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BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S ALTERNATIVE MOTION ON THE LIMITS OF THE APPLICABILITY OF CRIMES AGAINST HUMANITY AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rule 74(3)(a) of the ECCC Internal Rules, this jurisdictional challenge on the limits of crimes against humanity, should the OCIJ find that it has jurisdiction over them.[1] This jurisdictional challenge is made necessary because the definitions of crimes against humanity as set out in the Establishment Law and the Agreement depart from the customary international law of 1975-79 in several respects.[2] The ECCC is obliged to apply the law as it existed at that time.

I. APPLICABLE LAW

A. EXTRACTS FROM THE CAMBODIAN CONSTITUTION, THE AGREEMENT AND THE ESTABLISHMENT LAW

1. Article 5 of the Establishment Law provides in pertinent part:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.
> Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:...

2. Article 9 of the Agreement provides in pertinent part that "[t]he subject-matter jurisdiction of the Extraordinary Chambers shall be crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court..."[3]
3. Article 38 of the Cambodian Constitution provides in pertinent part that "[a]ny case of doubt shall be resolved in favor of the accused."
4. Article 31 of the Cambodian Constitution provides in pertinent part:

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

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[1] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Crimes Against Humanity at the ECCC, D378, ERN: 00498540-00498552 ("First Crimes Against Humanity Motion").

[2] In light of the recent Pre-Trial Chamber Decision concerning the applicability of Joint Criminal Enterprise at the ECCC, in which the Pre-Trial Chamber stated that the ECCC could apply forms of liability recognized under customary international law at the relevant time, the Defence notes for the record that it is not conceding nor waiving its continuous arguments concerning the ECCC's status as a domestic court and its inability to apply customary international law. *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 35), Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010 ("JCE Decision"), D97/14/15, ERN: 00486521-00486589, para. 48; *see also Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 60), IENG Sary's Appeal Against the OCIJ's Order on IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 13 April 2010, D345/5/1, ERN: 00491231-00491261, para. 29; *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 35), 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, D97/14/5, ERN: 00429213-00429253, paras. 7-31.

[3] *But see also* ICC Statute, Article 10: "Nothing in this Part [Jurisdiction, Admissibility and Applicable Law] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."

B. HIERARCHY AND INTERPLAY OF RELEVANT LEGAL INSTRUMENTS

5. The ECCC is a Cambodian domestic court.[4] As such, in the event of a conflict, the Cambodian Constitution takes precedence over the Agreement and the Establishment Law (together, the "Constitutive Instruments"). Protections enumerated in the international human rights instruments incorporated into Article 31 of the Cambodian Constitution therefore take precedence over anything to the contrary in the Constitutive Instruments.[5] These protections include the principles *nullum crimen sine lege*,[6] *lex mitior*[7] and *in dubio pro reo*.[8] Therefore the ECCC must apply crimes against humanity as defined in customary international law in 1975-79, unless the definition of the crime has become more favorable to the Charged Persons / accused, or there is a case of doubt. As previously explained by the Defence[9] – yet not decided by the OCIJ[10] – in the event of a conflict between the Constitutive Instruments, the Establishment Law takes precedence.

6. The OCIJ has taken "due note" of the characterization of crimes against humanity under Article 7 of the ICC Statute.[11] This is consistent with Article 9 of the Agreement which purports to confer jurisdiction over crimes against humanity as defined in the ICC

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[4] *See e.g., Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, C5/45, ERN: 00154285-00154302, para. 19.

[5] Note also that protections enumerated in Articles 14 and 15 of the International Covenant on Civil and Political Rights, adopted and open for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 ("ICCPR"), relating to exercise of the ECCC's jurisdiction, are also directly incorporated into the Constitutive Instruments. *See* Establishment Law, Art. 33 new, and Agreement, Art. 12(2).

[6] *See* Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948), Article 11(1); ICCPR, Art.15(1), which states in part: "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."

[7] *See* ICCPR, Art.15. Adherence to the principle of *lex mitior* requires that where a law that binds the court is subsequently changed to a more favorable law by which the court is also obliged to abide, the more lenient law will apply. *See also Prosecutor v. Deronjić*, IT-02-61-A, Judgement, 20 July 2005, para. 97.

[8] *See* Cambodian Constitution, Art. 38. *See also* para. 3 *supra*. At the ICTY, the principle *in dubio pro reo* is accepted by as a corollary to the presumption of innocence and the burden of proof beyond reasonable doubt (*Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 601). There, it has been recognized in relation to the findings required for conviction, such as those that make up the elements of the charged crime (*Prosecutor v. Limaj et al.*, IT-33-66-A, Judgement, 27 September 2007, para. 21).

[9] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009, D180/4, ERN: ERN: 00373977-00373994 ("Enforced Disappearance Response"), paras. 16-20.

[10] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Civil Party Request for Investigative Action Concerning Enforced Disappearance ("Enforced Disappearance Order"), 22 December 2009, D180/6, ERN: 00417295-00417299.

[11] *Id.*, para. 8.

Statute.[12] Although no reasoning was provided by the OCIJ at this stage, presumably "due note" was taken because Article 9 of the Agreement must be either consistent with, or subject to, first the Cambodian Constitution including the human rights instruments incorporated therein, and second the Establishment Law.[13]

II. ARGUMENT

A. The Charged Person/Accused must have knowledge of the attack

7. In Case 001, the OCIJ found "knowledge of the attack" to be an element of crimes against humanity.[14] Although no reasoning was provided, presumably the OCIJ derived this element from the ICC Statute (pursuant to Article 9 of the Agreement).[15] The definition in the Establishment Law (which does not track the language of the ICC Statute in this respect) appears to have been based on the ICTR Statute.[16] Jurisprudence from the *ad hoc* tribunals, however, makes it clear that "knowledge of the attack" is a necessary mental element of crimes against humanity.[17] In respect of this element, the OCIJ must follow its interpretation in Case 001 by reading this requirement into Article 5 of the Establishment Law.

B. Underlying acts require a nexus with an international armed conflict

8. Article 31 of the Cambodian Constitution requires the application of the principle *nullum crimen sine lege*.[18] Consequently, a nexus between the underlying acts and international armed conflict is a requirement of crimes against humanity at the ECCC.

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[12] *See para.* 2 *supra.*

[13] *See* Enforced Disappearance Response, paras. 16-20.

[14] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ, Closing Order Indicting Kaing Guek Eav alias Duch, 8 August 2008, para. 133: "Accordingly, the underlying criminal acts listed in Article 5 of the ECCC Law, characterized below with respect to S21, were committed as part of a widespread or systematic attack at S21 directed against a civilian population on political grounds, and with knowledge of the attack, under the customary definition of Crimes Against Humanity in 1975" (emphasis added).

[15] ICC Statute, Art. 7; *See also Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui,* ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008 ("*Katanga* Confirmation of Charges Decision"), para. 401; *see* paras. 5 and 6 *supra.*

[16] *See* ICTR Statute, Art. 3.

[17] *Prosecutor v. Gacumbitsi,* ICTR-2001-64-A, Judgement, 7 July 2006, para. 86: "[F]or crimes against humanity 'the accused must have acted with knowledge of the broader context of the attack, and with knowledge that his act formed part of the widespread and systematic attack against the civilian population.'" *See also Prosecutor v. Kordić & Čerkez,* IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić & Čerkez* Appeal Judgement"), para. 99; *Prosecutor v. Blaskić,* IT-95-14-A, Judgement, 29 July 2004 ("*Blaskić* Appeal Judgement"), para. 124; *Prosecutor v. Kunarac et al.*, IT-96-23&23/1-A, Judgement, 12 June 2002, para. 99; *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement"), para. 271; *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Judgement, 17 January 2005 ("*Blagojević & Jokić* Trial Judgement"), para. 548; *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgement"), para. 138; *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić* Trial Judgement), para. 556; *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005 ("*Limaj* Trial Judgement"), para. 188. At the Special Court for Sierra Leone, it appears that the standard employed is "knew or had reason to know." *See Prosecutor v. Fofana & Kondewa,* SCSL-04-14-T, Judgement, 2 August 2007, para. 121. *See also Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009 ("*RUF* Trial Judgement"), para. 90.

[18] *See* paras. 5 and 6 *supra.*

State practice and *opinio juris* demonstrate that a nexus between the underlying acts and international armed conflict was a requirement of crimes against humanity in customary international law in 1975-79.[19] The legal foundations of crimes against humanity lie in the laws of war.[20] Article 6(c) of the Charter of the International Tribunal at Nuremberg ("IMT Charter") (as amended by the October 6th Protocol)[21] established that crimes against humanity could not exist except in conjunction with either war crimes or crimes against peace.[22] The Judgement of the International Military Tribunal at Nuremberg ("IMT Judgement") and the Nuremberg Principles[23] reflect this understanding.[24]

9. Discussions at the International Law Commission ("ILC") in the late 1940s and early 1950s regarding *the progressive development of international law*[25] demonstrate that a nexus between underlying acts and international armed conflict was seen as a legal

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[19] Currently, customary international law no longer requires that the underlying acts of crimes against humanity have a nexus with an armed conflict. *See Prosecutor v. Tadić*, IT-94-1/AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Appeals Decision"), para. 141; *Prosecutor v. Blaškić*, IT-95-14, Judgement, 3 March 2000 ("*Blaškić* Trial Judgement), para. 71.

[20] *See*, for example, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 77 (Kluwer 1999) ("BASSIOUNI"): "The conclusion is clear that 'crimes against humanity' are analogous to war crimes and are an extension thereof, and that they are based on the same moral and legal principles that have long existed and that are the underpinning of principles, norms and rules of the humanization and regulation of armed conflicts." *See also* Egon Schwelb, *Crimes Against Humanity* 23 BYBIL 178, 206 (1946) ("Schwelb"): Crimes against humanity as interpreted in the IMT Judgement are "an 'accompanying' or an 'accessory' crime to either crimes against peace or violations of the laws and customs of war."

[21] Nuremberg Trial Proceedings Volume I: Protocol Rectifying Discrepancy in the Charter (Oct. 6th, 1945) ("October 6th Protocol"), *available at* http://avalon.law.yale.edu/imt/imtprot.asp.

[22] *See* Leslie C. Green, *International Regulations of Armed Conflicts, in* 1 INTERNATIONAL CRIMINAL LAW, CRIMES 355, 369 (M. Cherif Bassiouni ed., 2d ed. 1999), *cited in* Stuart Ford, *Crimes Against Humanity at The Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 ("Ford"), n.70 (2006-2007).

[23] Principles of International Law Recognized in the Charter of the Nürnburg Tribunal amd in the Judgment of the Tribunal, U.N. Doc. A/1316 (1950) ("Nuremberg Principles"), Principle VI(c); *see also* Affirmation of the Principles of International Law Recognized by the Nürnburg Tribunal *adopted* 11 December 1946, G.A. Res. 95(1), U.N. G.A.O.R. 1st Sess., 55th plen. Mtg, U.N. Doc A/64/Add.1 (1946) at 188.

[24] Judgment of the IMT, for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946, London H.S.S.O. Miscellaneous No.12 (1946), at 254. Although an armed conflict requirement was removed from Article II of Control Council Law No.10, (1) the jurisdictional link to the IMT Charter in Control Council Law No.10, Article I rendered moot the effect of this deletion, with judges repeatedly requiring a nexus between the war and the acts of the accused, and (2) the Allied and German courts applying this law were "local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." Schwelb, at 218-219.

[25] *See* Draft Code of Offences Against the Peace and Security of Mankind, Report by J. Spiropoulos, Special Rapporteur, dated 26 April 1950 ("Draft Code of Offences"), *available* in 2 Y.B. INT'L COMM'N 253, 255 para. 2 (1950) (noting that the Rapporteur was not codifying existing international law but rather engaging in a task of a more "speculative nature"); *See also id.* 257, para. 20 (noting that the ILC had discussed the issue and concluded that the Draft Code of Offences represented the "progressive development of international law"); JCE Decision, para. 61. It is submitted that the absence of a nexus requirement in the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") (G.A. Res. 260(III) (9 December 1948)) is not material. *See* Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 302-306, (2002). The Draft Code of Offences observed that the absence of a nexus requirement from the Genocide Convention was seen as a distinguishing feature of that crime viz. crimes against humanity. *See* Draft Code of Offences, at 263, para. 65. *See also* Ford, at 152-53.

requirement of crimes against humanity in that period.[26] From the 1950s to 1979, there is little evidence of a general practice among States and *opinio juris* that this nexus was no longer a necessary element,[27] and objections to its removal continued until the 1998 negotiations of the Rome Statute.[28]

C. The attack must involve multiple acts pursuant to or in furtherance of a State or organizational policy

10. The ICC Statute requires an "attack" to involve multiple acts committed "pursuant to or in furtherance of a State or organizational policy."[29] The Agreement refers to the definition of crimes against humanity in the ICC Statute. The Establishment Law does not contain this requirement, but does not exclude it either. The Cambodian Constitution requires any ambiguity in interpretation of the Constitutive Instruments to be resolved in favor of the accused.[30] The existence of a policy underpinning crimes against humanity was also a requirement of customary international law in 1975-79.[31]

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[26] *See* Summary of the 48th Meeting of the ILC, 16 June 1950, 364, 377 *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf.

[27] *See* Ford, at 159-67 noting that the 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity (a) fundamentally is a political document that garnered the support of less than half the member states of the United Nations (161-162), (b) gives an "overall impression" that a connection with armed conflict is required except where specific crimes, like apartheid and genocide, had developed that were explicitly not connected with armed conflict (160), and (c) demonstrates that no general practice among states existed at this time (167, 183). The 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes, and the International Convention on the Suppression and Punishment of the Crime of Apartheid (which entered into force on 18 July 1976) do not lend material support to a proposition that the nexus was no longer a requirement by 1975-79 (167, 168). *But see Attorney-General v. Eichmann* 36 I.L.R. 5 (JM 1961) 277-78 (S. Ct. 1962) (Isr), aff'd, 36 ILR; *Barbie* (French Court of Cassation (Criminal Chamber), 23 June 1988, reprinted in 100 I.L.R. 331, 336 (1995)); and *Touvier* (French Court of Appeal of Paris (First Chamber of Accusation, 13 April 1992, reprinted in 100 I.L.R. 361-63 (1981)) (in which the nexus arguably was not required in relation to crimes against humanity committed in World War II). It is submitted that these national decisions cannot be taken as declaratory of customary international law at the time the crimes were committed. Instead, it was the definition of crimes against humanity in the IMT Judgement that was authoritative. *See* Ford, at 148.

[28] Ford, at nn. 283-87; *see also* Final Report of the Preparatory Committee, 14 April 1998, U.N. Doc. A/CONF.183/2/Add.1, Part I, Art. 5, p.26, *cited by* BASSIOUNI at 199.

[29] ICC Statute, Art. 7(2)(a). *See also Katanga* Confirmation of Charges Decision, para. 396. As to the application of the ICC Statute, *see* paras. 5 and 6 *supra.*

[30] Cambodian Constitution, Art. 38; *See* paras. 5 and 6 *supra.*

[31] *See* IMT Judgement, para. 254, referring to the "policy of terror" and "policy of persecution, repression, and murder of civilians." *See also* Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), United Nations Security Council, S/1994/674, 27 May 1994, *cited in* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA ("BASSIOUNI & MANIKAS") 543 (Transnational Publishers 1996); *Public Prosecutor v. Menten*, The Netherlands, District Court of Amsterdam, Extraordinary Penal Chamber, reprinted in 75 I.L.R. 362-63 (1981): "The concept of 'crimes against humanity' also requires... that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people"; *See also* BASSIOUNI 243-65, 277, 558 "State action or policy is the essential characteristic of 'crimes against humanity'"; BASSIOUNI & MANIKAS 548 (the inclusion of persecution as a separately enumerated crime against humanity in the ICTY Statute "implies the removal of the requirement under 6(c) of the IMT Charter that such persecutions form a policy of persecution"). *But see Kordić & Čerkez* Appeal Judgement, para 98; *Blaškić* Appeal Judgement, para. 120; *Blagojević & Jokić* Trial Judgement, para. 576; *Brđanin* Trial Judgement, para. 137; *Limaj* Trial Judgement, paras 212, 184 (on the position under today's customary international law).

Consequently, the ECCC must apply this policy requirement so as not to violate the Cambodian Constitution by failing to respect the principles of *in dubio pro reo* and *nullum crimen sine lege*.[32]

D. The attack must have occurred on discriminatory grounds

11. The Establishment Law expressly requires that crimes against humanity involve an attack directed against any civilian population on national, political, ethnical, racial or religious grounds. This limitation must apply because (1) pursuant to the Cambodian Constitution, if the Establishment Law (as a later law than the Agreement) is more favorable to the accused, it must be applied ahead of the Agreement in accordance with *lex mitior*,[33] (2) pursuant to the Cambodian Constitution, any doubt in interpretation of the Constitutive Instruments must be resolved in favor of the accused,[34] (3) the general rule is that the Establishment Law takes precedence over the Agreement (subject to anything to the contrary in the Cambodian Constitution, which takes precedence over both Constitutive Instruments),[35] and (4) customary international law in 1975-79 did include a discriminatory requirement.[36] It follows that a discriminatory attack must be proved in order to establish crimes against humanity at the ECCC.[37]

E. Only underlying acts that were clearly defined as crimes against humanity in customary international law in 1975-79 may constitute violations of Article 5 of the Establishment Law

12. Crimes against humanity did not exist in domestic Cambodian law in 1975-79.[38] If the OCIJ finds that it has jurisdiction to apply these crimes, the applicable law must be consistent with the customary international law of 1975-79.[39] Consequently, the definitions of the underlying acts applicable at the ECCC must also be consistent with

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[32] *See paras.* 5 and 6 *supra.*

[33] *See* Cambodian Constitution, Art. 31; ICCPR, Art. 15. *See also* paras. 4 to 6 *supra.*

[34] Cambodian Constitution, Art. 38; *See also* paras. 3, 5 and 6 *supra.*

[35] *See* paras. 5 and 6 *supra.*

[36] It is submitted that *opinio juris* as late as 1993 required that crimes against humanity be committed "on national, political, ethnic, racial or religious grounds. *See* Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) and Annex thereto, U.N. Doc. S/25704, para. 48; *See also* Provisional Verbatim Record of the 3217th Meeting, U.N. Doc. S/PV.3217 (25 May 1993) 11 (statement of France, listing national, ethnic, racial and religious grounds), 16 (statement of the United States, listing national, political, ethnic, racial, gender and religious grounds) and 45 (statement of the Russian Federation, listing national, political, ethnic, religious or other grounds). *See also* WILLIAM SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE 196-198 (Cambridge 2006); BASSIOUNI & MANIKAS, at 543.

[37] Guidance as to the interpretation of the Establishment Law in relation to the nature of the discriminatory requirement can be drawn from ICTR jurisprudence. Article 3 of the ICTR Statute, like Article 5 of the Establishment Law, restricts jurisdiction over crimes against humanity to those acts which are committed as part of a widespread or systematic attack against a civilian population on discriminatory grounds. *See Prosecutor v. Akayesu*, ICTR-96-4-A, Judgement, 1 June 2001, paras. 467-68.

[38] There is no mention of crimes against humanity as a distinct category in the 1956 Penal Code. *See* First Crimes Against Humanity Motion.

[39] *See* para. 5 *supra. See also* JCE Decision, para. 48.

the customary international law of 1975-79. In addition, not all of the offenses enumerated in Article 5 of the Establishment Law[40] and Article 7 of the ICC Statute,[41] or otherwise purported to constitute crimes against humanity,[42] were enumerated in the definition of crimes against humanity in customary international law in 1975-79. These offenses must be excluded from the ECCC's jurisdiction in relation to crimes against humanity.[43]

F. The category "other inhumane acts" is not applicable at the ECCC. If the category of "other inhumane acts" is applicable, its application must be limited initially to those acts which would have been clearly identifiable as such in 1975-79 by reference to criminal law norms; only then may recourse be made to the *ejusdem generis* principle of interpretation

13. As a Cambodian court based on the Civil Law system, the ECCC only has jurisdiction over crimes explicitly pronounced by the law.[44] The ICTY Appeals Chamber in *Kordić* stated that it "considers that the potentially broad range of the crime of inhumane acts may raise concerns as to a possible violation of the *nullum crimen* principle."[45] The inherent lack of specificity of "other inhumane acts" is also demonstrated by the inconsistent approach to its interpretation at the ICTY.[46] Due to this lack of certainty, a problem which is particularly acute in a Civil Law system like Cambodia's, "other

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[40] For example, Rape and Imprisonment.

[41] For example, Forcible transfer and Enforced disappearance.

[42] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, 18 December 2009, D268/2, ERN: 00417249-00417254.

[43] *See also* Section F *infra.*

[44] Article 6 of the 1956 Penal Code provides that "No crime can be punished by the application of penalties which were not pronounced by the law before it was committed." (Unofficial translation).

[45] *Kordić & Čerkez* Appeal Judgement, para. 117. The ICTY *Stakić* Trial Chamber highlighted that "other inhumane acts" as a category "may well be considered to lack sufficient clarity, precision and definiteness," that is to violate the principle of certainty. *See Prosecutor v. Stakić*, IT-97-24-T, Decision Rule 98*bis* Motion for Judgment of Acquittal, 31 October 2002, para. 131. *But see Prosecutor v. Stakić*, IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para. 315. The Appeals Chamber overruled the Trial Chamber on this point and ruled that "other inhumane acts" forms part of customary international law. However, it is submitted that in a Civil Law system such as the ECCC, the *Kordić & Čerkez* Appeals Chamber's and *Stakić* Trial Chamber's views should be preferred.

[46] In attempting to establish the scope of "other inhumane acts," the ICTY *Kupreškić* Trial Chamber identified international standards on human rights "such as those laid down in the Universal Declaration on Human Rights of 1948 and the United Nations Covenants on Human Rights of 1966" as setting the foreseeable parameters of what would constitute "other inhumane acts" (*Kupreškić* Trial Judgement, para. 566). This approach was criticized by the ICTY *Stakić* Trial Chamber: "The Trial Chamber recalls the report of the Secretary-General according to which 'the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond doubt part of customary law.' Accordingly, this Trial Chamber hesitates to use such human rights instruments automatically as a basis for a norm of criminal law, such as the one set out in Article 5(i) of the Statute... A norm of criminal law must always provide a Trial Chamber with an appropriate yardstick to gauge alleged criminal conduct for the purposes of Article 5(i) so that individuals will know what is permissible behaviour and what is not." (*Prosecutor v. Stakić*, IT-97-24-T, Judgement ("*Stakić* Trial Judgement"), 31 July 2003, para. 721); *see also Blagojević & Jokić* Trial Judgement, para. 625.

inhumane acts" as a category violates the requirement that crimes must be explicitly pronounced and they may not be applied at the ECCC.

14. If the category of "other inhumane acts" is applicable, it must be limited to acts "of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[47] Although the statutes of the *ad hoc* tribunals (like the Establishment Law) do not explicitly contain this limitation, their jurisprudence has similarly limited its interpretation.[48] The ICTY jurisprudence suggests that the court should initially apply "norm[s] of criminal law" to determine the parameters of "other inhumane acts."[49] Due to its inherent lack of precision, only then should recourse be made to the *ejusdem generis*[50] rule of interpretation.[51] It is submitted that this interpretive method is consistent with the ICC Statute and consequently the Agreement, and should be adopted at the ECCC.

15. If the following crimes are considered crimes against humanity at the ECCC, they must be defined as "other inhumane acts" and, if "other inhumane acts" are applicable, they should be limited in the manner stated herein.

i. Rape

16. Rape, *as an enumerated crime against humanity*, is not listed in (a) the IMT Charter, (b) the 1946 Charter of the International Military Tribunal for the Far East, (c) the Nuremberg Principles, (d) the 1954 Draft Code of Offences Against the Peace and Security of Mankind, or (e) the 1968 Convention on the Non-Applicability of Statutory

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[47] ICC Statute, Art. 7(k).

[48] *See Kordić & Čerkez* Appeal Judgement, para. 117; *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Judgement, 31 March 2003, para. 247; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgement, 7 June 2001, paras. 91-92.

[49] *Stakić* Trial Judgement, para. 721. *See* n. 46 *supra. See also Prosecutor v. Jelisić* IT-95-10-T, Judgement, 14 December 1999, para. 52: "It is appropriate to recall the position of the Trial Chamber in the *Čelebići* case which stated that the notion of cruel treatment set out in Article 3 of the Statute [Violations of the laws or customs of war] 'carries an equivalent meaning... as inhuman treatment does in relation to grave breaches of the Geneva Conventions.' Likewise, the Trial Chamber considers that the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute [Crimes against humanity] have the same legal meaning." This is particularly so considering the requirement for a nexus with armed conflict still existed in customary international law in 1975-79. By contrast, today, crimes against humanity "are no longer linked to the laws of war but rather to human rights law." Kai Ambos & Steffen Wirth, *The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000*, 13 CRIM. L. F. 1, 24, (2002). *See also Blagojević & Jokić* Trial Judgement, para. 625.

[50] "*Ejusdem generis*" is defined as "[a] canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999).

[51] *See Kupreškić* Trial Judgement, paras. 564 and 566. Professor Bassiouni has also warned of the danger inherent in the common law, *ejusdem generis*, approach to interpreting "other inhumane acts," noting "it may well be deemed a violation of the 'principles of legality' if the interpretation by analogy is not carefully circumscribed." BASSIOUNI, at 330.

Limitations to War Crimes and Crimes Against Humanity.[52] The exclusion from these instruments of rape as a crime against humanity demonstrates that it was not an enumerated crime against humanity in customary international law in 1975-79. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable,[53] an act of 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.

ii. Imprisonment

17. Imprisonment, *as an enumerated crime against humanity*, is not listed in (a) the IMT Charter, (b) the 1946 Charter of the International Military Tribunal for the Far East, (c) the Nuremberg Principles, (d) the 1954 Draft Code of Offences Against the Peace and Security of Mankind, or (e) the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[54] The exclusion from these instruments of imprisonment as a crime against humanity demonstrates that imprisonment was not an enumerated crime against humanity in customary international law in 1975-79. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable,[55] an act of imprisonment can only violate Article 5 of the Establishment Law if (a) "other inhumane acts" as a category is applicable, and (b) imprisonment constituted an "other inhumane act" in 1975-79.

iii. Forced Labor

18. There are no international instruments pre-dating 1975-79 that enumerate forced labor as a crime against humanity, and it was not criminalized as such in 1975-79.[56] Forced labor must be distinguished from "enslavement." Enslavement encompasses an element of ownership over a person; forced labor does not.[57] Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable,[58] an act of

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[52] It is submitted that the enumeration of rape as a crime against humanity in Control Council Law No.10 is not material. The Allied and German courts applying this law were "local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." Schwelb, at 218-19.

[53] *See* para.13 *supra.*

[54] It is submitted that the enumeration of imprisonment as a crime against humanity in Control Council Law No.10 is not material. *See* n. 52 *supra.*

[55] *See* para. 13 *supra.*

[56] *See* Schwelb, at 192, who notes: "[a] belligerent power is, however, not prevented from deporting its own nationals to forced labour; under this interpretation, only reducing them to the actual state of slavery is a crime against humanity"; *See also Blaskić* Appeal Judgement, para. 597 (noting that forced labor is not always unlawful).

[57] *See, for example*, ICC Statute, Article 7(2)(c). *See also* the definition of "enslavement" in *Prosecutor v. Kunarac et al.*, IT-96-23 & 23/1, Judgement, 22 February 2001, paras. 542-43.

[58] *See* para. 13 *supra.*

forced labor can only violate Article 5 of the Establishment Law if (a) "other inhumane acts" as a category is applicable, and (b) forced labor constituted an "other inhumane act" in 1975-79.

iv. Torture

19. Torture, *as an enumerated crime against humanity*, is not listed in (a) the IMT Charter, (b) the 1946 Charter of the International Military Tribunal for the Far East, (c) the Nuremberg Principles, (d) the 1954 Draft Code of Offences Against the Peace and Security of Mankind, or (e) the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[59] The exclusion from these instruments of torture as a crime against humanity demonstrates that torture was not an enumerated crime against humanity in customary international law in 1975-79. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable,[60] an act of torture can only violate Article 5 of the Establishment Law if (a) "other inhumane acts" as a category is applicable, and (b) torture constituted an "other inhumane act" in 1975-79.

20. As to the elements of torture, the Pre-Trial Chamber has sought guidance from the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted by the General Assembly Resolution 3452 (XXX) of 9 December 1975 ("Torture Declaration") and the 1984 Convention against Torture and Other Cruel Treatment and Punishment ("CAT") when evaluating the applicable definition of torture.[61] However, General Assembly Resolutions do not have the power or authority to declare or transmute concepts into customary international law; thus, they are not binding..[62] In addition, the Torture Declaration was not declarative of customary international law.[63] Nor is the definition

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[59] It is submitted that the enumeration of torture as a crime against humanity in Control Council Law No.10 is not material. *See* n. 52 *supra*.
[60] *See* para. 13 *supra*.
[61] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/PTC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, D99/3/42, ERN: 0249846-0249887, paras. 63-67.
[62] *See* Hugh Thirlway, *The Sources of International Law, in* INTERNATIONAL LAW 115, 124 (M. Evans, ed., Oxford University Press, 2006) (stating that General Assembly Resolutions have been viewed as evidence of *opinio juris*, but not as acts of State practice).
[63] *See* Hans Danelius, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW (United Nations), 2008, at 1 "[T]he Torture Declaration was intended to be the starting-point for further work against torture... The definition of torture which appeared in the Torture Declaration was considered not to be precise enough and was criticized on various points."

of torture in the CAT applicable. In 1975-79, the CAT did not exist.[64] To apply its definition of torture would be a violation of the principle of *nullum crimen sine lege*.[65] If torture is applicable as an "other inhumane act," guidance as to the definition which must be applied is contained in the Commentaries to the 1949 Geneva Conventions.[66]

v. Forced Marriage

21. As previously explained by the Defence[67] – but not yet considered by the OCIJ[68] – forced marriage was not an enumerated crime against humanity under customary international law in 1975-79. Nor did it constitute an "other inhumane act" in 1975-79.[69] Forced marriage has been recognized as a crime against humanity only by the Special Court for Sierra Leone ("SCSL"),[70] which has jurisdiction over crimes that were committed in "the territory of Sierra Leone since 30 November 1996."[71] As such, any determination by that Court that forced marriage was a crime against humanity under customary international law applies solely to crimes committed after this date. It is noteworthy that no international convention outlawing forced marriage, nor any domestic jurisprudence ascribing criminal liability for forcing marriages, was provided and relied upon by the SCSL. This is simply because in many countries, although possibly anathema to Western values, arranged or forced marriage is an accepted part of society.[72] It was certainly not criminalized by customary international law in 1975-79.

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[64] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Grave Breaches of the Geneva Conventions at the ECCC, 1 June 2010, D379/2, ERN: 00526277 - 00526292, para. 35.

[65] ICCPR, Art. 15(1); *See* paras. 5 and 6 *supra.*.

[66] *See* Geneva Convention IV, Art. 147 and Commentary. *See also Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Grave Breaches of the Geneva Conventions at the ECCC, 1 June 2010, D379/2, ERN: 00526277-00526292, paras. 33-35.

[67] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning Forced Marriage and Forced Sexual Relations, 11 August 2009, D188/3, ERN: 00362834-00362848 ("Forced Marriage Response").

[68] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action Concerning Forced Marriages and Forced Sexual Relations, 18 December 2009, D268/2, ERN: 00417249-00417254.

[69] *See* Forced Marriage Response, paras. 10, 11.

[70] *See Prosecutor v. Brima et al.*, SCSL-2004-16-A, Judgement ("AFRC Appeal Judgement"), 22 February 2008, paras. 175-202; *RUF* Trial Judgement, para. 164; *See also* Neha Jain, *Forced Marriage as a Crime against Humanity: Problems of Definition and Prosecution*, 6(5) J. INT'L CRIM. JUST. 1013, 1014 (2008); Michael Scharf & Suzanne Mattler, *Forced Marriage: Exploring the Viability of The Special Court for Sierra Leone's New Crimes Against Humanity*, Case Research Paper Series in Legal Studies, Working Paper 05-35, October 2005, at 2; Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of "Forced Marriage"*, 7 NW. U. J. INT'L HUM. RTS. 128, 137 (2009).

[71] Statute of the SCSL, Article 1.

[72] *See for example,* ELC Research Unit, *Are forced or arranged marriages a violation of human rights or a valuable cultural practice which promotes social cohesion?*; *See also* M.M. Mehndiratta, B. Paul & P. Mehndiratta, *Arranged Marriage, Consanguinity and Epilepsy*, NEUROLOGY ASIA 12, 15-17 (2007), Binaya Kumar Bastia, *Socio-Cultural Aspects of Sexual Practices and Sexual Offences – An Indian Scenario*, 13 J. CLIN. FORENSIC MED. 208, 210 (2006); Michelle Vachon, *Book Examines 'Ritualcide' During KR Regime*, CAMBODIA DAILY, Apr. 29, 2010, at 1, 2, and 4: "Arranged marriages are still the traditional means of

vi. Enforced Disappearance

22. As previously explained by the Defence[73] – but not yet considered by the OCIJ[74] – enforced disappearance was not an enumerated crime against humanity under customary international law in 1975-79. Nor did it constitute an "other inhumane act" in 1975-79.[75] There are no international instruments which pre-date 1975-79 enumerating enforced disappearance as a crime against humanity.[76] Only in 1992 did the UN General Assembly adopt the Declaration on Protection of all Persons from Enforced Disappearance.[77] Yet, this Declaration is not of binding character. The first legally binding instrument in this field was the Inter-American Convention on Forced Disappearance, adopted by the General Assembly of the Organization of American States only in 1994.[78] The ICTY Statute does not enumerate enforced disappearance as a crime against humanity and the ICTY has never charged this crime.[79] While enforced disappearance may nowadays be recognized as a crime against humanity in customary international law after ratification of the ICC Statute in 1998,[80] it was not a crime against humanity under customary international law during 1975-79.

vii. Forcible Transfer

23. Forcible transfer, *as an enumerated crime against humanity*, is not listed in (a) the IMT Charter, (b) the 1946 Charter of the International Military Tribunal for the Far East, (c) the Nuremberg Principles, or (d) the 1954 Draft Code of Offences Against the Peace and Security of Mankind.[81] The exclusion from these instruments of forcible transfer as a

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matrimony in Cambodia, and people interviewed... did not use the word 'forced' to describe their marriage during the [Khmer Rouge] regime."

[73] *See* Enforced Disappearance Response.

[74] The OCIJ stated that it "would not pre-judge the Closing Order by providing declaratory relief on how facts will be legally characterized." Enforced Disappearance Order, para. 8.

[75] *See* discussion in Enforced Disappearance Response, paras. 21-27, for an explanation of why sources which post-date the period at issue cannot be relied upon as evidence of customary international law.

[76] *Id.*

[77] G.A. Res. 47/133, U.N. G.A.O.R 47th Sess., Agenda item 97(b), U.N. Doc A/RES/47/133 (1993). Despite the fact that the UN General Assembly Declaration was adopted in December 1992, very few States even today have taken specific action to comply with its standards.

[78] The Convention has been ratified by 14 out of 34 OAS member states, hardly evidence of the consistent State practice required to establish customary international law. A list of States which have ratified the Convention is *available at* http://www.oas.org/juridico/english/sigs/a-60.html.

[79] The only reference to enforced disappearance was an *obiter dictum* in the *Kupreškić* Trial Judgement, para. 566, stating that enforced disappearance could be considered as "other inhumane acts," relying upon the UN General Assembly Declaration of 1992 and the Inter-American Convention of 1994.

[80] ICC Statute, Art. 7(1)(i).

[81] Note that evacuations of populations from homes which were then burned may have been interpreted as an "inhumane act" in the IMT Judgement. IMT Judgement, *available at* http://avalon.law.yale.edu/imt/judwarcr.asp. However, the "Tribunal's views on these questions of interpretation were never systematically set out in the *Judgement* and have to be gathered from the various verdicts pronounced upon each defendant; with regard to ["inhumane acts"]... it is not really clear whether any interpretation was ever attempted." Sydney L. Goldenberg, *Crimes Against Humanity – 1945-1970*, 10 W. ONTARIO L. REV. 1, 42 n.132a. (1971).

crime against humanity demonstrates that it was not an enumerated crime against humanity in customary international law in 1975-79. Forcible transfer is not a sub-category of "deportation." "Deportation" requires a *de jure* State border or, in certain circumstances, a *de facto* border to be crossed.[82] As forcible transfer does not require this element, it must be distinguished from deportation. Thus, without prejudice to the Defence's position that "other inhumane acts" as a category is inapplicable,[83] an act of forcible transfer can only violate Article 5 of the Establishment Law if (a) "other inhumane acts" as a category is applicable, and (b) forcible transfer constituted an "other inhumane act" in 1975-79.[84]

G. "Persecutions" must be limited to acts which have a nexus with other crimes within the jurisdiction of the ECCC and which are of comparable gravity to the acts enumerated in Article 5 of the Establishment Law

24. According to the ICC Statute, acts of persecution are limited to those which have a nexus with other crimes within the Court's jurisdiction. The Establishment Law does not contain this requirement, nor does it exclude it. The Agreement refers to the definition of crimes against humanity in the ICC Statute. Therefore, the ECCC should limit the acts of persecution to those which have a nexus with other crimes within its jurisdiction.[85] At the ICTY, acts of persecution are "of gravity equal to the crimes listed in Article 5 of the Statute [crimes against humanity]."[86] The OCIJ should also be guided by ICTY jurisprudence by limiting persecutions to acts which are of the same gravity as the other enumerated crimes.

H. "Persecutions" must be limited to acts committed with a specific intent to discriminate on political, racial and religious grounds

25. Article 5 of the Establishment Law expressly requires that acts of persecution must be committed on political, racial and religious grounds. Article 5(h) of the ICTY Statute and Article 3(h) of the ICTR Statute similarly require persecutions to be committed on

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[82] *See Stakić* Appeal Judgement, para. 278, 289; *See also Brđanin* Trial Judgement, para. 542; *see also Blagojević & Jokić* Trial Judgement, para. 597 - 601, 629, for a discussion of exceptions to today's prohibition of forced displacements when not carried out for one of the grounds recognised under international law.

[83] *See para.* 13 *supra.*

[84] As to which, *see* THE UN INTERNATIONAL CRIMINAL TRIBUNALS, at 224: "The [*Stakić*] Trial Chamber pointed out that the concept of forcible transfer was not unknown to the drafters of the ICTY Statute, because they included it in article 4, as one of the punishable acts of genocide (forcible transfer of children from one group to another). Therefore, '[t]he fact that forcible transfer is not explicitly mentioned in Article 5 (Crimes Against Humanity) provides additional support for not considering it as part of "other inhumane acts," as distinct from deportation...' The *Stakić* Trial Chamber's finding is only one manifestation of a clear unease among judges at the tribunals with the imprecise nature of the category of other inhumane acts... [as to which more generally, *see* para. 13 *supra*]." Similarly, at the ECCC "forcible transfer" is recognized in Article 4 [Genocide] of the Establishment Law. Consequently, it should not be prosecuted as an "other inhumane act."

[85] ICC Statute, Art. 7(1)(h); *See also* paras. 5 and 6 *supra.*

[86] *Kordić & Čerkez* Appeal Judgement, paras. 102-03; *See also Blaskić* Appeal Judgement, paras. 135, 138-39; *Kupreškić* Trial Judgement, paras. 618-19.

these grounds.[87] It is clear that only the political, racial and religious grounds enumerated in the Establishment Law can establish persecution at the ECCC.

26. At the ICTY a specific intent to discriminate on political, racial or religious grounds must be proven in relation to the underlying act (as opposed to the attack in general), as well as the intent to commit the underlying act.[88] Such intent may not be "inferred directly from the general discriminatory nature of an attack characterized as a crime against humanity."[89] At the ECCC, a specific intent to discriminate on political, racial or religious grounds must be considered an element of the *mens rea* of persecution.

III. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests that should the Co-Investigating Judges find, despite all Defence arguments to the contrary, that crimes against humanity may be applied at the ECCC, they should:

a. LIMIT the application of crimes against humanity to situations in which the Charged Person/Accused has knowledge of the attack;

b. LIMIT the application of crimes against humanity to acts having a nexus with international armed conflict;

c. LIMIT the application of crimes against humanity to acts perpetrated as part of an attack pursuant to or in furtherance of a State or organizational policy;

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[87] *See Kordić & Čerkez* Appeal Judgement, para. 711. *See also Prosecutor v. Vasiljević*, IT-98-32-A, Judgement, 25 February 2004, para. 113; *Prosecutor v. Krnojelac*, T-97-25-A, Judgement, 17 September 2003, para. 184; *Brđanin* Trial Judgement, para. 996; *Prosecutor v. Simić et al.*, IT-95-9-T, Judgement, 17 October 2003 ("*Simić* Trial Judgement"), para. 51, *Stakić* Trial Judgement, para. 738; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2, Judgement, 26 February 2001 ("*Kordić & Čerkez* Trial Judgement"), para. 212; *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement, 15 May 2003, paras. 350, 470-71. *But see*, in relation to ethnic grounds at the ICTR, *Prosecutor v. Nahimana, et al.*, ICTR-99-52-A, Judgement, 28 November 2007, paras 986-88; *see also Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgement, 18 December 2008, para. 2209.

[88] *Stakić* Appeal Judgement, para. 328. *Kordić & Čerkez* Trial Judgement, paras. 216-17; *Simić* Trial Judgement, para. 51.

[89] *Kordić & Čerkez* Appeal Judgement, para. 110. Note, however, that the Appeals Chamber added: "[T]he Appeals Chamber considers that the discriminatory intent may be inferred from such context as long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent." It is submitted that ICTY jurisprudence diluting the *mens rea*, by allowing convictions in situations where specific intent is not proved, clashes precariously with the principle of legality: an accused charged with persecution can be convicted without evidence of the existence of special persecutory intent based on ordering, planning or instigating, aiding and abetting and joint criminal enterprise liability. See Section J.7 of the Annex for a more complete discussion of this case law. *See also Case of IENG Sary*, 002/19-09-2007, ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010, D345/3, ERN: 0045746–004575757, paras. 20-21; *Case of IENG Sary*, 002/19-09-2007, ECCC/OCIJ, IENG Sary's Supplemental Alternative Submission to his Motion against the Applicability of Genocide at the ECCC, 21 December 2009, D240/2, ERN: 00421720-00421743, paras. 20-26.

d. LIMIT the application of crimes against humanity to acts committed as part of a discriminatory attack occurring on national, political, ethnical, racial or religious grounds;

e. LIMIT the application of crimes against humanity to only those underlying acts that were clearly defined as crimes against humanity in customary international law in 1975-79;

f. DECLARE that "other inhumane acts" is inapplicable as a category of crimes against humanity at the ECCC, or LIMIT "other inhumane acts" to those acts which would have been clearly identifiable as such in 1975-79 by initially referring to criminal law norms, and then the *ejusdem generis* rule;

g. LIMIT "persecution" to acts which have a nexus with other crimes within the jurisdiction of the ECCC, which are of comparable gravity to the acts enumerated in Article 5 of the Establishment Law, and which are committed with a specific intent to discriminate on political, racial and religious grounds.

Respectfully submitted,

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ANG Udom | Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **23rd** day of June, 2010