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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 MOTION AGAINST THE APPLICATION OF GRAVE BREACHES AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves against the application of grave breaches of the Geneva Conventions[1] ("grave breaches") at the ECCC. This jurisdictional challenge is made necessary because the application of grave breaches at the ECCC would violate the principle of *nullum crimen sine lege*. This is because: 1) the Agreement and Establishment Law do not create new law; they merely provide the ECCC with jurisdiction to apply already existing laws; 2) grave breaches are not found in the 1956 Penal Code; 3) substantive international criminal law cannot be directly applied in Cambodian courts; 4) customary international law cannot be directly applied by Cambodian courts; 5) whether grave breaches have achieved a *jus cogens* status does not affect applicability at the ECCC; and 6) war crimes are not applicable at the ECCC.

I. Admissibility of this Jurisdictional Challenge

1. Jurisdictional issues must be raised at this stage of the proceedings.[2] Rule 74(3)(a) entitles the Defence to appeal orders confirming the jurisdiction of the ECCC to the Pre-Trial Chamber. This right of appeal would be meaningless if the Defence were forbidden to raise jurisdictional issues before the OCIJ. The Rules should not be interpreted to reduce protection explicitly accorded to the parties. Any doubt as to the proper interpretation of the Rules must be resolved in favor of Mr. IENG Sary, in accordance with Article 38 of the Cambodian Constitution.[3]

2. When the Defence has sought to raise past jurisdictional challenges,[4] 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

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[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] Rule 74(3)(a) allows the parties to appeal orders or decisions of the OCIJ confirming the jurisdiction of the ECCC. The Defence must first be able to raise challenges to the jurisdiction of the ECCC for this Rule to have any practical application.

[3] *See* 1993 Cambodian Constitution, as amended in 1999, Art. 38: "Any case of doubt, it shall be resolved in favor of the accused."

[4] *See e.g.*, *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; *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.

Establishment Law.[5] The OCIJ claimed that it was not required to set out final legal characterizations until the Closing Order and that it was therefore not necessary at this stage to conduct a full analysis of these issues.[6]

3. At the ICTY it has been held that "jurisdictional challenges raise fundamental issues of fairness and one of their underlying purposes is to avert the possibility of an accused being tried and convicted on charges that are not properly brought before the Tribunal."[7] At the ICTY and ICTR, jurisdictional issues are raised through preliminary motions before trial.[8] As explained by the *Tadić* Appeals Chamber:

> Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? ... Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected.[9]

4. 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 whether the ECCC has jurisdiction to charge Mr. IENG Sary with grave breaches. The

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[5] *See 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; *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.

[6] *See e.g.*, Genocide Order, para. 4; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on IENG Sary's Motion Against the Application of Command Responsibility, 19 March 2010, D345/4, ERN: 00487605-00487608, para. 11.

[7] *Prosecutor v. Prlić et al.*, IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, para. 20.

[8] *See* ICTY Rules of Procedure and Evidence, Rule 72. Rule 72(A)(i) provides that preliminary motions are motions which challenge jurisdiction. *See also Prosecutor v. Kanyabashi*, ICTR-96-15-T, Decision on the Defence Motion on Jurisdiction, 18 June 1997, para. 3: "Rule 72(B) of the Rules allows the Prosecution as well as the Defence to file preliminary motions and further establishes that the Trial Chamber shall dispose thereof *in limine litis*. The purpose of this requirement, evidently, is to ensure that all basic questions and fundamental objections raised by the parties against the competence, the proceedings and the functions of the Tribunal are properly addressed and dealt with before the beginning of the trial on the merits."

[9] *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

Defence is entitled to be informed as to the crimes with which the ECCC has jurisdiction to try Mr. IENG Sary and to raise legitimate challenges to the jurisdiction of the ECCC.[10]

II. APPLICABLE LAW

A. Grave Breaches

5. Article 9 of the Agreement provides in part that "[t]he subject-matter jurisdiction of the Extraordinary Chambers shall be ... grave breaches of the 1949 Geneva Conventions..."

6. Article 6 of the Establishment Law provides:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:
> • wilful killing;
> • torture or inhumane treatment;
> • wilfully causing great suffering or serious injury to body or health;
> • destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
> • compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
> • wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
> • unlawful deportation or transfer or unlawful confinement of a civilian;
> • taking civilians as hostages.

B. *Nullum Crimen Sine Lege*

7. The principle of *nullum crimen, nulla poena sine lege*[11] dictates that no one may be prosecuted unless, at the time of the offense, the act was specified in law to be a crime and unless a punishment was provided by law. This principle is enshrined in the Universal Declaration of Human Rights and in the International Convention on Civil and Political Rights ("ICCPR"), whose standards the ECCC must fully respect.[12]

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[10] The Defence cannot assume that grave breaches are applicable at the ECCC simply because it was applied in Case 001. As the OCIJ is aware, the Defence in Case 001 did not raise jurisdictional challenges with the OCIJ.

[11] In particular, the principle of *nullum crimen sine lege* in civil law countries articulates four notions: i) criminal offenses may only be provided in written law (*"nullum crimen sine lege scripta"*); ii) criminal offenses must be provided for through specific legislation (*"nullum crimen sine lege stricta"*); iii) criminal offenses must be provided for in prior law (*"nullum crimen sine proevia lege"*); and iv) criminal offenses shall not be construed by analogy. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 141-42 (Oxford University Press 2003) ("CASSESE").

[12] According to Article 31 of the 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999, "[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights,

8. Article 11(2) of the Universal Declaration of Human Rights states this principle as follows:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

9. Article 15 of the ICCPR states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.[13]

10. Article 6 of the 1956 Penal Code sets out this fundamental principle in stricter terms:

> Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed.
> Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place.[14]

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women's and children's rights." (Emphasis added). According to Article 33 new of the Establishment Law, "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights." According to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, "[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

[13] Article 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. This principle is similarly upheld in a multitude of other human rights instruments. *See* European Convention on Human Rights and Fundamental Freedoms, Article 7; Inter-American Convention on Human Rights, Article 9; African Charter of Human and People's Rights, Article 7(2); Rome Statute of the International Criminal Court, Articles 22, 24; Third Geneva Convention of 1949, Article 99; Fourth Geneva Convention of 1949, Article 67. It has also been recognized by the ICTY. *See e.g.*, *Prosecutor v. Vasiljević,* IT-98-32-T, Judgement, 29 November 2002, para. 193; *Prosecutor v Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 92.

[14] Unofficial translation from the French version.

This strict prohibition of retroactive criminal legislation found in the 1956 Penal Code[15] was also established by the Paris Peace Accords that led to the adoption of the 1993 Cambodian Constitution.[16]

C. Permissible Investigation by the OCIJ

11. Rule 55(2) states: "The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission."

III. ARGUMENT

A. The Agreement and Establishment Law do not create new law; they merely provide the ECCC with jurisdiction to apply already existing laws

12. The Agreement and the Establishment Law do not create new substantive domestic criminal law. The Agreement was formed in order 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.[17] The Establishment Law was created "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."[18] Thus, the role of the Agreement was to establish the cooperation between the UN and the Cambodian government, whereas the role of the Establishment Law was

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[15] The Cambodian Constitutional Council has recognized that this is a fundamental principle set out in the 1956 Penal Code. However, when the Constitutional Council considered whether extending the statute of limitations for the crimes covered by the 1956 Penal Code would violate Cambodia's Constitution, it appears to have found that it would not, since the principle of *nullum crimen sine lege* is not found in the Cambodian Constitution. *See* Constitutional Council Decision No. 040/002/2001, 12 February 2001. This decision is erroneous: Article 31 of the Constitution explicitly states that Cambodia must respect human rights as stipulated in the Universal Declaration of Human Rights and other human rights instruments. The principle of *nullum crimen sine lege* is found in these instruments. Furthermore, the Constitutional Council improperly decided to ignore Article 6 of the 1956 Penal Code. The Constitutional Council was not asked to review the constitutionality of Article 6 of the 1956 Penal Code, as it has the authority to do upon request pursuant to Article 141 New of the Cambodian Constitution and it did not decide that this Article was unconstitutional, as it could have done pursuant to Article 142 New of the Cambodian Constitution. It simply chose to ignore the provision against the retroactive application of criminal law found in Article 6, while leaving that law in place. Clearly this decision was made in order to achieve a desired result, without concern for its actual legal basis. Cambodia must abide by its applicable law and cannot disregard provisions of its law which it finds inconvenient, without using the proper procedure to change its laws.

[16] *See* Principles for a New Constitution for Cambodia, to the Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, 23 October 1991, Annex 5, Principle 2.

[17] Agreement, Art. 1.

[18] Establishment Law, Art. 1.

to put into practice exactly how this would be done, including by specifying the subject matter, temporal and personal jurisdiction of the ECCC.

13. Article 6 of the Establishment Law merely sets out the definition of the crime of grave breaches over which the ECCC would have jurisdiction, were it punishable under applicable substantive law. It does not create a substantive crime which can be retroactively applied. To do so would violate the principle of *nullum crimen sine lege*. Failure to respect the principle of *nullum crimen sine lege* is a violation of Article 6 of the 1956 Penal Code.[19]

B. Grave breaches are not found in the 1956 Penal Code

14. The ECCC, as a Cambodian court, is obliged to follow Cambodian law.[20] The 1956 Penal Code has been officially recognized as the Penal Code in force in Cambodia during 1975-1979, the time the crimes were allegedly committed.[21] This Penal Code does not contain any provision criminalizing grave breaches as a distinct crime. It is therefore impossible to draw on the 1956 Penal Code as a basis for a charge of grave breaches.

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[19] *See* Bert Swart, *Internationalized Courts and Substantive Criminal Law*, *in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 291, 310 (Cesare P.R. Romano, ed., 2004). "[T]here may be cases in which the accused can be held responsible pursuant to international law but not pursuant to domestic law. The most likely example of such a situation probably is the one in which, at the time of conduct, domestic law did not yet have adequate criminal legislation with regard to crimes under general international law. Domestic principles with regard to *nullum crimen* might then make it inevitable for an internationalized court to acquit the accused, even though Article 15(2) of the International Covenant would perhaps not forbid retroactive application of domestic application of domestic legislation incriminating 'any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'" (Emphasis added). The extent of protection which Cambodian legislation affords against the retroactivity of criminal legislation extends further than that afforded by the ICCPR, which merely lays down minimum guarantees. As provided in Article 5(2) of the ICCPR, when the protection of a right is broader at the national level than at the international level, the national provision is to prevail and to be applied. Article 5(2) of the ICCPR provides that "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." This provision essentially preserves the sanctity of any laws that provide a higher level of protection for civil and political rights than those set out in the ICCPR. *See* MANFRED NOVAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: ICCPR COMMENTARY 118 (N.P. Engel Publisher, 2005). This is especially true in the present case where the ICCPR has been signed and ratified by Cambodia after the alleged crimes occurred. Cambodia signed the ICCPR on 17 October 1980 and acceded to it on 26 May 1992.
See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[20] *See* Agreement, Art. 12(1).

[21] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code, 17 August 2009, E91/5, ERN: 00365471-00365472.

15. To charge and subsequently punish a suspect / accused under the 1956 Penal Code for actions that do not actually breach this Code would violate the principle of *nullum crimen sine lege*, which requires that punishable acts must have constituted crimes at the time they were conducted.[22] This would be a violation of Cambodian law.[23]

C. Substantive International Criminal Law Cannot be Directly Applied in Cambodian Courts

16. Article 2 of the Establishment Law states that the ECCC has competence over violations of "international conventions recognized by Cambodia." The Geneva Conventions, which incorporate the grave breaches applicable at the ECCC, were ratified by Cambodia on 8 December 1958.[24] However, the Geneva Conventions are not directly applicable in Cambodian courts. The ECCC is a domestic court established within the existing court structure of the national legal system of Cambodia.[25] Treaties, such as the Geneva Conventions, cannot be directly applied in Cambodian courts. This is because Cambodia adheres to a dualist – as opposed to a monist – system[26] in its approach to implementing international law in its domestic legal order.[27]

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[22] *See* Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective*, 5 INT'L CRIM. L. REV. 313, 320-321(2005), where Kreicker argues that only clearly defined and written national criminal law provisions are easily accessible, so that the individual can know what acts will make him criminally liable. *See also* CASSESE, at 142, who notes that the purpose of the principle of *nullum crimen sine lege* is "to safeguard citizens as far as possible against both the arbitrary power of government and possibly excessive judicial discretion. In short, the basic underpinning of this doctrine lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis* or in favour of society)."

[23] *See* 1956 Penal Code, Art. 6. *See also* Bert Swart, *Internationalized Courts and Substantive Criminal Law, in* INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA 291, 310 (Cesare P.R. Romano, ed., 2004). "[T]here may be cases in which the accused can be held responsible pursuant to international law but not pursuant to domestic law. The most likely example of such a situation probably is the one in which, at the time of conduct, domestic law did not yet have adequate criminal legislation with regard to crimes under general international law. Domestic principles with regard to *nullum crimen* might then make it inevitable for an internationalized court to acquit the accused, even though Article 15(2) of the International Covenant would perhaps not forbid retroactive application of domestic application of domestic legislation incriminating 'any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.'" (Emphasis added).

[24] Signatories and ratifications of the Geneva Conventions can be found at the website of the International Committee of the Red Cross, *available at*: http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P.

[25] This has been confirmed by the Pre-Trial Chamber in its first decision. The Chamber held that "for all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure." *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", 3 December 2007, para. 19. (Emphasis added). *See also 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. 7-24 for an explanation of the ECCC's status as a domestic Cambodian court.

[26] "Monists assert that there is but one system of law, with international law as an element 'alongside all the various branches of domestic law.' For the monist, international law is simply a part of the law of the land,

17. Adherence to either the monist or the dualist system determines the mechanism that a state employs in order to give effect to its international obligations. A State that adheres to a dualist system considers international law to be separate from domestic law.[28] International law is only applied in such systems if: (1) direct application is explicitly authorized by the Constitution; or (2) national implementing legislation has incorporated the international law into that State's domestic legal system.[29] "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions."[30]

18. Cambodia's enactment of the Establishment Law does not constitute the implementing legislation necessary for conventions or customary international law to be directly applied in Cambodian courts to conduct that occurred before the Law was enacted. Articles 1 and

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together with the more familiar areas of national law. Dualists, on the other hand, assert that there are two essentially different legal systems. They exist 'side by side within different spheres of action – the international plane and the domestic plane." Michael Kirby, *The Growing* Rapprochement *between International Law and National Law*, *in* LEGAL VISIONS OF THE 21ST CENTURY: ESSAYS IN HONOUR OF JUDGE CHRISTOPHER 333 (Antony Anghie & Garry Sturgess eds. 1998), *quoting* ROSALYN HIGGINS, PROBLEMS AND PROCESS – INTERNATIONAL LAW AND HOW WE USE IT 205 (Oxford, 1994). Although France, on whose justice system the Cambodian system is modelled, is a monist system, at least with respect to international conventions, it is clear from a comparison of the French and the Cambodian Constitutions that Cambodia does not follow a similar approach. *See* Title VI of the French Constitution, *available at*: http://www.assemblee-nationale.fr/english/8ab.asp; as compared to the Cambodian Constitution. The distinction between the French and Cambodian systems in this regard is not relevant in this particular matter in any event, because even France does not directly apply customary international law. *See* para. 22, *infra.*

[27] *See* UN Doc. CERD/C/292/Add.2, 5 May 1997, para. 19, where the Committee on the Elimination of Racial Discrimination referred to eight conventions ratified by Cambodia and stated that there were not to be directly invoked before Cambodian courts or administrative authorities. *See also* Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, 11 S.Y.B.I.L.195, 203-204 (2007), where she states that the Cambodian government has a preference for dualism.

[28] In dualist systems, "[w]hen the legislature and the executive have failed to take adequate implementing measures, national courts often refrain from upholding international law through direct application, finding that they cannot substitute for the political organs in choosing the mode of compliance with international obligations. In such cases, the freedom to choose *how* to implement in practice extends to a freedom to choose *whether* to implement at all." WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 142 (T.M.C. Asser Press 2006) ("FERDINANDUSSE"). *See also id.*, at 132: "As a general rule, international law leaves States free to implement and fulfill their international obligations in any way they see fit."

[29] Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 86-87 (2006) ("Olivi").

[30] *See* CASSESE, at 303 (emphasis in original). *See also U.S. v. Yousef*, 327 F.3d 56, 91 (2nd Cir. 2003) "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both."

2 of the Establishment Law state that the ECCC has been established in order to "bring to trial ... those who were most responsible for the crimes and serious violations of ... international humanitarian law and custom, and international conventions recognized by Cambodia..." Even though these Articles mention international conventions and include "custom" in their wording, they cannot retroactively implement the Geneva Conventions or customary international law within the domestic legal system of Cambodia. The Establishment Law was adopted in 2001: it can therefore only incorporate conventions and customary international law relating to crimes committed after 2001. Allowing the Establishment Law to retroactively implement a convention or to incorporate customary international law that may have existed in 1975-79 would violate the principle of *nullum crimen sine lege*[31] and would consequently breach Cambodian law.

19. The Geneva Conventions are not directly applicable in Cambodian courts.[32] The Constitutions that were in force at the time when the alleged crimes were committed do not provide for a procedure of incorporation of the Geneva Conventions into domestic law. The Cambodian National Assembly has not passed any legislation which by explicit reference incorporates the Geneva Conventions in the domestic legal system. The Geneva Conventions could not have been incorporated through the 1956 Penal Code or the 1954 Code of Military Justice as Cambodia only ratified the Geneva Conventions after these Codes entered into force. Thus any punishment of a suspect / accused for a violation of the Geneva Conventions would violate the principle of *nullum crimen sine lege* as a violation was not considered a criminal offense in Cambodia in 1975-79.

20. Each of the four Geneva Conventions has an article requiring States to implement national legislation in order to give penal sanctions for persons who have committed grave breaches of the Geneva Conventions.[33] This duty does not fall to the ECCC but to

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[31] *See e.g.,* Senegal, Cour de Cassation, Souleymane Guengueng et autres Contre Hissène Habré, Arrêt no. 14, 20 March 2001; East Timor, Court of Appeal, Armando dos Santos, Applicable Subsidiary Law decision, 15 July 2003, p. 14., where the Court held that "even though the acts committed by the defendant in 1999 include the crime against humanity provided for under Section 5.1 (a) of UNTAET Regulation 200/15, the defendant may not be tried under and convicted based on this criminal law, which did not exist upon the date on which these acts were committed and, as such, may not be applied retroactively."

[32] "[I]t is commonly accepted that human rights treaties, like international law in general, are not directly applicable *per se*." FERDINANDUSSE, at 132.

[33] Article 49 Convention I; Article 50 Convention II; Article 129 Convention III; and Article 146 Convention IV provides that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."

the Cambodian government. In democratic societies, "criminal offences are clearly established by the executive. The judiciary cannot itself determine the existence of an offence *de novo* that is not prescribed in the statutes promulgated by the executive."[34] Without any penal legislation, no individual can be held criminally liable for a violation of grave breaches. Cambodia has not implemented any such legislation. As the ECCC is a domestic court, any punishment of a suspect / accused of a violation of grave breaches would violate the principle of *nullum crimen sine lege* as a violation is not considered a criminal offense in Cambodia today, nor was it in 1975-79.

D. Customary International Law cannot be directly applied by Cambodian Courts

21. Customary international law penalizing the crime of grave breaches is not directly applicable in Cambodian courts. Whenever customary international law is invoked in a national court, the court must consider if and under what circumstances its national legal system is open to the application of customary international law. In the absence of specific directives in its Constitution, legislation or national jurisprudence, a national court is under no obligation to apply customary international law.[35] As Cambodia adheres to a dualist system, its Constitution or national legislation must provide for a rule of customary international law to be applicable in the domestic sphere before it can be applied.

22. The Constitutions that were in force at the time when the alleged crimes were committed do not provide for a procedure of incorporation of customary international law into domestic law. The Cambodian National Assembly has not passed any legislation which by explicit reference incorporates any rule of customary international law relating to grave breaches in the domestic legal system. In addition to the fact that the direct application of customary international law is not allowed in Cambodia's legal system, the

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[34] Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L CRIM. L. REV. 121, 125 (2006).

[35] *See* CASSESE, at 303. "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions." (Emphasis in original).

principle of *nullum crimen sine lege* prevents the direct application of customary international law into the domestic legal system in this case.[36]

23. The courts of France, whose legal system the Cambodian system is modelled after, have held that customary international law may not be applied directly in French courts due to the lack of written provisions in the French jurisdiction criminalizing the relevant conduct. In *Rapporteurs sans Frontières v. Mille Collines,* for instance, the Paris Court of Appeals held that it lacked jurisdiction for various international crimes perpetrated abroad by foreigners because "in the absence of domestic law international custom cannot have effect of extending the extraterritorial jurisdiction of the French courts."[37]

24. A similar approach rejecting the direct application of customary international law has been followed by the Dutch Supreme Court in the *Bouterse* case, which ruled against the direct application of custom as a basis for international criminal prosecutions in national courts. In this judgment it was held that direct applicability would pose a threat to the principle of *nullum crimen sine lege*.[38] Similar findings have been reached by courts of Germany,[39] Switzerland[40] and other States.

25. An extensive analysis of the application of customary international law generally in Cambodia and in other countries[41] shows that the OCIJ is not permitted, let alone mandated, to directly apply customary international law in the absence of implementing legislation. Customary international law may only be directly applied in Cambodia if it has been explicitly implemented through Cambodian law.

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[36] "[T]he two inter-related principles of *nullum crimen sine lege* and legal certainty are generally considered to be so fundamental to the legal order, that they effectively prevent the inclusion into domestic criminal law – even by way of interpretation – of unwritten customary rules. ... The adoption of implementing legislation is, therefore, a universal prerequisite for any application of international criminal law principles in the national legal order." Simonetta Stirling-Zanda, *The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland)*, 4 NON STATE ACTORS AND INT'L L. 3, 6 (2004) (emphasis added).

[37] Olivi, at 87, *quoting Reportiers sans Frontières v. Mille Collines*, Paris Court of Appeals, Judgment, 6 November 1995, at 48-51.

[38] FERDINANDUSSE, at 69.

[39] The principle of legality in German law apparently excludes general direct application of international offences altogether, whether they are contained in custom or conventions. *Id.*, at 40.

[40] The Swiss Military Court of Appeal held in 2000 that the customary criminalization of genocide could not be applied in absence of a specific rule of reference allowing its application at the time when the alleged acts were committed. *Id.*, at 40-41.

[41] *See* Annex B to *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECCC, 24 November 2008 for a condensed commentary on the application of customary international law in domestic courts.

E. Whether Grave Breaches has achieved a *jus cogens* Status does not affect Applicability at the ECCC

26. *Jus cogens* norms have been defined as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of the contrary."[42] To say that grave breaches are *jus cogens* means that a State has an obligation not to participate in grave breaches. States cannot invoke the *jus cogens* nature of a crime to exercise subject matter jurisdiction, if their domestic legal systems do not otherwise provide for this jurisdiction. Cambodia's legal system, as explained above, does not.

F. War Crimes are not applicable at the ECCC

27. Grave breaches are a sub-section of war crimes.[43] War crimes, other than grave breaches,[44] are not included in the Establishment Law, the Agreement, or the Introductory Submission. The explicit exclusion of war crimes in the Establishment Law denotes that it is excluded as a crime applicable at the ECCC. Article 9 of the Agreement, entitled "crimes falling within the jurisdiction of the Extraordinary Chambers," again does not explicitly include war crimes within the jurisdiction of the ECCC. The Introductory Submission does not refer to war crimes and therefore war crimes should not even be investigated by the OCIJ. As the ECCC is a Cambodian court which follows the Civil Law system, any crime which falls under the jurisdiction of the ECCC must be explicitly set out. To allow the ECCC competence over war crimes would violate the principle of *nullum crimen sine lege* and Rule 55(2).[45]

IV. CONCLUSION AND RELIEF REQUESTED

28. The Defence challenges the jurisdiction of the ECCC to apply a charge of grave breaches against Mr. IENG Sary. The application of grave breaches at the ECCC would violate the principle of *nullum crimen sine lege*. This is because: 1) The Agreement and Establishment Law do not create new law; they merely provide the ECCC with jurisdiction to apply already existing laws; 2) grave breaches are not found in the 1956 Penal Code; 3) substantive international criminal law cannot be directly applied in

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[42] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510 (Oxford University Press, 7th ed, 2008).
[43] CASSESE at 54; *see also* Article 8(2) of the Rome Statute 1998: "For the purposes of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949…"
[44] The term "war crimes" will now be used to refer to war crimes excluding grave breaches.
[45] Rule 55(2) states: "The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission." (Emphasis added).

Cambodian courts; 4) customary international law cannot be directly applied by Cambodian courts; 5) whether grave breaches have achieved a *jus cogens* status does not affect applicability at the ECCC; and 6) war crimes are not applicable at the ECCC.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to REJECT the applicability of grave breaches before the ECCC.

Respectfully submitted,

ANG Udom

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Signed in Phnom Penh, Kingdom of Cambodia on this 7th day of May, 2010