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BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENTG SARY'S ALTERNATIVE MOTION ON THE LIMITS OF THE
APPLICABILITY OF GRAVE BREACHES OF THE GENEVA CONVENTIONS AT
THE ECCC

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits this motion on the limits of grave breaches of the Geneva Conventions¹ (“grave breaches”), should they apply at the ECCC.² A further jurisdictional challenge is warranted because: 1) grave breaches are limited to grave breaches of the Geneva Conventions; 2) grave breaches are only applicable in an international armed conflict; 3) there must be a nexus between the underlying acts and the international armed conflict; 4) the victims or objects of the underlying acts must qualify as protected persons or property pursuant to the Geneva Conventions and the Establishment Law; 5) the *mens rea* required for a grave breach offense is intent, or under certain circumstances, recklessness; 6) the only forms of liability applicable to grave breaches are committing and ordering; and 7) the definition of some of the underlying acts must be limited, namely torture, destruction and serious damage to property not justified by military necessity and carried out unlawfully and wantonly, and taking civilians as hostages. An Annex is attached.³

I. Admissibility of this Jurisdictional Challenge

1. Jurisdictional issues must be raised at this stage of the proceedings. Through this jurisdictional challenge, the Defence does not request the OCIJ to pre-judge the facts before the Closing Order. The Defence simply requests the OCIJ to determine the limits of the applicability of grave breaches, should the OCIJ determine that the ECCC has jurisdiction to charge Mr. IENG Sary with grave breaches. The Defence is entitled to be informed as to the delimitation of the crimes over which the ECCC has jurisdiction to try Mr. IENG Sary and to raise legitimate jurisdictional challenges.⁴
2. The Pre-Trial Chamber has found that both international standards and Article 35 new of the Establishment Law require specificity in an indictment.⁵ An indictment cannot be specific unless the delimitation of crimes relied on in the indictment are set out. Indeed,

¹ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (“Convention I”); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949 (“Convention II”); Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (“Convention III”); Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (“Convention IV”) (collectively “Geneva Conventions”).

² See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion against the Application of Grave Breaches at the ECCC, 7 May 2010, D379, ERN: 00511576-00511589 (“First Grave Breaches Motion”).

³ See attached Annex which sets out the law concerning grave breaches as codified in the Geneva Conventions, at the International Criminal Court (“ICC”) and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), and how it has been applied through the jurisprudence at the ICTY.

⁴ The Defence cannot assume that grave breaches are applicable at the ECCC simply because they were applied in Case 001.

⁵ *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. 34.

throughout the JCE Decision, the Pre-Trial Chamber delimited the applicability of the JCE mode of liability.

3. Acknowledging that at the *ad hoc* tribunals challenges relating to the specific contours of a substantive crime are matters to be addressed at trial,⁶ the ECCC must be differentiated in certain aspects from the *ad hoc* tribunals. The delimitation of a substantive crime is one of these aspects. The delimitation of substantive crimes must be resolved prior to the Closing Order in order for the Defence to have sufficient time to prepare any challenges prior to a potential indictment against Mr. IENG Sary. Recognizing that Rule 74(3) may not expressly specify the Defence's right to Appeal the Closing Order, it is submitted that implicitly nothing prohibits the Defence from doing so, particularly in the interests of justice and in keeping with the equality of arms. In this instance, if the substantive crimes are not delimited before the production of the Closing Order, it may be necessary for the Defence to Appeal the Closing Order under Rule 74(3)(a).⁷
4. It will be imprudent for the OCIJ to refrain from delimiting the contours of grave breaches until the Closing Order, should grave breaches apply at the ECCC. This will only delay any jurisdictional appeal and is highly judicially uneconomic. This could further lengthen any proceedings against Mr. IENG Sary which the OCIJ is keen to avoid.⁸ More importantly, delaying the delimitation of the contours of grave breaches until the Closing Order places a significant restraint on the Defence's ability to fully prepare its defence for Mr. IENG Sary: there are a myriad of legal issues foreseeable immediately following the Closing Order where there is a thirty day window of opportunity afforded by Rule 75 to appeal any OCIJ Orders. Consequently, delaying the delimitation of the contours of grave breaches profoundly affect the fair trial rights of Mr. IENG Sary.
5. The delimitation of the substantive crimes such as grave breaches is in order for sufficient notice to be provided, which in turn is useful for the conduct of the investigation under Rule 55(10).⁹ The OCIJ has considered motions in the past under Rule 55(10) in order to

⁶ *Id.*, paras. 23-24.

⁷ Rule 74(3)(a) entitles the Defence to appeal orders confirming the jurisdiction of the ECCC to the Pre-Trial Chamber.

⁸ See e.g., *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order Issuing Warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519, para. 13.

⁹ Note that unlike the English version of the Rules, the French version merely states that the requested investigative action must be "useful." *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 8 December 2009, D97/13, ERN: 00411047-00411056, fn. 23.

provide sufficient notice.¹⁰ Further, the Pre-Trial has also delimited the application of Crimes at the ECCC.¹¹ The OCIJ must follow suit to delimit all substantive crimes applicable at the ECCC.

6. When the Defence has sought to raise past jurisdictional challenges,¹² the OCIJ has rejected these challenges, stating that the Defence sought declaratory relief and that the concern of providing due notice to the Charged Persons does not arise with matters such as genocide or command responsibility since they are expressly articulated in the Establishment Law.¹³ The Pre-Trial Chamber has held that the form and substance of a jurisdictional challenge makes it more than a mere declaration.¹⁴

II. ARGUMENT

A. Grave breaches are limited to grave breaches of the Geneva Conventions

7. Article 6 of the Establishment Law clearly states that the ECCC has jurisdiction over “grave breaches of the Geneva Conventions of 12 August 1949.”¹⁵ The ECCC is a Cambodian court based on the Civil Law system: only crimes explicitly pronounced by the law can be punished.¹⁶ Grave breaches of the Geneva Conventions are set out explicitly in the Establishment Law; grave breaches of Additional Protocol I¹⁷ are not.
8. Additional Protocol I was only ratified by Cambodia on 14 January 1998.¹⁸ The temporal jurisdiction of the ECCC covers the period between 17 April 1975 and 6 January 1979. Additional Protocol I was not a convention signed or ratified by Cambodia during the ECCC’s temporal jurisdiction period. Thus, to apply any grave breach provision from

¹⁰ *Id.*, para. 8.

¹¹ See JCE Decision.

¹² See e.g., *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion Against the Application of Command Responsibility at the ECCC, 15 February 2010, D345/2, ERN: 00475513-00475527; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940.

¹³ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Extension of Page Limit, 12 February 2010, D345/1, ERN: 00452734-00452736, para. 4; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action on the Applicability of the Crime of Genocide at the ECCC, 28 December 2009, D240/3, ERN: 00421137-00421140 (“Genocide Order”), para. 3.

¹⁴ JCE Decision, para. 18.

¹⁵ Emphasis added.

¹⁶ 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).

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 85.

¹⁸ Signatories and ratifying states of Additional Protocol I *available at*: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.

Additional Protocol I would violate the principle of *nullum crimen sine lege*,¹⁹ the Agreement,²⁰ and the Establishment Law.²¹

9. Additional Protocol I cannot be considered to codify then existing customary international law.²² By the end of 1978, while 54 States had signed Additional Protocol I,²³ only 3 States had ratified it: El Salvador, Ghana, and Libya. Most States did not ratify Additional Protocol I until much later, if at all.²⁴ Noteworthy, of the five permanent members of the UN Security Council, Russia ratified it in 1989, the United Kingdom in 1998, and France in 2001,²⁵ while China and the United States have yet to ratify it.²⁶ This does not show the widespread, consistent State practice necessary to form customary international law. “There are good reasons to be suspicious of promises that do not blossom into full-fledged conduct. Either the alleged rule is an empty piety because it is too general or, worse still, the statements are disingenuous.”²⁷ Grave breaches of Additional Protocol I plainly cannot be applied at the ECCC through customary international law. Additional Protocol I was not customary international law during the period 1975-79.
10. Furthermore, Article 2 of the ICTY Statute is identical to Article 6 of the Establishment Law in stating that each respective tribunal or court has the power to prosecute, or bring to trial, all persons or suspects who committed or ordered the commission of “grave

¹⁹ The principle of *nullum crimen sine lege* is recognized by Article 15(1) of the International Covenant on Civil and Political Rights (“ICCPR”), which must be respected at the ECCC pursuant to Article 31 of the Cambodian Constitution and Article 13(1) of the Agreement.

²⁰ Agreement, Art. 1 states: “The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979” (emphasis added).

²¹ Establishment Law, Art. 1 states: “The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979” (emphasis added).

²² “Customary law begins as a customary practice and then ripens into a binding rule when those who follow the rule begin to regard the practice as binding on them.” George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 556 (2005). It must be noted that “[i]t is notoriously difficult to establish sufficient consensus to validate a rule as customary international law.” *Id.*

²³ See ICRC list of States Parties, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.

²⁴ A review of the dates of accession or ratification shows that most States ratified Additional Protocol I between 1985-95. Between 1985-90, there were 45 new ratifications/accessions and between 1990-95, there were 44 new ratifications/accessions. See ICRC list of States Parties, available at: <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 Am. J. Int’l L. 747, 752 (2005). See also Fletcher & Ohlin, at 557: “It is understandable that the pious leaders of the West ... would declare ... peremptory rules of CIL. Unfortunately, the piety of the West cannot coherently be considered a source of law.”

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breaches of the Geneva Conventions of 12 August 1949.”²⁸ The ICTY: 1) does not in its Statute or within its jurisprudence provide for grave breaches of Additional Protocol I; and 2) does not in its Statute or within its jurisprudence provide for grave breaches of customary international law, apart from the Geneva Conventions which are reflective of customary international law.²⁹ Indeed, as one commentator notes: “Article 2 of the [ICTY] Statute so closely follows the relevant provisions of the Geneva Conventions that a liberal understanding ... would go beyond the test of Article 2.”³⁰ As the ICTY Statute and Establishment Law are identical in specifically establishing jurisdiction only over grave breaches of the Geneva Conventions, the ECCC should be guided by the jurisprudence of the ICTY and limit grave breaches to those set out in the Geneva Conventions.

B. Grave breaches are only applicable in an international armed conflict

11. Common Article 2 of the Geneva Conventions states in part: “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties....” Only common Article 3 of the Geneva Conventions is applicable to an armed conflict of a non-international character.³¹ As grave breaches are a part of the Geneva Conventions, but not covered by common Article 3 of the Geneva Conventions, grave breaches are only applicable in an international armed conflict.
12. The ICC Statute identifies grave breaches as only applicable in an international armed conflict. Article 8 sets out war crimes over which the ICC has jurisdiction. Article 8(2)(a) sets out grave breaches over which the ICC has jurisdiction. Article 8(2)(b) sets out the jurisdiction of the ICC over “Other serious violations of the laws and customs applicable in international armed conflict.”³² Article 8(2)(c-f) sets out the jurisdiction of the ICC over war crimes which are in an “armed conflicts not of an international character.”³³ Thus, the ICC Statute clearly differentiates between an international armed

²⁸ Article 2 of the ICTY Statute states in part: “The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949....”

²⁹ *Prosecutor v. Tadić*, IT-94-1-T, Judgement, 7 May 1997 (“*Tadić* Trial Judgement”), para. 577.

³⁰ Dieter Fleck, *Shortcomings of the Grave Breaches Regime*, 7(4) J. INT’L CRIM. JUST. 833, 840 (2009).

³¹ Geneva Conventions, Common Art. 3 states in part: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...” (emphasis added).

³² The term “serious violations of the laws and customs applicable in international armed conflict” is an “unusual amalgamation of the older notion of the “laws or customs of war.” KNUT DÖRMANN, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES: ARTICLE BY ARTICLE 322, 323 (O. Triffterer (ed), 2008) (emphasis added).

³³ Emphasis added.

conflict and conflicts which are not of an international character. At the ICC grave breaches clearly can only occur in an international armed conflict. This is confirmed by the text adopted by the Preparatory Committee of the ICC Statute.³⁴

13. The ICTY is also clear in stating grave breaches are only applicable in an international armed conflict. The Appeals Chamber in *Tadić* held: “[I]n the present state of development of the law, [grave breaches] only applies to offences committed within the context of international armed conflicts.”³⁵ The ICTY has repeatedly upheld this.³⁶
14. There are no provisions in the statutes of the International Criminal Tribunal for Rwanda (“ICTR”) or the Special Court for Sierra Leone (“SCSL”) criminalizing grave breaches. Both the ICTR and SCSL only have jurisdiction over an armed conflict which is non-international.³⁷

C. There must be a nexus between the underlying acts and the international armed conflict

15. The criterion of a nexus is necessary in order for grave breaches to include violations of international humanitarian law but to exclude, for example, domestic crimes. Logically, if the underlying act is not related to the international armed conflict, there is no violation of international humanitarian law. The ICTY has followed this reasoning.³⁸ The ECCC should follow suit.
16. The ICTY has held that one of the preconditions to the applicability of grave breaches is: “the establishment of a nexus between the alleged crimes and the armed conflict.”³⁹ The nexus requirement demands a geographical and temporal link between the acts of the Accused and the armed conflict: “It is sufficient that the alleged crimes were closely

³⁴ “The conduct took place in the context and of and was associated with an international armed conflict.” KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (“DÖRMANN”) 17 (Cambridge University Press, 2002).

³⁵ *Tadić* Jurisdiction Decision, para. 84.

³⁶ “In order for the International Tribunal to prosecute an individual for grave breaches of the Geneva Conventions under Article 2 of the Statute, the offence must be committed, *inter alia*: (i) in the context of an international armed conflict.” *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 170 (emphasis added). See also *Prosecutor v. Brđanin*, IT-99-36-T, Judgement, 1 September 2004, (“*Brđanin* Trial Judgement”) para. 121; *Prosecutor v. Simić et al.*, IT-95-9-T, Judgement, 17 October 2003, para. 106; *Prosecutor v. Naletilić & Martinović*, IT-98-34-T, Judgement, 31 March 2003 (“*Naletilić* Trial Judgement”), para. 176.

³⁷ Instead the ICTR and SCSL criminalizes “serious violations” of Common Art. 3 of the Geneva Conventions and of Additional Protocol II (ICTR Statute, Art. 4; SCSL Statute, Art. 3). However, as explained in the First Grave Breaches Motion, war crimes which are not grave breaches are not applicable at the ECCC.

³⁸ *Tadić* Trial Judgement, para. 572; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 193.

³⁹ *Brđanin* Trial Judgement, para. 121; *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordić* Trial Judgement”), para. 32; *Prosecutor v. Blaškić*, IT-95-14-T, Judgement, 3 March 2000, para. 69.

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- related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.”⁴⁰
17. The ICTY Appeals Chamber has set a high threshold for the nexus between the alleged crime and international conflict, namely that the “existence of an armed conflict, at a minimum, must have played a substantial part in the perpetrator’s ability to commit [the grave breach], his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”⁴¹ This qualification is needed in order to “distinguish a war crime from a purely domestic offence.”⁴² A “substantial part” suggests the armed conflict must play a significant role in the Accused’s ability to commit the crime. Only having “some part” will not make the crime a grave breach.
18. The Accused must have knowledge of the existence of an international armed conflict. The ICTY Appeals Chamber held: “[i]t suffices that [an accused] was aware of the *factual* circumstances, *e.g.* that a foreign state was involved in the armed conflict.”⁴³ Without this knowledge, the alleged crime cannot be considered to be a grave breach.
19. Two further criteria must be considered. First, grave breaches are only applicable “until the cessation of combat activities in a certain region,”⁴⁴ and second, grave breaches only occur if “committed in furtherance or take advantage of the situation created by the fighting.”⁴⁵ If these criteria are not met, the alleged crime is not a grave breach.
20. The ICTY Appeals Chamber has set out factors that *inter alia* may be taken into account in determining whether the nexus has been established:
- the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.⁴⁶
21. The ICC has followed the jurisprudence of the ICTY in requiring a nexus: “The Elements of Crime require that the conduct took place in the context of and was associated with an

⁴⁰ *Tadić* Jurisdiction Decision, para. 70. See also *Naletilić* Trial Judgement, para. 177; *Brđanin* Trial Judgement, para. 123; *Prosecutor v. Krnojelac*, IT-97-25-T, Judgement, 15 March 2002, para. 51; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac* Trial Judgement”), para. 402.

⁴¹ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac* Appeals Judgement”), para. 58.

⁴² *Id.*

⁴³ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-A, Judgement, 17 February 2004, para. 311 (emphasis in original).

⁴⁴ *Kunarac* Trial Judgement, para. 568.

⁴⁵ *Id.*

⁴⁶ *Kunarac* Appeals Judgement, para. 59.

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armed conflict.”⁴⁷ The Preparatory Committee of the ICC Statute has further stated that an Accused must know that the victim belonged to an adverse party.⁴⁸

22. If grave breaches are found to be applicable at the ECCC, the requisite criteria to establish a nexus between the underlying act and the international armed conflict constitute a very high threshold, as is also the case at the ICTY and ICC. If the criteria above are not met, the nexus is not established.

D. The victims of the underlying acts must qualify as protected persons or property pursuant to the Geneva Conventions and the Establishment Law

23. Article 4(1) of Convention IV defines persons protected pursuant to the Geneva Conventions: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” The commentary to the Geneva Conventions names two classes of protected persons: “(1) ‘enemy nationals’ within the national territory of each of the Parties to the conflict and (2) ‘the whole population’ of occupied territories (excluding nationals of the Occupying Power).”⁴⁹ The commentary to the Geneva Conventions, in defining Article 4(1) of Convention IV, states:

The definition has been put in negative form; as it is intended to cover anyone who is ‘not’ a national of the Party to the conflict or Occupying Power in whose hands he is. The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State’s relations with its own nationals.⁵⁰

24. The commentary to Article 4(1) further explains that Article 4(1) requires the exclusion of the following persons from claiming protected status:

- A. On the territory of belligerent States: protection is accorded under Article 4 to all persons of foreign nationality and to persons without any nationality. The following are, however, excluded:
- (1) Nationals of a State which is not bound by the Convention;
 - (2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;

⁴⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 29 January 2007 (“*Lubanga* Confirmation Decision”), para. 286, upheld in *Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008 (“*Katanga* Confirmation Decision”), para. 379.

⁴⁸ DÖRMANN, 29.

⁴⁹ Convention IV, Art. 4(1).

⁵⁰ Commentary to Geneva Convention IV, Art. 4(1) available at: <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument>.

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- (3) Persons covered by the definition given above under A who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.
- B. In occupied territories: protection is accorded to all persons who are not of the nationality of the occupying State. The following are, however, excluded:
- (1) Nationals of a State which is not party to the Convention.
 - (2) Nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State.
 - (3) Persons covered by the definition given above under B who enjoy protection under one of the three other Geneva Conventions of August 12, 1949.

The Geneva Conventions and the commentary to the Geneva Conventions therefore make clear that a protected person is defined by his or her nationality.

25. Until June 1999, the ICTY defined protected persons based on their nationality.⁵¹ Only in July 1999 did the ICTY Appeals Chamber extend the definition of “nationals” to persons with different ethnicity.⁵² The ECCC has temporal jurisdiction over the period of 1975-79, at which time an extended definition was not sufficiently foreseeable or accessible. The ICTY Appeals Chamber’s extended definition of protected persons cannot be applied at the ECCC as it would violate the principle of *nullum crimen sine lege*. The definition of protected persons at the ECCC must only include persons protected based on their nationality.
26. The extended definition of protected persons did not exist until formulated by the ICTY Appeals Chamber in July 1999. This was done because: “[t]his legal approach, hinging on substantial relations more than formal bonds, becomes all the more important in present-day international armed conflicts.”⁵³ In defining “present-day international armed conflicts,” the ICTY Appeals Chamber stated: “While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance.”⁵⁴ Therefore the ICTY Appeals Chamber applied the extended definition of nationals only in the context of the potential creation of new states in a modern inter-ethnic armed conflict. Unless there is the potential creation of new states in a modern inter-ethnic armed conflict, the limited definition of nationals – as recognized in the Geneva Conventions and their commentary – must be applied.

⁵¹ *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999, para. 46.

⁵² *Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 166.

⁵³ *Id.*

⁵⁴ *Id.* (Emphasis added).

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27. The Preparatory Committee of the ICC Statute has added a subjective element to the definition of a protected person, namely that an Accused must know that the victim belonged to an adverse party.⁵⁵ The Preparatory Committee is a delegation of states which helped draft the element of crimes at the ICC. As such, they expressed the *opinio juris* of the international community to be practiced at the ICC. Where the law can be interpreted to the benefit of an Accused, it must be interpreted in that manner. This being in accordance with the principle of *in dubio pro reo* as provided by Article 38 of the Cambodian Constitution.

E. The *mens rea* required for a grave breach offense is intent, or under certain circumstances, recklessness

28. Article 30(1) of the ICC Statute deals with the “mental element” for offenses included in its Statute: “Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”⁵⁶ The ICC is clear that criminal responsibility for crimes over which it has jurisdiction can only be attributed when the Accused has intent and knowledge. There is no mention of the term “negligent.” The ECCC likewise cannot charge an Accused of grave breaches on the basis of negligence.

29. The ICTY Trial Chamber held that the “*mens rea* constituting all the violations of [grave breach offenses] include both guilty intent and recklessness which may be likened to serious criminal negligence.”⁵⁷ The ICTY Trial Chamber made two errors. First, recklessness does not equate to serious criminal negligence; they are two completely separate legal standards. “Negligence” is defined by Black’s Law Dictionary as “the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation...”⁵⁸ “Recklessness” is defined as “conduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk... Recklessness involves a greater degree of fault than negligence, but a lesser degree of fault than intentional wrongdoing.”⁵⁹ Even where negligence is serious, a diligent court would not equate it to recklessness.⁶⁰ Therefore,

⁵⁵ DÖRMANN, 29.

⁵⁶ ICC Statute, Art. 30(1).

⁵⁷ *Blaškić* Trial Judgement, para. 152.

⁵⁸ BLACK’S LAW DICTIONARY 1056 (7th ed. 1999).

⁵⁹ BLACK’S LAW DICTIONARY 1277 (7th ed. 1999).

⁶⁰ “But it is still true that most courts consider that ‘gross negligence’ falls short of reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind.” BLACK’S LAW DICTIONARY 1057 (7th ed. 1999) quoting W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 211-12 (5th ed. 1984).

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the threshold to prove negligence is lower than that to prove recklessness. Second, the seriousness of grave breaches cannot warrant a *mens rea* standard of negligence. To do so would devalue the seriousness of a grave breaches offense. Jones and Powles sum up the position succinctly:

This reference to negligence is, however, somewhat surprising. One would not ordinarily expect an accused who has been merely negligent, or even seriously negligent, to be convicted by the ICTY of a 'serious violation of international humanitarian law.' The Chamber here may have been thinking here of liability under Article 7(3) of the ICTY Statute, which may be seen as creating liability on the part of a commander for negligence under certain circumstances. But this is a separate issue from the requisite *mens rea* for liability under Article 2 of the Statute, and it is submitted that negligence of any sort would not suffice. Only intention or, under certain circumstances, recklessness should be sufficient to ground a charge for a 'grave breach' of the Geneva Conventions.⁶¹

The ECCC can only convict an Accused on the basis of intent, or under certain circumstances, recklessness.⁶²

30. Liability arising from the *mens rea* of command responsibility or JCE – should these forms of liability apply at the ECCC – is a separate issue from the requisite *mens rea* of grave breaches.⁶³ For a grave breach to have occurred, the perpetrator must be showed to have acted with intent or recklessness. The issue of a commander's or a JCE participant's *mens rea* will then be determined separately.

F. The only forms of liability applicable to grave breaches are *committing* and *ordering*

31. Article 6 of the Establishment Law limits the applicability of grave breaches to "all Suspects who committed or ordered." Any other form of liability listed in Article 29 of the Establishment Law or even those forms of liability which are not listed in Article 29 of the Establishment Law – such as JCE – are therefore not applicable to the crime of grave breaches.

G. Definition of underlying acts

32. It is not possible in the space available to discuss every possible element of every crime which could constitute a grave breach. The Defence notes, however, that the elements of the offenses must be applied as they were defined in 1975-79 in order to fall under the ECCC's jurisdiction.

i. Torture

⁶¹ JONES AND POWLES, INTERNATIONAL CRIMINAL PRACTICE 246 (Oxford University Press 2003).

⁶² See paras. 30-39 *infra*.

⁶³ *Id.*

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33. The commentary to the Geneva Conventions sets out three key limits of torture. First, the threshold for an act to constitute torture is that it must involve the infliction of pain which is more than a mere assault on the physical or moral integrity of a person. Second, it is the purpose behind an act which determines whether the act constitutes torture, not the pain itself. Therefore, pain arising solely from inherent in or incidental to lawful sanctions is not included. Third, the purpose can only be to obtain confessions or information. Therefore, if infliction of pain on a person is carried out without the intention to obtain information or confessions from a person, it cannot constitute torture.⁶⁴
34. The ICTY has stated that any act of torture must be “intentional.”⁶⁵ A high threshold for the necessary *mens rea* for torture has thus been set out at the ICTY. Recklessness will not suffice.⁶⁶
35. The ECCC must nevertheless depart from ICTY jurisprudence where it is not representative of the definition of torture in the Geneva Conventions. The ICTY has extended the definition of torture: “The act or omission must have occurred in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate, on any ground, against the victim or a third person.”⁶⁷ The definition of torture at the ICTY “is intended to reflect the constitutive elements of the crime as set out in the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment and Punishment [(“CAT”)]...”⁶⁸ In 1975-79 CAT did not exist. CAT cannot therefore be applicable at the ECCC. To apply a definition of torture based on the constitutive elements of the crime as set out in CAT would be a violation of the principle of *nullum crimen sine lege*.
36. The extended definition of torture at the ICTY includes torture as a means to punish, intimidate, coerce or discriminate, which is not the definition given in the commentary to the Geneva Conventions. The Establishment Law has stated explicitly that torture is

⁶⁴ Commentary to Geneva Convention IV, Art. 147 available at: <http://www.icrc.org/ihl.nsf/COM/380-600169?OpenDocument>.

⁶⁵ *Kunarac Appeals Judgement*, para. 153; *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005, para. 238; *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, para. 162; *Kunarac Trial Judgement*, para. 497.

⁶⁶ “The infliction of pain and suffering that is said to amount to torture must have been intentional, that is, must have been done deliberately, so that the torture may not be committed negligently or recklessly,” GUÉNAËL METTRAUX, *INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS* 116, (Oxford University Press 2005); M.E. Badar, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 6 INT’L CRIM. LAW REV. (2006) 313, 321.

⁶⁷ *Brđanin Trial Judgement*, para. 481(3).

⁶⁸ Ken Roberts, *The contribution of the ICTY to the Grave Breaches Regime*, 7(4) J. INT’L CRIM. JUST 743, 756 (2009); See also *Brđanin Trial Judgement*, para. 481.

based on a violation of grave breaches of the Geneva Conventions. Logically, and especially in a Civil Law system such as Cambodia, the definition of torture must come from the stated source. In this case the Geneva Conventions are the stated source and the elements of torture are defined in the commentary.⁶⁹ If the ECCC is to find it has jurisdiction over grave breaches, including torture, it must apply the limitations as stated in the commentary to the Geneva Conventions.

37. Torture, as a grave breach of the Geneva Conventions, cannot include “biological experiments.” Biological experiments are listed as a grave breach in the Geneva Conventions,⁷⁰ but are not enumerated in the list of grave breaches applicable at the ECCC. The exclusion of biological experiments at the ECCC demonstrates that the ECCC was not intended to have jurisdiction over this particular grave breach offense. In a Civil Law system such as Cambodia, crimes must be clearly defined. Any ambiguity between the Geneva Conventions and Article 6 of the Establishment Law must be resolved in favor of the Accused. This being in accordance with the principle of *in dubio pro reo* as provided by Article 38 of the Cambodian Constitution. Therefore torture cannot include biological experiments.

ii. Destruction and serious damage to property not justified by military necessity and carried out unlawfully and wantonly

38. Article 6 of the Establishment Law states: “destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly.”⁷¹ This is a marked distinction from the Geneva Conventions and Article 2 of the ICTY Statute which both state: “extensive destruction and appropriation of property.”⁷² The exclusion of appropriation of property at the ECCC demonstrates that the ECCC was not intended to have jurisdiction over this particular grave breach offense. As repeatedly stated, in a Civil Law system such as Cambodia, crimes must be clearly defined. The ambiguity between the Geneva Conventions and Article 6 of the Establishment Law must be resolved in accordance with the principle of *in dubio pro reo* in favor of the Accused. Therefore the ECCC cannot have jurisdiction over the appropriation of property.

39. The Geneva Conventions state that “extensive destruction” is required. Article 6 of the Establishment Law simply states that “destruction” is required. Therefore in relation to this offense there are two different tests required for the destruction of property. Any

⁶⁹ Further 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).

⁷⁰ Convention I, Art. 50; Convention II, Art. 51; Convention III, Art. 130; Convention IV, Art. 147.

⁷¹ Establishment Law, Art. 6 (Emphasis added).

⁷² Convention I, Art. 50; Convention II, Art. 51; Convention III, Art. 130; Convention IV, Art. 147.

ambiguity must be resolved in accordance with the principle of *in dubio pro reo* in favor of the Accused. Therefore extensive destruction to property is required.

40. Serious damage cannot be equated to extensive destruction. Serious damage⁷³ is a lower test to prove compared to extensive destruction.⁷⁴ Serious damage is not an underlying act which can be considered to be a grave breach at the ECCC. Serious damage is not stated in the Geneva Conventions as an underlying act.⁷⁵ To consider serious damage as an underlying act would be a violation of the principle of *nullum crimen sine lege*.

iii. Taking civilians as hostages

41. The commentary to the Geneva Conventions sets out two criteria for the underlying act of taking of civilians as hostages: 1) hostages must be “persons illegally deprived of their liberty;” and 2) there must be “the threat either to prolong the hostage’s detention or to put him to death.”⁷⁶ As the jurisdiction of the ECCC is limited to the Geneva Conventions, grave breaches must be defined according to the Geneva Conventions. The definition of hostages at the ICTY departs from the definition in the Geneva Conventions. The ICTY Trial Chamber altered the criterion of “the threat either to prolong the hostage’s detention or to put him to death,” to “inhumane treatment or death.”⁷⁷ The effect of this change is to create a wider range of acts which can satisfy the criteria of hostage taking. This extends the definition of the Geneva Conventions beyond the criteria laid out in the commentary. The extended definition was not law in 1975-79 and was neither foreseeable nor accessible to the Charged Persons in 1975-79. To apply the ICTY extended criteria of “inhumane treatment or death” would consequently violate the principle of *nullum crimen sine lege*.
42. The Preparatory Committee of the ICC has based the elements of taking civilians as hostages based on the International Convention against the Taking of Hostages 1979.⁷⁸

⁷³ “Damage” is defined by the Oxford English Dictionary as: “To do or cause damage to; to hurt, harm, injure; now commonly to injure (a thing) so as to lessen or destroy its value.” OXFORD ENGLISH DICTIONARY (2nd ed. 1989), available at:

http://dictionary.oed.com/cgi/entry/50057262?query_type=word&queryword=damage&first=1&max_to_show=10&sort_type=alpha&result_place=2&search_id=Dpfl-fti2Yu-18241&hilite=50057262.

⁷⁴ “Destruction” is defined by the Oxford English Dictionary as: “The action of demolishing a building or structure of any kind, of pulling to pieces, reducing to fragments, undoing, wasting, rendering useless, putting an end to, or doing away with anything material or immaterial; demolition.” OXFORD ENGLISH DICTIONARY (2nd ed. 1989), available at:

http://dictionary.oed.com/cgi/entry/50062191?single=1&query_type=word&queryword=destruction&first=1&max_to_show=10.

⁷⁵ The ECCC may only charge an accused for a grave breach of the Geneva Conventions. See paras. 7-10 *supra*.

⁷⁶ Commentary to Geneva Convention IV, Art. 147 available at: <http://www.icrc.org/ihl.nsf/COM/380-600169?OpenDocument>.

⁷⁷ *Kordić* Trial Judgement, para. 314.

⁷⁸ DÖRMANN, 124.

