

**BEFORE THE PRE-TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 004/1/07-09-2009-ECCC/OCIJ (PTC 50)**Party Filing:** The Defence for IM Chaem**Filed to:** The Pre-Trial Chamber**Original language:** English**Date of document:** 10 November 2017**CLASSIFICATION****Classification of the document  
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**IM CHAEM'S RESPONSE TO THE CPCLS' SUBMISSION ON THE POSITION OF  
THE ECCC WITHIN THE CAMBODIAN LEGAL SYSTEM (D308/3/1/9)**

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Case 004/1**

## I. INTRODUCTION

1. Ms. IM Chaem, through her Co-Lawyers (the “Defence”), hereby respectfully submits this Response to the *Civil Party Co-Lawyers’ Submission on the ECCC Position within the Cambodian Legal System* (“Submission”).<sup>1</sup> In the Submission, the CPCLs challenge the CIJs’ finding that “one of the effects of the ECCC Law is that it ‘excludes any personal or subject matter jurisdiction by the ordinary Cambodian courts over the events under the ECCC’s temporal jurisdiction.’”<sup>2</sup> The CPCLs submit that the Closing Order “purports to legally strip ordinary Cambodian courts of their jurisdiction to adjudicate *any* Khmer Rouge-era crimes, including those that fall outside the ECCC’s limited jurisdiction”<sup>3</sup> and that, contrary to the CIJs’ finding, ordinary Cambodian courts maintain jurisdiction over crimes that do not fall within the ECCC’s scope.<sup>4</sup> The CPCLs request the PTC to i) redress the Closing Order’s findings on the jurisdiction of ordinary Cambodian courts<sup>5</sup> and ii) declare that the extent to which ordinary Cambodian courts have competence to adjudicate Khmer Rouge-era crimes is an issue to be determined by those courts.<sup>6</sup>
2. In this Response, the Defence submits that the PTC is not the appropriate forum to purport to achieve finality concerning the question of the jurisdiction of ordinary Cambodian courts over Khmer Rouge-era crimes. As will be argued below, the object and purpose of the CIJs’ impugned finding was not to finally determine or delineate these jurisdictional boundaries for the ECCC or the ordinary courts of Cambodia. Although, in light of the relevant negotiating history and subsequent statements and practice, the CIJs’ conclusion that the Cambodian state has elected to deprive its own (ordinary) Cambodian courts of any jurisdiction over Khmer Rouge-eras crimes is convincing, this does not provide any basis upon which the PTC should redress the Closing Order or otherwise make any declaratory pronouncement. The CPCLs misunderstand the nature of the CIJs’ approach and seek a remedy when none is required or

<sup>1</sup> Civil Party Co-Lawyers’ Submission on the Position of the ECCC within the Cambodian Legal System, 8 September 2017, **D308/3/1/9** (“Submission”). The Khmer translation of the Submission was filed on 31 October 2017, therefore commencing the 10-day deadline from the day after the notification of the translation. *See*, Email from the Case File Notification Officer to the parties in Case 004/1 entitled “[Filed by Civil Party (004)] TRANSLATION(S): CASE FILE No. 004/1 Civil Party Co-Lawyers’ Submission on ECCC Position within Cambodian Legal System, 31 October 2017 (**Authority 1**).

<sup>2</sup> Submission, para. 3, *citing* Closing Order (Reasons), 10 July 2017, **D308/3**, para. 23.

<sup>3</sup> Submission, para. 3 (emphasis in original Submission).

<sup>4</sup> Submission, para. 8. *See also*, Submission, paras. 9-31.

<sup>5</sup> Submission, paras. 3, 32.

<sup>6</sup> Submission, para. 32.

desirable. The Defence respectfully requests the PTC to find the CPCLs' Submission inadmissible. The PTC is not the appropriate judicial forum to debate or make these determinations or provide the requested redress.

## II. BACKGROUND

3. On 10 July 2017, the CIJs issued the Closing Order in Case 004/1 and dismissed all charges against Ms. IM Chaem.<sup>7</sup> On 29 August 2017, the PTC granted SAM Sokong the right to file a submission on the “specific issue of the position of the ECCC within the Cambodian Legal System (Section 2.1.1 of the Closing Order)”.<sup>8</sup> On 8 September and 31 October 2017, the CPCLs filed the Submission in English and Khmer, respectively.<sup>9</sup>

## III. RESPONSE

### A. THE PTC IS NOT THE APPROPRIATE FORUM TO DECIDE ON THE SUBMISSION

4. The CPCLs submit that the “jurisdiction of Cambodian courts is an issue to be determined by the Cambodian courts themselves, not the ECCC”.<sup>10</sup> In the CPCLs' view, by concluding to the lack of jurisdiction of ordinary Cambodian courts in the Closing Order, the CIJs sought to “strip [them] of their jurisdiction by judicial fiat.”<sup>11</sup> On this basis, the CPCLs request the PTC to “redress the Closing Order's conclusions on the jurisdiction of ordinary Cambodian courts over Khmer Rouge-era crimes”<sup>12</sup> and to declare that the extent to which ordinary Cambodian courts have competence to adjudicate Khmer Rouge-era crimes is an issue to be determined by those courts.<sup>13</sup>
5. As a preliminary issue, the CPCLs' Submission is circular and lacks internal consistency. On the one hand, the CPCLs contend that the ECCC are incompetent to make determinations

<sup>7</sup> Closing Order (Reasons), 10 July 2017, **D308/3**.

<sup>8</sup> Decision on the National Civil Party Co-Lawyer's Request Regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to file Submissions, 29 August 2017, **D308/3/1/8**, paras. 12-13.

<sup>9</sup> The Defence notes that the Submission was filed by SAM Sokong, Emmanuel Jacomy, and Lyma Nguyen (*See*, Submission, cover page, “filing party”); however, only SAM Sokong was granted the right to file the Submission. *See*, Decision on the National Civil Party Co-Lawyer's Request Regarding the Filing of Response to the Appeal Against the Closing Order and Invitation to file Submissions, 29 August 2017., **D308/3/1/8**, paras. 12 [“[T]he interests of justice favours affording the National Civil Party Co-Lawyer an opportunity to express the views of Civil Party applicants he represents”], 13 [“In light of the foregoing, the Pre-Trial Chamber ... invites the National Civil Party Co-Lawyer to file submissions”].

<sup>10</sup> Submission, para. 4.

<sup>11</sup> Submission, para. 4.

<sup>12</sup> Submission, para. 7.

<sup>13</sup> Submission, para. 32.

concerning the jurisdiction of ordinary Cambodian courts over Khmer Rouge-era crimes because it is “an issue to be determined by the Cambodian courts themselves, not the ECCC.”<sup>14</sup> On the other, the CPCLs request the PTC to redress the CIJs’ findings on this matter<sup>15</sup> on the basis that the PTC is the “only judicial forum” because “[o]rdinary Cambodian courts have no right of review over the Closing Order.”<sup>16</sup>

6. The Defence accepts that only ordinary Cambodian courts can finally determine the extent of their jurisdiction over Khmer Rouge-era crimes. As correctly observed in the Submission,<sup>17</sup> there is no line of authority between the ECCC and ordinary Cambodian courts.<sup>18</sup> 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.”<sup>19</sup> As found previously by the PTC, “[t]here is no provision for interaction between the ECCC and any other judicial bodies within the Cambodian court structure.”<sup>20</sup> It follows that the PTC is not the appropriate forum to provide the redress requested by the CPCLs.
7. Moreover, the CPCLs’ Submission misinterprets the object, purpose, and effect of the CIJs’ analysis of the ECCC’s position within the Cambodian legal system. The CPCLs claim that the CIJs intended to “categorically bar ordinary Cambodian courts from exercising jurisdiction” over all Khmer Rouge-era crimes<sup>21</sup> is a misreading of the nature and scope of the impugned decision. The CIJs merely concluded that the lack of ordinary Cambodian courts’ jurisdiction “must have no policy impact on [their] exercise of discretion regarding personal jurisdiction”;<sup>22</sup> a dispositive issue that is not challenged by the CPCLs. In this regard, the CIJs did not purport to reach a final decision on the issues raised by the CPCLs or in anyway to presume to curtail or otherwise supplant the Cambodian courts’ jurisdiction.
8. The CIJs’ analysis of the ECCC’s position within the Cambodian legal system was made “in

<sup>14</sup> Submission, para. 4.

<sup>15</sup> Submission, para. 7.

<sup>16</sup> Submission, para. 7.

<sup>17</sup> Submission, para. 4.

<sup>18</sup> *Case of KAINING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on Request for Release, 15 June 2009, **E3/95**, para. 12.

<sup>19</sup> *Case of KAINING Guek Eav alias Duch*, 001/18-07-2007/ECCC/OCIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “DUCH”, 3 December 2007, **C5/45**, para. 19.

<sup>20</sup> *Case of KAINING Guek Eav alias Duch*, 001/18-07-2007/ECCC/OCIJ (PTC01), Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “DUCH”, 3 December 2007, **C5/45**, para. 17.

<sup>21</sup> Submission, para. 6.

<sup>22</sup> Closing Order (Reasons), 10 July 2017, **D308/3**, para. 25.

order to gauge the consequences of a finding of lack of personal jurisdiction, and what impact it should have on the exercise of the policy discretion by the CIJs when deciding to dismiss a case based on personal jurisdiction alone.”<sup>23</sup> This finding was a prerequisite finding to assess, and ultimately circumscribe, the nature of their own discretion and did not touch upon that of the ordinary Cambodian courts.<sup>24</sup>

9. Any suggestion to the contrary is a step into the hypothetical. The CPCLs argue that the PTC should redress the Closing Order’s finding because, if left to stand, it would prevent “Cambodian courts from ever addressing for themselves whether they can exercise jurisdiction over [the Khmer Rouge] period.”<sup>25</sup> They claim that “Cambodian courts *may* decide that the 1993 Constitution of Cambodia allows for, or even requires, the direct application of offences recogni[s]ed under customary international criminal law for Khmer Rouge-era crimes”,<sup>26</sup> “*may* ... rule to permit prosecutions for crimes on the basis of provisions ... that were enacted after the commission of the crimes”,<sup>27</sup> or that “Cambodia *may even* enact additional laws that provide its national courts more express jurisdiction over Khmer Rouge-era crimes.”<sup>28</sup> As recalled by the PTC on numerous occasions, the PTC is not required to entertain or provide ad hoc, advisory opinions premised upon hypothetical scenarios.<sup>29</sup> It is not the function of the PTC to reason through the scenario presented by the CPCLs in which Cambodia may or may not decide to exercise jurisdiction over Khmer Rouge-era crimes in the future.
10. In the context of the Appeal of the Closing Order, the only question that arises for the PTC’s consideration is whether the CIJs erred in concluding that the exercise of their discretion was unaffected by any prevailing policy concerning Cambodian ordinary courts’ jurisdiction over the relevant crimes. Even if the CIJs erred in concluding that ordinary Cambodian courts

<sup>23</sup> Closing Order (Reasons), 10 July 2017, **D308/3**, para. 11.

<sup>24</sup> The CIJs enjoy the broadest discretion in their determination of the ECCC’s personal jurisdiction criterion. *See*, the Defence’s arguments in its Response to the Appeal against the Closing Order, incorporated by reference: IM Chaem’s Response to the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 22 September 2017, **D308/3/1/11**, paras. 10-15.

<sup>25</sup> Submission, para. 31.

<sup>26</sup> Submission, para. 31 (emphasis added).

<sup>27</sup> Submission, para. 31 (emphasis added).

<sup>28</sup> Submission, para. 31 (emphasis added).

<sup>29</sup> *See*, Decision on the YIM Tith’s Appeal against the Decision Denying his Request for Clarification, 13 November 2014, **D205/1/1/2**, para. 8; Decision on YIM Tith’s Appeal against the International Co-Investigating Judge’s Clarification on the Validity of a Summons Issued by One Co-Investigating Judge, 4 December 2014, **D212/1/2/2**, para. 6; Decision on TA An’s Appeal against the Decision Rejecting his Request for Information concerning the Co-Investigating Judges’ Disagreement of 5 April 2013, 22 January 2015, **D208/1/1/2**, para. 8.

lacked jurisdiction, the gravamen of their finding is that whether the ordinary Cambodian courts have jurisdiction or not has no impact upon their exercise of discretion regarding personal jurisdiction. The CPCLs do not appear to challenge this finding or otherwise suggest that the finding concerning the Cambodian state's exercise of its own sovereign rights led the CIJs into any justiciable error.

11. In sum, should ordinary Cambodian courts at some time in the future consider themselves competent to prosecute Khmer Rouge-era crimes falling outside the ECCC's scope, they would neither be bound by the CIJs' analysis in the Closing Order nor by any subsequent ruling or restraining declaration by the PTC on this issue. In any event, as will be argued in **Section B** below, consistent with its sovereign right to determine ordinary courts' jurisdiction over certain crimes, the preponderance of indications point clearly to the Cambodian state having decided that ordinary Cambodian courts lack jurisdiction over all Khmer Rouge-era crimes. The Defence submits that any intervention by the PTC in the manner sought by the CPCLs risks undermining Cambodia's sovereign right to determine that its own ordinary Cambodian courts lack jurisdiction to investigate and prosecute Khmer Rouge-era crimes.

**B. THE CIJS CORRECTLY CONCLUDED THAT ORDINARY CAMBODIAN COURTS LACK JURISDICTION OVER ALL KHMER ROUGE-ERA CRIMES**

12. The CPCLs argue that a plain reading of the ECCC's founding documents leads to the conclusion that ordinary Cambodian courts maintain jurisdiction over crimes falling outside the scope of the ECCC.<sup>30</sup> The CPCLs submit that the CIJs' interpretation of the ECCC Agreement runs counter to its object and purpose<sup>31</sup> because it deprives Cambodia of its sovereign right to prosecute former Khmer Rouge members for crimes committed during the Regime.<sup>32</sup> However, as will be outlined below, the Defence submits that key sources support the CIJs' finding in the Closing Order.
13. The Defence agrees that States have primary jurisdiction over crimes committed on their territory<sup>33</sup> and that the ECCC Agreement does not explicitly waive the jurisdiction of ordinary Cambodian courts over crimes committed during the Khmer Rouge-era that fall outside the

<sup>30</sup> Submission, para. 8. *See also*, Submission, paras. 9-31.

<sup>31</sup> Submission, paras. 10-15.

<sup>32</sup> Submission, paras. 10-12.

<sup>33</sup> Submission, para. 11.

ECCC's scope.<sup>34</sup> However, the CPCLs' further claims disregard the views of the RGC expressed during the negotiations creating the ECCC, as well as subsequent statements and practice that provide evidence of intent.

*i. Cambodian institutions have exercised their sovereign right*

14. A sovereign country is entitled to approach the exercise of its right to enforce and regulate its criminal jurisdiction by taking into account factors such as national reconciliation, political stability, or the interests of justice. A state's power to exercise its jurisdiction over criminal matters "rests in its sovereignty".<sup>35</sup> The issuance of domestic criminal judgments has been viewed by states "historically ... as an exercise of national sovereignty".<sup>36</sup> A state is endowed with discretion to "adopt the principles which it regards as best and most suitable".<sup>37</sup>
15. Whilst customary international law may indeed permit a state to prosecute certain international offences, it does not however impose an obligation on states to prosecute crimes – including crimes against humanity – in all cases.<sup>38</sup> Bases for the exercise of jurisdiction should be sufficiently broad and effective to ensure that a sovereign State brings relevant persons, regardless of their nationality, before its own courts.<sup>39</sup> The fact that the RGC elected to exercise its sovereignty and enforce its own criminal law through signing the ECCC Agreement

<sup>34</sup> Submission, para. 10.

<sup>35</sup> *The Case of the S.S. "Lotus" (France v. Turkey)*, (Publications of the P.C.I.J. 1927), Judgment, 7 September 1927, p. 19 (**Authority 2**).

<sup>36</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, (2nd ed., Martinus Nijhoff, 2013), p. 509 (**Authority 3**).

<sup>37</sup> *The Case of the S.S. "Lotus" (France v. Turkey)*, (Publications of the P.C.I.J. 1927), Judgment, 7 September 1927, p. 19.

<sup>38</sup> *R v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet Ugarte (Amnesty International and others intervening)* [1998] 4 All ER 897, pp. 929-30 (per Lord Lloyd of Berwick) ["Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity ... Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government. ... It has not been argued that these amnesties are as such contrary to international law by reason of the failure to prosecute the individual perpetrators. ... [S]tate practice does not at present support an obligation to extradite or prosecute in all cases."] (**Authority 4**).

<sup>39</sup> See, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, Art. 49 (**Authority 5**); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, Art. 50 (**Authority 6**); Geneva Convention Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, Art. 129 (**Authority 7**); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Art. 146 (**Authority 8**); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Art. 86 (**Authority 9**).

establishing the ECCC does not give rise to enhanced obligations (beyond those established by customary or conventional law). There can be no assumption that Cambodian state is not, or is not properly, exercising its sovereign rights when electing to refrain from pursuing further prosecutions of Khmer Rouge-era offences. As has been recognised, in post-conflict scenarios criminal prosecutions form only one part of “the process of national ... reconciliation.”<sup>40</sup> Indeed, “[s]ocieties emerging from repressive rule, civil conflict and war have successfully employed various non-prosecutorial and non-legal approaches and methods in their attempts to achieve post-conflict justice.”<sup>41</sup> Such recognition appears to provide the underpinnings for Cambodia’s approach that seeks limited criminal prosecutions through the ECCC and at the same time employs its remaining and limited resources in furtherance of programs providing education and victims’ support as means of achieving rehabilitation in relation to its tragic past.<sup>42</sup>

*ii. The CIJs’ finding is consistent with the ECCC negotiating history*

16. The CPCLs claim that the CIJs’ conclusion that ordinary Cambodian courts lack jurisdiction over all Khmer Rouge-era crimes is contrary to the circumstances of the conclusion of the ECCC Agreement and the preparatory work.<sup>43</sup> In particular, the CPCLs submit that various key sources support their argument that ordinary Cambodian courts maintain jurisdiction over Khmer Rouge-era crimes.<sup>44</sup> On the contrary, the Defence submits that the key sources relevant to the negotiating history provide powerful support for the contention that the Cambodian state has decided to limit its ordinary courts and deprive them of domestic jurisdiction over all Khmer Rouge-era crimes.

<sup>40</sup> M.W. Hanna, *International Criminal Law - Volume III: International Enforcement* (M. Cherif Bassiouni (Ed.), 3rd ed., Martinus Nijhoff, 2008), Chapter 3.2: An Historical Overview of National Prosecutions for International Crimes, p. 300 (**Authority 10**).

<sup>41</sup> M.W. Hanna, *International Criminal Law - Volume III: International Enforcement* (M. Cherif Bassiouni (Ed.), 3rd ed., Martinus Nijhoff, 2008), Chapter 3.2: An Historical Overview of National Prosecutions for International Crimes, pp. 300-01.

<sup>42</sup> See, e.g., The Anlong Veng Peace Centre (DC-Cam), available at <<http://www.dccam.org/Projects/AVPC/avpc.htm>> last accessed 9 November 2017 (an initiative of DC-Cam and the Ministry of Tourism “dedicated to memory, reconciliation, and peace building, and it achieves these objectives through peace studies and genocide education”); The Sleuk Rith Institute (DC-Cam, 2014), available at <<http://www.cambodiasri.org/about>> last accessed 9 November 2017 (“a museum of memory, a research and national policy development center, and academy of genocide, conflict and human rights studies”). See also, J. D. Ciorciari and J. Ramji-Nogales, ‘Lessons from the Cambodian Experience with Truth and Reconciliation’, 19 *Buffalo Human Rights Law Review* (2012) 193-216, pp. 213-15 (describing public education projects, community dialogues, and public memorials and ceremonies) (**Authority 11**).

<sup>43</sup> Submission, paras. 17-25.

<sup>44</sup> Submission, paras. 13-15.



17. First, the RCG's Request for Assistance<sup>45</sup> was a clear indication of Cambodia's acceptance that its courts lacked relevant capacity and evidence of the exercise of its sovereign right to limit its ordinary courts and deprive them of domestic jurisdiction over all Khmer Rouge-era crimes.
18. Second, the CPCLs' reliance upon a 1997 report by the Commission on Human Rights in Cambodia ("Hammarberg Report")<sup>46</sup> allegedly documenting grave concerns over the "impunity for atrocities committed by the Khmer Rouge"<sup>47</sup> and calling upon the RGC to prosecute "all those who had perpetrated human rights violations"<sup>48</sup> is misconceived. The Hammarberg Report was issued six months prior to the first RGC request for assistance of the UN in prosecuting Khmer Rouge perpetrators: at a time where discussions concerning the ECCC's creation had not begun.<sup>49</sup> Moreover, even if the Report could constitute evidence of Cambodia's intent concerning the ECCC,<sup>50</sup> a closer examination of the issue undermines these claims. The portions cited are related to the crimes committed following the Khmer Rouge-era – not during this period – over which ordinary Cambodian courts maintain jurisdiction.<sup>51</sup>
19. Third, the CPCLs' reliance on the UN General Assembly Resolution 52/135, adopted "to address the human rights situation in Cambodia and respond to the Government's request for assistance" in bringing Khmer Rouge to justice<sup>52</sup> is also misconceived. Contrary to the CPCLs' implied assertion,<sup>53</sup> the General Assembly did not call upon the RGC to prosecute all Khmer Rouge perpetrators. Rather, the Resolution i) noted with concern that no unyielding Khmer Rouge leader had been brought to justice for crimes committed after the fall of the Regime (that

<sup>45</sup> See, Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, UN Doc. A/51/930 S/1997/488, 24 June 1997 (**Authority 12**).

<sup>46</sup> Submission, para. 18.

<sup>47</sup> Submission, para. 18, *referring to* Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr. Thomas Hammarberg, submitted in accordance with Commission resolution 1996/54, UN Doc. E/CN.4/1997/85, 31 January 1997 ("Hammarberg Report"), para. 7 (**Authority 13**).

<sup>48</sup> Submission para. 18, *referring to* Hammarberg Report, para. 8.

<sup>49</sup> See, Letter dated 21 June 1997 from the First and Second Prime Ministers of Cambodia addressed to the Secretary-General, UN Doc. A/51/930 S/1997/488, 24 June 1997.

<sup>50</sup> Submission, para. 18.

<sup>51</sup> The Hammarberg Report expresses grave concerns over crimes committed by unyielding Khmer Rouge *after the fall* of the Democratic Kampuchea Regime (that is, after the relevant temporal scope at issue in this Submission) and over the impunity of violators of human rights – "particularly members of the military, police and other armed forces". See, Hammarberg Report, para. 71. See also, generally, Hammarberg Report, paras. 61-80, describing the *de facto* and *de jure* problem of impunity or inability to prosecute violators of human rights in Cambodia.

<sup>52</sup> Submission, para. 20, *referring to* General Assembly Resolution 52/135 "Situation of human rights in Cambodia", UN Doc. A/RES/52/135, 27 February 1998 ("UNGA Resolution 52/135") (**Authority 14**).

<sup>53</sup> See, Submission, para. 20.

is, after the temporal scope at issue in this Submission);<sup>54</sup> and ii) noted the possibility of appointing a group of experts as a means of achieving “national reconciliation, strengthening democracy and addressing the issue of individual accountability.”<sup>55</sup> As is plain, neither party to the ECCC negotiations history envisaged or planned for any residual jurisdiction for Khmer Rouge-era crimes. Discussions were focused upon how to best conciliate the objectives of national reconciliation and justice.

20. Finally, the CPCLs cite to the Report prepared by the UN Group of Experts<sup>56</sup> as evidence that ordinary Cambodian courts maintain jurisdiction over Khmer Rouge-era crimes.<sup>57</sup> However, the Group of Experts’ mandate was to determine “the nature of the crimes committed by Khmer Rouge *leaders* in the years 1975-1979 ... and explore legal options for bringing *them* to justice before an international or national jurisdiction.”<sup>58</sup> Regardless of whether prosecutions would be conducted before an international or a national jurisdiction, the undeniable focus was on how to prosecute former Khmer Rouge leaders (as opposed to all Khmer Rouge perpetrators) in either an international or national jurisdiction. As is plain, the ECCC was the fruits of that election.
21. The Group of Experts clearly took the view that prosecution before ordinary Cambodian courts was not a viable option.<sup>59</sup> The Group concluded that the prosecution of most Khmer Rouge perpetrators was logistically and financially impossible, that it would impede national reconciliation, and that the responsibility of low-level perpetrators was a complex legal issue.<sup>60</sup> In sum, the Group of Experts’ Report lends cogent support for the proposition that the ECCC was the court created to try the leaders and balance critical transitional justice objectives.

*iii. No referral mechanism was envisaged*

22. The CPCLs claim that, at the time of the ECCC negotiations (commencing from Cambodia’s

<sup>54</sup> UNGA Resolution 52/135, para. 15.

<sup>55</sup> UNGA Resolution 52/135, para. 16.

<sup>56</sup> Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, UN Doc. A/53/850-S/1999/231, 16 March 1999 (“Group of Experts’ Report”) (**Authority 15**).

<sup>57</sup> Submission, paras. 21-22.

<sup>58</sup> *Case of MEAS Muth*, 003/07-09-2009-ECCC/OCIJ, Identical letters dated 15 March 1999 from the Secretary-general to the President of the General Assembly and the President of the Security Council, UN Doc. A/53/850, 16 March 1999, **D181/2.15**, p. 1 (emphasis added).

<sup>59</sup> Group of Experts’ Report, para. 132 [“[T]he Group is of the opinion that domestic trials organized under Cambodian law are not feasible and should not be supported financially by the United Nations.”].

<sup>60</sup> Group of Experts’ Report, para. 106.

Request for Assistance in 1997), “Cambodian courts were functionally unequipped to handle these trials”.<sup>61</sup> According to the CPCLs, this explains the absence of any referral mechanism (similar to that of the ICTR and ICTY) in the ECCC Agreement.<sup>62</sup> The CPCLs argue that it “was always the design of Cambodia as well as the UN to draw upon the experience of other tribunals”<sup>63</sup> and therefore make subsequent provisions for prosecutions. According to the CPCLs, the ECCC Agreement (restricting personal jurisdiction) “was drafted at a time when it was understood that existing *ad hoc* tribunals were struggling with their caseload”<sup>64</sup> and any gap in provision at that time was not specifically intended to “provide impunity to all other Khmer Rouge-era perpetrators.”<sup>65</sup> However, these are not convincing hypotheses. If this was the intent of the parties at that time, there was nothing to prevent them from including the outline of a residual mechanism within the agreement or otherwise expressly foreshadowing this intent. Absent these indications, the reasonable inference to be drawn from the absence of residual mechanism is that the parties to the ECCC Agreement intentionally drafted “the contours of the law on the ECCC ... in the knowledge that there was no negotiated residual jurisdiction of the ordinary Cambodian courts”.<sup>66</sup>

*iv. The CIJs’ conclusion is consistent with subsequent statements and practice*

23. Contrary to the CPCLs’ assertion,<sup>67</sup> the CIJs’ reasonable interpretation of the ECCC negotiating history and the conclusion that ordinary Cambodian courts lack jurisdiction, is further evidenced by the Cambodian state’s more recent practice and declarations. As stated by Professor David Scheffer, during the negotiations, it was clear that:

[I]t would be up to Cambodia to determine the fate of the lower level Khmer Rouge perpetrators; the task of the ECCC would be to prosecute the senior leaders and those most responsible. All others would be left to the fate of how Cambodian law evolves and the capabilities of its national court system.<sup>68</sup>

24. The following appear to be important considerations in determining the Cambodian state’s

<sup>61</sup> Submission, para. 24.

<sup>62</sup> Submission, paras. 24-25.

<sup>63</sup> Submission, para. 25.

<sup>64</sup> Submission, para. 25.

<sup>65</sup> Submission, para. 25.

<sup>66</sup> Closing Order (Reasons), 10 July 2017, **D308/3**, para. 13.

<sup>67</sup> Submission, paras. 26-28.

<sup>68</sup> Statement of Professor David Scheffer, 6 September 2017 (attached as Annex A in the Submission, **D308/3/1/9.2**), para. 8.

prevailing view and intent concerning how Cambodian law evolves and the capabilities of its national court system.

Unequivocal statements indicate that domestic prosecutions are not envisaged

25. The CPCLs claim that the RGC's statements highlighting "combatting impunity as critical to addressing the legacy of the Khmer Rouge"<sup>69</sup> are evidence of the alleged error in the CIJs' conclusion that ordinary Cambodian courts lack jurisdiction over Khmer Rouge-era crimes.<sup>70</sup> However, the only statement cited is irrelevant to the question of the jurisdiction of domestic courts over Khmer Rouge-era crimes and merely stresses the importance of mutual cooperation concerning the prosecution of former Khmer Rouge before the ECCC.<sup>71</sup>
26. Moreover, even if providing a scintilla of evidence in support of the CPCLs' claim, this statement must be situated within the wealth of statements that tend towards the contrary view. Citing to national reconciliation and political stability, the RGC has consistently and expressly indicated its disagreement with any prosecution aside from senior leaders and those most responsible (as provided for by the ECCC Agreement)<sup>72</sup> arguing that further domestic prosecutions would be antithetical to these critical transitional justice aims.
27. According to Dinah PoKempner, General counsel at Human Rights Watch, ECCC donor and several foreign states appear to acknowledge, or even share, this view:

<sup>69</sup> Submission, para. 26, *referring to* Joint Statement by H.E. Deputy Prime Minister SOK An and Ms. Patricia O'Brien, Under Secretary-General for Legal Affairs, The Legal Counsel, UNAKRT, 19 April 2010 (**Authority 16**).

<sup>70</sup> Submission, para. 26, *referring to* Joint Statement by H.E. Deputy Prime Minister SOK An and Ms. Patricia O'Brien, Under Secretary-General for Legal Affairs, The Legal Counsel, UNAKRT, 19 April 2010.

<sup>71</sup> Joint Statement by H.E. Deputy Prime Minister SOK An and Ms. Patricia O'Brien, Under Secretary-General for Legal Affairs, The Legal Counsel, UNAKRT, 19 April 2010 ["Both the Government and the United Nations are committed to ending impunity for the atrocities of the former Khmer Rouge regime, and fully support and respect the ECCC and its independent judicial process"].

<sup>72</sup> See, CHEANG Sokha and James O'Toole, *Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC*, Phnom Penh Post, 27 October 2010, available at <<http://www.phnompenhpost.com/national/hun-sen-ban-ki-moon-case-002-last-trial-eccc>> (**Authority 17**); HENG Reaksmeay, *CPP Chief Calls Next Tribunal Trial Enough for 'Justice'*, VOA Khmer, 20 July 2011, available at <<https://www.voacambodia.com/a/cpp-chief-calls-next-tribunal-trial-enough-for-justice-125891733/1354698.html>> (**Authority 18**); SOK Khemara and PIN Sisovann, *Dismissal of Khmer Rouge Atrocity Charges Sparks Calls for End of Prosecutions*, VOA Khmer, 2 May 2017, available at <<https://www.voacambodia.com/a/dismissal-of-khmer-rouge-atrocity-charges-sparks-calls-for-end-of-prosecutions/3833154.html>> (**Authority 19**). See also, Rupert Skilbeck, 'Defending the Khmer Rouge', 8 *International Criminal Law Review* (2008) 423-45, p. 434 ["There are thousands of individual perpetrators who would have been subject to prosecution under a broader mandate. However, the government of Cambodia has always made it clear that the mandate must be limited in order to allow for national reconciliation to occur, with peace, political stability and national unit considered a key objective of the trial process"] (**Authority 20**).

Both the Cambodian government and foreign states *would prefer to keep the number of defendants low, to minimize expenses and political tension*. There are political disincentives to holding any significant portion of the former Khmer Rouge responsible now for past atrocities or upsetting expectations as to who the likely suspects are by reaching too far down the ranks for defendants, threatening members or supporters of the CPP, or imperiling former Khmer Rouge who have cut deals with the leadership. *The bottom line is that the alternative to prosecution by the [Extraordinary Chambers] is likely to be impunity, not domestic prosecution.*<sup>73</sup>

Current practice indicates that domestic prosecutions are not envisaged

28. Cambodia's subsequent practice in its ordinary courts is further evidence of this prevailing view. As noted by the CIJs, despite 14 years since the ECCC Agreement, no Khmer Rouge perpetrator has ever been prosecuted before domestic courts.<sup>74</sup>

Lack of Legal Framework to Prosecute domestically

29. As noted above, the CPCLs' claim that "[w]hether, and on what domestic legal bases, ordinary Cambodian courts might determine that they are able to adjudicate these crimes is a matter for these courts to resolve themselves"<sup>75</sup> is accepted. However, a review of the Government's legislative and prosecutorial inactivity with regard to further prosecutions, suggest that Cambodia has determined this issue and concluded that further prosecutions of these crimes are impractical and may violate fundamental fair trial rights.
30. Article 610 of the Cambodian Code of Criminal Procedure provides "[t]he statute of limitation for a criminal action and of a sentence of offenses committed before the entry into force of this Code shall be subject to the provisions of previous law."<sup>76</sup> The previous law, applicable during the Khmer Rouge-era, is the 1956 Penal Code that contains a ten-year limitation period for felonies.<sup>77</sup> Upon expiry of the relevant statute of limitations for a particular offence "a criminal action is extinguished [and] can no longer be pursued".<sup>78</sup> In Case 001, the Trial Chamber considered that criminal investigations and prosecutions had been suspended between 1975 and

<sup>73</sup> Dinah PoKempner, 'The Khmer Rouge Tribunal: Criticisms and Concerns', *Justice Initiatives: The Extraordinary Chambers*, Open Society Justice Initiative, Spring 2006, p. 39 (emphasis added) (**Authority 21**).

<sup>74</sup> Closing Order (Reasons), 10 July 2017, **D308/3**, para. 24.

<sup>75</sup> Submission, para. 31.

<sup>76</sup> Criminal Procedure Code of Kingdom of Cambodia, 2007, Art. 610 (**Authority 22**).

<sup>77</sup> Penal Code of Cambodia, 1956, Art. 109 (**Authority 23**). See, *Case of KANG Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, **E187**, fn. 13.

<sup>78</sup> Criminal Procedure Code of Kingdom of Cambodia, 2007, Art. 7.

1979, therefore preventing the ten-year limitation period for felonies from commencing between these dates.<sup>79</sup> Whilst the Trial Chamber judges took differing positions as to whether this suspension continued beyond 1979,<sup>80</sup> the latest date when the limitation period was considered to commence was 24 September 1993.<sup>81</sup> As such, the statute of limitation for prosecution of the relevant domestic crimes has now elapsed.

31. Outside the context of the ECCC, the time limit has not been extended: Article 3 (new) of the ECCC Law is inapplicable to proceedings before ordinary Cambodian courts. The extension of the statute of limitations contained in this provision purports to apply solely within “the jurisdiction of the Extraordinary Chambers”<sup>82</sup> and confers no additional jurisdiction on ordinary Cambodian courts. Accordingly, proceedings are currently incapable of being instituted in ordinary Cambodian courts for alleged offences under the 1956 Penal Code committed between 1975 and 1979. The Cambodian state’s lack of legislative or parliamentary action in regard to these issues appears to reflect the views of both the international judges of the Trial Chamber (who considered that “notions of foreseeability, legal certainty and fair trial principles” support the conclusion that retrospective changes designed to allow prosecutions are impermissible<sup>83</sup>) and the caselaw of the ECtHR (according to which an attempt to reactivate a limitation period after its expiry may be contrary to the principle of legality).<sup>84</sup>
32. However, even assuming that it may be open to the Cambodian state to enlarge these temporal restrictions, the fact remains that the RGC has opted to maintain the ten-year limitation in its

<sup>79</sup> *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, **E187**, para. 14.

<sup>80</sup> *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, **E187**, paras. 25 [Cambodian Judges concluded “that the limitation period with respect to the domestic crimes allegedly committed by the Accused and falling within the jurisdiction of the ECCC started to run, at the earliest, on 24 September 1993”], 27 [International Judges were “unable to conclude that the applicable statute of limitations was suspended between 1979 and 1993”].

<sup>81</sup> *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, **E187**, para. 25.

<sup>82</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 27 October 2004, Art. 3 new.

<sup>83</sup> *Case of KAING Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, **E187**, para. 50. *See also*, *Case of KAING Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, **F28**, para. 96 [noting that the notion of foreseeability forms part of the principle of legality]; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, **F36**, para. 761 [noting that the notion of foreseeability forms part of the principle of legality]; *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/SC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, **E50**, para. 29 [noting that legal certainty is a “fundamental fair trial guarantee”].

<sup>84</sup> *Kononov v. Latvia* (Application no. 36376/04), ECtHR, 24 July 2008, paras. 144-46 (**Authority 24**).

ordinary courts. In other words, Cambodia's acts and conduct provide further support for the view that it intended to limit the jurisdiction of its ordinary courts has determined by the CIJs.

International crimes

33. The CPCLs contend that ordinary “Cambodian courts may decide that the 1993 Constitution of Cambodia allows for, or even requires, the direct application of offences recogni[s]ed under customary international criminal law for Khmer Rouge-era crimes.”<sup>85</sup> However, this possibility remains wholly theoretical. There are considerable obstacles that militate against such steps.
34. Article 3 of the 2009 Penal Code encompasses the principles of *nullum crimen sine lege* and *nulla poena sine lege*.<sup>86</sup> In the context of domestic implementation of international crimes, the principle of legality requires the existence of “enactments on penalties prior to their application”.<sup>87</sup> Consistent with international standards, the SCC of the ECCC noted that the validity of a court's jurisdiction over a crime is contingent upon the presence of the offence in the legal instrument governing the court.<sup>88</sup> The PTC has also stated that compliance with the principle of legality requires, *inter alia*, the existence of a law granting jurisdiction over the offences in question.<sup>89</sup> The same is true with regard to specified sentencing provisions.
35. For example, as recognised by the CIJs, the 1956 Penal Code, applicable during the Khmer Rouge-era, does not refer to any provisions outlining crimes against humanity<sup>90</sup> or any associated sentencing regime for such acts.<sup>91</sup> Cambodia has to-date elected not to seek to change this law or otherwise domestically prosecute crimes against humanity for conduct

<sup>85</sup> Submission, para. 31.

<sup>86</sup> Criminal Code of the Kingdom of Cambodia, 2009, Art. 3 (**Authority 25**).

<sup>87</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, (2nd ed., Martinus Nijhoff, 2013), p. 475 [“[I]f international crimes are ... directly applicable in national legal proceedings without the intermediation of domestic criminal law, the problem arises as to what penalties apply. What complicates that problem is that the principles of legality include the requirements of the enactments on penalties prior to their application. This is the principle *nulla poena sine lege*.”].

<sup>88</sup> *Case of KAINING Guek Eav alias Duch*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, **F28**, para. 98, citing *Prosecutor v. Milan Milutinović et al.*, (IT-99-37-AR72), AC, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction - Joint Criminal Enterprise, 21 May 2003, para. 21 (**Authority 26**); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, (IT-02-60-T), TC, Judgement, 17 January 2005, para. 695, fn. 2145 (**Authority 27**); *Prosecutor v. Milomir Stakić*, (IT-97-24-T), TC, Judgement, 31 July 2003, para. 431 (**Authority 28**).

<sup>89</sup> *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, **D427/1/30**, para. 212.

<sup>90</sup> Closing Order (Reasons), 10 July 2017, **D308/3**, para. 21.

<sup>91</sup> *See*, Closing Order (Reasons), 10 July 2017, **D308/3**, para. 21.

between 1975 and 1979. On the face of these lacunas, the Cambodian state may well have decided that to take these and other necessary steps risks violating core elements of the principle of legality.<sup>92</sup>

36. In conclusion, the CPCLs' Submission, not only misinterprets the object, purpose, and effect of the CIJs' analysis of the ECCC's position within the Cambodian legal system, but also provides little to undermine the reasoned view of the CIJs in concluding that the Cambodian State has exercised its sovereign rights. Accordingly, the CPCL's request for redress remains both inadmissible and unfounded. As argued, the PTC is not the appropriate forum to provide the redress requested by the CPCLs.

#### IV. RELIEF REQUESTED

For the reasons above, the Defence respectfully requests the PTC to find the CPCLs' Submission inadmissible or, in the alternative, conclude to the CIJs' reasonable interpretation of the ECCC's position within the Cambodian legal system.

Respectfully submitted,



BIT Seanglim



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Signed on this 10th day of November, 2017

<sup>92</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, (2nd ed., Martinus Nijhoff, 2013), pp. 246-47 ["No matter what the source, legal proscriptions established in [International Criminal Law] must satisfy the requirements of the principles of legality. These principles require that there be no crime without a law (*nullum crimen sine lege*), no punishment without a law (*nulla poena sine lege*), and no *ex post facto* application of laws."].