporting the charges of genocide by killing (of the Cham and Vietnamese) laid down in paragraphs 1336-1349, murder and exterminationa as crimes against humanity laid down in paragraphs 1373-1390 and wilful killing as a grave breach of the Geneva Convention laid down in paragraphs 1491-1497. Facts supporting the charge of torture under the 1956 Penal Code shall be seen as the same as those supporting the charges of torture as a crime against humanity laid down in paragraphs 1408- 1414 and torture as a grave breach of the Geneva Conventions laid down in 1498-1500. Facts supporting the charge of religious persecution under the 1956 Penal Code shall be seen as the same as those supporting the charges of religious persecution as a crime against humanity laid down in paragraphs 1419-1421.

save for the modes of liability that the Co-Investigating Judges have said to be international, namely commission via a joint criminal enterprise, superior responsibility and instigation, which shall not apply to the national crimes.[542] Whether the facts stated in the indictment can actually be characterised as murder, torture and religious persecution under the 1956 Penal Code is ultimately a question of legal characterisation that is to be determined by the Trial Chamber[543] and bears no effect, at this stage, on the jurisdiction of the ECCC to send the accused for trial in relation to these crimes.

297. The Pre-Trial Chamber finds that Ground Five shall be dismissed in its entirety.

5. Ground Seven (Crimes Against Humanity)

298. In the Section on Admissibility of Appeal above in this decision, the Pre-Trial Chamber found that the following sub-grounds of Ground Seven of the Appeal represent jurisdictional challenges: sub-ground 3 ("*nexus* argument")[544]; sub-ground 10 ("imprisonment argument")[545]; sub-ground 11 ("torture argument")[546]; sub-ground 14 ("rape argument")[547]; sub-ground 15 ("other inhumane acts argument")[548]; sub-ground

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[541] Apart from the international modes of liability, the accused is charged for the crimes of genocide by killings, murder as a crime against humanity and wilful killings as a grave breach of the Geneva Conventions, torture as a crime against humanity and a grave breach of the Geneva Conventions and religious persecution as a crime against humanity under the following modes of liability: planning, as set out in paragraphs 1544-1545; instigating, as set out in paragraphs 1547-1548; aiding and abetting, as set out in pargraphs 1550-1551 and ordering, as set out in paragraphs 1553-1554.

[542] Closing Order, para. 1307. See also Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, para. 22 (where the Co-Investigating Judges stated that "the modes of liability for international crime can only be applied to the international crimes"). This conclusion has not been disturbed in appeal by the Pre-Trial Chamber: JCE Decision, para. 102 (where the Pre-Trial Chamber states that "none of the arguments raised by the parties in the present appeal demonstrate that the Impugned Order is in error in considering that JCE, a form of liability recognized in customary international law, shall apply to international crimes rather than domestic crimes").

[543] Internal Rule 98(2) (providing that the Trial Chamber may change the legal characterisation of the crime as set out in the Indictment, as long as no new constitutive elements are introduced).

[544] Ieng Sary Appeal, paras 188- 189.

[545] Ieng Sary Appeal, paras 205-207.

[546] Ieng Sary Appeal, paras 208-209.

[547] Ieng Sary Appeal, paras 218-219.

[548] Ieng Sary Appeal, para.220.

16 ("forced marriage argument")[549]; sub-ground 17 ("sexual violence argument")[550] and sub-ground 19 ("enforced disappearances argument").[551]

299. The Co-lawyers' arguments in relation to these sub-grounds are briefly introduced in the Section on Admissibility of Appeal above in this decision. In the paragraphs that follow, the Pre-Trial Chamber provides a full summary of parties' submissions followed by a discussion and conclusions on the merits of each sub-ground.

i) Sub-ground 3 (*nexus*):

Submissions:

300. The Co-Lawyers for Ieng Sary assert in their Appeal that the Co-Investigating Judges erred by failing to explain "that a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC.' They suggest that "a nexus with international armed conflict must be included in the applicable definition of crimes against humanity so as not to violate the principle of legality" because, as they argue, "a nexus between the underlying acts and international armed conflict was a requirement of crimes against humanity in customary international law in 1975-79" and "from the 1950s to 1979, there is little evidence of a general practice among states and *opinio juris*[552] that this nexus was no longer a necessary element."[553]

301. In their Response, the Co-Prosecutors submit that '[i]t is doubtful that a nexus between armed conflict and crimes against humanity was ever required as a matter of customary law' as the nexus requirement contained in the Nuremberg Charter pertained merely to the particular jurisdiction of that tribunal without thereby incorporating an additional chapeau element into the crime itself.[554] In the alternative, the Co-Prosecutors submit

[549] Ieng Sary Appeal, para. 223.
[550] Ieng Sary Appeal, para. 225.
[551] Ieng Sary Appeal, para 230.
[552] The meaning in English of the Latin term *opinio juris* is: "the principle that for conduct or a practice to become a rule of customary international law, it must be shown that nations believe that international law (rather than moral boligation) mandates the conduct or practice."; Black's Law Dictionary.
[553] Ieng Sary Appeal, paras 188, 189.
[554] Co-Prosecutors' Response, paras 176, 181

that in any case, the explicit severing of the link to armed conflict for the crimes against humanity of genocide and apartheid constitutes 'a strong indication that this was customary international law during the period between 1975 and 1979.'[555] They insist that this conclusion is reinforced by state practice and *opinio juris*,[556] as evidenced by the 1954 International Law Commission's Draft Code of Offences Against the Peace and Security of Mankind,[557] the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity,[558] and national legislation such as a 1950 Israeli law.[559] Finally, they posit that notwithstanding the absence of submissions on point in Case 001, in the interests of 'judicial efficiency,' the Pre-Trial Chamber should adopt the precedent of the Trial Chamber's judgment in that case.[560]

302. The Pre-Trial Chamber observes that none of the observations filed by the Civil Parties addressed the matter of a nexus between the underlying acts and international armed conflict being a requirement of crimes against humanity in 1975-79.[561]

303. In reply, the Co-Lawyers for Ieng Sary reiterate that crimes against humanity were derived from war crimes and that this was appropriately reflected in the nexus requirement included in the Nuremberg Charter.[562] They contend that the sources relied upon by the Co-Prosecutors are not demonstrative of customary law: the Genocide Convention is immaterial as genocide and crimes against humanity were legally

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[555] Co-Prosecutors' Response, para. 180.
[556] Co-Prosecutors' Response, para. 183.
[557] *Draft Code of Offences against the Peace and Security of Mankind*, Third Report of J. Spiropoulos, Special Rapporteur, Doc. A/CN.4/85, reproduced in *Yearbook of the International Law Commission, 1954, Vol. II*, p. 112-121. See the definition of crimes against humanity in Art. 2(11), omitting a *nexus* requirement: 'Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.'
[558] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, (adopted 26 November 1968, entered into force 11 November 1970), U.N. G.A. Res. 2391 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968), 754 U.N.T.S. 73 (opened for signature 26 November 1968, entered into force 11 November 1970), Art. 1(b) 'Crimes against humanity whether committed in time of war or in time of peace.'
[559] *The Nazi and Nazi Collaborators (Punishment) Law of 1950* (Israel), Art 1(a)(2) and (b): 'Crime against humanity' are defined similarly to the Nuremberg Charter, omitting the nexus requirement; see also *The Crime of Genocide (Prevention and Punishment) Law of 1950* (Israel), Art. 5.
[560] Co-Prosecutors' Response, para. 185; Judgement in Case 001, paras 291-292.
[561] Civil Parties Observations I, II and III.
[562] Ieng Sary Reply, para. 87.

distinct; the Apartheid Convention only entered into force on 18 July 1976 and had not been signed by any Western nations; the 1954 International Law Commission's Draft was directed towards the development of international law rather than its codification; and, the 1968 Statute of Limitations Convention 'garnered the support of less than half the member States of the UN.'[563]

Discussion:

304. The Pre-Trial Chamber notes that the Co-Lawyers do not refer to any specific paragraphs of the Closing Order in relation to this argument. The Pre-Trial Chamber observes that the relevant paragraphs of the Closing Order include 1313-1315, 1350-1478 and 1613. Having examined these paragraphs of the Closing Order, the Pre-Trial Chamber notes that the Co-Investigating Judges charge[564] the Accused with crimes against humanity pursuant to Article 5 of the ECCC Law. In the reasoning part of the Closing Order, in Chapter IV (A) of Part Three, entitled "Legal Findings," the Co-Investigating Judges enumerate the "Chapeau Elements" of Crimes against Humanity as they appear in the second paragraph of Article 5 of the ECCC Law. The Pre-Trial Chamber observes that there is no mention in this part of the Closing Order of an element of a nexus between the underlying acts and armed conflict.

305. Having reviewed the arguments of the parties on this issue, agreeing with the Co-Lawyers that this issue relates to the standard of the principle of legality applied before the ECCC, having seriously considered the impact it may have on the case and having reviewed the relevant sources in law, the Pre-Trial Chamber makes its own assessment as to whether international customary law at the relevant time encompassed conduct without a nexus to an armed conflict.

306. The Pre-Trial Chamber recalls, as noted previously, that the definition of crimes against humanity was first codified in international law under Article 6(c) of the Nuremberg

[563] Ieng Sary Reply, paras 88, 90.
[564] Closing Order, para. 1613.

(IMT) Charter. Embedded within that definition is the so-called armed conflict nexus requirement, which stipulates that the underlying acts constituting crimes against humanity be perpetrated "in execution of or in connection with any crime within the jurisdiction of the Tribunal."[565] This provision imported into the definition a requirement that there be a connection between crimes against humanity and crimes against peace or war crimes as set out in the preceding two paragraphs of the same article. This requirement was also included in the Nuremberg Principles.[566]

307. The Pre-Trial Chamber observes that the ICTY jurisprudence has held that the explicit requirement of a nexus in the Nuremberg Charter and Nuremberg Principles was peculiar to that tribunal. The ICTY Appeals Chamber in *Tadić* held that 'there is no logical or legal basis for this requirement' outside of the Nuremberg context.[567] It concluded that "it is *by now* a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict." The Pre-Trial Chamber observes that, in general terms, it has to show caution in relying to ICTY findings where it discusses the state of customary international law because the cases before ICTY relate to a different point in time from that which is within ECCC's jurisdiction. Also, the Pre-Trial Chamber has to observe the difference between ICTY discussing the state of customary law for the purpose of finding an accurate definition of a crime as opposed to ICTY discussing the state of customary law for the purpose of determining whether a crime existed at a certain time. For the purposes of examining the issues raised in this Appeal, the Pre-Trial Chamber shall examine the state of customary international law in 1975-79 to the extent that it establishes or not the existence of a crime or form of liability at that time.

308. The Pre-Trial Chamber observes that the ICTY Trials Chamber quoted the *Einsatzgruppen* Case in support of the proposition that Control Council Law No. 10

[565] Nuremberg (IMT) Charter, Art. 6(c).
[566] Nuremberg Principles, Principle VI(c).
[567] *Prosecutor v. Dusko Tadic*, IT-94-1-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995, para. 140.

removed the nexus to armed conflict.[568] The ICTY Trial Chamber does not mention later jurisprudence of the Nuremberg Military Tribunal that reaffirmed the war nexus.[569] Moreover, the Pre-Trial Chamber observes that the distant predecessors to crimes against humanity – the preamble of the Declaration of St. Petersburg in 1868[570] and the Martens Clause in the Hague Conventions of 1899[571] and 1907[572] – were firmly based in the laws and customs of war. The Pre-Trial Chamber agrees that the drafters of the Nuremberg Charter ensured a connection to armed conflict in order to avoid allegations that the resulting convictions went beyond that provided for under international customary and conventional law.[573] Thus, at the time of its genesis, crimes against humanity required a nexus to armed conflict.

309. The Pre-Trial Chamber also observes that it is not clear from the material available, whether the nexus was severed prior to, or during, the temporal jurisdiction of ECCC. Thus, the Control Council Law No. 10[574] was essentially domestic legislation enacted

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[568] Nuremberg Military Tribunals ("NMT"), *United States v Otto Ohlendorf et al.*, Case No. 9, NMT Vol. 4. ("*Einsatzgruppen* Case"), p. 499.; *Prosecutor v. Dusko Tadić*, IT-94-1-T, "Decision on the Defence Motion on Jurisdiction", Trial Chamber, 10 August 1995, para. 79.

[569] Nuremberg Military Tribunals, *United States v Friedrich Flick et al.*, Case No. 5, NMT Vol. 6, ("*Flick* Case"), p. 83: 'Acts properly falling within the definition in Law No. 10 are, we believe, punishable under that law when viewed as an occupational enactment, whether or not they were connected with crimes against peace or war crimes. No other conclusion can be drawn from the disappearance of the clause "in execution of or in connection with any crime within the jurisdiction of the Tribunal"' (emphasis added). The removal of the nexus was therefore seen as related to the domestic law status of Control Council Law No. 10; Nuremberg Military Tribunals, *United States v Ernst von Weizsaecker et al.*, Case No. 11, NMT Vol. 14, see for eg. p. 654, where in considering whether the defendant was involved in the commission of crimes against humanity, their Honours held that '[i]t was carried on as a part and in aid of German aggressions and crimes against peace.' For another example of the application of the nexus requirement see p. 606, where their Honours found, 'There is no evidence, however, that the alleged conduct was in furtherance of or in connection with crimes against peace or war crimes... It is therefore not a crime cognizable by this Tribunal.'

[570] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (adopted 29 November / 11 December 1868, entered into force 11 December 1868), reprinted in D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher: 1988, p. 102. See preamble: '...the employment of such arms would, therefore, be *contrary to the laws of humanity*' (emphasis added).

[571] *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land* (adopted 29 July 1899, entered into force 4 September 1900), preamble.

[572] *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, entered into force 26 January 1910), preamble.

[573] M. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hague: 1999, pp. 23-25, 29-30, 43.

[574] *Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, enacted by the Allied Control Council of Germany, composed of the UK, France, the USA

by the Allied Powers on behalf of Germany pursuant to their assumed 'supreme legislative authority.'[575] Although the 1948 Genocide Convention was unanimously adopted by the United Nations General Assembly,[576] the definition of genocide contained therein unequivocally departed from its crimes against humanity origins by requiring a "specific intent", an element that was not articulated in the Nuremberg Charter.[577] The Pre-Trial Chamber agrees with the view that even if genocide is considered as being a subset of crimes against humanity in 1948, the Genocide Convention 'did not change the general requirement of a connection to armed conflict for crimes against humanity other than genocide.' The 1950 Nuremberg Principles, which reflected principles of international law at the time, included it in the crimes against humanity definition. The 1954 International Law Commission's Draft Code of Offences Against the Peace and Security of Mankind was not accepted by the United Nations General Assembly.[578] The 1968 Statute of Limitations Convention[579] was signed, ratified or acceded to by only 18 United Nations Member States of a total of 134 by 17 April 1975, while one additional State ratified it during the ECCC's temporal jurisdiction. While the Pre-Trial Chamber accepts that the practice of States need not be perfectly uniform to amount to general practice, it cannot be said that the 1968 Statute of Limitations Convention had passed a threshold level of acceptance in order to qualify as general practice. Furthermore, in 1968, the representatives to the Convention on Statutes of Limitation were almost equally divided among those in favor of removing the armed conflict nexus and those who opposed such a step.[580] Similarly, the Apartheid Convention, which purported to define the crime against humanity of apartheid without

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and the USSR, Berlin, 20 December 1945 ("Control Council Law No. 10"), art II(1)(c) ('before or during the war' omitted).

[575] See also M. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hague: 1999, p. 33.

[576] Genocide Convention, Art 1: 'whether committed in time of peace or in time of war.'

[577] Genocide Convention, Art 2: '...committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group...'

[578] See the General Assembly's rejection: Draft Code of Offences against the Peace and Security of Mankind, U.N. G.A. Res. 897 (IX), 4 December 1954.

[579] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity* (adopted 26 November 1968, entered into force 11 November 1970), U.N. G.A. Res. 2391 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968), 754 U.N.T.S. 73, Art. 1(b) 'Crimes against humanity whether committed in time of war or in time of peace.'

[580] Commission on Human Rights, Report of the Twenty-Third Session, 20 February 1967 - 23 March 1967, paras 144-145, in Economic and Social Council Official Records, 42nd Sess., Supp. No. 6.

a nexus requirement,[581] was signed, ratified or acceded to by only 25 United Nations member States of a total of 134 by 17 April 1975, and by 32 further States during the ECCC's temporal jurisdiction by the close of which the total number of member States had increased to 148[582] Furthermore, as noted with respect to the 1948 Genocide Convention, the removal of the armed conflict nexus requirement for apartheid did not change the general requirement of a nexus for all other crimes against humanity. In addition, as far as the Pre-Trial Chamber can ascertain, there are few examples of national legislation defining crimes against humanity without this nexus requirement. The lone example of domestic severance of a nexus requirement found in the 1950 Israeli law serves only to demonstrate its exceptional nature.

310. The Pre-Trial Chamber finds that, even if these instruments are judged by their combined effect, such that their inadequacies when judged individually are somehow reduced, it remains unclear precisely when severance was effected in customary law. It may be said, that in 1968, the representatives to the Convention on Statutes of Limitation were almost equally divided among those in favour of removing the war nexus and those who opposed such a step.[583] Also, when the International Law Commission again recommended adopting a definition of crimes against humanity without a nexus requirement in 1984, the debates among State representatives appear to evince that those who would remove the nexus represented the mainstream of opinion within the international community. However, in the absence of clear State practice and *opinio juris*, this Chamber nonetheless remains unable to identify the crucial tipping point between 1968 and 1984 when the transition occurred. According to the principle of *in dubio pro reo*, any ambiguity such as this must be resolved in the favour of the accused.

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[581] *International Convention on the Suppression and Punishment of the Crime of Apartheid* (entered into force 18 July 1976), U.N. G.A. Res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243. Note the preamble in paras. 6 and 7 where apartheid is expressed as a crime against humanity, and Art. II where the *nexus* is omitted in the definition of apartheid.

[582] United Nations, *Multilateral Treaties Deposited with the Secretary-General Treaty Series* Database, "Status of Treaties", Chap. IV, 7.

[583] Commission on Human Rights, Report of the Twenty-Third Session, 20 February 1967 - 23 March 1967, paras. 144-145, in Economic and Social Council Official Records, 42nd Sess., Supp. No. 6.

311. Thus the Pre-Trial Chamber determines that the definition of crimes against humanity in the Nuremberg Charter and Nuremberg Principles continued to apply in the period 1975 to 1979, such that a connection to crimes against peace or war crimes remained a necessary element. It is pertinent to note, however, that as war crimes are prohibited under customary international law both in international and internal contexts, the necessary nexus to armed conflict need not be international in character.[584]

312. Having reached this conclusion, the Pre-Trial Chamber finds it appropriate to observe that the Closing Order in paragraph 150-155 states that there existed a state of international armed conflict almost immediately following the entry into Phnom Penh of the Cambodian People's National Liberation Armed Forces (CPNLAF) on 17 April 1975, between the Socialist Republic of Vietnam and Democratic Kampuchea and that protracted armed hostilities continued until the capture of Phnom Penh on 7 January 1979 by Vietnamese forces and beyond.

313. For all these reasons, the Pre-Trial Chamber grants this sub-ground of Ground Seven of the Appeal and, as articulated in point 7(1) of the disposition on this Appeal, to add the "existence of a nexus between the underlying acts and the armed conflict" to the "Chapeau" requirements in Chapter IV (A) of Part Thee of the Closing Order.

ii) Sub-ground 10 (imprisonment):

Submissions:

314. The Co-Lawyers for Ieng Sary submit in the Appeal, and again in their Reply to the Co-Prosecutors Response, that the Co-Investigating Judges 'erred by holding imprisonment to be an enumerated act constituting a crime against humanity,', i.e. a crime in its own right, as it was not explicitly included as a crime against humanity in, inter alia, the *Charter of the International Military Tribunal for the Trial of the Major War Criminals*,

[584] *Prosecutor v. Dusko Tadić*, IT-94-1-T, "Decision on the Defence Motion on Jurisdiction", Trial Chamber, 10 August 1995, para. 82.

also known as the Nuremberg Charter (the "Nuremberg (IMT) Charter")[585], the Charter of the International Military Tribunal for the Far East, also known as the Tokyo Charter ("Tokyo (IMTFE) Charter")[586] or the codified Nuremberg Principles.[587]

315. In their Response, the Co-Prosecutors argue that the prohibition on arbitrary imprisonment emerged from the law of war and is supported by human rights instruments.[588] As evidence that it was criminalised prior to 1975, they point to its explicit inclusion in Control Council Law No. 10[589] and the 1956 Penal Code of Cambodia,[590] and rely on the Trial Chamber's judgment in Case 001.[591] The Civil Parties in their observations do not make submissions specifically on the issue of Imprisonment but submit in general that the formulation of crimes against humanity adopted in Article 5 of the ECCC Law comports with that existing under customary international law during the 1975-1979 period.[592]

Discussion:

316. The Pre-Trial Chamber observes that in paragraph 1613 of the Closing Order the Co-Investigating Judges ultimately charge Ieng Sary with crimes against humanity, enumerating imprisonment as a crime against humanity in its own right.[593] The Co-Lawyers in their Appeal refer to paragraph 1314 of the Closing Order, which reads:

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[585] *Charter of the International Military Tribunal for the Trial of the Major War Criminals*, appended to the London Agreement, 8 August 1945, 82 U.N.T.S. 280 ("Nuremberg (IMT) Charter").
[586] *Charter of the International Military Tribunal for the Far East*, approved by an Executive Order, General Dougals MacArther, Supreme Commander for the Allied Powers in Japan, 19 January 1946, amended on 26 April 1946, also known as the Tokyo Charter ("Tokyo (IMTFE) Charter").
[587] See Ieng Sary Appeal, para. 205 and ftn. 476 referring to para. 1314 of the Closing Order; *see also* Ieng Sary Reply, para. 95.
[588] Co-Prosecutors' Response, para. 188.
[589] Control Council Law No. 10, Art. II(1)(c): "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, *imprisonment*, torture, rape, or other inhumane acts..." (emphasis added).
[590] Penal Code (1956), Arts 248-251.
[591] Judgment in Case 001, paras. 352-353.
[592] Civil Party Lawyers' Observation I, paras 20-28; Civil Party Lawyers' Observations II, para. 15; Civil Party Lawyers' Observations III submit at para. 8 that "Civil Party Co-Lawyers find that all arguments presented in the Appellants' Appeals [...] are not acceptable, and we wish to declare that we support all arguments presented by the Co-Prosecutors in their joint Response [...]".
[593] Closing Order, para. 1613.

> The definition of crimes against humanity under customary international law is the commission of one or more of the following acts, as part of a widespread or systematic attack directed against a civilian population, [...] imprisonment; [...]

317. The Pre-Trial Chamber notes that the ECCC Law specifically provides for 'imprisonment' as a crime against humanity in its own right in Article 5 and that, as the Co-Lawyers contend, imprisonment was not enumerated as a crime against humanity in the Nuremberg (IMT) and Tokyo (IMTFE) Charters.

318. The Pre-Trial Chamber observes that in making their statement in paragraph 1314 of the Closing Order the Co-Investigating Judges use the following as supporting sources:

> Case file No. 001/18-07-2007/ECCC/TC Judgement para.347; Control Council Law No.10 [1945] art. II(1)(c); Greifelt et al. Control Council Law No.10 Trials [1947] Indictment Vol. IV, p.609; International Covenant on Civil and Political Rights [1966] art.9. [594]

319. In relation to these sources, the Pre-Trial Chamber observes that, firstly, in Case 001, Duch did not challenge the jurisdiction of the ECCC over imprisonment as a crime against humanity in its own right and that, in the quoted part of the Judgment in Case 001, the Trial Chamber examined the definition of imprisonment, rather than establishing whether it was criminalised in its own right under international law prior to 1975.[595] Therefore, the Trial Chamber judgment in Case 001 while being of assistance in establishing that in customary international law imprisonment is seen as a crime against humanity, it does not help in establishing whether such was true during ECCC's temporal jurisdiction.

320. The Pre-Trial Chamber observes that the unlawful confinement of civilians has long been prohibited as an offence under the laws of war. Although confinement of civilians might be justified under certain circumstances[596], the Geneva Convention IV prohibits it

[594] Closing Order, ftn. 5190.
[595] Judgment in Case 001, paras 347-351.
[596] Specified in Arts 41, 42 and 43 of the Geneva Convention IV.

during armed conflicts when the detaining party does not comply with the provisions of Articles 42 and 43 of the Geneva Convention IV. As such, the laws of war criminalises unlawful confinement of civilians where (i) the individual is detained *without reasonable grounds* for believing that the security of the Detaining Power makes it absolutely necessary; and (ii) *where the procedural safeguards* required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.[597] Illegal confinement of civilians was indeed prosecuted as a war crime in the aftermath of World War II, in addition to being prosecuted as a crime against humanity, as shown below.

321. The Pre-Trial Chamber finds that although not explicitly enumerated in the Nuremberg (IMT) or Tokyo (IMTFE) Charters, imprisonment was included, as the Co-Investigating Judges also found, in Control Council Law No. 10. The jurisprudence from the Nuremberg Military Tribunals ("NMTs") in the occupied zones which were governed by Control Council Law No. 10 avers that defendants were prosecuted and convicted for imprisonment as a crime against humanity in its own right in several cases, notably in the case involving concentration camps. In most cases, the defendants were prosecuted under war crimes and crimes against humanity for illegal imprisonment and the NMTs have generally considered the charges together, hence informing the notion of imprisonment as a crime against humanity from the more established notions under the laws of war.[598]

[597] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-T, "Judgment", 26 February 2001, para. 291.
[598] In addition to the cases discussed below, *see also*: *United States of America v. Alfried Felix Alwyn Krupp von Bohlen und Halbach et al,* 31 July 1948, reproduced in *NMT Trials*, Vol IX, p. 1, at p. 1373 (where defendents were charged for "imprisonment" under Count Three of the Indictment, which included Crimes against Humanity in its part (c). Part (c) of Count Three contains the following statement: It is also averred that the acts relied upon as constituting violations of these provisions were likewise violations of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations and of international conventions, particularly of certain specified articles of the Hague Regulations of Land Warfare, 1907, and of the Prisoners of War Convention, Geneva, 1929. All of the acts relied upon as constituting crimes against humanity occurred during and in connection with the war). Defendants Krupp, Loeser, Houdremont, Mueller, Janssen, Ihn, Eberhardt, Korschan, von Buelow, Lehmann, and Kupke were all found guilty on Count Three (p. 1449).

322. In *United States v. Oswald Pohl et al* (the "*Pohl* Case"), defendants were charged, with a number being convicted,[599] under Count Three for Crimes Against Humanity, including "illegal imprisonment", in relation to acts committed in concentration and labour camps throughout Germany and in the occupied territories.[600] It is noted that in the *Pohl* Case, the defendants were indicted and found guilty of the crime against humanity of '*illegal* imprisonment' or '*unlawful* imprisonment,'[601] indicating that the deprivation of liberty had to be arbitrary in the sense that it was not justified by the law. Evidence adduced in the *Pohl* Case suggests that imprisonment became unlawful where the original lawful justification lapsed, but the person did not thereby regain his or her liberty.[602]

323. In the *United States v. Wilhelm List et al.* (the "*Hostage* Case"), three defendants have also been charged and convicted[603] for illegal imprisonment as a crime against humanity under Count Four, which reads:

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[599] Nuremberg Military Tribunals, *United States v. Oswald Pohl et al.*, 3 November 1947, reproduced in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10,* United States Government Printing Office, 1949-1952 ("*NMT Trials*"),Vol. V, p. 195 (the "*Pohl* Case"). Phol, Frank, Loerner, Tschenstcher, Kiefer, Eirenschmalz, Sommer, Pook, Hohberg and Baier were all convicted under Count Three of the Indictment for crimes against humanity.

[600] According to the Indictment, which was endorsed by the finding of the Tribunal (see notably p. 1304),"[t]he established policy of the WVHA was to extract from the inmates of the concentration camps the greatest possible amount of work with the smallest possible amount of food, clothing, housing, sanitation, medical, and surgical services, and other necessary provisions or facilities. This policy resulted, foreseeably, in the deaths of thousands of people from disease or sheer physical exhaustion. For the vast majority of inmates, there was no provision for eventual release from the 'concentration camps, except through death, and little or no provision or plan for sustaining life in those incapable of work. Epidemics of disease were treated by killing those afflicted. As a result' of this policy, the disposal of bodies of the dead became a problem of insurmountable proportions." (p. 205, para. 16) Count Three – Crimes Against Humanity of the Indictment reads: "Between September 1939 and April 1945 all of the defendants herein unlawfully, wilfully, and knowingly committed Crimes against Humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, *illegal imprisonment, torture*, persecution on political, racial and religious grounds, and ill treatment of, and other inhumane and criminal acts against thousands of persons. [...]." (p. 205, para. 24) (emphasis added).

[601] *Pohl* Case, pp. 962 and 964.

[602] *Pohl* Case, p. 982 (According to one affidavit quoted in the judgment, "an order by Pohl was sent to the concentration camps, which authorized the camp commanders to retain prisoners who had been released for discharge by the Reich Security Main Office, but were important for the organization of labor in the camp. The duration of this illegal imprisonment could be extended to the end of the war.")

[603] *United States v. Wilhelm List et al.*, 19 February 1948, reproduced in *NMT Trials*, Vol. XI (the "*Hostage* Case"). Kuntze (p.1281), Rendulic (p. 1297 and von Leyser (p. 1305) were found guilty on on Count Four.

> "That defendants were principals or accessories to the murder, torture, and systematic terrorization, *imprisonment in concentration camps,* forced labor on military installations, and deportation to slave labor of the civilian populations of Greece, Yugoslavia, and Albania by troops of the German armed forces acting pursuant to the orders of the defendants; *that large numbers of citizens-democrats, Nationalists, Jews, and gypsies were seized, thrown into concentration camps, beaten, tortured, ill-treated,* and murdered while other citizens were forcibly conscripted for labor in the Reich and occupied territories."[604]

The Court emphasized in its judgment that "[t]he acts charged in each of the four counts are alleged to have been committed willfully, knowingly, and unlawfully and constitute violations of *international conventions*, the Hague Regulations, 1907, the laws and customs of war, *the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and were declared, recognized, and defined as crimes by Article II of Control Council Law No. 10* adopted by the representatives of the United States of America, Great Britain, the Republic of France, and the Soviet Union."[605]

324. Similarly, in the *Trial of Wilhelm Von Leeb and Thirteen Others* (the "*High Command* Case), the defendants, 14 high-ranking generals of the German Wehrmacht and former members of the High Command of Nazi Germany's military forces, were prosecuted in relation to their participation in, inter alia, the arrest and imprisonment of civilians by German forces in the occupied territories during the War. In execution of Hitler's Night and Fog Decree "persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, *were taken secretly* to Germany and handed over to the SIPO [Sicherheitspolizei (Security Police)] and SD [Sicherheitsdienst (Security Service)] for trial or punishment in Germany."[606] The arrested persons by the aid of a secret police force were sent to concentration camps which, the judgment states, were first used to "*imprison without trial* all those persons who were opposed to the government, or who were in any way obnoxious to

[604] *Hostage* Case, p. 1234.
[605] *Hostage* Case, p. 1234.
[606] *Trial of Wilhelm Von Leeb and Thirteen Others*, 28 October 1948, reproduced in *NMT Trials*, Vols X – XI (the "*High Command* Case"), at pp. 496-497, quoting excerpts from the IMT Judgment, which are endorsed at p. 501) (emphasis added).

German authority" and, later on, used in the occupied territories to destroy all opposition groups.[607] The defendants were charged and found guilty for "imprisonment without cause" as a crime against humanity under Count Three of the Indictment titled "war crimes and crimes against humanity committed against civilians".[608]

325. In *United States of America v. Greifelt et al.* (the "*RuSHA* Case"), defendants were charged and convicted[609] for imprisonment as a crime against humanity under Count One, which stated:

> "1. Between September, 1939, and April, 1945, all the defendants herein committed Crimes against Humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organisations or groups connected with : atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, *imprisonment,* torture, persecutions on political, racial and religious grounds, and other inhumane and criminal acts against civilian populations, including German civilians and nationals of other countries, and against prisoners of war." (emphasis added)

326. Some defendants were also prosecuted for acts amounting to illegal imprisonment before the International Military Tribunal (IMT). Although illegal imprisonment was not specifically mentioned as a crime in its own right in the Counts of the Indictment, it was part of the grounds upon which the defendants were convicted for crimes against humanity, notably in the context of concentration camps, the purpose of which was 'to *imprison without trial* all those persons who were opposed to the Government, or who were in any way obnoxious to German authority.'[610] The Nuremberg (IMT) Judgment frequently referred to 'imprisonment' in connection with the enumerated crimes of 'enslavement' and 'deportation', in the context of concentration camps. When judging

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[607] *High Command* Case, p. 498, quoting excerpts from the IMT Judgment, which are endorsed at p. 501 (emphasis added).
[608] *High Command* Case, p. 27. *See* Count Three – War Crimes and Crimes Against Humanity. For a statement of the facts by the Prosecutor, see the paragraphs that follow.
[609] *United States v. Ulrich Greifelt et al.*, 10 March 1948, reproduced in *NMT Trials*, Vols. IV – V, p. 599 (the "*RuSHA* Case"). Defendants Greifelt (p. 155), Creutz (p. 155), Huebner (p. 159), Lorenz (p. 159), Brueckner (p. 160), Hofmann (p.160) and Hildebrandt (p. 162) were all found guilty upon Count One of the Indictment.
[610] International Military Tribunal ("IMT"), *Trial of the Major War Criminals before the International Military Tribunal*, "Judgment", 1 October 1946, reprinted in *Trial of the Major War Criminals*, Secretariat of the International Military Tribunal, 1947, Vol. I, p. 171 ("Nuremberg (IMT) Judgment"), at, Vol. 22, "Proceedings: 27 August 1946 – 1 October 1946", p. 477 (emphasis added).

individual defendants for crimes against humanity, the Tribunal distinctly drew out the factual matrices constituting arbitrary arrest separate to the subsequent deportation and slave labour.[611] Kaltenbrunner, Head of the RSHA, was convicted by the IMT under Count Four for war crimes and crimes against humanity on the basis, amongst others, of his authority to order transfer and confinement to a concentration camp[612] and protective custody and release from concentration camps.[613]

327. Therefore, on the basis of Control Council Law No. 10 and the post World War II jurisprudence, the Pre-Trial Chamber finds that "imprisonment" arose as a crime against humanity in its own right under customary international law by 1975.

328. In order to complete its analysis as to whether indicting Ieng Sary for imprisonment as a crime against humanity would violate the principle of legality, it needs to be determined whether all the elements of the principle of legality, as defined in its analysis in Ground Three above, are respected. Hence, it shall examine whether there was a sufficiently specific definition of the offence of "imprisonment" as a crime against humanity that existed under customary international law from 1975-1979 such that it was both foreseeable and accessible to Ieng Sary that he could be prosecuted for such crime.

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[611] *See* Nuremberg (IMT) Judgment, Vol. 22. For Keitel, the Tribunal found that he had signed a decree by which "crimes of resistance against the army of occupation would be tried only if a death sentence was likely; otherwise they would be handed to the Gestapo for transportation to Germany" (pp. 535-536). For Rosenberg, the Tribunal found that he "had knowledge of [...] the methods of "recruiting" [...] He gave his civil administrators quotas of labourers to be sent to the Reich, which had to be met by whatever means necessary" (p. 541). For Frank, the Tribunal found that he made "use of police raids to meet [a] quota [of labourers to be deported to Germany]" (p. 543). For Frick, the Tribunal found that he had signed a decree "which placed [Jews] 'outside the law' and handed them over to the Gestapo [thereby arbitrarily depriving them of their liberty]" (p. 546). For Funk, *see* p. 552. For Sauckel, the Tribunal emphasised the involuntary nature of "recruiting" (p. 567). For Speer, the Tribunal found that "[t]he practice was developed under which Speer transmitted to Sauckel an estimate of the total number of workers needed. Sauckel obtained the labour [...] Speer knew when he made his demands on Sauckel that they would be supplied by foreign labourers serving under compulsion" (p. 578). For Bormann, the Tribunal found that he "signed an ordinance withdrawing Jews from the protection of the law courts and placing them under the exclusive jurisdiction of Himmler's Gestapo [thereby arbitrarily depriving them of their liberty]" (p. 586).

[612] Nuremberg (IMT) Judgment, Vol. 22, p. 537.

[613] Nuremberg (IMT) Judgment, Vol. I, pp. 291-193.

329. The jurisprudence post World War II, when referring to "illegal imprisonment", "unlawful imprisonment", "imprisonment without trial", "imprisonment without cause", refers to the notion of deprivation of physical liberty without a legal basis, i.e. arbitrary.

330. In line with this jurisprudence, human rights instruments adopted in the aftermath of World War II, both international and regional, have enshrined the right of an individual not to be deprived of his or her liberty arbitrarily, reaffirming that the right to liberty, which is not "absolute", can only be restricted by "procedures established by law."[614] Indeed, insofar as the international instruments adopted before 1975 are concerned, Article 9 of the Universal Declaration of Human Rights (1948) states that nobody shall be subjected to *arbitrary arrest, detention or exile.* Article 9 of the ICCPR (1966) similarly requires that no one shall be subjected to *arbitrary arrest or detention.* Article II of the International Convention on the Suppression and Punishment of the Crime of Apartheid (1973) defines the "*arbitrary arrest and illegal imprisonment* of the members of a racial group or groups" as an act constituting the crime of apartheid. Similar provisions were contained in regional Human Rights instruments.[615]

331. The Pre-Trial Chamber finds that the instruments adopted by most States before the temporal jurisdiction of the ECCC, albeit not criminalising an offence of illegal imprisonment, together with the jurisprudence post World War II, confirm that it was accessible and foreseeable to the accused that arbitrary imprisonment might entail criminal liability.

332. The Pre-Trial Chamber therefore finds that the offence of imprisonment as a crime against humanity not only existed in 1975-1979 but was also adequately specific in the sense "generally understood," which combined with the appalling nature of the crime, especially where committed in a widespread and systematic manner, leaves no room for

[614] *Prosecutor v. Knojelac*, IT-97-25-T, "Judgement", Trial Chamber, 12 March 2002, para. 109.
[615] The ECHR (1950) enshrines in Article 5 the right to liberty and security and states that no one shall be deprived of his liberty except in particular cases, as enumerated in the Convention. The American Convention on Human Rights (1969) ("ACHR") provides in Article 7 that "no one shall be deprived of his physical liberty" except in certain cases and that "no one shall be subject to arbitrary arrest or imprisonment".

entertaining claims that an accused would not know of the criminal nature of the acts or of criminal responsibility for such acts. It was therefore sufficiently accessible and foreseeable to the Accused that he could be held criminally responsible for arbitrarily imprisoning Cambodian citizens or citizens under his control in a widespread or systematic manner.

333. Therefore, the Pre-Trial Chamber finds that the Co-Investigating Judges did not violate the principle of legality when charging the Accused with imprisonment as a category of crimes against humanity in its own right and, as such, this sub-ground of Ground Seven of the Appeal is dismissed.

iii) Sub-ground 11 (torture):

Submissions:

334. The Co-Lawyers for Ieng Sary submit in their Appeal and again in their Reply to the Co-Prosecutors' Response that the Co-Investigating Judges 'erred by holding torture to be an enumerated act constituting a crime against humanity,' as it was not explicitly included as a crime against humanity in, *inter alia*, the Nuremberg (IMT) and Tokyo (IMTFE) Charters or the codified Nuremberg Principles.[616]

335. The Co-Prosecutors argue in their Response that torture had attained customary international law status,[617] relying upon the Trial Chamber's Judgment in Case 001,[618] the 1975 United Nations General Assembly Declaration on Torture,[619] the 1984 Convention Against Torture,[620] ICTY jurisprudence[621] and the 1956 Penal Code of

[616] Ieng Sary Appeal, para. 208; Ieng Sary Reply, para. 96.
[617] Co-Prosecutors Response, para. 189.
[618] Judgment in Case 001, paras 352-358.
[619] *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. G.A. Res. 3452 (XXX), U.N. GAOR, 30th Sess., 2433rd Pl. Mtg., U.N. Doc. A/10408, 9 December 1975.
[620] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 10 December 1984, entered into force 26 June 1987), U.N. G.A. Res. 39/46, U.N. GAOR, 39th Sess., 93rd Pl. Mtg., U.N. Doc. A/39/708, 10 December 1984 ("Convention Against Torture")

Cambodia.[622] The Civil Parties in their observations do not make submissions specifically on the issue of torture but in general terms they put forward that the formulation of crimes against humanity adopted in Article 5 of the ECCC Establishment Law comports with that existing under customary international law during the 1975-1979.

336. Ieng Sary, in his Reply to the Co-Prosecutors' Response, averred that the Torture Declaration 'was not declarative of customary international law in 1975-79,' and that it did not exist in 1975-79.[623]

Discussion:

337. The Pre-Trial Chamber observes that in paragraph 1613 of the Closing Order the Co-Investigating Judges charge Ieng Sary with crimes against humanity, enumerating torture as a crime against humanity in its own right.[624] The Co-Lawyers in the Appeal refer to paragraph 1314 of the Closing Order which reads:

> The definition of crimes against humanity under customary international law is the commission of one or more of the following acts, as part of a widespread or systematic attack directed against a civilian population, [...] torture; [...]

338. The Pre-Trial Chamber notes that the ECCC Law specifically provides for 'torture' as a crime against humanity in its own right in Article 5 and that, as the Co-Lawyers contend, torture was not enumerated as a crime against humanity in the Nuremberg (IMT) Charter or the Nuremberg Principles.

339. In making their statement in paragraph 1314 of the Closing Order the Co-Investigating Judges rely on the following authorities:

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[621] *Prosecutor v Delalić*, IT-96-21-T, "Judgement", Trial Chamber, 16 November 1998, para. 459 (the "Čelebići case"); *Prosecutor v Furundžija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000, para. 111; *Prosecutor v Furundžija*, IT-95-17/1-T, "Judgement", Trial Chamber, 10 December 1998, paras. 151-153; *Prosecutor v Krnojelac*, IT-97-25-T, "Judgement", Trial Chamber II, 15 March 2002, para. 182.
[622] Code Pénal (1956), Art. 500.
[623] Ieng Sary Reply, para. 97.
[624] Closing Order, para. 1613.

Case file No. 001/18-07-2007/ECCC/TC Judgement para.352-357; Karl Brandt et al. Control Council Law No.10 Trials [1946] Indictment Vol.I p.7; Instructions for the Government of the Armies of the United States (Lieber Code) [1863] art.16; Control Council Law No.10 [1945] art.II(1)(c); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment UNGA RES/3452 (XXX) 9 December 1975; Convention against Torture (opened for signature 10 December 1984) 1465 UNTS 85; International Covenant on Civil and Political Rights [1966] art.7.[625]

340. In relation to these authorities used by the Co-Investigating Judges, the Pre-Trial Chamber observes that the quoted Trial Chamber's findings in this part of its judgment in Case 001 were directed towards the definition of torture in customary international law, rather than whether it existed as a crime against humanity in its own right under customary international law by 1975.[626]

341. Secondly, the Pre-Trial Chamber notes that the prohibition of torture arises in several arena of international law, and that care must be taken to avoid importing liability for torture under human rights law or war crimes law to crimes against humanity by means of analogy alone. Different iterations of torture may, however, serve as sources of guidance and contribute to make it accessible and foreseeable to an accused that the prohibited conduct can lead to criminal prosecution.

342. Torture has long been prohibited as a violation of the laws of war. In 1863, the Lieber Code stated in its Article 16: "Military necessity does not admit of cruelty – that is, the *infliction of suffering for the sake of suffering or for revenge*, nor of maiming or wounding except in fight, nor of *torture to extort confessions*." Prohibition of torture was later codified in Article 3 common to the Geneva Conventions in the context of armed conflicts. The International Committee of the Red Cross ("ICRC") stated in its commentary on Article 147 of the Geneva Convention IV that under the laws of war, torture "was understood as the infliction of suffering on a person to obtain from that person, or from another person, confessions or information. [...] It is more than a mere

[625] Closing Order, ftn. 5191.
[626] Judgment in Case 001, para. 353.

assault on the physical or moral integrity of a person. What is important is not so much the pain itself as the purpose behind its infliction."[627] Infliction of suffering for the sake of revenge, although not specifically called torture, was also prohibited under the Lieber Code as appears from the excerpt above. Torture was indeed prosecuted as a war crime in the aftermath of World War II.

343. The Pre-Trial Chamber notes, as the Co-Lawyers contend, that torture was not enumerated as a crime against humanity in its own right in the Nuremberg (IMT) Charter nor in the Tokyo (IMTFE) Charter, however, it notes, as cited by the Co-Investigating Judges in the Closing Order, that it was included in Control Council Law No. 10.[628] Akin to imprisonment, the NMTs convicted defendants for torture as a crime against humanity in its own right, particularly in the context of interrogations and ill treatments in concentration camps, including medical experiments.[629]

344. For instance, in the *High Command* Case discussed above, the defendants were prosecuted, and some were convicted, for their role in the infliction of torture on those who were interrogated by the Gestapo[630] and/or detained in concentration camps, notably Jews, Soviet nationals, gypsies and Poles, designated as "social inferiors" and who "received what the Hitlerites called "special treatment", or "liquidation", or "final solution"".[631] Under Count 3 of the Indictment, the defendants were notably charged for torture as a crime against humanity. Some of the acts of torture, where the individuals were interrogated by the Gestapo, appear to have inflicted *severe pain or suffering* and been committed *with the purpose of obtaining information or confessions*. In this regards, the Judgment states:

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[627] Jean Pictet (ed.), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, 1958, p. 598.
[628] *Control Council Law No. 10*, art II(1)(c): "Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, *torture*, rape, or other inhumane acts [...]" (emphasis added).
[629] In addition to the cases referred to below, *see inter alia*: *United States v. Carl Krauch et al.*, 30 July 1948, reproduced in *NMT Trials,* Vols VII-VIII, p. 1 ("*I. G. Farben* Case"). The Defendants were prosecuted under Count Three for, inter alia, torture as a crime against humanity (Vol. VII, pp. 50-51; see also Vol. VII, p. 11 and Vol. VIII, p. 1167. Krauch and Meer were found guilty under Count Three (Vol. VIII, pp. 1190-1191).
[630] *High Command* Case, pp. 496-497.
[631] *High Command* Case, p. 495.

> "On 12 June 1942, the chief of the SIPO and SD published, through Mueller, the Gestapo Chief, an order authorizing the use of 'third degree' methods of interrogation, where preliminary investigation had indicated that the person could give information on important matters, such as subversive activities, though not for the purpose of extorting confessions of the prisoner's own crimes.
>
> This order provided:
>
> [...] Third degree can, according to circumstances, consist among other methods of very simple diet (bread and water), hard bunk, dark cell, deprivation of sleep, exhaustive drilling, also in flogging (for more than twenty strokes a doctor must be consulted)."[632]

The Judgment makes further references to orders directing to use the "severest measures" as "experience shows, only the application of the most rigorous methods cause suspicious elements to make statements." These included being repeatedly hit on the buttocks with rubber tubings (for women) or cowhide or rubber trancheons (for men).[633]

345. In the *Hostage* Case, the defendants were charged and some were convicted[634] for torture as a war crime and a crime against humanity under Counts One and Four in the context of "retaliation", i.e. associated with *punishment*. Count One, in its relevant parts, stated that "thousands of noncombatants, arbitrarily designated as "partisans," "Communists," "Communist suspects," "bandit suspects" were terrorized, *tortured*, and murdered in retaliation" for lawful attacks perpetrated against German militaries[635]. Count Four was stated and discussed above in the section on imprisonment.[636]

346. In *United States of America v. Otto Ohlendorf et al.* ("*Einsatzgruppen* Case"), the defendants were charged under Count One of the Indictment and convicted, amongst

[632] *High Command* Case, p. 497.
[633] *High Command* Case, pp. 590-592.
[634] *Hostage* Case. List, von Leyser, Felmy and Lanz were found guilty on Count One (respectively pp. 1274, 1305,1309 and 1313). Kuntze and Rendulic and were found guilty on Counts One and Four (respectively pp. 1281 and 1297).
[635] *Hostage* Case, p. 1233.
[636] Attention is notably drawn to p. 1234 of the Judgment, quoted above in the section on imprisonment.

others, for torture as a crime against humanity, as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups by murderous extermination. In its judgment, the Tribunal emphasises that torture is to be considered as a crime against humanity:

> *"The first count of the indictment in this case charges the defendants with crimes against humanity.* Not crimes against any specified country, but against humanity.
>
> Humanity is the sovereignty which has been offended and a tribunal is convoked to determine why. This is not a new concept in the realm of morals, but it is an innovation in the empire of the law. Thus a lamp has been lighted in the dark and tenebrous atmosphere of the fields of the innocent dead.
>
> Murder, *torture*, enslavement, and similar *crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations.* Thus murder becomes no less murder because directed against a whole race instead of a single person."[637]

347. In *United States v. Karl Brandt et al* ("*Medical* Case"), Karl Brandt and others were convicted under Counts Two and Three for their participation in "plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, *tortures and other inhumane acts were committed.*"[638]

348. Similarly, torture was also prosecuted as a crime against humanity in the *Pohl* Case, in the context of medical experiments committed on concentration camps inmates. While, again, the Judgment does not specify what is being considered as torture, the section "Medical Experiments" of the Judgment states facts showing acts inflicting severe pain or suffering:

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[637] *United States v. Otto Ohlendorf et al.*, 8 and 9 April 1948, reproduced in *NMT Trials*, Vol. IV, p. 3 (the "*Einsatzgruppen* Case"), at p. 409. The Judgment also emphasised that "although the trial has been on the subject of murder, the defendants are charged also in counts one and two with crimes against humanity and violations of laws or customs of war which include but are not limited to atrocities, enslavement, deportation, *imprisonment, torture*, and other inhumane acts committed against civilian populations. Thus, if and where a conclusion of guilt is reached, such. conclusion is not based alone on the charge of murder but on all committed acts coming within the purview of crimes against humanity and war crimes. In each adjudication, without its being stated, the verdict is based upon the entire record." (p. 510). Haensch (pp. 554 – 555), Redetzky (p. 576) and Schubert (p. 584) were all found guilty of crimes against humanity.

[638] *United States v. Karl Brandt et al.*, 19 August 1947, reproduced in *NMT Trials*, Vols I-II, p. 3 (the "*Medical* Case"), at Vol. II, p. 198.

> "The concentration camps furnished an unlimited supply of human subjects for these barbarous experiments, and inmates in large numbers were *compelled to submit to so-called scientific tests which invariably involved torture* and in thousands of cases maiming, disfigurement, and death. Inmates were placed in tanks, where the air pressure was de-creased in simulation of high altitudes. A careful chart was kept of their violent reactions, which *indicated intense pain and suffering*. The chart not infrequently ended with, "Subject died at 9:18." Others were exposed, naked to freezing temperatures for hours, aided by ice-water immersion. As was to be expected, many subjects froze to death. Others were compelled to drink sea water until they went mad from thirst. Inmates were exposed to artificial inoculation of yellow fever, cholera, malaria, typhus, and spotted fever, and hundreds died as a result. Incisions were made in the legs of subject's and the development of gangrene accelerated by the introduction of septic foreign matter. Poison gas, mustard gas, phosphorous, and sulphur were used on inmates in order to prove that these chemicals are dangerous and often fatal-by no means a novel scientific finding; This is but a part of the horrible inventory. As one means toward "a final solution of the Jewish problem," a program of wholesale sterilization of the Jews was instituted and various methods by which sterility could be accomplished without the knowledge of the victim were devised. Even deliberate castration was resorted to."[639]

349. Torture as a crime against humanity was also prosecuted by national jurisdictions. For instance, Takashi Sakai was convicted by the Chinese War Crime Military Tribunal of the Ministry of Defence, sitting in Nanking, for torture as a war crime and a crime against humanity,[640] under the terms of Chinese Rules governing the Trial of War Criminals that were in force at the time of the trial. According to Article 1 of these Rules the primary source of substantive law for Chinese war crimes tribunals is international law. With reference to offences against civilians and members of the armed forces for which the accused was found guilty, the Tribunal said:

> "In inciting or permitting his subordinates to murder prisoners of war, wounded soldiers; nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he-had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity."[641]

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[639] *Pohl* Case, p. 971 (emphasis added).
[640] Chinese War Crimes Military Tribunal of the Ministry of National Defence, *Trial of Takashi Sakai*, , 29 August 1946, reported in The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, London, 1949, Vol. XIV, p. 1 ("*Trial of Takashi Sakai*")
[641] *Trial of Takashi Sakai*, p. 7.

350. Some defendants were also prosecuted for acts amounting to torture before the IMT as crimes against humanity. Although torture was not specifically mentioned as a crime in its own right in the Counts of the Indictment, it was part of the grounds upon which the defendants were convicted for crimes against humanity, notably in the context of concentration camps.[642] Before the IMT, Kaltenbrunner for instance was found guilty of both war crimes and crimes against humanity on the basis of authorising, *inter alia*, "methods which included the torture and confinement in concentration camps."[643] The Court found that torture had been conducted "in complete disregard of the elementary dictates of humanity," albeit in the context of war crimes.[644]

351. The Pre-Trial Chamber finds that, on the basis of Control Council Law No. 10 and the post World War II jurisprudence, torture arose as a crime against humanity in its own right under customary international law by 1975.

352. Turning now to consider whether the offence of torture was sufficiently defined, the Pre-Trial Chamber recalls that torture was first defined under the laws of war as encompassing the following elements: (i) acts inflicting suffering on a person's physical or moral integrity (ii) for the specific purpose of obtaining from that person, or from another person, confessions or information. Insofar as the first element is concerned, the Pre-Trial Chamber notes that some of the judgments mentioned above specifically refer to the notion of severe pain or suffering and that, in any event, all the cases quoted refer to facts that clearly indicated the infliction of physical or mental suffering. Insofar as the second element is concerned, the Chamber observes that the specific purpose of obtaining information can be found in the *High Command* Case. The *Hostage* Case also suggests that torture was committed for a specific purpose, *i.e.* in retaliation, but the other cases are vague as to the purpose for which acts of torture were perpetrated. The human rights instruments adopted in the aftermath of World War II have contributed to refining the definition of torture as initially understood under the laws of war and the post World War jurisprudence, drawing from and further defining the two elements

[642] Nuremberg (IMT) Judgment, Vol. 22, p. 477, 489 and 495.
[643] Nuremberg (IMT) Judgment, Vol. 22, p. 537.
[644] Nuremberg (IMT) Judgment, Vol. 1, p. 227.

identified above. As stated by the ICTY Trial Chamber in *Furundzija*, (at Para 143), "[t]he prohibition of torture laid down in international humanitarian law with regard to situations of armed conflict is reinforced by the body of international treaty rules on human rights: these rules ban torture both in armed conflict and in time of peace."[645]

353. The prohibition, which is said to be absolute, was in 1975, enshrined in several human rights instruments, international[646] and regional[647]. Of particular relevance to the applicable law on torture in the "Democratic Kampuchea" period is the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by consensus by General Assembly resolution 3452 (XXX) of 9 December 1975, ("Declaration on Torture").[648] This Declaration provides the following definition in its Article 1:

> "For the purpose of this Declaration, torture means *any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted* by or at the instigation of a public official on a person *for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.* It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners." (emphasis added)

354. The Declaration on Torture was the predecessor of the Convention Against Torture, adopted by the General Assembly on 10 December 1984 (entered into force on 26 June 1987), which is said to have codified pre-existing customary law.[649] This Convention, again drawing on the two elements described above, defines torture as follows:

> "1. For the purposes of this Convention, the term 'torture' means *any act by which severe pain or suffering, whether physical or mental,* is intentionally inflicted on a person *for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has*

[645] *Prosecutor v. Furundzija*, IT-95-17/1, "Judgement", Trial Chamber II, 10 December 1998 ("*Furundzija* Judgment", para. 143.
[646] Article 7 of the ICCPR.
[647] Article 7 of the ECHR, Article 5(2) of the ACHR.
[648] Decision on Appeal against the Closing Order indicting Kaing Guek Eav alias "Duch", 5 December 2008, D99/3/42, para. 63.
[649] *Furundzija* Judgment, paras 160-161, as confirmed in appeal on the judgment of 21 July 2000, para. 111. *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Appeals Chamber, 12 June 2002, para. 146.

> *committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind,* when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
>
> 2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

355. The Pre-Trial Chamber agrees that the Declaration on Torture codified the pre-existing customary law and finds that by 1975-1979, it was sufficiently clear under international customary law that torture as a crime against humanity, akin to a war crime, encompassed the two elements of i) inflicting severe pain or suffering on a person (physical or mental) ii) with a specific purpose of obtaining information or a confession, to punish or intimidate. The Pre-Trial Chamber takes no position on whether the Torture Convention constituted an evolution of the definition of torture by adding purposes for which acts of torture may be committed or merely codified customary law, as it finds that a sufficiently comprehensive definition of torture as a crime against humanity had arose by 1975 and that accordingly, such conduct was considered to be criminal in the sense generally understood and therefore foreseeable from that point in time. All of these combined with the appalling nature of crimes of torture committed in a widespread and systematic manner leaves no room for entertaining claims that an accused would not know of the criminal nature of the acts or of criminal responsibility for such.

356. Therefore, the Pre-Trial Chamber finds that the Co-Investigating Judges, when charging the Accused for torture as a crime against humanity in its own right, did not violated the principle of legality and, as such, dismisses this sub-ground of Ground Seven of the Appeal.

iv) Sub-ground 14 (rape):

Submissions:

357. The Co-Lawyers submit that the Co-Investigating Judges erred by holding rape to be an enumerated act constituting a crime against humanity.[650] As rape was not explicitly included in, *inter alia*, the Nuremberg Charter, the Tokyo Charter or the codified Nuremberg Principles, the Co-Lawyers for Ieng Sary submit in their Appeal and again in their Reply that rape did not exist as 'an enumerated crime against humanity in customary international law in 1975-79.'[651] The Co-Lawyers suggest that "rape can only violate Article 5 of the Establishment Law if: a. "other inhumane acts" as a category is applicable; and b. rape constituted an "other inhumane act" in 1975-79."[652]

358. In their response the Co-Prosecutors submitted that the Trial Chamber was correct in Case 001 in finding that rape was clearly a crime against humanity[653] and that the ICTR's judgment in *Prosecutor v Akayesu* merely represents 'a modern reaffirmation of the continued customary status of crimes against humanity under international law.'[654] They further referred to the 1956 Penal Code of Cambodia,[655] and to ICTY jurisprudence. The Civil Parties in their observations do not make submissions specifically on the issue of rape but in general terms they put forward that the formulation of crimes against humanity adopted in Article 5 of the ECCC Law is consistent with that existing under customary international law during the 1975-1979.

Discussion:

359. The Pre-Trial Chamber observes that in paragraph 1613 of the Closing Order the Co-Investigating Judges charge the Accused with:

[650] Ieng Sary Appeal, para. 218, referring to the Closing Order para. 1314.
[651] Ieng Sary Appeal, para. 218; Ieng Sary Reply, para. 98.
[652] Ieng Sary Appeal, para. 218; Ieng Sary Reply, para. 98.
[653] Judgment in Case 001, para. 361.
[654] Co-Prosecutors' Response, para. 190.
[655] Penal Code (1956), Art. 443.

> [c]rimes against humanity, specifically [...(g) rape ....] punishable under Articles 5, [...] of the ECCC Law.

360. The Co-Lawyers in their Appeal refer to paragraph 1314 of the Closing Order, which reads:

> The definition of crimes against humanity under customary international law is the commission of one or more of the following acts, as part of a widespread or systematic attack directed against a civilian population: [....] rape; [....].

361. The Pre-Trial Chamber also notes that in the Closing Order the Co-Investigating Judges found that '[t]he legal elements of the crime against humanity of rape have been established in the context of forced marriage.'[656]

362. The Pre-Trial Chamber notes that the Co-Investigating Judges charge the Accused with rape as a crime against humanity in its own right. Article 5 of the ECCC Law also enumerates rape as a crime against humanity in its own right.

363. In the reasoning part of the Closing Order, while they find that crimes against humanity existed in international law at the relevant time,[657] the Co-Investigating Judges state in paragraph 1314 of the Closing Order that rape was also a crime against humanity under customary international law.[658] The Pre-Trial Chamber notes that, in making such statement, the Co-Investigating Judges rely on the following authorities:

> Case file No. 001/18-07-2007/ECCC/TC Judgment para.361; Instructions for the Government of the Armies of the United States (Lieber Code) [1863] art.44; The Laws of War on Land (Oxford Manual) [1880] art.49; Convention (II) & (IV) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague Regulations) (adopted 29 July 1899 & 18 October 1907 respectively) preamble (Martens clause) art.46; Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the

[656] Closing Order, para. 1430.
[657] Closing Order, para. 1313, which, as noted in the Section discussing the merits of Ground three of Appeal above in this decision, is a correct finding.
[658] Closing Order, ftn. 5192.

Preliminary Peace Conference (adopted 29 March 1919); Control Council Law No.10 [1945] art.II(1)(c); International Military Tribunal for the Far East Indictment [1946] Preamble; Nuremburg Judgment IMT (Nuremburg) [31 January & 14 February 1946] Vol.VI pp.404-407,565; Judgment of the International Military Tribunal for the Far East IMT (Tokyo) [1948] p.1012-1019,1023,1180-1191, esp.1185-1186; Cyprus v. Turkey European Commission of Human Rights Applications 6780/74 and 6950/75 [10 July 1976] (1982) 4 E.H.R.R. p.482,483. [659]

364. The Pre-Trial Chamber, after an examination of these sources used by the Co-Investigating Judges, observes that such sources do not explicitly support a proposition that by 1975 rape existed as a 'crime against humanity,' rather many of them condemn the act and occasionally give an indication as to its gravity. In particular, the Pre-Trial Chamber makes the following observations:

1. The Trial Chamber found Duch only "criminally responsible [...] for the following offences as crimes against humanity: [...], torture (including one instance of rape)."[660] The Pre-Trial Chamber notes that in the case of Duch, the Trial Chamber did not particularly have to focus in making findings on whether rape existed as a Crime Against Humanity in its own right in customary law in 1975-79,[661] which is explicable because Duch was only found responsible for one isolated instance of rape, which is not sufficient to qualify it as a Crime Against Humanity because the "widespread and systematic" chapeau element of Crimes Against Humanity was not even in question. It is interesting to note, however, that, although in section 2.5.3 of the judgment[662] the Trial Chamber enumerates rape as a Crime Against Humanity in its own right, in paragraph 361 of the judgment it only states that rape has 'long been prohibited in customary international law and has been described as "one of the worst suffering a human being can inflict upon another",' which, in the understanding of the Pre-Trial Chamber, does not amount to an explicit

[659] Closing Order, ftn. 5192.
[660] Judgment in Case 001, para. 567.
[661] The Pre-Trial Chamber did not have to make such a finding in the appeal against the Closing Order in case 001 either, because it was not questioned by the Defence in that case.
[662] Judgment in Case 001, "Law and findings on offences as crimes against humanity," para. 330, page 117 ff.

finding that rape existed by 1975-79 as a Crime Against Humanity in its own right in customary international law.

2. The Pre-Trial Chamber further notes that Article 44 of the *Instructions for the Government of the Armies of the United States* also consider rape a high gravity crime.[663] The *Laws of War on Land (Oxford Manual)* Art. 49 and Art 46 of *Conventions (II) and (IV) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague 29 July 1899* use similar language by referring to "respect for family honor and rights, individual lives, religious convictions and liberty." The Pre-Trial Chamber also observes here rape is not explicitly mentioned although it could be implied within the rights of individual lives. A close reading of the terms[664] used in the Preambles to the Conventions of 1899 may be an indication that acts against individual rights are raised to the level of crimes against humanity but does not explicitly say so either.
3. The Pre-Trial Chamber further notes that rape was explicitly recognised as a crime against humanity only in Art. II(1)(c) of *Control Council Law No 10.*
4. The Preamble to the *International Military Tribunal for the Far East Indictment* states that crimes against humanity were referred to and defined in the Charter.[665] It further included rape as a violation of international law and the 'recognized customs and conventions of war'. It does not make the explicit link between rape and crimes against humanity.
5. The Nurembert (IMT) judgment stated facts and instances of rape, implicitly condemning it, but not arriving at any legal conclusions with regard to rape as a crime against humanity.

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[663] Lieber Code, art 44 considers rape prohibited under the penalty of death as a starting point, and then goes on to say 'or such other severe punishment as may seem adequate for the gravity of the offense.'

[664] The Preambles to the Conventions of 1899 both include references to the "interests of humanity" and "laws of humanity."

[665] International Military Tribunal for the Far East, *The United States of America et al. v Araki et al.*, "Indictment", reproduced in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments,* Oxford University Press: 2008, p. 16.

6. The judgment of the International Military Tribunal for the Far East[666] refers to the Rape of Nanking whereby soldiers engaged in countless acts of rape.[667] It condemned rape where it stated "[t]he barbarous behavior of the Japanese Army cannot be excused as the acts of soldiery which had temporarily gotten out of hand when at last a stubbornly defended position capitulated – rape, arson and murder continued to be committed on a large scale for at least six weeks after the city had been taken and for at least four weeks after Matsui and Muto had entered the city."[668] This section of the judgment does not explicitly identify rape as a crime against humanity.
7. In *Cyprus v Turkey*, the incidents of rape by Turkish soldiers constituted 'inhuman treatment' in the sense of Article 3 of the European Convention of Human Rights. While this case condemns rape, it does not identify it as a crime against humanity.[669]

365. The Pre Trial Chamber finds, in relation to these sources used by the Co-Investigating Judges, that these sources, on their own, do not adequately support the proposition that rape was a crime against humanity in its own right under customary international law by 1975. With the exception of Control Council No 10, none of the sources indicate that rape was, in its own right, a crime against humanity.

366. Despite the explicit enumeration of rape in Article 5 of the ECCC Law, the Pre-Trial Chamber shall make its own assessment to determine whether there was a rationale for its inclusion by an examination of whether rape existed in fact in international law as a crime against humanity in its own right by 1975.

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[666] International Military Tribunal for the Far East, *The United States of America et al. v Araki et al.*, "Majority Judgement", reproduced in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments,* Oxford University Press: 2008.,
[667] International Military Tribunal for the Far East, *The United States of America et al. v Araki et al.*, "Majority Judgment", reproduced in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments,* Oxford University Press: 2008, p. 49, 605.
[668] International Military Tribunal for the Far East, *The United States of America et al. v Araki et al.*, "Majority Judgment", reproduced in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments,* Oxford University Press: 2008, p. 49, 612.
[669] European Commission of Human Rights, *Cyprus v Turkey*, (1982) 4 EHRR 482, Application no. 6780/74 & 6950/75, 10 July 1976, ("*Cyprus v. Turkey*").

367. The Pre-Trial Chamber notes that the offence of rape has long been prohibited as a war crime, with its nascence dating back at least to the Lieber Code of 1863.[670] The Oxford Manual, drafted by the Institute of International Law in 1880, then mandated that 'family honor and rights' – a nineteenth century euphemism which encompassed a prohibition on rape and sexual assault[671] – must be respected as part of the laws and customs of war.[672] The 1899[673] and 1907[674] Hague Conventions repeated the same requirement, reinforced by the general protection afforded by the Martens Clause contained therein.[675] Rape was then explicitly prohibited in the Geneva Conventions of 1949,[676] Additional Protocol I of 1977,[677] and Additional Protocol II of 1977.[678] It is thus to be concluded that rape was a war crime well before 1975.

368. Prior to 1975, rape was criminalised as a crime against humanity only in Control Council Law No. 10, though examples of conviction for rape pursuant to this law were

[670] Lieber Code, Art 44: "All wanton violence committed against persons in the invaded country ... all *rape*, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense' (emphasis added).
[671] M. Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hague: 1999, p. 348.
[672] *The Laws of War on Land*, adopted by the Institute of International Law, Oxford, 9 September 1880 ("Oxford Manual"), Art 49: 'Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected.'
[673] *Hague Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899, ("1899 Hague Regulations"), Art 46: 'Family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.'
[674] *Hague Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land*, 18 October 1907 ("1907 Hague Regulations"), Art 46: 'Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.'
[675] *Hague Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899, preamble; *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, preamble.
[676] *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287 (opened for signature 12 August 1949, entered into force 21 October 1950) ("Fourth Geneva Convention"), Art 27 (second para.).
[677] *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, 1125 U.N.T.S. 3 (adopted 8 June 1977, entered into force 7 December 1978) ("Additional Protocol I"), Arts 76(1) (adopted by consensus).
[678] *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)* 1125 U.N.T.S. 609 (adopted 8 June 1977, entered into force 7 December 1978) ("Additional Protocol II"), Art 4(2)(e) (adopted by consensus).

not provided to this Chamber, nor could the Chamber find any such examples.[679] Evidence of rape was read into the record by the French and Soviet prosecutors before the IMT,[680] however nowhere in the Nuremberg (IMT) judgment was rape mentioned and no defendants were convicted of rape characterised as any crime, let alone as a crime against humanity in its own right.[681] The United Nations General Assembly did not recognise rape as a crime against humanity on its own right when it affirmed the Nuremberg Principles of International Law.

369. The Co-Investigating Judges[682] and the Co-Prosecutors[683] have not referred this Chamber to any other sources indicative of the customary criminalisation of rape as a crime against humanity in its own right prior to, or during, the period 1975 to 1979.

370. An alternative source of international law is 'the general principles of law recognized by civilized nations.'[684] The Pre-Trial Chamber finds that rape was near universally criminalised under the domestic criminal laws of states, albeit using varying definitions of rape.[685] Indeed, this Chamber has been unable to locate an example of a legal system that failed to criminalise rape by 1975. However, rape as a crime against humanity is necessarily composed of *chapeau* elements common to all crimes against humanity,

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[679] For mention of other sexual crimes see: the "Medical Case" (*United States v Karl Brandt et al.*) Case No. 1, NMT Vol. 2 (forced sterilization and castration); the "Pohl Case" (*United States v Oswald Pohl et al.*) Case No. 4, NMT Vol 5 (evidence of forced abortion and concentration camp "brothels"); the "RuSHA Case" (*United States v Ulrich Greifelt et al.*) Case No. 8, NMT Vols 4-5 (forced abortion, gender persecutions and reproductive crimes).

[680] See International Military Tribunal, Trial of the Major War Criminals, 1946, Nuremberg: 1947, Vol 6, Transcript 31 January, pp. 404-407; Vol 7, Transcript 14 February 1946, pp. 456-457 (reading into evidence the "The Molotov Note" dated 6 January 1942).

[681] See IMT Judgment and Kelly Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", *Berkeley Journal of International Law*, 2003, p. 301.

[682] Closing Order, 16 September 2010, D427 ("Closing Order"), ftn. 2570 and 2571.

[683] Co-Prosecutors' Response, ftn. 485-494.

[684] Statute of the International Court of Justice, art 38(1)(c). *See* also Section discussing the merits of Ground three of Appeal above in this decision.

[685] See for eg. *Code Pénal* (1956), Art. 443 (Cambodia); *Code Pénal* (1810) Arts. 331-333 (France); *Penal Code* (Act No. 45 of 1907), Arts. 177-178 (Japan); *Indian Penal Code* (Act No. 45 of 1860), art. 375 (India); *Penal Code* (No. 58 of 1937), Arts. 267-268 (Egypt); *The Criminal Code* (Act No. 29 of 1960), s 98 (Ghana); *Criminal Code of RSFSR* (1960, as amended to 1 March 1972), Art. 117 (Russian Socialist Federal Soviet Republic, USSR); *Código Penal* (Decreto-Lei No. 2.848 de 1940), Arts. 213-215 (Brazil); *Crimes Act* (Public Act No. 43 of 1961), s 128 (New Zealand); *Criminal Code Act 1899*, s 349-350 (Queensland, Australia); *California Penal Code* (1873), ss 261-269 (California, USA); *The Criminal Code*, 1892, 55-56 Vict., c. 29, s. 266 (Canada).

such as the requirement that the act form part of a 'widespread or systematic attack.'[686] Rape as it is defined under domestic criminal codes does not contain such element. The facts constituting rape as a crime against humanity may also support a charge of rape under domestic law, but the same may not be true in reverse, given that an isolated event unconnected to a broader reign of terror cannot amount to a crime against humanity. In another context, the Pre-Trial Chamber has previously considered whether domestic crimes and international crimes may be considered synonymous. The Pre-Trial Chamber indicated that where the constitutive elements are not identical, domestic and international crimes are to be treated as distinct crimes.[687] The Pre-Trial Chamber, therefore, finds that rape cannot simply be imported into international law as a crime against humanity in its own right by recourse to the general principles of law recognized by civilized nations. Consistent with ICTY jurisprudence, such principles may serve merely to assist in clarifying the *actus reus* and *mens rea* of rape once the existence of the crime has already been established.[688]

Conclusion:

371. The Pre-Trial Chamber finds that by 1975 rape did not exist under international law in its own right as an enumerated crime against humanity. However, the Pre-Trial Chamber opines that the material facts pleaded in the Closing Order with respect to rape may potentially amount to the crime against humanity of an 'other inhumane act.' In this respect, the Pre-Trial Chamber notes that the Co-Lawyers say that "rape can only violate Article 5 of the Establishment Law if: a. "other inhumane acts" as a category is applicable; and b. rape constituted an "other inhumane act" in 1975-79." The Pre-Trial Chamber finds in discussing the sub-grounds 15, 16, 17 and 19 below that by 1975 'other inhumane acts' existed in international law as a crime against humanity and that

[686] Judgment in Case 001, para. 300; *Prosecutor v Tadić*, IT-94-1-T, "Opinion and Judgment", Trial Chamber, 7 May 1997, paras 646-648; *Prosecutor v Akayesu*, ICTR-96-4-T, "Judgment", Trial Chamber, 2 September 1998, para. 579.
[687] Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias "Duch", 8 December 2008, D99/3/42, see paras 72 and 84.
[688] *Prosecutor v Furundžija*, IT-95-17/1-T, "Judgment", Trial Chamber, 10 December 1998, para. 177: '[T]o arrive at an accurate definition of rape based on the criminal law principle of specificity ... it is necessary to look for principles of criminal law common to the major legal systems of the world'; see also *Prosecutor v Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, "Judgment", Trial Chamber, 22 February 2001, paras 439-460.

further consideration of arguments related to the existence in law by 1975 of sub-categories of 'other inhumane acts' is not warranted.

372. Therefore, this sub-ground of Appeal is granted and the Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g)) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterised as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts and therefore are to be charged as such.

v) Sub-grounds 15 (other inhumane acts), 16 (forced marriage), 17 (sexual violence) and 19 (enforced disappearances):

Submissions:

373. The Co-Lawyers submit that "other inhumane acts" did not exist as an underlying offence constituting crimes against humanity in 1975-79 and that they were not sufficiently "pronounced."[689] The Co-Lawyers then argue that the Co-Investigating Judges erred in finding that they had jurisdiction over such 'other inhumane acts' as forced marriage, sexual violence, forced transfers of population and enforced disappearance, as these species of conduct had not attained such status by 1975.[690]

374. The Co-Prosecutors respond by arguing that 'other inhumane acts' comprise a residual offence which is intended to criminalise conduct which meets the threshold criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.'[691] They submit that "it is well established in international law that an act amounts to an 'other inhumane act' if it is "sufficiently similar in gravity to the other enumerated crimes".' They further aver that assessments of gravity involved in this

[689] Ieng Sary Appeal, para. 220 referring to the Closing Order, para. 1314.
[690] Ieng Sary Appeal, paras 220, 223-224 (forced marriage), 225 (sexual violence), 226-229 (forced transfers of population), 230-231 (enforced disappearance), each referring to the Closing Order, para. 1314.
[691] Co-Prosecutors' Response, para. 198.

enquiry are not jurisdictional matters and should therefore be determined at trial.[692] The Civil Parties in their observations do not make submissions specifically on the issue of 'other inhumane acts' but, as mentioned in para ...17... above, in general terms they put forward that the formulation of crimes against humanity adopted in Article 5 of the ECCC Law comports with that existing under the customary international law during the 1975-1979.

375. In Reply, the Co-Lawyers emphasise the 'inherent lack of specificity' of 'other inhumane acts,' and argue that this removes the offence from ECCC's jurisdiction.[693]

Discussion:

376. The Pre-Trial Chamber observes that in paragraph 1613 of the Closing Order the Co-Investigating Judges indict Ieng Sary with crimes against humanity, enumerating only 'other inhumane acts' as a crime against humanity on its own right.[694] The Co-Lawyers in the Appeal refer to paragraph 1314 of the Closing Order which, the Pre-Trial Chamber notes, is found in the reasoning part of the Closing Order and reads:

> The definition of crimes against humanity under customary international law is the commission of one or more of the following acts, as part of a widespread or systematic attack directed against a civilian population, [...] and other inhumane acts, *including* forced marriage, sexual violence, enforced disappearance and forced transfers of population."

377. The Pre-Trial Chamber notes that this paragraph of the Closing Order is mainly aimed at elaborating the meaning of crimes against humanity and of its sub-categories and that it enumerates forced marriage, sexual violence, enforced disappearance and forced transfers of population as being 'other inhumane acts,' which is obvious by the use of the term "*including*" in order to link both.

[692] Co-Prosecutors' Response, para. 198.
[693] Ieng Sary, para. 104.
[694] Closing Order, para. 1613.

378. At the outset, with regard to the Co-Lawyers related argument that the Co-Investigating Judges erred in finding that they have jurisdiction over such 'other inhumane acts' as forced marriage, sexual violence, forced transfers of population and enforced disappearance, the Pre-Trial Chamber concurs with the ICTY Trial Chamber in *Blagojević* that '[i]t should be stressed that other inhumane acts is *in itself* a crime under international law.'[695] To require that each sub-category of 'other inhumane acts' entail individual criminal responsibility under international law, is to render the category of 'other inhumane acts' otiose; that is, the conduct would have to amount to a crime in its own right, regardless of whether or not it also amounts to a crime as an 'other inhumane act.' The requirements of the principle of legality attach to the entire category of 'other inhumane acts' and not to each sub-category thereof. Further consideration of the Co-Lawyers arguments in relation to the existence in law by 1975 of the sub-categories of 'other inhumane acts' is, therefore, not warranted. The Co-Investigating Judges indicting Ieng Sary enumerating "other inhumane acts" as a crime against humanity in its own right, is the reason as to whether 'other inhumane acts' constituted a crime against humanity in international law in 1975-79 warrants consideration.

379. In relation to the Co-Lawyers argument that "other inhumane acts" did not exist as an underlying offence constituting crimes against humanity by 1975-79 and that they were not sufficiently pronounced, the Pre-Trial Chamber notes that in making their statement in relation to 'other inhumane acts' in paragraph 1314 of the Closing Order, the Co-Investigating Judges rely on the following authorities:

> "Case file No. 001/18-07-2007/ECCC/TC Judgment paras.293,367 et seq.; *Instructions for the Government of the Armies of the United States (Lieber Code)* [1863] art.16,22,56; *Convention (II) & (IV) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague Regulations)* [1899 & 1907]

[695] *Prosecutor v Blagojević & Jokić*, IT-02-60-T, "Judgment", Trial Chamber I Section A, 17 January 2005, para. 624 (emphasis added); see also *Prosecutor v Brima et al.*, SCSL-2004-16-T, "Judgment", Trial Chamber II, 20 June 2007 ("*Brima* Trial Judgment"), paras. 697-698; *Prosecutor v Brima et al.*, SCSL-2004-16-A, "Judgment", Appeals Chamber, 22 February 2008 ("*Brima* Appeals judgment"), paras. 183, 197-198; *Prosecutor v Kayeshima & Ruzindana*, ICTR-95-1-T, "Judgment", Trial Chamber, 21 May 1999, para. 583; *Prosecutor v Stakić*, IT-97-24-A, "Judgment", Appeals Chamber, 22 March 2006, paras. 315-317; *Prosecutor v Stakić*, IT-97-24-T, "Judgment", Trial Chamber II, 31 July 2003, para. 719.

preamble (Martens Clause); *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference* (adopted 29 March 1919); *Nuremburg Charter* [1945] art.6(b) & (c); *Control Council Law No.10* [1945] art.II(1)(b) & (c); *US Regulations Governing the Trials of the Accused War Criminals in the Pacific Region I & II* (1945) Regulation 2(b) & 5; *International Military Tribunal* [1945] Indictment Count Four Part (A); *Nuremberg (IMT) Judgment,* Nuremburg) [1946] Vol.I p.227; *Charter of the International Military Tribunal for the Far East* [1946] art.5(c); *Judgment of the International Military Tribunal for the Far East* IMT (Tokyo) [1948] Chapter VIII p.1001; *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal* Yearbook of the International Law Commission Vol.2 [1950] p.377 Principle VI(c); *Yearbook of the International Law Commission Documents of the Third Session* Vol.2 [1951]; *Draft Code of Crimes Against the Peace and Security of Mankind* International Law Commission [1954] art.2(11); *Yearbook of the International Law Commission Documents of the Sixth Session* Volume II [1954]; *Medical Case* Control Council Law No.10 [1947] Trial Judgment Vol.I p.16 & Vol.II p.175-180; *Justice Case* Control Council Law No.10 Trials [1947] Trial Judgment Vol.III p.3-4,23; *Ministries Case* Control Council Law No.10 Trials [1949] Trial Judgment Vol.XIV p.467; *High Command Case* Control Council Law No.10 Trials [1948] Trial Judgment Vol.X p.27-29,36,462; *Hostages Case* Control Council Law No.10 Trials [1948] Indictment Vol.XI p.770, Trial Judgment p.1232; *Universal Declaration of Human Rights* [1948] art.5; *International Covenant on Civil and Political Rights* [1966] (Cambodia signed 17 October 1980, ratified 26 May 1992) art.4(2),7; *European Convention on Human Rights* [1950] art.3,15(2); *American Convention of Human Rights* (adopted 22 November *1969 entered into force* 18 July 1978) art.5(2),27(2); *United Nations Command Rules and Regulations* [1950] rule 4; *UNGA RES/2547 XXIV* (1969) paras.2–3 and 7; *UNGA RES/3103 XXVIII* (1974) para.4; *UNGA RES/34/93 H* (1979) paras.1 and 4, *UNGA RES/41/35*; *UNGA RES/3318 XXIX* (1974) para.5; *UNGA RES/3452 XXX* (1975) para.2; *Corfu Channel Case (Merits)* ICJ [1949] Judgment p.22 para.215; *Report for the Greek Case* ECHR [1969] Part B Chapter IV(B)(VI) Section A para.34, Section C paras.16–17 and Section D para.21."[696]

380. In relation to these authorities used by the Co-Investigating Judges, the Pre-trial Chamber observes, that the reference, as quoted in the Closing Order, to the Trial Chamber judgment in Case 001 supports a conclusion that the notion of "other inhumane acts" existed in law as a crime against humanity since 1945 including: Article 6(c) of the Nuremberg Charter, Article 5(c) of the Tokyo Charter and Article II of Control Council Law No. 10. The rest of the authorities mentioned in the Trial Chamber's judgment in Case 001, as quoted in this paragraph of the Closing Order, appear to have been used to explore the definition of "other inhumane acts" and support

[696] Closing Order, ftn. 5194.

the conclusion that the prohibition against "other inhumane acts" *is now*[697] included in a large number of international legal instruments and forms part of customary international law.[698]

381. The Pre-Trial Chamber notes, in addition, that the Nuremberg Charter was in 1945 appended to the London Agreement between France, the USSR, the UK and the USA[699] and that by the end of 1945, nineteen other States had subsequently acceded to the Charter.[700] 'Other inhuman acts' is thus based in treaty law which amount to evidence of the *opinio juris* of those signatory states. The subsequent inclusion of 'other inhumane acts' in Article 5(c) of the Tokyo Charter[701] and Article II(1)(c) of Control Council Law No. 10,[702] are relevant as examples of State practice.

382. The Co-Investigating Judges have also relied on the Nuremberg Principles, which recognised the principles of international law found in the Nuremberg Charter and Judgment and explicitly list[703] 'other inhumane acts' as 'crimes against humanity.' The Pre-Trial Chamber emphasises the customary nature of such Principles in that in 1946, the United Nations General Assembly unanimously affirmed[704] and in 1950 the International Law Commission codified them[705] pursuant to the General Assembly's

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[697] Not necessarily before 1975.
[698] Judgment in Case 001, para. 367 quoting in ftn. 674 the *Celebici* Trial judgment, para. 517; *Prosecutor v. Brima et al.*, judgment, SCSL Appeals Chamber (SCSL-04-16-A), 22 February 2008 ("*Brima* Appeal judgment"), para. 183
[699] *Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 82 U.N.T.C. 280 (8 August 1945) ("London Agreement").
[700] Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia: International Committee of the Red Cross, 'International Humanitarian Law – State Parties / Signatories: Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945' (2005) http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=350&ps=P
[701] Tokyo (IMTFE) Charter, art 5(c) (the only difference in wording is the omission of religion from the persecution grounds and the inclusion of 'common plan' or 'conspiracy' liability).
[702] Control Council Law No. 10, art II(1)(c) ('before or during the war' omitted, and other inhumane acts reinforced by the words 'including but not limited to').
[703] Nuremberg Principles, Principle VI(c).
[704] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236, 11 December 1946.
[705] International Law Commission, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, International Law Commission: 1950 http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf

direction in 1947.[706] This unanimous endorsement by 1946 by the international community of the Nuremberg Charter and Judgment is a significant indication that by that time criminality for commission of 'other inhumane acts' as 'crimes against humanity' arose as a customary rule of international law.

383. The definition of crimes against humanity codified under Principle VI(c) of the Nuremburg Principles derives from the preamble of the Declaration of St. Petersburg in 1868 and the Martens Clause in the Hague Conventions of 1899 and 1907 invoking "the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience"[707] as residual protection against acts not specifically prohibited in the text of the Hague Conventions.[708] While Principle VI(c) articulates specific acts that constitute crimes against the laws of humanity, it nevertheless provides a non-exhaustive list and includes "other inhumane acts" as a residual category, in order to, in the spirit of the Martens Clause, avoid creating an opportunity for evasion of the laws of humanity.[709]

384. In respect of the requirement of accessibility and foreseeability regarding 'other inhumane acts,' the Co-Lawyers for Ieng Sary submit that inconsistent interpretations of the category 'other inhumane acts' demonstrate its inherent lack of specification, and that it therefore violates the principle of legality.[710] The Co-Lawyers refer to purportedly conflicting ICTY jurisprudence.[711] While the Pre-Trial Chamber cannot see how conflicting case law from the early 2000s may have led to confusion in the period

[706] Formulation of the Principles Recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal, U.N. G.A. Res. 177(II), 123rd Pl. Mtg., 21 November 1947.
[707] 1899 Hague Convention IV, Preamble; see also 1907 Hague Convention II, Preamble.
[708] See also *ICRC Commentary on the IVth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958, reprinted 1994, p. 39 (regarding 'inhumane treatment' in Common Art. 3 of the 1949 Geneva Conventions, it states: "[h]owever great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.")
[709] Judgment in Case 001, para. 367; *Prosecutor v. Kupreškić et al.*, IT-96-16-T, "Judgment", Trial Chamber, 14 January 2000, para. 563.
[710] Ieng Sary Appeal, para. 220.
[711] Ieng Sary Appeal, ftn. 523, contrasts *Prosecutor v Kupreškić et al.*, IT-96-16-T, "Judgment", Trial Chamber, 14 January 2000 ("*Kupreškić* Trial judgment"), para. 566 with *Prosecutor v Stakić*, IT-97-24-T, "Judgment", Trial Chamber II, 31 July 2003, para. 721. But note that the Appeals Chamber emphatically rejected the Trial Chamber's position and agreed with *Kupreškić*: *Prosecutor v Stakić*, IT-97-24-A, "Judgment", Appeals Chamber, 22 March 2006, paras 313-318.

1975 to 1979, it considers that the requirement of specification will be satisfied where the definition of the crime allows individuals to determine in advance whether certain conduct will or will not fall within its parameters. For obvious reasons, this is especially problematic in the case of a residual category of crime such as 'other inhumane acts.'[712]

385. The ECCC Law does not explicitly provide a definition for "other inhumane acts", neither has this Chamber found examples of an explicit definition of "other inhumane acts" in national law or in custom before 1975. For the objective test of accessibility and foreseeability to be met, it is sufficient to find that the notion of the criminal act was clear in the sense "generally understood" without the necessity to refer to written law. The notion of 'other inhumane acts' was listed in law as a crime against humanity before 1975. Its explicit definition appeared for the first time in law in Article 7 of the Statute of the International Criminal Court (ICC Statute), according to which "other inhumane acts" are "*acts of a similar character* [to those listed in Article 7(1), from (a) to (j)] *intentionally causing great suffering, or serious injury to body or to mental or physical health.*"[713] Some of the acts listed in Article 7(1), from (a) to (j), in the ICC Statute, which are identical to the acts listed in Article 5 of the ECCC Law include: murder, extermination, enslavement, deportation, imprisonment, torture and persecution.

386. This first explicit definition of the notion 'other inhumane act' in the ICC Statute does not represent the first time the meaning of 'other inhumane acts' was generally understood, it merely clarifies the objective elements of some of the underlying offences, by making explicit notions that before such definition were only implicit and could therefore be determined only by way of interpretation.[714] The Pre-Trial Chamber acknowledges, as pointed out below, that differences may be discerned between the ICC definition and that laid down in customary international law prior to 1975. Indeed the roots of such definition can be found in the post World War II jurisprudence.

[712] *Kupreškić* Trial judgment, para. 563.
[713] Rome Statute.
[714] See also Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 91.

387. The Pre-Trial Chamber emphasises that the following discussion of the elements of 'other inhumane acts,' as they appear in the post World War II jurisprudence, is purely necessary to establish whether the offence was sufficiently specific by 1975.

388. The ECCC Law, as well as the Nuremberg Charter, the Tokyo Charter, Control Council No. 10, and the Nuremberg Principles, list certain acts that are deemed to be crimes against humanity including 'other inhumane acts.' The word 'other' imports an *ejusdem generis* rule of interpretation, whereby 'other inhumane acts' can only include acts which are both 'inhumane' and of a "similar nature and gravity" to those specifically enumerated; namely, murder, extermination, enslavement and deportation.[715]

389. In finding that the doctrine of *ejusdem generis* is relevant for determining the content of "other inhumane acts", the Pre-Trial Chamber emphasises that this is not in violation of the rule against analogy found in civil law jurisdictions.[716] Applying a crime by analogy to unregulated conduct (*analogia lexis*) is distinguishable from – as with "other inhumane acts" – applying a subcategory within a crime by analogy to another subcategory within that crime for purposes of clarifying the definition of that other subcategory. In the latter scenario, if the conduct at issue falls within the definition of the crime, then it is in fact *regulated* conduct, such that the rationale of the rule against analogy does not apply.[717] This distinction is unavoidable when it is further considered that the category of "other inhumane acts" as crimes against humanity was specifically designed as a residual crime to avoid lacunae in the law, and that the term is rendered meaningless without applying an *ejusdem generis* canon of construction.

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[715] Nuremberg Military Tribunal, *United States v Friedrich Flick, et al.*, NMT Vol. 6, ("the Flick Case") p. 1215; *Ternek Elsa* (District Court of Tel Aviv, 14 December 1951), 5 Pesakim Mehoziim (1951-2), pp. 142-152 (Hebrew); 18 ILR 1951, p. 540 (English summary; note wrongly mentioned as 'Tarnek'); *Enigster Yehezkel Ben Alish* (District Court of Tel Aviv, 4 January 1952), 5 Pesakim Mehoziim (1951-2), pp. 152-180 (Hebrew); 18 ILR 1951, p. 541-542 (English summary); cf. *Prosecutor v Kupreskic et al.*, IT-96-16-T, "Judgment", Trial Chamber, 14 January 2000, para. 564: '[t]his interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal.'

[716] See Ieng Thirith Defence Appeal, paras 49-51 where it is argued that 'sexual violence' and 'forced marriage' cannot amount to 'other inhumane acts' by analogy to recognised crimes against humanity.

[717] Many legal commentators simply list *ejusdem generis* as an exception to the rule against analogy. See for example, Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, pp. 153-156.

390. In the NMT jurisprudence judges used the doctrine of *ejusdem generis*[718] to clarify whether the taking of property falls within the definition of crimes against humanity as an unenumerated act. For example, in the *Flick* Case and later in the *I. G. Farben* Case, the Tribunals found that the offenses listed in the Council Control Law's crimes against humanity provision are all offences against the person and, as such, "must be deemed to include only such as affect life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category."[719] In *Eichmann*, the Supreme Court of Israel found that "[c]ausing serious physical and mental harm" can amount to another inhumane act committed against a civilian population as defined by the Nazi and Nazi Collaborators (Punishment) Law, section 1(a), which reproduces the definition of crimes against humanity in the Nuremberg (IMT) Charter.[720] It further found that the plunder of property may be considered an inhumane act within the meaning of the definition of crime against humanity when, amongst others, "it is linked to any of the other acts of violence defined by the Law as a crime against humanity, or as a result of any of those acts, i.e., murder, extermination, starvation, or deportation of any civilian population, so that the plunder is only part of a general process".[721] In that case, Eichmann was charged and convicted for the plunder of the Jews' property as part of a procedure of expulsion, which, the Court found, amounted to a crime against humanity on the form or another inhumane act.[722] In the *Ministries* Case, the Tribunal distinguished confiscation of personal property from industrial property and considered that the plunder of property amounts to an inhumane act where it is committed *as part of mass terror* against a civilian

[718] The meaning in English of the Latin term *ejusdem generis* is: "a canon of construction that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same type os those listed."; Black's Law Dictionary.
[719] *Flick* Case, Vol. VI, p. 1215; endorsed in *United States v. Carl Krauch et al.*, 30 July 1948, reproduced in *NMT Trials,* Vols VII-VIII, p. 1("*I. G. Farben* Case"), at Vol. VIII , p. 1130.
[720] *Eichmann* case, para. 204.
[721] *Eichmann* case, para. 204.
[722] *Eichmann* Case, paras 204-205. See also the *Ministries Case (see fully quoted in footnote 723 below)*, referred to in *Eichmann Case*, Vol. XIV, pp. 990-991 (where the Minister of Finance, Schwerin von Krosigk, was convicted for war crimes and crimes against humanity as other inhumane acts for the plunder of Jews' property upon expulsion).

population or *where it is linked to the other acts* of violence enumerated as a crime against humanity.[723]

391. In addition to the use of the doctrine of *ejusdem generis* with respect to enumerated acts in the definition of crimes against humanity, the Pre-Trial Chamber notes that it is also clear from Nuremberg jurisprudence that the Tribunals, in routinely dealing with war crimes and crimes against humanity together, relied on the settled scope of war crimes under international law to inform the content of crimes against humanity, including "other inhumane acts", against German nationals or civilian populations in occupied territories.

392. In the *Justice* Case, the Tribunal noted that their 'jurisdiction to try persons charged with crimes against humanity '[wa]s limited in scope, both by definition and illustration, as appears from [Control Council Law No. 10].'[724] The Court considered it significant that the crimes against humanity provision employed the words '*against any civilian population*' instead of 'against any civilian individual,'[725] concluding that 'crimes against humanity as defined in [Control Council Law No. 10] must be strictly construed to exclude isolated cases of atrocity or persecution.'[726] In the *Justice* Case, the defendants were charged and convicted for "murder, torture, and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons" as war crimes and also as crimes against humanity.[727] In that case, when addressing the issue of crimes against humanity as violations of international law, the judges stated that "[t]he charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, *in violation of the laws of war and of humanity*."[728]

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[723] *United States of America vs. Ernst von Weizsaecker, et al.*, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, United States Government Printing Office, 1951 ("*Ministries Case*"),Vol. 14, pp 344, 991; see also interpretation in *Attorney General of Israel v Eichmann* (Israel District Court of Jerusalem, 12 December 1961), 36 ILR 5 (1962), para. 204.
[724] Nuremberg Military Tribunal, *United States of America v Josef Altstoetter et al.*, Case No. 3, NMT Vol. 3 ("*Justice* Case"), p. 973.
[725] *Justice* Case, p. 973.
[726] Justice Case, p. 982.
[727] Justice Case, pp. 3-4, 19, 23.
[728] Justice Case, p. 985.

393. In the *Medical* Case, the war crime of conducting 'medical experiments' without consent[729] against non-German civilians and armed forces was also charged and found to constitute "other inhumane acts" as crimes against humanity against German nationals.[730]

394. In the Ministries case, defendants were charged and convicted under Count 5 for:

> war crimes and crimes against humanity in that they participated in atrocities and offenses, including murder, extermination, enslavement, deportation, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under belligerent occupation of, or otherwise controlled by Germany [. . .].[731]

395. Accordingly, the Pre-Trial Chamber finds that, by 1975-1979, provided that the requisite *chapeau* and *mens rea* elements existed, an impugned act or omission constituted an "other inhumane act" as a crime against humanity where it was of a *similar nature and gravity* to the enumerated crimes against humanity of murder, extermination, enslavement or deportation such that: 1) it seriously affected the life or liberty of persons, including *inflicting serious physical or mental harm on persons* or 2) was otherwise *linked to an enumerated crime against humanity*. In this respect it was foreseeable that acts prohibited by the international regulation of armed conflict *on the basis of being inhumane would similarly be prohibited as a crime against humanity*. The definition of "other inhumane acts" was likely to encompass acts that would amount to serious violations or grave breaches of, *inter alia,* the 1899 Hague Regulations, the 1907 Hague Regulations, the 1929 Geneva Convention and the 1949

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[729] *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S. 31 (opened for signature 12 August 1949, entered into force 21 October 1950) ("First Geneva Convention"), Art 12; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S. 85 (opened for signature 12 August 1949, entered into force 21 October 1950) ("Second Geneva Convention"), Art 12; *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135 (opened for signature 12 August 1949, entered into force 21 October 1950) ("Third Geneva Convention"), Art 13; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287 (opened for signature 12 August 1949, entered into force 21 October 1950) ("Fourth Geneva Convention"), Art 32.

[730] The "Medical Case" (*United States v Karl Brandt et al.*) Case No. 1, NMT Vol. 1, p. 16, Vol. 2, pp. 174-180, 198.

[731] *Ministries* Case, pp. 467-68. See also *High Command* Case, Vol. X, pp. 29, 36, Vol. XI, pp. 463-465; *Hostages* Case, Vol. XI, pp. 765-766, 769-70, 1233-34, 262 et seq.

Geneva Conventions provided that they would meet the other requirements specific to these instruments.

396. On the basis of the foregoing, the Pre-Trial Chamber concludes that although by 1975 the articulation of the contours of the elements of other inhumane acts as crimes against humanity was not always clear or complete in accordance with our understanding of them today, the principle that an individual may be held criminally responsible for committing crimes which are "similar in nature and gravity" to the other listed crimes against humanity was established and generally understood.

397. With respect to the final matter of whether the Co-Investigating Judges 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. As such, it is not a jurisdictional issue that may be determined by the Pre-Trial Chamber pursuant to Internal Rule 74(3)(a), but is one for the Trial Chamber to decide at trial.

398. The Pre-Trial Chamber finds that the crime against humanity of "other inhumane acts" not only existed in law by 1975 but it was also both foreseeable and accessible to Ieng Sary that he could be indicted for such crimes perpetrated in the period of time 1975-1979. Sub-grounds 15, 16, 17 and 19 of Ground Seven of Appeal are dismissed.

6. Ground Eleven (Command Responsibility)

Summary of submissions:

The Co-Lawyers for Ieng Sary submissions on Appeal:

399. The Co-Lawyers for Ieng Sary assert in their Appeal that the Co-Investigating Judges erred in holding that the ECCC has jurisdiction over command responsibility as

command responsibility did not exist in customary international law in 1975-79.[732] They argue that: a) that Post World War II cases did not sufficiently clearly define the elements of command responsibility;[733] b) State practice does not show that custom existed pre-1975;[734] and c) Additional Protocol I to the Geneva Conventions did not codify customary international law related to command responsibility.[735]

400. The Co-Lawyers note that none of the statutory texts creating the post-World War II tribunals contained provisions setting out this form of liability.[736] They argue that although these tribunals attached criminal liability to command responsibility, their trials are of limited value in assessing the existence of command responsibility in international customary law because "the verdicts were short and contained limited, if any, legal reasoning"[737] and each express a variety of inconsistent views on the mental element required for liability.[738]

401. The Co-Lawyers assert that most States did not incorporate command responsibility provisions in their penal codes in 1975-79,[739] and that those provisions which did exist were "not uniform enough to be the basis of the widespread and consistent State practice required to find customary international law."[740]

402. The Co-Lawyers note that Articles 86 and 87 of Additional Protocol I, which came into effect in 1977, represent the first time penal sanctions for command responsibility were imposed at international law[741] and that their preparation provides additional evidence that insufficient consensus existed in the international community regarding the

[732] Ieng Sary Appeal, para. 283.
[733] Ieng Sary Appeal, paras 285-292.
[734] Ieng Sary Appeal, paras 293-297.
[735] Ieng Sary Appeal, paras 298-302.
[736] Ieng Sary Appeal, para. 286, referring to the Nuremberg (IMT) Charter, Control Council law No. 10, and the Tokyo (IMTFE) Charter, and citing Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 Yale J. Int'l L. 89, 105-06 (2000).
[737] Ieng Sary Appeal, para. 287.
[738] Ieng Sary Appeal, paras. 288-291.
[739] The Ieng Sary Appeal fn. 713 notes "the small number of countries that currently have command responsibility implementing legislation" as listed on the National Implementing Legislation Database on the ICC website, *available at* http://iccdb.webfactional.com/data/keyword/569/.
[740] Ieng Sary Appeal para. 293-296.
[741] Ieng Sary Appeal, para. 298.

elements of command responsibility for it to have formed part of customary international law.[742] The Co-Lawyers further submit that Additional Protocol I was not binding on Cambodia when it came into force[743] and that when it did come into force it only imposed obligations on States, and did not provide for individual criminal liability.[744] They add that the language of Article 87 of Additional Protocol I only includes liability for military commanders,[745] and that the 1994 Final Report of the Commission of Experts on Command Responsibility shares this view having stated that "most legal cases in which the doctrine of command responsibility has been considered have involved military or paramilitary accused."[746] The Co-Lawyers argue that there was no widespread, consistent State practice by 1975-79 to hold civilian superiors criminally liable for the actions of their subordinates.[747]

The Co-Prosecutors' Response and Civil Parties Observations:

403. In response to Ieng Sary's submissions, the Co-Prosecutors assert that superior responsibility is an applicable mode of liability at the ECCC since it meets the four preconditions set out by this Chamber in the JCE Decision that any mode of liability must satisfy in order to come within the jurisdiction of the ECCC: 1) it must be provided for in the [ECCC Law], explicitly or implicitly; 2) it must have existed under customary international law at the relevant time; 3) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; 4) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.[748]

[742] Ieng Sary Appeal, para. 299-300. The Appeal submits that the fact that Article 86 was redrafted five times demonstrates that what was agreed upon was a compromise between states, not a reflection of existing customary international law.
[743] Ieng Sary Appeal, para. 300. The Appeal notes that only three states had ratified the Additional Protocol by 1978, and that Cambodia had not even signed on to it.
[744] Ieng Sary Appeal, paras 301-302.
[745] Ieng Sary Appeal, para. 315.
[746] Ieng Sary Appeal, para. 315, quoting Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) UN Doc. S/1994/647, 27 May 1994, p. 16.
[747] Ieng Sary Appeal, para. 314.
[748] Co-Prosecutros' Response, para. 210, quoting JCE Decision, para. 43.

404. The Co-Prosecutors submit that the first precondition is met as Article 29 of the ECCC Law explicitly provides for the application of superior responsibility.[749] Regarding the second precondition, the Co-Prosecutors submit that by 1975, the doctrine of superior responsibility was "firmly established in customary international law."[750] This, it is argued, is demonstrated by 'substantial authority' including international instruments referring to responsible command[751] and later to command responsibility,[752] national legislation,[753] national military manuals,[754] and post First[755] and Second World War jurisprudence.[756] The Co-Prosecutors argue that Additional Protocol I codifies pre-existing customary international law regarding superior responsibility, noting that this fact has also been recognised by the ICTY Appeals Chamber.[757]

[749] Co-Prosecutors' Response, paras 212-213.
[750] Co-Prosecutors' Response, para. 214.
[751] 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, Art. 1; Geneva Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, arts 18, 33.
[752] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties – Report Presented to the Preliminary Peace Conference, 25 January 1919, *reprinted in* Violations of the Laws and Customs of War 24 (1919); Treaty of Versailles, 28 June 1919, Art. 228.
[753] Ordonnance du 28 août 1944 relative à la répression des crimes de guerre, Art. 4 (1944) (France); Law of 24 October 1946 Governing the Trial of War Criminals, article 9, 1946, (China), 1950; Loi du 2 août 1947 sur la repression des crimes de guerre, Grand-Duché de Luxembourg, Art. 3, 1947 (Luxemburg); Law of July 1947, Art. 27(a)(3)(1947) *amending* Extraordinary Penal Law Decree of 22 December 1943 (The Netherlands).
[754] Act respecting War Crimes, 31 August 1946, regulations 10(4) – 10(5) (Canada); U.S. Department of the Army, Field Manual 27-10: The Law of Land Warfare, 1956, para. 501.
[755] The Co-Prosecutors' Response at para. 218 notes a German Supreme Court case: Judgement in the Case of Emil Muller, 30 May 1921, *reprinted in* 16 Am. J. Int'l L. 684, 1922, p. 691.
[756] *Trial of General Tomoyuki Yamashita*, Case No. 21, Judgement of the United States Military Commission, Manila, 8 Oct. 1945-7 Dec. 1945, as reprinted in the *Law Reports of Trials of War Criminals,* selected and prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, ("*Yamashita* Judgement") pp. 1-2; *re Hirota*, Judgement, International Military Tribunal for the Far East, 12 November 1948 ("Tokyo Trials"), pp. 1179-80; *United States v. Brandt*, *in* 2 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1949 ("Medical Case"), pp. 1, 207, 212; *United States v. Pohl*, in 5 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council law No. 1, 1949 ("Pohl Decision"), pp. 193, 1159-1163; *United States v. Toyoda*, War Crimes Tribunal Courthouse, Tokyo (6 September 1949), *reproduced in relevant part in* William H. Parks, *Command Responsibility for War Crimes*, 62 M.L.Rev. 1, 1973, p. 72; *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling et. al.*, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals under Council Control Law No. 10, Vol. XIV, Appendix. B ("*Roechling Case*"), pp. 1061, 1139-43.
[757] Co-Prosecutors' Response, paras 228 – 230, noting the decision in *Hadžihasanović*, para. 29, and in the *Čelebići* Trial Judgement, para. 195.

405. The Co-Prosecutors further argue that the application of superior responsibility at the ECCC satisfies the requirements of accessibility and foreseeability.[758] They submit that in light of the status of superior responsibility in customary international law,[759] and the notoriety of the convictions supported by this doctrine following World War II,[760] a man in the position of Ieng Sary, a well-educated, well-travelled senior leader of the Democratic Kampuchea regime "undoubtedly had the capacity and the means to reach the logical conclusion that his actions and omissions could be criminalized on the basis of superior responsibility."[761]

406. In relation to whether command responsibility applied against civilian superiors, the Co-Prosecutors submit that principles of customary international law that have been "consistently applied since the 1950s" find that both military and civilian superiors who possess effective control over their subordinates could be found criminally liable for the actions of those subordinates.[762] They further submit that the jurisprudence of the ICTY and ICTR regarding civilian superior responsibility is instructive as their statutes mirror Article 29 of the ECCC Law, and as there were no significant developments in customary international law regarding this issue between the 1970s and the 1990s.[763]

Civil Party Lawyers Observations:

407. In the Civil Party Lawyers Observations I, it is submitted that command responsibility exists in customary international law as its principles were set out in the Geneva Conventions of 1949, Article 1 of the Hague Convention respecting the Laws and Customs of War on Land ("Hague Convention (IV)"), as well as in Article 43(1) of Additional Protocol I.[764] The Civil Party Lawyers' Observations II do not consider Ieng Sary's arguments with relation to command responsibility,[765] while in the Civil Party

[758] Co-Prosecutors' Response, paras 232 – 237.
[759] Co-Prosecutors' Response, para. 233.
[760] Co-Prosecutors' Response, para. 234.
[761] Co-Prosecutors' Response, para. 235.
[762] Co-Prosecutors' Response, para. 239
[763] Co-Prosecutors' Response, para. 240.
[764] Civil Party Lawyers' Observations I, paras 51, 52 & 54.
[765] Civil Party Lawyers' Observations II.

Lawyers' Observations III it is stated that the Civil Party Co-Lawyers "support all the arguments presented by the Co-Prosecutors in their joint Response [...]"[766]

408. The Civil Party Lawyers Observations I also submit that command responsibility exists for any superior with effective control over their subordinates.[767] They note that the statutes of international criminal tribunals provide for the superior responsibility of civilians,[768] and that civilian officials have been held liable through command responsibility at the Tokyo trials.[769]

The Co-Lawyers Replies:

409. In their Reply to the Co-Prosecutors' Response, the Co-Lawyers for Ieng Sary submit that it is insufficient for command responsibility to have existed at customary international law in 1975-79. Since the ECCC is a domestic court, it must have also existed in domestic Cambodian law to be applicable.[770]

410. The Co-Lawyers also reassert that command responsibility was not a part of customary international law in 1975-79, arguing that command responsibility was first codified at international law with the Additional Protocol I in 1977, and only widely accepted much later.[771] Any reference to an earlier principle of responsible command, it is stated, is irrelevant.[772] The Co-Lawyers go on in the Reply to dispute the relevance or reliability of several of the sources relied upon by the Co-Prosecutors to show that superior responsibility existed as customary international law, namely the existence of responsible command at customary international law;[773] the international Commission on the Responsibility of the Authors of War and on Enforcement of Penalties, created

[766] Civil Party Lawyers' Observations III, para. 8.
[767] Civil Party Lawyers' Observations I, paras 56 – 57.
[768] Civil Party Lawyers' Observations I, para. 58.
[769] Civil Party Lawyers' Observations I, para. 59.
[770] Ieng Sary Reply, paras 112 – 113.
[771] Ieng Sary Reply, para. 113.
[772] Ieng Sary Reply, para. 113.
[773] Ieng Sary Reply, para. 114.

during the 1919 Peace Conference;[774] the Treaty of Versailles;[775] the alleged application of international law by the German Supreme Court in the interwar period;[776] the post-World War II judgments;[777] national laws incorporating command responsibility;[778] and the reliance upon reasoning from ICTY judgments.[779]

411. Regarding foreseeability and accessibility, the Co-Lawyers submit that it is insufficient to rely upon the existence of a form of liability at customary international law to suggest its application is foreseeable.[780] They later assert that "[c]ommand responsibility would not be foreseeable to Mr. Ieng Sary because it did not exist in applicable law at the relevant time."[781] The Co-Lawyers further submit that the use of command responsibility by the post-World War II tribunals would not have been likely to be known by a non-lawyer such as Ieng Sary.[782] They submit that the inaccessibility of information in Cambodia in the 1970s would have prevented Ieng Sary from becoming aware of command responsibility as a valid form of individual criminal liability at customary international law, and that it would be applicable to him as a civilian superior.[783]

412. In their Reply to the Civil Party Lawyers' Observations I, the Co-Lawyers for Ieng Sary submit that the Hague Convention (IV), as well as Article 43(1) of Additional Protocol I merely set out a principle of responsible command, which cannot be equated to command responsibility.[784] They add that the statutes of international criminal tribunals cited in the Civil Party Lawyers' Observations I have no bearing on whether command responsibility existed in 1975-79.[785]

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[774] Ieng Sary Reply, para. 115.
[775] Ieng Sary Reply, para. 116.
[776] Ieng Sary Reply, para. 117.
[777] Ieng Sary Reply, para. 119.
[778] Ieng Sary Reply, para. 120.
[779] Ieng Sary Reply, para. 122.
[780] Ieng Sary Reply, para. 123.
[781] Ieng Sary Reply, para. 124.
[782] Ieng Sary Reply, para. 124.
[783] Ieng Sary Reply, paras 126-127.
[784] Ieng Sary Reply to Civil Party Lawyers Observartions I, para. 21.
[785] Ieng Sary Reply to Civil Party Lawyers Observartions I, para. 24.

Discussion:

413. The Co-Lawyers take issue with the Co-Investigating Judges' finding that command responsibility existed in customary international law in 1975-79. The Pre-Trial Chamber notes that in the Appeal the Co-Lawyers explicitly refer only to paragraphs 1319 and 1558 of the Closing Order. The Pre-Trial Chamber observes that other parts of the Closing Order which are related to these arguments but are not referred to by the Co-Lawyers in the Appeal are paragraphs 1307 and 1318.

414. The Pre-Trial Chamber observes that in making their statement in paragraph 1307 of the Closing Order that because "superior responsibility [was] also set out under international law through sources such as the trials following World War II [it] can be considered sufficiently accessible to the Charged Persons," the Co-Investigating Judges use as supporting sources ECCC's Trial Chamber Judgment in Case 001, paragraphs 32, 295 and 407 and the *Milutinovic et al.* ICTY [2003] Decision on Dragoljob Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, para.42.

415. In making their statement that "all of the modes of criminal responsibility set out in Article 29 (new) of the ECCC Law were part of international law applicable in Cambodia at the relevant time," in paragraph 1318 of the Closing Order, the Co-Investigating Judges use as supporting source the ECCC's Trial Chamber Judgment in Case 001, at paragraphs 472 and following.

416. Further, in making their statement that "this mode of responsibility applies to civilian superiors for the crimes committed by their subordinates," in paragraph 1319 of the Closing Order, the Co-Investigating Judges use as supporting sources the *Pohl* Case and the *Medical* Case.[786] For their statement in paragraph 1558 of the Closing Order "the criminal responsibility of the superior applies at both to military superiors and to civilian superiors, with that a formal hierarchy not being necessary for a person to be

[786] Closing Order, para. 1319, ftn. 5223.

considered responsible as a superior," the Co-Investigating Judges use as source the ICTR's Appeals Chamber Judgment in *Nahimana et al* Case.[787]

417. Regarding these sources used by the Co-Investigating Judges in support of their statements in the abovementioned paragraphs of the Closing Order, firstly, in relation to Trial Chamber findings in Case 001, as mentioned in paragraph 234 above, "the Pre-Trial Chamber notes that it may rely, where it finds it appropriate, on such findings and that the validity of some of the findings of the Trial Chamber's have not been challenged."

418. The Pre-Trial Chamber, having examined the sources supporting the statement that "all of the modes of criminal responsibility set out in Article 29 (new) of the ECCC Law were part of international law applicable in Cambodia at the relevant time," and for the reasons provided in the paragraphs that follow, agrees with the findings of the Trial Chamber in relation to superior responsibility in paragraphs 476 and 477 of its Judgment in Case 001 that: 1) "the Nuremberg-era tribunals found that the failure of a superior to carry out his duty to control his subordinates' criminal conduct could lead to individual criminal responsibility;" 2) that, as cited from the ICTY's Appeals' Chamber Decision of 16 July 2003, although Additional Protocol I was adopted in 1977, its Articles 86 and 87 were only declaring the existing position, and not constituting it; and 3) that jurisprudence from the Nuremberg-era tribunals also indicate that superior responsibility was not confined to military commanders under customary international law during the 1975 to 1979 period.

419. The Pre-Trial Chamber observes that Article 29 (new) of the ECCC Law stipulates that superior responsibility is defined as follows:

> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and

[787] Closing Order, para. 1558, ftn. 5302.

> the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

420. In other words, in order for an individual accused to be held liable for the criminal conduct of a subordinate under Article 29 (new) pursuant to the doctrine of superior responsibility, three elements must be demonstrated to exist. First, "there must have been a superior-subordinate relationship between the accused and the person who committed the crime" with effective command and control or authority and control; second, "the accused must have known, or had reason to know, that the crime was about to be or had been committed" referred to as the *mens rea* element of actual or constructive knowledge; and third, "the accused must have failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator" or the *actus reus* by omission element.[788]

421. The Pre-Trial Chamber notes that the evolution of individual criminal responsibility pursuant to the doctrine of superior responsibility as a customary international law norm was foreshadowed by events in the aftermath of World War I. First, in the 1919 report of the Commission on Responsibility of Authors of the War and on Enforcement of Penalties, which was created by the Preliminary Peace Conference for purposes of determining responsibilities relating to the war, the Commission gave explicit expression to the doctrine of superior responsibility in recommending that charges be brought before an international tribunal:

> [a]gainst all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered or, *with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war* (it being understood that no such abstention should constitute a defence for the actual perpetrators).[789]

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[788] Judgment in Case 001, para. 538.

[789] Reprinted in Vol. 14 *American Journal of International Law*, No. 1, pp. 95-154 , (Jan. - Apr., 1920), p. 121 (emphasis added).

422. While trial by international tribunal of individuals from Germany and her allies pursuant to the doctrine of superior responsibility never occurred, the German government agreed to try twelve individuals before the Supreme Court of the Reich at Leipzig for war crimes.[790] In one of these cases with respect to Emil Müller, a Captain in the Reserve of Karlsruhe, the Supreme Court found the accused to be liable for the mistreatment of a prisoner by a subordinate on the basis that he witnessed the mistreatment and failed to take action in the aftermath. The Court concluded that Müller had "at least tolerated and approved of this brutal treatment, even if it was not done on his orders".[791] Whereas, with respect to another incident of prisoner mistreatment by a subordinate, the Court did not find that Müller was responsible because it was "not clear whether this ill-treatment had not taken place before the accused either noticed it or could prevent it. Therefore, no case of knowingly permitting this when he could have prevented it [. . .] can be established here."[792]

423. However, it was only in the aftermath of World War II that international prosecutions based on the doctrine of superior responsibility were actually carried out. While the doctrine was not expressly provided for under the Nuremberg (IMT) Charter, the Tokyo (IMTFE) Charter or in Control Council Law No. 10, a number of cases of German and Japanese superiors tried before the IMTFE and the Allied military commissions or tribunals articulated and applied the doctrine.

424. First, in the 1945 trial of Japanese General Tomoyuki Yamashita, "an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army,"[793] before a United States Military Commission in Manila, General Yamashita was charged with:

> unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war

[790] James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, 1982, p. 142.
[791] Judgement in the Case of Emil Müller, 30 May 1921 reprinted in 16 *American Journal of International Law* 684, 1922 ("Emil Müller Judgement"), p. 691.
[792] Emil Müller Judgement, p. 691.
[793] *Yamashita* Judgement, p. 35.

> crimes. The essence of the case for the Prosecution was that the accused knew or must have known of, and permitted, the widespread crimes committed in the Philippines by troops under his command (which included murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial) [. . .][794]

425. Although the evidence submitted was conflicting or unclear with respect to General Yamashita's knowledge of crimes committed by his subordinates or effective control over them at the relevant time, there was abundant evidence before the Commission that the offences were "many and widespread both in space and time"[795] and were committed "by Japanese forces under [General Yamashita's] command".[796] Consequently, the Commission held that "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."[797] The Commission therefore convicted General Yamashita on the basis that "a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command" and "during the period in question you failed to provide effective control of your troops as was required by the circumstances."[798]

426. In response to a petition for a writ of *habeas corpus* on behalf of General Yamashita, the United States Supreme Court endorsed the Military Commission's findings, holding that certain provisions of international law "plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures *as were within his power* and appropriate in the circumstances to protect prisoners of war and the civilian population.

[794] *Yamashita* Judgement, p. 1.
[795] *Yamashita* Judgement, p. 2.
[796] *Yamashita* Judgement, p. 35.
[797] *Yamashita* Judgement, p. 35.
[798] *Yamashita* Judgement, p. 35.

This duty of a commanding officer has heretofore been recognised, and its breach penalised by our own military tribunals."[799]

427. The Pre-Trial Chamber notes that, while the articulation and application of the specific elements of the doctrine of superior responsibility by the Judges in this case has been controversial, specifically with respect to the requisite *mens rea* standard including a negligence or even a strict liability standard, and failing to establish effective control of General Yamashita over his troops, it is without question that *Yamashita* serves as precedent for the notion that a superior may be held criminally responsible under international law with respect to crimes committed by subordinates. Furthermore, the dissenting opinions in the Supreme Court case "have contributed, more than the Judgment of the majority, to moulding this concept into a doctrinally-sound form of criminal liability."[800]

428. Second, several of the twelve cases heard and decided under the Control Council Law No. 10 from October 1946-April 1949 before the Nuremberg Military Tribunals ("NMT") in the U.S. occupation zone in Germany applied the doctrine of superior responsibility. Perhaps the most well known is *United States v. Wilhelm von Leeb et al.* ("the *High Command* Case"),[801] which involved prosecution of fourteen high ranking officers in the German military for, among other charges, war crimes against enemy belligerents and prisoners of war (Count Two); and crimes against humanity against civilians (Count Three) as alleged in the indictment.[802]

429. Ten of the defendants were found guilty for both war crimes and crimes against humanity while the lead defendant, Field Marshal von Leeb, was only convicted for

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[799] *In re Yamashita,* US Supreme Court, Judgement of 4 February 1946, 327 US 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946) reprinted, in part, in the Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, Vol IV, London: HMSO, 1948, pp. 43-44 (emphasis added).
[800] Guénaël Mettraux, *The Law of Command Responsibility*, Oxford, 2009, pp. 7-8.
[801] *United States v. Wilhelm von Leeb et al.* in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, Vols. X and XI, United States Government Printing Office, 1951 ("*High Command* Case").
[802] *High Command* Case, Vol. X, p. 10; Vol. XI, pp. 463-465.

crimes against humanity.[803] Field Marshal von Leeb was convicted specifically for crimes against humanity as a military superior.[804] When articulating a theory of command responsibility, the Tribunal stated the following, which touches upon the requisite *mens rea* and *actus reus* requirements:

> [m]ilitary subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as know to civilized nations. [. . .] [T]he occupying commander must have knowledge of these offences [by his troops] and acquiesce or participate or criminally neglect to interfere in their commission and [. . .] the offences committed must be patently criminal.[805]

430. With respect to the requisite nature of the superior/subordinate relationship, the Tribunal laid out a form of the requirement of effective control, when rejecting the Prosecution's theory that a field commander officially responsible for an occupied territory could be held strictly liable for crimes committed against a civilian population by his subordinates in that territory due to the actions of higher military and Reich authorities.[806] The Tribunal found that where such authority was alleged to have been

[803] *High Command* Case, Vol. XI, pp. pp. 560-561. The other defendant committed suicide before the trial was adjourned.
[804] *High Command* Case, Vol. XI, pp. 560-561.
[805] *High Command* Case, Vol. XI, pp. 543-545.
[806] The Tribunal stated that: "Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is per se responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate. [...] It is the opinion of this Tribunal that [...] [i]t cannot be said that he exercises the power by which a civilian population is

removed from a commander, it would examine objective and subjective factors in considering the validity of the defence.[807]

431. Another NMT case applied the doctrine of superior responsibility, specifically, *United States v. Wilhelm List et al.* (the "*Hostage* Case"),[808] which involved high-ranking field marshals and generals who were charged with war crimes and crimes against humanity perpetrated against civilians, enemy troops and prisoners of war[809] "by troops of German armed forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed, and distributed"[810] by the defendants. The Tribunal held that "[i]n determining the guilt or innocence of each of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced."[811] General List was found guilty for war crimes and crimes against humanity under Counts One and Three of the indictment with respect to murder and ill treatment perpetrated against thousands of civilians, enemy troops and prisoners of war by his subordinates when he was the Armed Forces Commander Southeast in the occupied territories of Yugoslavia, Greece and Albania.[812] The Tribunal found that the evidence indicated that with respect to the *mens rea* and *actus reus* requirements of command responsibility:

> [t]he reports made to the defendant List as Armed Forces Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these un-lawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility. Instead of taking corrective

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subject to his invading army while at the same time the state which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment. [...] We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal." *High Command* Case, Vol. XI, pp. 544-545.

[807] *High Command* Case, Vol. XI, pp. 548-549.

[808] *United States v. Wilhelm List et al.* in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, Vol. XI, United States Government Printing Office, 1951 ("*Hostage* Case").

[809] *Hostage* Case, pp. 765-776, 1233-1234.

[810] *Hostage* Case, pp. 765-766.

[811] *Hostage* Case, pp. 765-766.

[812] *Hostage* Case, p. 1274.

> measures, he complacently permitted thousands of innocent people to die before the execution squads of the Wehrmacht and other armed units operating in the territory.[813]

432. The Tribunal rejected the defence that he lacked knowledge of these reports on the basis that "[r]eports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf."[814] Furthermore, with respect to the superior/subordinate requirement for command responsibility, the Tribunal did not accept his argument that many of the killings were carried out by military units not tactically subordinate to him.[815] The Tribunal noted that "[a] commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command."[816] Consequently, the Tribunal found that General List's authority was inherent in that position and "[t]he primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators."[817]

433. Similarly, General Walter Kuntze, who assumed the position of Armed Forces Commander Southeast from General List was convicted under Counts One, Three and Four, for war crimes and crimes against humanity committed against thousands of civilians, enemy troops and prisoners of war by his subordinates.[818] The Tribunal held that he was responsible under command responsibility theory for the collection of thousands of Jews and Gypsies into concentrations camps and their killings when it found that the:

> evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies shortly after the defendant assumed

[813] *Hostage* Case, pp. 1271-1272.
[814] *Hostage* Case, p. 1271.
[815] *Hostage* Case, p. 1272.
[816] *Hostage* Case, p. 1271.
[817] *Hostage* Case, p. 1272.
[818] *Hostage* Case, p. 1281.

> command in the Southeast by units that were subordinate to him. The record does not show that the defendant Kuntze ordered the shooting of Jews or their transfer to a collecting camp. The evidence does show that he had notice from the reports that units subordinate to him did carry out the shooting of a large group of Jews and gypsies as hereinbefore mentioned. He did have knowledge that troops subordinate to him were collecting and transporting Jews to collecting camps. Nowhere in the reports is it shown that the defendant Kuntze acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence. We think his responsibility for these unlawful acts is amply established by the record.[819]

434. In addition, as commander of the LXIX Reserve Corps in northern Croatia, General Ernst Dehner was convicted under Count One of the indictment for unlawful killings of thousands of innocent civilian hostages and reprisals taken against civilian prisoners by his direct subordinates, which constituted war crimes and crimes against humanity.[820] The Tribunal found that "[t]he records show that this defendant had full knowledge of these acts. [. . .] It appears to us from an examination of the evidence that the practice of killing hostages and reprisal prisoners got completely out of hand, legality was ignored, and arbitrary action became the accepted policy. The defendant is criminally responsible for permitting or tolerating such conduct on the part of his subordinate commanders."[821] In response to General Dehner's defense that it was the divisional commanders responsible for ordering the commission of the acts, the Tribunal agreed; however, it found that "the superior commander is also responsible if he orders, permits, or acquiesces in such criminal conduct. His duty and obligation is to prevent such acts, or if they have been already executed, to take steps to prevent their recurrence."[822]

435. Likewise, General Hubert Lanz was convicted for failing to prevent unlawful reprisals against innocent civilians as war crimes and crime against humanity under Count One committed by subordinates.[823] The Tribunal held that:

> The defendant says that as a tactical commander he was too busy to give attention to the matter of reprisals. This is a very lame excuse. The unlawful

[819] *Hostage* Case, pp. 1279-1280.
[820] *Hostage* Case, pp. 1297, 1299..
[821] *Hostage* Case, p. 1299.
[822] *Hostage* Case, p. 1298.
[823] *Hostage* Case, p. 1313.

> killing of innocent people is a matter that demands prompt and efficient handling by the highest officer of any army. This defendant, with full knowledge of what was going on, did absolutely nothing about it. Nowhere does an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war. The defendant does not even contend that he did. As commander of the XXII Corps it was his duty to act and when he failed to so do and permitted these inhumane and unlawful killings to continue, he is criminally responsible.

436. Finally, General Wilhelm Speidal, as Military Commander Southern Greece, was convicted under Count One for war crimes and crimes against humanity for carrying out of unlawful hostage and reprisal killings by his subordinates against innocent civilians.[824] The Tribunal found that "the Military Commander Greece could *control* the reprisal and hostage practice through the various subarea headquarters which were subordinate to him cannot be questioned."[825] Furthermore, the Tribunal found that the evidence indicated that General Speidal had knowledge of these acts and permitted them to occur.[826]

437. *United States v. Karl Brandt et al.* ("*Medical* Case"),[827] is still another NMT case that applied the doctrine of superior responsibility. However, unlike the *High Command* and *Hostage* Cases, the theory was applied to defendant Karl Brandt, who was not a military superior, strictly speaking. In 1934 he was Hitler's personal physician and a member of the Allgemeigne SS. In 1940, he was transferred to the armed wing of the SS, the Waffen SS, in which commissions were equivalent to those of the army although it was not part of the German army.[828] By decree issued by Hitler on 25 August 1944, Brandt became Reich Commissioner for Medical and Health Services, "authorizing him to issue instructions to all the medical services of the State, Party, and Wehrmacht concerning medical problems", both civilian and military.[829] The Tribunal found that in addition to his visits to concentration camps, Brandt became aware of sulfanilamide

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[824] *Hostage* Case, p. 1317.
[825] *Hostage* Case, p. 1314.
[826] *Hostage* Case, p. 1315-1316.
[827] *United States v. Karl Brandt et al.*, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Council Control Law No. 10*, Vols. I and II, United States Government Printing Office, 1951 ("*Medical* Case").
[828] *Medical* Case, Vol. II, p. 190.
[829] *Medical* Case, Vol. II, pp. 191-192.

experiments on human subjects at Ravensbrueck for a period of about a year prior to August 1943 at a meeting held in May 1943 where a complete report on the experiments was made.[830] At the time:

> [i]n the medical field Karl Brandt held a position of the highest rank directly under Hitler. He was in a position to intervene with authority on all medical matters; indeed, it appears that such was his positive duty. It does not appear that at any time he took any steps to check medical experiments upon human subjects. [. . .] Occupying the position he did, and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.[831]

438. Consequently, the Tribunal concluded that:

> [w]e find that Karl Brandt *was responsible for*, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non- German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed. To the extent that these criminal acts did not constitute war crimes they constituted crimes, against humanity.[832]

439. Similarly, Brandt's co-defendant, Oskar Schroeder was convicted under superior responsibility as a military superior for war crimes and crimes against humanity against non-German civilians and prisoners of war due to freezing experiments conducted in 1942 at the Dachau concentration camp for the benefit of the Luftwaffe. The Tribunal found that at the time he became Chief of the Medical Service of the Luftwaffe he had actual knowledge of the experiments resulting in suffering and death of the non-German subjects. He also had knowledge that typhus vaccine research was being administered on non-German subjects at Natzweiler and Schirmeck concentration camps in 1942-1943, and he had means of knowledge through reports to him that deaths were resulting, but failed to inquire on this point.[833] The Tribunal convicted him for these experiments committed by subordinates, finding that "the law of war imposes on a military officer in

[830] *Medical* Case, Vol. II, p. 193.
[831] *Medical* Case, Vol. II, p. 193-194.
[832] *Medical* Case, Vol. II, p. 198 (emphasis added).
[833] *Medical* Case, Vol. II, pp. 211-213.

a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war."[834]

440. Another co-defendant, Sigfried Handloser, was also convicted for war crimes and crimes against humanity committed against non-German and German civilians and prisoners of war in his capacity as a military superior.[835] The Tribunal found that Handloser had actual knowledge of freezing and sulfanimide experiments being conducted on inmates against their consent and resulting in death; however, he made no attempts to investigate or control his subordinates conducting the experiments.[836] Citing to the *Yamashita* precedent, the Judges held that:

> [i]n connection with Handloser's responsibility for unlawful experiments upon human beings, the evidence is conclusive that with knowledge of the frequent use of non-German nationals as human experimental subjects, he failed to exercise any proper degree of control over those subordinated to him who were implicated in medical experiments coming within his official sphere of competence. This was a duty which clearly devolved upon him by virtue of his official position. Had he exercised his responsibility, great numbers of non-German nationals would have been saved from murder. To the extent that the crimes committed by or under his authority were not war crimes they were crimes against humanity.[837]

441. Fourth, in *United States of America vs. Ernst von Weizsaecker, et al.*,[838] Gottlob Berger, Chief of the Main Office SS from 1940-1945 and Himmler's liaison officer for the Ministry for Eastern Territories was found guilty for crimes against humanity committed by the Dirlewanger brigade, which were *de facto* subordinate to him.[839] Like

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[834] *Medical* Case, Vol. II, pp. 212.
[835] Specifically, "as Chief of the Medical Service of the Wehrmacht occupying the position of superior over the Army Medical Service and the chiefs of the Medical Services of the Navy and Luftwaffe and certain other subordinate agencies pertaining to the Wehrmacht. The chart also indicates his authority over the Chief of the Medical Office [Service] of the Waffen SS and components of the Waffen SS when attached to the Wehrmacht." *Medical* Case, Vol. II, pp. 212.
[836] *Medical* Case, Vol. II, pp. 206.
[837] *Medical* Case, Vol. II, pp. 206.
[838] *Ministries Case*.
[839] "While in the field the unit was not under his tactical direction, it was organized by him, trained by the man whom he selected, the idea was his, he kept it and its commander under his protection, he was repeatedly informed of its savage and uncivilized behavior, which he not only permitted to continue, but attempted to justify; he fought every effort to have it transferred or dispersed, recommended its commander for promotion and

Karl Brandt, he was not a military superior strictly speaking; he was a Lieutenant General in the Waffen SS while also serving in some government ministry posts.[840]

442. Fifth, in *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling*,[841] German industrialists Hermann Roechling and von Gemmingen-Hornberg, were held responsible for war crimes for the inhumane treatment by the Gestapo of foreign deportees and prisoner of war workers in their plants through a disciplinary system that had been set up by prior agreement with the industrialists.[842] Although the Tribunal states that these two civilian superiors "permitted" and "encouraged" the existence and further development of this system of inhumane treatment in their plants,[843] Hermann Roechling's culpability is also in the language of omission as a superior. The Tribunal found that in view of his position and power, it was his:

> duty to keep himself informed about the treatment of the deportees; the fact that he did no longer concern himself about their fate, could only increase his responsibility. In his dual capacity as chief of the Voelklingen plants and chairman of the Reich Association Iron he had sufficient authority to intervene and to render the abuses less severe, even if he could not stop them. The contested judgment validly establishes that the witnesses declared Hermann Roechling to have had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoners' uniform on those occasions.[844]

443. Similarly, with respect to von Gemmingen-Hornberg, the Tribunal stated that he:

> was president of the Directorate of the Stahlwerke Roechling; he furthermore held the position of works manager, that is, as the works representative in negotiations with the authorities specially competent to deal with matters

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covered him with the mantle of his protection. That one of the purposes for which the brigade was organized was to commit crimes against humanity, and that it did so to an extent which horrified and shocked even Nazi commissioners and Rosenberg's Ministry for the Eastern Territories, who can hardly be justly accused of leniency toward the Jews, and people of the eastern territories, is shown beyond a doubt. Berger's responsibility is quite as clear. He is guilty with respect to the matters charged against him regarding the actions of the Dirlewanger unit, and we so find." *Ministries* Case, Vol. XIV, pp. 545-546.

[840] *Ministries* Case, Vol. XII, pp. 17-18.

[841] *Roechling* Case.

[842] *Roechling* Case, pp. 1135, 1140.

[843] *Roechling* Case, pp. 1136, 1140.

[844] *Roechling* Case, p. 1136.

> relating to labor. His sphere of competence also included contact with the Gestapo in regard to the works police. Von Gemmingen-Hornberg declares that he was incapable of altering the conditions, of which he was aware, since the deported workers were under the jurisdiction of the Gestapo and the German Labor Front. However, the high position which he held provided him with sufficient authority to intervene and to ensure an improvement in the treatment of the convicted deportees.[845]

444. Sixth, the 1949 IMTFE Judgment articulates the doctrine of superior responsibility under Chapter II entitled "The Law", with respect to individual criminal responsibility for war crimes against prisoners and applies it to military or naval officers commanding military formations with prisoners in their possession; officials in departments responsible for the well-being of prisoners; and officials, whether civilian, military or naval, having direct and immediate control of prisoners.[846] Although the Judgment does not explicitly refer to "superior responsibility" when it outlines the applicable law in this regard, the language used tracks the fundamental elements of the doctrine found in the ECCC Law. The Judgment provides that all such officials by virtue of their position have a duty to prevent ill treatment of prisoners by "establishing and securing the continuous and efficient working of a system appropriate for these purposes."[847] Once that system is established, such officials are not responsible for the commission of war crimes against the prisoners unless:

> (1) *[t]hey had knowledge* that such crimes were being committed, and having such knowledge *they failed to take such steps* as were *within their power to prevent* the commission of such crimes in the future, or (2) They are at fault in having failed to acquire such knowledge. *If such person had, or should,* but for negligence or supineness, *have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes.*[848]

445. Furthermore, with respect to army or navy commanders in particular, the IMTFE Judgment provides that:

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[845] *Roechling* Case, p. 1136.
[846] International Military Tribunal for the Far East, *The United States of America et al v. Araki et al* "Majority Judgement", 4-12 November 1948, reproduced in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments,* Oxford, 2008 ("IMTFE Judgement")., pp. 48443-48444.
[847] IMTFE Judgement, p. 48444.
[848] IMTFE Judgement, pp. 48444 -48445 (emphasis added).

> If crimes are committed against prisoners under their control, *of the likely occurrence of which they had, or should have had knowledge in advance,* they are responsible for those crimes. If, for example, it be shown that *within the units under his command* conventional war crimes have been committed *of which he knew or should have known*, a commander *who takes no adequate steps to prevent the occurrence of such crimes in the future* will be responsible for such future crimes.[849]

446. In addition under Chapter X of the IMTFE Judgment, entitled "Findings on Counts of the Indictment", Judges applied the principles laid out under Chapter II to the individual accused who were superiors when determining individual culpability under Count 55 of the Indictment. Count 55 charged the accused "with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war."[850] Subsequently, the Judges convicted General Iwane Matsui, Commander-in-Chief of the Central China Area Army, under Count 55 with respect to atrocities committed by his troops against civilians during the "Rape of Nanking." The Judges found that Matsui had received reports of the atrocities and had made his own observations. Thus, the tribunal was "satisfied that Matsui knew what was happening."[851] Nevertheless, "[h]e did nothing, or nothing effective to abate these horrors [. . .] *He had the power*, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge his duty."[852]

447. IMTFE Judges also found Field Marshal Shunroku Hata guilty for war crimes committed by his expeditionary forces in China in 1938 and 1941-1944, stating that:

> atrocities were committed on a large scale by the troops under his command and were spread over a long period of time. Either Hata knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war and civilians were obeyed. In either case, he was in breach of his duty as charged under Count 55.[853]

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[849] IMTFE Judgement, p. 48446.
[850] IMTFE Judgement, p. 48424.
[851] IMTFE Judgement, p. 49815.
[852] IMTFE Judgement, p. 49815-49816 (emphasis added).
[853] IMTFE Judgement, p. 49784.

448. Similarly, with respect to General Heitarō Kimura, commander of the Burma Area Army from August 1944 until surrender to Allied forces, the Judges convicted him under Count 55 because he was found to have knowledge of mistreatment of prisoners and when he took over command of the Burma Area Army, he failed to take effective disciplinary measures to stop the crimes. The Judges found that:

> The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders [. . .] His duty is to take such steps and issue such orders as will prevent thereafter the commission of such war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus, he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.[854]

449. In addition, in acquitting accused Admiral Takasumi Oka under Count 55 for responsibility for mistreatment of prisoners of war when he was Chief of the Naval Affairs Bureau from October 1940 to July 1944, which had primary responsibility for administration of the system designed to deal with prisoners, the Judges applied superior responsibility elements in so doing. They found that "[t]here is some evidence tending that Oka knew or ought to have known that war crimes were being committed by naval personnel against prisoners of war with whose welfare his department was concerned, but it falls short of the standard of proof which justifies a conviction in criminal cases."[855]

450. Alongside military officials, several other government officials were convicted as well under Count 55 of the indictment who were civilian officials or had dual civilian and military roles. Kōki Hirota, was convicted for war crimes committed during the "Nanjing Massacre" in the late 1930s, during which time he was Prime Minister and Foreign Minister. The IMTFE Tribunal found that he clearly had knowledge of the event as he received reports on the atrocities from foreign sources, and he brought the international protests with respect to Nanjing before the Cabinet for discussion.[856] However, the Tribunal held that he should not have simply relied upon assurances from

[854] IMTFE Judgement, p. 49809.
[855] IMTFE Judgement, p. 49822.
[856] IMTFE Judgement, p. 49791.

the War Ministry that they would not continue[857] and was "of the opinion that Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[858]

451. In addition, Mamoru Shigemitsu was convicted for war crimes with respect to mistreatment of prisoners and civilian internees during his tenure as foreign minister. Similar to Hirota, the IMTFE Tribunal found that he received information from foreign governments on this mistreatment from 1943-1945.[859] The Tribunal held that he:

> took no adequate steps to have the matter investigated, although he, as a member of the government, bore overall responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.[860]

452. Another, Prime Minister, General Kuniaki Koiso, was held responsible under Count 55 for war crimes committed against prisoners of war. The Tribunal noted that when General Koiso was Prime Minister from 1944-1945, mistreatment of prisoners of war was so widespread that it was "improbable" that he could not have known of it.[861] Furthermore, they found that following a meeting in 1944 in which the foreign minister reported on information from sources about Japan's mistreatment of prisoners, "Koiso remained Prime Minister for six months during which the Japanese treatment of prisoners and internees showed no improvement whatever. This amounted to a deliberate disregard of duty."[862]

453. It is noted that the IMTFE Tribunal considered charges against other high level civilian officials under Count 55 and acquitted them as superiors. For example, Hiranuma Kiichirō, Prime Minister in 1939 and Home Minister thereafter, was charged with war

[857] IMTFE Judgement, p. 49791.
[858] IMTFE Judgement, p. 49471.
[859] IMTFE Judgement, pp. 49829-49830.
[860] IMTFE Judgement, p. 49831.
[861] IMTFE Judgement, p. 49813.
[862] IMTFE Judgement, p. 49813.

crimes under Count 55. He was acquitted because the Tribunal found that there was no evidence directly connecting him to the crimes.[863] Another example is Kōichi Kido, Lord Keeper of the Privy Seal from 1940-1945 who was acquitted under Count 55 because, although he was found to be a member of the Cabinet during the Nanjing Massacre, "[t]he evidence is not sufficient to attach him with responsibility for failure to prevent war crimes."[864]

454. The Pre-Trial Chamber notes, in considering, in particular the *Yamashita* Judgment, that the contours of the elements of the doctrine of superior responsibility laid out by the Judges in Chapter II of the IMTFE Judgment or their application in Chapter X to specific accused are not as developed as the present day definition of the theory found in international jurisprudence. This is true with respect to the requirement of a superior/subordinate relationship with effective control, particularly in the context of non-military superiors, where the Judgment does not make explicit findings demonstrating such a relationship, but seems to assume it by virtue of the accused's high level positions, and only makes reference to "failed to take such steps as were *within their power* to prevent" in Chapter II. As such, the Pre-Trial Chamber considers that the IMTFE is not conclusive with respect to whether the doctrine of superior responsibility extends to non-military superiors as it fails to make findings relating to the core of the theory that whether there was a superior subordinate relationship, either *de jure* or *de facto*, between government officials and the military staff involved in the crimes.

455. For military superiors, the Judgment clearly refers to "units under [. . .] command", but again, except for General Matsui's case, seems to presume effective control by virtue of that *de jure* relationship. In addition, the "failure to punish" prong of the *actus reus* is not explicitly included in the definition although failure to take "adequate steps to prevent the occurrence of such crimes in the future" could be interpreted to include punishment. Finally, similar to *Yamashita*, the requisite *mens rea* broadly includes a

[863] IMTFE Judgement, p. 49787.
[864] IMTFE Judgement, pp. 49805-49806.

negligence standard in addition to actual and constructive knowledge. Nevertheless, the Chamber finds that the IMTFE Judgment, when read as a whole, sufficiently articulates the doctrine of superior responsibility as a mode of individual liability in its applicable law and verdicts sections.

456. Finally, in the 1948-1949 trial of Admiral Soemu Toyoda, former Commander-in-Chief of the Japanese Combined Fleet, the Combined Naval Forces, and the Naval Escort Command from 3 May 1944-29 May 1945, one of the last major war crimes trials concluded in the aftermath of World War II, the Australian/U.S. military tribunal addressed the issue of superior responsibility after reviewing other international trials preceding it. The tribunal defined the essential elements of the doctrine as follows:

> 1. That atrocities were actually committed; 2. Notice of the commission thereof. This notice may be either: a. Actual [...] or b. Constructive. [...] 3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders. 4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war. 5. Failure to punish offenders.[865]

457. In acquitting Admiral Toyoda for atrocities committed by navy personnel, the tribunal noted that:

> [h]is guilt cannot [simply] be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties.[866]

458. On the basis of the foregoing, the Pre-Trial Chamber concludes that the doctrine of superior responsibility as articulated under Article 29 (new) of the ECCC Law existed as a matter of customary international law by 1975. Although the articulation of the

[865] *United States v. Soemu Toyoda*, Official Transcript of Record of Trial 5005, 5006
[866] *United States v. Soemu Toyoda*, Official Transcript of Record of Trial 5005, 5006

contours of fundamental elements of the doctrine was not always clear or complete in accordance with our understanding of them today, and the application of those elements to the specific facts in the post World War II cases was at times inconsistent and incomplete, nevertheless, the principle that a superior may be held criminally responsible with respect to crimes committed by subordinates where there is a superior/subordinate relationship with effective control; the *mens rea* of actual or constructive knowledge; and the *actus reus* of failure to act was established.

459. Furthermore, this overview demonstrates that the doctrine of superior responsibility was understood not to be strictly limited to military commanders, but it was also extended to include non-military superiors. Therefore, this jurisprudence indicates that the exact nature of one's role or function as a superior and whether it is *de jure* or *de facto* is less important than the degree of command or authority exercised over one's subordinates. As such, it will be for the Trial Chamber to determine under the facts of this case the actual position and level of control over subordinates each accused possessed within the structure of the Khmer Rouge regime and whether, in light of that, the doctrine of superior responsibility applies to them.

460. Therefore, on the basis of the foregoing, the Pre-Trial Chamber finds that the doctrine of superior responsibility as charged in the Closing Order with respect to Ieng Sary existed as a matter of customary international law from 1975-1979. In light of the post-World War II international case law cited above and the serious nature of the crimes, it was both foreseeable and accessible to Ieng Sary that he could be prosecuted as a superior, whether military or non-military, for such crimes perpetrated by his subordinates from 1975-1979. Ground Eleven of the Ieng Sary's Appeal is dismissed.

E. REASONS FOR DETENTION:

461. On 24 January 2011, the Pre-Trial Chamber notified, in writing the reasons for its determination in point 11 of the disposition on the Appeal.[867] These reasons read:

[867] Reasons for Continuation of Detention.

"MAINTENANCE OF THE ACCUSED IN PROVISIONAL DETENTION: REASONS

4. Pursuant to sub-rule 68(2), once an appeal is lodged against the indictment, no matter what the nature of the appeal is, "the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber."

5. In addition to his Appeal which is the subject of the current decision, the Accused has lodged a separate Appeal against the Closing Order's extension of his provisional detention (the "Appeal on extension of provisional detention). The Appeal on extension of provisional detention was dismissed on 13 January 2011 whereby the Pre-Trial Chamber has pronounced the final disposition of the Appeal and announced that the reasons for this decision shall follow in due course. Reasons for this decision were provided previously today. In its decision, the Pre-Trial Chamber explained why the Appeal on extension of provisional detention failed to demonstrate that the Co-Investigating Judges have committed an error in their order to maintain the Accused in provisional detention.

6. The Pre-Trial Chamber finds that there is no new circumstance since the issuance of the Closing Order by Co-Investigating Judges except the confirmation of the indictment by the Pre-Trial Chamber, which reinforces the well founded reasons to believe that the Accused may have committed the crimes charged in the indictment and the necessity to maintain him in provisional detention in order to ensure his presence at trial, protect his security and preserve public order. The Pre-Trial Chamber considers that the reasons given by the Co-Investigating Judges to order that the Accused remains in provisional detention, which it adopts, justify that it orders that the provisional detention of the Accused pursuant to Internal Rule 68(3) continue until he is brought before the Trial Chamber."[868]

462. Therefore, for all the abovementioned reasons, the Pre-Trial Chamber decided as announced in its determination on Appeal of 13 January 2011.

[868] Reasons for Continuation of Detention, paras 4-6.

In accordance with Internal Rule 77(13), this decision is not subject to appeal.

Phnom Penh, 11 April 2011

Pre-Trial Chamber **President**

Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**

Greffiers

SAR Chanrath **Entela JOSIFI**