

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 18 January 2013**CLASSIFICATION****Classification of the document
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IENG SARY'S SUBMISSION ON APPLICABLE LAW IN CASE 002/01

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Reserve Judge Claudia FENZ**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rule 92 of the ECCC Internal Rules (“Rules”) and the Trial Chamber’s instruction,¹ hereby submits the applicable law pertaining to the crimes and modes of liability alleged in Case 002/01. In light of the 20-page limitation imposed by the Trial Chamber,² the Defence incorporates by reference all previous submissions relating to the law to be applied at the ECCC.³ The Defence reserves

¹ Trial Chamber Memorandum titled “Notification of Decision on Co-Prosecutors’ Request to Include Additional Crime Sites within the Scope of Trial in Case 002/01 (E163) and deadline for submission of applicable law portion of Closing Briefs,” 8 October 2012, E163/5.

² *Id.*, para. 4.

³ IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, 28 July 2008 (“Motion Against the Application of JCE”), D97; IENG Sary’s Supplemental Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008 (“Supplemental Observations on JCE”), D97/7; IENG Sary’s Response to Co-Lawyers of Civil Parties’ Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009 (“Response to Civil Parties’ Request on Enforced Disappearance”), D180/4; IENG Sary’s Appeal Against the OCIJ’s Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 January 2010 (“Appeal Against OCIJ Order on JCE”), D97/14/5; IENG Sary’s Motion Against the Application of Command Responsibility at the ECCC, 15 February 2010 (“Motion Against Application of Command Responsibility”), D345/2; IENG Sary’s Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010 (“Alternative Motion on Application of Command Responsibility”), D345/3; IENG Sary’s Reply to the Co-Prosecutors’ Response to Ieng Sary, Ieng Thirith and Khieu Samphan’s Appeals on Joint Criminal Enterprise, 18 March 2010, D97/14/14; IENG Sary’s Appeal Against the OCIJ’s Order on Motion Against the Application of Command Responsibility, 13 April 2010 (“Appeal Against OCIJ Order on Command Responsibility”), D345/5/1; IENG Sary’s Motion Against the Applicability of Crimes Against Humanity at the ECCC, 13 April 2010, D378 (“Motion Against Application of Crimes Against Humanity”); IENG Sary’s Written Reply in Support of the Oral Submissions to the Hearing Before the Pre-Trial Chamber Concerning the Co-Prosecutors’ Response to Ieng Sary’s Appeal on Command Responsibility, 21 May 2010 (“Reply Supporting Oral Submissions”), D345/5/9; IENG Sary’s Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC, 23 June 2010 (“Alternative Motion on Application of Crimes Against Humanity”), D378/2; IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010 (“Response to OCP Final Submission”), D390/1/2/1.3; IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6 (“Appeal Against the Closing Order”); IENG Sary’s Reply to the Co-Prosecutors’ Joint Response to NUON Chea, IENG Sary and IENG Thiriths’ Appeals Against the Closing Order, 6 December 2010 (“Reply to OCP Response to Appeals Against Closing Order”), D427/1/23; IENG Sary’s Reply to the Combined Response by *Advocats Sans Frontières* 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 (“Reply to *Advocats Sans Frontières* Response to Appeals Against Closing Order”), D427/1/24; 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 (“Reply to Joint Observations on Appeals Against Closing Order”), D427/1/125; Summary of IENG Sary’s Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011 (“Summary of Preliminary Objections”), E51/4; IENG Sary’s Response to the Co-Prosecutors’ Request for the Trial Chamber to Exclude the Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 22 June 2011 (“Response to OCP Request to Exclude Nexus Requirement”), E95/4; IENG Sary’s Response to the Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability and Request for an Oral Hearing, 22 July 2011 (“Response to OCP Request Regarding JCE III”), E100/2; IENG SARY’s Observations on OCP’s Consolidated Reply to Defence Responses to OCP’s Request to Re-characterize Charges in the Indictment and to Exclude the Nexus Requirement for Armed Conflict to Prove Crimes Against Humanity, 18 August 2011, E95/7; IENG Sary’s Appeal Against the Trial Chamber’s Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 25 November 2011 (“Appeal Against Trial Chamber Decision on Nexus”), E95/8/1/1.

the right to address the applicable law again in its Closing Brief.⁴ Attached herewith please find Annex A on the applicable law.

INTRODUCTORY REMARKS TO ANNEX A

1. Annex A sets forth: **a.** the jurisdictional (*chapeau*) elements of crimes against humanity; **b.** the elements of the offenses at issue in Case 002/01 (murder; extermination; persecution on political and racial grounds; and other inhumane acts, including attacks on human dignity, forcible transfer and enforced disappearance);⁵ and **c.** the elements of the modes of liability under which Mr. IENG Sary is charged. Annex A addresses the elements of crimes and modes of liability in the order presented in Article 5 (crimes against humanity) and Article 29 (individual responsibility) of the Establishment Law. Also addressed is joint criminal enterprise liability, despite the fact that it is not explicitly included in Article 29.⁶
2. Mr. IENG Sary is presumed innocent until proven guilty.⁷ The OCP bears the burden of proof.⁸ Before the Trial Chamber can convict Mr. IENG Sary of any offense, it must be convinced of his guilt beyond a reasonable doubt.⁹
3. As a Cambodian court, the ECCC must follow Cambodian law,¹⁰ which incorporates the principles of legality (*nullum crimen sine lege*), *in dubio pro reo* and *lex mitior*. The 1956 Penal Code incorporates the principle of legality, providing that an Accused cannot be punished for a crime that did not exist in Cambodian law at the time of the alleged offense.¹¹ Liability for the offense must have been sufficiently foreseeable and accessible

⁴ See Trial Chamber Memorandum titled "Clarification regarding applicable law briefs," 7 December 2012, E163/5/6.

⁵ Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124, para. 5.

⁶ See Decision on the Appeals Against Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D47/14/15; Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6.

⁷ Constitution of the Kingdom of Cambodia, adopted 21 September 1993 ("Constitution"), Art. 38; Agreement, Art. 13(1); Establishment Law, Art. 35 new; Rule 21(1)(d).

⁸ Rule 87(1).

⁹ *Id.*

¹⁰ See Agreement, Art. 12(1); Rules, preamble.

¹¹ See 1956 Penal Code, Art. 6: "Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed. Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place" (unofficial translation). See also 1966 International Covenant on Civil and Political Rights ("ICCPR"), Art. 15(1), which states in part: "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed"; Universal Declaration of Human Rights, U.N.G.A. Res. 217A(III), U.N. GAOR, 3rd Sess. At 71, U.N. Doc. A/810 (1948), Art. 11(1). Pursuant to the Constitution, the Agreement and the Establishment Law, the guarantees contained within the

to the Accused at the time.¹² The principle of *in dubio pro reo* requires that the Trial Chamber must resolve any doubts in favor of Mr. IENG Sary.¹³ The principle of *lex mitior* requires that, where a law that binds the Trial Chamber is amended to a law that is more favorable to the Accused, the Trial Chamber must apply the more favorable law.¹⁴

4. Customary international law penalizing crimes against humanity is not directly applicable at the ECCC.¹⁵ Should the Trial Chamber nevertheless decide to apply customary international law, it merits emphasizing that customary international law is established only when it is conclusively determined that two criteria are met: **a.** general and consistent State practice; and **b.** *opinio juris*.¹⁶ “State practice” is the “tacit agreement” of States through their practice and expression of what they believe to be legally binding amongst themselves.¹⁷ While State practice should be both “extensive and virtually

ICCPR must be respected. See Constitution, Art. 31; Establishment Law, Art. 33 new; Agreement, Art. 13(1). The Defence contests the Trial Chamber’s conclusion that the principle of legality may be satisfied if a law exists in international law or in general principles of law. See *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/SC, Trial Judgement, 26 July 2010 (“*Duch* Trial Judgement”), paras. 28-34. This definition of the principle of legality is expansive, given the 1956 Penal Code’s requirement that the law must have existed in applicable domestic law at the time of the crime at issue. See Summary of Preliminary Objections, para. 24, referring to Mr. IENG Sary’s preliminary objection that the ECCC does not have jurisdiction to apply international crimes and forms of liability against him.

¹² See Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011 (“Pre-Trial Chamber Decision on Appeal Against Closing Order”), D427/1/30, paras. 229, 235-36; *Duch* Trial Judgement, para. 28.

¹³ Article 38 of the Constitution incorporates the principle of *in dubio pro reo* and requires that any doubts be resolved in favor of the Accused. The Supreme Court Chamber has held that this principle applies to interpretations of law, subject to Civil Law rules of interpretation. Decision on Immediate Appeal by KHIEU Samphan on Application for Immediate Release, 6 June 2011, E50/3/1/4, para. 31: “In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it is limited to doubts that remain after interpretation. Therefore, *in dubio pro reo* is primarily applied to doubts about the content of a legal norm that remain after the application of the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective.”

¹⁴ 1956 Penal Code, Art. 6. See also ICCPR, Art. 15(1); *Prosecutor v. Deronjić*, IT-02-61-A, Appeals Judgement, 20 July 2005, para. 97.

¹⁵ See Motion Against Application of JCE, paras. 25-27; Motion Against Application of Crimes Against Humanity, paras. 15-21; Appeal Against the Closing Order, paras. 111-14, 121-25; Reply to Joint Observations on Appeals Against Closing Order, paras. 10-12; Summary of Preliminary Objections, para. 24.

¹⁶ Customary international law is incorporated in Article 38(1)(b) of the Statute of the International Court of Justice (“ICJ”) as “international custom, as evidence of a general practice accepted as law.” See *Military and Paramilitary Activities* (Nic. v. U.S.), 1986 I.C.J. 14, 98 (27 June) (“*Military and Paramilitary Activities*”); *Continental Shelf* (Libya v. Malta), 1985 I.C.J. 13, 29-30 (3 June): “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states.” The concepts of State practice and *opinio juris* are inextricably linked and may overlap. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 9 (6th ed., OUP 2004) (“BROWNLIE”); RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987), which also adopts a two-pronged approach to the formation of international custom.

¹⁷ *S.S. “Lotus”* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (7 September), where the Permanent Court of International Justice stated that customary international law is an expression of the free will of States. See also MALCOLM N. SHAW, INTERNATIONAL LAW 84 (6th ed. CUP 2008) (“SHAW”): “The formulation that ‘state practice covers any act or statements by a state from which views about customary international law may be inferred’, is substantially correct.”

uniform in the sense of the provision invoked,”¹⁸ it need not be “in absolutely rigorous conformity with the rule.”¹⁹ “*Opinio juris*” is the recognition by States that a certain practice is “required” by law.²⁰ Reliance on international agreements and resolutions *alone* is not enough to establish *opinio juris* and State practice.²¹

5. To comply with the Constitution and the principles of *nullem crimen sine lege* and *in dubio pro reo*, the Trial Chamber must apply the elements of crimes and modes of liability as they existed in 1975-79.
6. Annex A demonstrates the following: **a.** the definition of crimes against humanity required a State or organizational policy²² and a nexus with armed conflict;²³ **b.** neither forcible transfer²⁴ nor enforced disappearance²⁵ was recognized as a crime against humanity; **c.** the Trial Chamber does not have jurisdiction over “other inhumane acts”;²⁶ **d.** joint criminal enterprise did not exist as a mode of liability;²⁷ **e.** command responsibility did not exist as a mode of liability;²⁸ and **f.** if command responsibility existed in 1975-79, it applied only to international armed conflicts,²⁹ it did not apply to

¹⁸ *North Sea Continental Shelf* (F.R.G. v. Den./F.R.G. v. Neth.) 1969 I.C.J. 3, 43 (20 February) (“*North Sea Continental Shelf*”). See also *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 276 (20 November) (“*Asylum*”); SHAW, at 76-78.

¹⁹ *Military and Paramilitary Activities*, at 98. The party seeking to rely on a rule of customary international law must prove its existence. *Asylum*, at 276-77. See also BROWNLIE, at 7; DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (6th ed. OUP 2004), Chap. 2; HUGH THIRLWAY, *The Sources of International Law* in MALCOLM EVANS (ED.) INTERNATIONAL LAW (2nd ed. OUP 2006); J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems* 15 EUR. J. INT’L L. 523 (2004).

²⁰ *North Sea Continental Shelf*, at 44: “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.... The frequency, or even habitual character of the acts is not in itself enough.” See JL BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 61 (6th ed. Oxford University Press, 1963).

²¹ See SHAW, at 82: “It is how states behave in practice that forms the basis of customary law, but evidence of what a state does can be obtained from numerous sources.” See *id.*, at 88: “The key, however, is the attitude taken by the states concerned, whether as parties to a particular treaty or as participants in the adoption of a UN resolution.” See, e.g., *Legality of the Threat or use of Nuclear Weapons*, Advisory Opinion, 1966 I.C.J. 226, 253-56 (8 July); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 53-54 (21 June) (discussing differences between a binding and a non-binding resolution and their relative normative qualities).

²² See Annex A, paras. 7-10.

²³ See *id.*, paras. 11-12.

²⁴ See *id.*, para. 18.

²⁵ See *id.*, para. 21.

²⁶ See *id.*, paras. 23-24.

²⁷ See *id.*, paras. 31-33.

²⁸ See *id.*, paras. 36-39.

²⁹ See *id.*, para. 40.

civilian superiors,³⁰ it required proof of causation,³¹ civilian superiors were only liable if they had a pre-existing duty to act,³² and it did not apply to specific-intent crimes.³³

Respectfully submitted,

ANG Udom



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Signed in Phnom Penh, Kingdom of Cambodia on this 18th day of **January, 2013**

³⁰ *See id.*, para. 40.

³¹ *See id.*, para. 41.

³² *See id.*

³³ *See id.*