D 388

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/OCIJ

Party Filing: The Defence for IENG Sary

Filed to: The Co-Investigating Judges

Original language: ENGLISH

Date of document: 22 July 2010

CLASSIFICATION

Classification of the document suggested by the filing party: **PUBLIC**

Classification by OCIJ or Chamber:

Classification Status:

Review of Interim Classification:

Records Ofﬁcer Name:

Signature:

IENG SARY'S MOTION AGAINST THE DIRECT APPLICATION OF CUSTOMARY INTERNATIONAL LAW AT THE ECCC

Filed by:

The Co-Lawyers:

ANG Udom
Michael G. KARNAVAS

Distribution to:

Co-Investigating Judges:

Judge YOU Bunleng
Judge Marcel LEMONDE

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

All Defence Teams

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves against the direct application of customary international law at the ECCC. The application of customary international law will have a great impact on the future proceedings at the ECCC since many jurisdictional issues raised at the ECCC, such as crimes against humanity, only exist in customary international law. This jurisdictional challenge is made necessary because the ECCC will act *ultra vires* by directly applying customary international law. This is because: 1) the ECCC is a domestic court; 2) customary international law is not directly applicable in Cambodian domestic courts; 3) customary international law is not applicable at the ECCC; and 4) whether certain customary international law norms have achieved a *jus cogens* status does not affect their non-applicability at the ECCC.

I. ADMISSIBILITY OF THIS JURISDICTIONAL CHALLENGE

1. Jurisdictional issues must be raised at this stage of the proceedings.[1] 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.[2]

II. RELEVANT LAW - CUSTOMARY INTERNATIONAL LAW IN DOMESTIC COURTS

2. International law does not generally dictate how international obligations are to be implemented within the domestic sphere.[3] In the absence of a specific obligation in a treaty to alter some facet of a State's internal legal framework, it is usually up to each State to determine how to give effect to its international obligations.[4] States often employ different rules on applying international law in their domestic courts depending on whether they follow the monist or dualist tradition.

3. A monist State envisages international law as being part of its domestic legal order. In essence, there is but one system into which international law flows freely.[5] In its purest form,

---

[1] 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.

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

[3] *See* MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW, 82-83 (4th ed. Blackstone Press Limited 2002) ("DIXON").

[4] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 304-06 (Oxford University Press 2003) ("CASSESE").

[5] MALCOLM SHAW, INTERNATIONAL LAW, 122 (5th ed. Cambridge 2003) ("SHAW").

monism views international law as supreme even in the municipal sphere.[6] Critics of this aspect of the monist system, such as Professor Ian Brownlie, have termed it "antipathetic to the legal corollaries of the existence of sovereign states... [It] reduces municipal law to the status of pensioner in international law."[7]

4. Dualist States consider the international and municipal legal systems as two discrete spheres.[8] The "rules of the systems of international law and municipal law exist separately and cannot purport to have an effect on, or overrule, the other."[9] In such States, international law cannot penetrate into the municipal sphere in the absence of some act of the relevant national authorities expressly transforming those norms into domestic law.[10]

A. General principles on the application of customary international law in domestic courts

5. National courts are more reticent to directly apply customary international law than international law derived from treaties or conventions. This is in part due to the unwritten and evolving nature of customary international law.[11] Customary international law has been defined in terms that "customs and general principles are classed as unwritten sources of law, and the degree of clarity, precision and – in the final analysis – security which they bring to legal relationships in general does not even remotely rival the corresponding qualities of international treaties."[12] Indeed, national legal systems have only applied rules of customary international law if (1) direct application is explicitly authorized by the constitution;[13] or (2) direct application of a rule of customary international law is expressly provided for in national implementing legislation and it is incorporated into that State's domestic legal system.[14]

1.Application through constitutional authorization

6. Despite a reference to customary international law in a State's constitution, this "does not in itself facilitate its automatic direct application; several other factors must be taken into

---

[6] DIXON, at 83. "...there may be a conflict between the two systems: international law may require one result and the provisions of national law another. If this happens in a concrete case, international law is said to prevail."
[7] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 32, (6TH ed. Oxford 2004).
[8] SHAW, at 122.
[9] *Id.*
[10] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 130 (T.M.C. Asser Press 2006) ("FERDINANDUSSE").
[11] Simonetta Stirling-Zanda, *The Determination of Customary International Law in European Courts (France, Germany, Italy, The Netherlands, Spain, Switzerland), in* 4 NON-STATE ACTORS & INT'L L. 3, 5 (2004) ("Zanda").
[12] Constantin Economides, *The Relationship between International and Domestic Law* (Council of Europe, 1993), 15.
[13] Zanda, at 4.
[14] Gabriele Olivi, *The Role of National Courts in Prosecuting International Crimes: New Perspectives*, 18 SRI LANKA J. INT'L L. 83, 87 (2006).

consideration."[15] The court adjudicating upon the application of customary international law must also consider "whether the drafters had intended the particular unwritten norm in question to become part of the domestic legal system."[16]

7. Furthermore, even if the constitution permits the application of customary international law, the constitutional principles themselves must not yield to customary law.[17] In this regard, reference to the implementation by Canada of domestic criminal law based on the crimes set out in the ICC Statute is instructive. Although this implementation concerns criminal liability under a treaty rather than customary international law, the principles are analogous. In implementing command responsibility under the ICC Statute, Canada considered that the form of command responsibility set out in Article 28 of the Statute would violate its Constitution. This is because the Canadian Constitution required that the *mens rea* of certain serious crimes be based on a subjective test whereas a conviction for command responsibility under the ICC Statute could be based simply on an objective test. As such, the Canadian Parliament created a new and separate offense of "breach of command responsibility" based on this objective *mens rea*, rather than implementing a form of criminal liability which violated its Constitution.[18]

2.Application through implementing legislation

8. In the sphere of international criminal law, it has been submitted that implementing legislation is necessary. According to Zanda:

> the 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.[19]

9. This implementing legislation may be constituted by a dynamic reference to specific customary rules or the introduction of national criminal law provisions.[20] A dynamic reference to customary international law by national criminal law provisions is the model used by Canada in its Crimes Against Humanity and War Crimes Act 2000.[21] The Act

---

[15] Zanda, at 4.
[16] *Id.*
[17] *Id.*, p. 8.
[18] *See* Progress Report by Canada and Appendix, *The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court*, Consult/ICC (2001) 11, 16 July 2001.
[19] Zanda, at 6 (emphasis added).
[20] Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective* 5 INT'L CRIM. L. REV. 313 (2005).
[21] Crimes Against Humanity and War Crimes Act 2000 (c. 24) (Assented to 29 June 2000).

describes genocide as an indictable offense[22] and simply refers to the rules of international law for its definition.[23] Implementation of customary international law by the introduction of national criminal law provisions effectively amounts to passing autonomous domestic laws which have the same content as international law but which do not refer to their customary international law basis.[24]

B. Comparative application of customary international law

1.Dualist legal systems

10. Dualist legal systems have taken a nuanced approach in deciding on the direct application of customary international law. There has been a move away from directly applying customary international law in England and Wales, where the general rule had been that customary international law was directly incorporated into Common Law.[25] In *Pinochet*,[26] the majority view held that the customary international crime of torture did not apply in England until provided for by the Criminal Justice Act 1988. Lord Hope declared that "prior to the coming into force of section 134 of the Criminal Justice Act 1988 ... there is no basis upon which [Pinochet] could have been tried extraterritorially in this country,"[27] thereby rejecting any direct application of customary international law into the courts of England and Wales.
11. More recently, the House of Lords decision in *R v. Jones*[28] addressed the application of customary international law in England and Wales. It drew a distinction between customary international law in relation to civil law rights and duties and customary international law in relation to international crimes. While that relating to the former could be applied directly, that which related to the latter could not.[29] One central rationale for the rejection of customary international law in relation to international crimes was set out by Lord Hoffman who declared that "new domestic offences should in my opinion be debated in Parliament, defined in a statute and come into force on a prescribed date. They should not creep into existence as a result of an international consensus to which only the executive of this country

---

[22] *Id.*, § 4(1)(a).
[23] *Id.*, section 4(3) describes genocide as "an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that, at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission." (Emphasis added).
[24] Kreicker, at 323.
[25] *See Trendtex Trading Corp v. Central Bank of Nigeria* [1977] QB 526, at 553. It is noteworthy that the direct application of customary international law in this case concerned a commercial dispute rather than criminal liability.
[26] *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No 3)*, 24 March 1999, [2000] 1 AC 147 ("*Pinochet*").
[27] *Id.*, at 237.
[28] *R v. Jones* [2006] UKHL 16.
[29] *Id.*, para. 23, *quoting* SIR FRANKLIN BERMAN, ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES, 11 (M. Evans and S. Konstantinidis ed., Hart Publishing Ltd. 2003).

is a party."[30] Lord Bingham declared that although customary international law crimes may be assimilated into national law, this needs to be done through an implementing statute as "it would be odd if the Executive could, by means of that kind, acting in concert with other States, amend or modify specifically the criminal law, with all the consequences that flow for the liberty of the individual and rights of personal property ... [T]he power to create crimes should now be regarded as reserved exclusively to Parliament, by Statute."[31]

12. In Australia there are "no constitutional or statutory provisions that regulate the means by which courts ascertain and apply rules of customary international law."[32] In *Nulyarimma v. Thompson*, the Australian High Court rejected the direct application of the crime of genocide under customary international law.[33] In the case of *Buzzacott v. Hill*, Justice Wilcox explained some of the problems that would flow from doing so in holding that:

> In the case of serious criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide.[34]

13. The USA also does not consider itself obligated to apply customary international law directly in domestic courts, "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."[35] Chief Justice Roberts of the United States Supreme Court, in his Confirmation Hearings, disagreed with the application of international law in American courts as the use of international law to determine the meaning of the United States Constitution is a "misuse of precedent, not a correct use of precedent."[36]

2.Monist legal systems

14. A comparative review of monist legal systems shows that in the absence of implementing legislation, these systems have refused to directly apply customary international law in their domestic courts. In France, it has been repeatedly held that customary international law may not be applied directly. In *Reporters sans Frontières v. Mille Collines*,[37] the Paris Court of

---

[30] *Id.*, para. 62.
[31] *Id.*, para. 23, *quoting* SIR FRANKLIN BERMAN, ASSERTING JURISDICTION: INTERNATIONAL AND EUROPEAN LEGAL PERSPECTIVES, 11 (M. Evans and S. Konstantinidis ed., Hart Publishing Ltd. 2003).
[32] Henry Burmester QC, *The Determination of Customary International Law in Australian Courts*, 4 NON-STATE ACTORS & INT'L L. 39, 40 (2004).
[33] *Nulyarimma v. Thompson* (1999) 96 FCR 153.
[34] *Buzzacott v. Hill* [1999] FCA 1192; (1999) 165 ALR 621, at 630.
[35] *U.S. v. Yousef*, 327 F.3d 56, 91 (2nd Cir. 2003).
[36] Justice John Roberts Confirmation Hearings, 13 September 2005 (Day 2), transcript *available at*: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301210.html
[37] Olivi, at 87, *quoting* Paris Court of Appeals (Cour d'appel de Paris), *Reporters sans Frontières v. Mille Collines*, 6 November 1995.

Appeals held it lacked jurisdiction for various international crimes committed abroad by foreigners as:

> [I]n the absence of provisions of domestic law international custom cannot have the effect of extending the extraterritorial jurisdiction of the French courts. In that respect, only the provisions of international treaties are applicable under the national legal system, provided they have been duly approved or ratified by France and, on account of their contents, the provisions of such treaties produce a direct effect.[38]

15. In *Aussaresses*,[39] the Court de Cassation took a similar view, and declared that "[I]nternational customary rules cannot make up for the absence of a provision which criminalizes the acts denounced by the civil petitioner (*partie civile*) as crimes against humanity."[40] Such a rejection may be based on the fact that France, like Cambodia,[41] refers only to treaties and international agreements in its Constitution, rather than customary international law.

16. A similar approach rejecting the direct application of customary international law has been followed by the Dutch Supreme Court in the *Bouterse* case. In that case, the Dutch Supreme Court ruled against the direct application of custom as a basis for international criminal prosecutions in national courts. It held that direct applicability would pose a threat to the principle of *nullum crimen sine lege*.[42] A similar approach to rejecting the direct application of customary international law can also be found in the jurisprudence of Switzerland[43] and Germany.[44]

III. ARGUMENT

A. ECCC is a domestic court

17. The negotiations for the establishment of the ECCC resulted in the creation of national chambers within the Cambodian court system assisted by international funding and resources. Neither the Cambodian Government nor the United Nations ("UN") intended to establish the ECCC as an international court; nothing in the ECCC's founding documents bears this out – explicitly or implicitly. During negotiations between the Cambodian government and the UN, the international community suggested the establishment of an international tribunal. This option, however, was explicitly rejected by the Cambodian

---

[38] *Id.*, at 48-51.
[39] *Aussaresses* case, Cour de Cassation, Chambre Criminelle, 17 June 2003, *Bull. crim.* 2003 n° 122, p. 465.
[40] *See* Juliette Lelieur-Fischer, *Prosecuting the Crimes against Humanity Committed during the Algerian War: an Impossible Endeavour?*, 2 J. INT'L CRIM. JUST. 236 (2004), quoting the *Cour de Cassation* Judgement of 17 June 2003.
[41] *See* RAOUL M. JENNAR, CAMBODIAN CONSTITUTIONS (1953-1993) (White Lotus, 1995) ("JENNAR").
[42] FERDINANDUSSE, at 69.
[43] *Id.*, at 40-41.
[44] *Id.*, at 40.

government.[45] Prime Minister Samdech Akka Moha Sena Padei Techo Hun Sen insisted that the extent of the UN's participation be limited "to provid[ing] experts to assist Cambodia in drafting legislation that would provide for a special national Cambodian court to try Khmer Rouge leaders and that would provide for foreign judges and prosecutors to participate in its proceedings."[46] Thus, unquestionably, the Cambodian government and the UN negotiated and reached an agreement establishing the ECCC as a national court within the existing court structure.[47]

18. Reflecting the intent and results of the negotiations, the Agreement reads:

> **WHEREAS** prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations ... and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia
>
> ...
>
> **WHEREAS** by its resolution 57/228, the General Assembly ... requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations...[48]

The Establishment Law confirms that the "Extraordinary Chambers shall be established in the existing court structure..."[49]

19. In deciding whether the Establishment Law was in accordance with the Cambodian Constitution, the Cambodian Constitutional Council's concern with the status of the ECCC is clear. It noted that "[i]n order to serve in the Extraordinary Chambers all the Cambodian and United Nations components shall be appointed by the Supreme Council of the Magistracy, which is a supreme Cambodian national institution, while the Director and Deputy Director of the Office of Administration are also to be appointed by Cambodian authorities. In this regard the United Nations only provides a list of candidates, and has no decision-making

[45] Report of the Secretary-General on Khmer Rouge trials, UN Doc. No. A/57/769, 31 March 2003, para. 6.
[46] *Id.*, para. 7. (emphasis added).
[47] *Id.*, para. 10. The Secretary-General stated, "In paragraph 1 of resolution 57/228, the General Assembly specifically mandated me to negotiate to conclude an agreement which would be consistent with the provisions of that resolution. It was my understanding that, to be consistent with the terms of the resolution, any agreement between the United Nations and the Government of Cambodia would have to satisfy the following conditions: (a) The agreement would have to respect and give concrete effect to the principle that the Extraordinary Chambers are to be national courts, within the existing court structure of Cambodia, established and operated with international assistance..." *See also id.*, para. 31, where he discusses the nature of the ECCC under the draft agreement: "The legal nature of the Extraordinary Chambers, like that of any legal entity, would be determined by the instrument that created them. In accordance with the draft agreement, the Extraordinary Chambers would be created by the national law of Cambodia. The Extraordinary Chambers would therefore be national Cambodian courts, established within the court structure of that country." (emphasis added).
[48] Agreement, preamble.
[49] Establishment Law, Art. 2 new (emphasis added).

rights."[50] It further stated that "[u]tilising the existing Cambodian court system, and selecting Phnom Penh as the location for the proceedings again protect the sovereignty of the Kingdom of Cambodia."[51]

20. The ECCC and the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT") websites also explain to the public that the ECCC is a national Cambodian court. The ECCC website states that "[t]he government of Cambodia insisted that, for the sake of the Cambodian people, the trial must be held in Cambodia using Cambodian staff and judges together with foreign personnel. Cambodia invited international participation due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice."[52] The UNAKRT website states that "UNAKRT provides technical assistance to the Extraordinary Chambers in the Courts of Cambodia (ECCC). The ECCC is a domestic court supported with international staff, established in accordance with Cambodian law."[53]
21. The Pre-Trial Chamber stated, "For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure..."[54] While it noted that the Office of the Co-Prosecutors ("OCP") had submitted that the ECCC was a "special internationalized tribunal,"[55] the Pre-Trial Chamber did not adopt this position. If the ECCC were truly an international tribunal (or "internationalized", assuming this OCP designated moniker is of any worth), to the extent it can import laws and forms of liabilities distinct from and in contravention of the Cambodian Constitution, Criminal Code and Criminal Procedure, then how is it that its judges are not competent to deal with issues of corruption at the ECCC? The ECCC Judges' decision to defer to the Cambodian government by declining to deal with the issue[56] suggests that they do view the ECCC as being a Cambodian court. Certainly, any of the *ad hoc* international tribunals or "internationalized" tribunals would not

[50] Constitutional Council Decision No. 040/002/2001, 12 February 2001, p. 3 (unofficial translation, emphasis added).
[51] *Id.*, p. 4 (unofficial translation, emphasis added).
[52] *Available at* http://www.eccc.gov.kh/english/about_eccc.aspx.
[53] *Available at* http://www.unakrt-online.org/01_home.htm (emphasis added).
[54] *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, C5/45, ERN: 00154284-00154302 ("Duch Provisional Detention Decision"), para. 19 (emphasis added). *See also Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC35), Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, ERN: 00486521-00486589 ("JCE Decision"), para. 47.
[55] "The Co-Prosecutors have submitted that this independence, which makes the ECCC a 'special internationalised tribunal', is demonstrated by a number of factors that are summarised in the Report." Duch Provisional Detention Decision, para. 19 (emphasis added).
[56] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC20), Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on NUON Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, ERN: 00366747-00366761, para. 29: "The Pre-Trial Chamber further observes that this matter is before the appropriate authorities of the Kingdom of Cambodia and the United Nations."

have deliberately opted to ignore, if not condone (a resulting perception due to inaction), the sort of corrupt practices purported to have existed at the ECCC.[57]

B. Customary international law is not directly applicable in Cambodian domestic courts

1.No provisions exist for the application of customary international law through constitutional authorization

22. It is noteworthy that none of the Constitutions of Cambodia have provided a procedure to incorporate customary international law into domestic law.[58] Between 17 April 1975 and 6 January 1979, two Constitutions were in force.[59] On 10 May 1972, a Constitution was promulgated which remained in force throughout the period of the Khmer Republic (until 1975). The Khmer Republic Constitution is similar to the 1993 Constitution in that it merely provided under Article 38 that the "President of the Republic shall sign treaties and international conventions and shall ratify them pursuant to parliamentary vote."[60] Article 72 prohibited the retroactive application of laws "except for special provisions which are expressly stipulated therein." [61] There is no provision within the Khmer Republic Constitution to support a contention that customary international law was directly applicable in Cambodian domestic courts at the time.

23. The next constitution was promulgated on 5 January 1976 and remained in force during the period of Democratic Kampuchea (1975-1979).[62] This Constitution included limited

---

[57] *See Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ, Eleventh Request for Investigative Action, 27 March 2009, D158, ERN: 002294816-00294830; *Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ, Order on Request for Investigative Action, 3 April 2009, D158/5, ERN: 00294885-00294888; *Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Motion to Join and Adopt Nuon Chea's Eleventh Request for Investigative Action, 27 March 2009, D258/2, ERN: 00294872-00294873; *Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ(PTC21), Appeal Against Order on Eleventh Request for Investigative Action, 4 May 2009, D158/5/1/1, ERN: 00323238-00323255; *Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ(PTC20), Ieng Sary's Appeal Against the Co-Investigating Judges' Order on Request for Investigative Action Regarding Ongoing Allegation of Corruption and Request for an Expedited Oral Hearing, 4 May 2009, D158/5/3/1, ERN: 00323171-00323193; *Case of Nuon Chea* 002/19-09-2007-ECCC/OCIJ(PTC21), Decision on Appeal Against the Co-Investigating Judges' Order on the Charged Person's Eleventh Request for Investigative Action, 18 August 2009, D158/5/1/15, ERN: 00364033-00364046; *Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ(PTC20), Decision on the Charged Person's Appeal Against the Co-Investigating Judges' Order on Nuon Chea's Eleventh Request for Investigative Action, 25 August 2009, D158/5/3/15, ERN: 00366747-00366761; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-TC, Group 1-Civil Parties' Co-Lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 11 May 2009, E65, ERN: 00327910-00327919; *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-TC, Decision on Group 1-Civil Parties' Co-lawyers' Request that the Trial Chamber Facilitate the Disclosure of an UN-OIOS Report to the Parties, 23 September 2009, E65/9, ERN: 00378404-00378411.

[58] *See* JENNAR.

[59] JENNAR, at 57, 81.

[60] *Id.*, at 54.

[61] *Id.*, at 58.

[62] *Id.*, at 81. Though the principles of this Constitution were decided upon at the end of April 1975, the text was actually adopted during a command group meeting in Phnom Penh from 15 to 19 December 1975.

provisions in relation to the legislative framework applicable during that period. There were no provisions within the 1976 Democratic Kampuchea Constitution to support a contention that any form of international law – treaty or custom – was directly applicable in Cambodian domestic courts at the time. Article 5 merely provided that legislative power was vested in the Representative Assembly of the people, workers, peasants, and all other Kampuchean laborers. Article 7 confirmed that the People's Representative Assembly was responsible for legislation and for defining the various domestic and foreign policies of Democratic Kampuchea.[63]

24. The 1993 Constitution (amended in 1999), which is currently in force, merely states that the King shall sign and ratify international treaties and conventions after a vote of approval by the National Assembly and the Senate.[64] There is no provision within the 1993 Constitution to support the contention that customary international law is directly applicable in Cambodian domestic courts today, including the ECCC.

2.No implementing legislation exists for customary international law

25. The Cambodian National Assembly has not passed any legislation containing any explicit reference to any rule of customary international law. For the past 17 years, the Cambodian National Assembly has only adopted international treaties and conventions, such as the Law on Approval for Cambodia to be a member of the Kyoto Protocol of the United Nations Convention on Climate Change, enacted on 26 October 2006.[65]

3.Cambodian courts do not apply customary international law directly

26. There are no Cambodian cases or decisions addressing the complex issue of the direct application of customary international law in Cambodian domestic courts. Instructive, however, is the unquestionable fact that the Cambodian legal system mirrors the French legal system, and as such, the approach of French courts to this issue is especially pertinent. Given that France has rejected the direct application of customary international law in its domestic courts,[66] it logically follows that Cambodia – save for explicit legislation to the contrary – would equally reject the direct application of customary international law in its domestic courts.

27. Whenever customary international law is invoked in a national court, the court is under an obligation to consider if and under what circumstances the national legal system is permitted

---

[63] *Id.*, at 68.
[64] *See* Article 26 of the 1993 Constitution, as amended in March 1999.
[65] *See Case of Ieng Sary* 002/19-09-2007-ECCC/OCIJ(PTC35), 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: Annex A: Synopsis of JCE Submissions by the Ieng Sary Defence, 22 Janaury 2010, D97/14/5.2, ERN: 00440434-00440481, fn. 241.
[66] *See* paras. 14 and 15 *supra*.

or obliged to apply customary international law. In the absence of specific directives in its Constitution, legislation or national jurisprudence, a national court has no authority to apply customary international law.[67]

28. The practice of Cambodian domestic courts in directly applying customary international law is summed up by one author as "While Article 31 [of the 1993 Cambodian Constitution] appears to introduce international human rights norms directly into Cambodian law, the Constitution does not declare if Cambodia follows a monist or dualist approach. The courts refuse to entertain claims that are, in the absence of enabling legislation, directly based on international laws, or even for that matter, the Constitution."[68] Therefore, in the absence of enabling legislation, Cambodian courts – such as the ECCC – will refuse to entertain claims based on customary international law.

C. Customary international law is not applicable at the ECCC

29. The Pre-Trial Chamber has adopted the criteria set out at the ICTY in that "the ICTY Appeals Chamber identified four pre-conditions that any form of responsibility must satisfy in order for it to come within [its] jurisdiction."[69] Applying these criteria to customary international law, as discussed below, none are met:

1. Customary international law provided for in the [ECCC Law] violates the principle of *nullum crimen nulla poena sine lege*

30. The Pre-Trial Chamber has held that "the clear terms of Article 2 of the ECCC Law ... can only lead to the conclusion that the ECCC has jurisdiction to apply ... customary international law at the relevant time."[70] Article 2 new provides that the ECCC has been established to "bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of ... international humanitarian law and custom..." The Pre-Trial Chamber has therefore found that the Establishment Law could retroactively implement customary international law. This finding violates the principle of

---

[67] 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).

[68] Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, 11 SING. Y.B. INT'L L. 195, 203-04 (2007) (emphasis added).

[69] "i) it must be provided for in the [ECCC Law], explicitly or implicitly; ii) it must have existed under customary international law at the relevant time; iii) the law ... must have been sufficiently accessible at the relevant time to anyone who acted in such a way; iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended." JCE Decision, para. 43.

[70] JCE Decision, para. 48.

nullum crimen nulla poena sine lege. The principle of *nullum crimen, nulla poena sine lege*[71] 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 ("UDHR") and in the International Convention on Civil and Political Rights ("ICCPR"), whose standards the ECCC must fully respect.[72]

31. Article 15(1) of the ICCPR states "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."[73] With respect to national law, as explained *supra*, customary international law did not form part of national law during the period the ECCC has temporal jurisdiction.[74]

32. Guidance as to the meaning of the phrase "or international law" can be found in the jurisprudence of the European Court of Human Rights ("ECHR"). In the case of *K. -H. W. v. Germany*,[75] the ECHR considered Article 7 of the European Convention of Human Rights, which mirrors Article 15 of the ICCPR.[76] Commentary to *K. -H. W. v. Germany* states that the ECHR held compliance with the phrase "or international law" "depends on whether the person concerned could reasonably know that the offence committed by him was prohibited and punishable within the relevant legal system at the time, either by virtue of a national legal provision or by virtue of a directly applicable international legal provision with internal

---

[71] 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. CASSESE, at 141-42.

[72] 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, 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."

[73] Article 11(2) of the Universal Declaration of Human Rights has a similar provision: "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."

[74] *See* Section III(B) *supra*.

[75] *K. -H. W. v. Germany*, (Application no. 37201/97), Judgement, 22 March 2001 ("*K. -H. W. v. Germany*").

[76] Article 7(1) of the ECHR 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."

effect."[77] Therefore, only reasonable knowledge of an international law offense which was prohibited and punishable by the Cambodian courts in 1975-79 would allow the application of that offense to a Charged Person.

33. Further, the principle of *nullum crimen, nulla poena sine lege* dictates that a punishment must be provided by law. No criminal offense in customary international law in 1975-79 – should any be found to exist – had a corresponding punishment. Therefore, any criminal offense of customary international law in 1975-79 applied at the ECCC would violate the principle of *nullum crimen, nulla poena sine lege* as no punishment existed for any such crime.

2. Any crime or mode of liability existing under customary international law at the relevant time is irrelevant as Cambodian law does not provide for the direct application of customary international law

34. A fundamental difference between the ECCC and the ICTY is that, as an international court established by the UN Security Council, the ICTY is entitled to directly apply customary international law.[78] This is entirely logical. The ICTY is not a domestic Yugoslav court and does not have to choose between Yugoslav domestic law and customary international law. It is only obliged to take note of the domestic law of the former Yugoslavia with regards to sentencing.[79] By contrast, the ECCC is established within the existing court structure of the national legal system of Cambodia;[80] it may only apply customary international law if permitted or obliged by Cambodian law.

3. Any crime or mode of liability existing under customary international law was not sufficiently accessible at the relevant time

35. The Pre-Trial Chamber held "[a]s to accessibility, reliance can be placed on a law which is based on custom,"[81] without providing any analysis as to why this is the case. Professor Ferdinandusse highlights the fundamental problem of accessibility of offenses based on customary international law, "[a]s these are unwritten sources, they cannot simply be published as are treaties and statutes. As a result, they are less accessible to the general

---

[77] PIETER VAN DIJK, FRIED VAN HOOF, ARJEN VAN RIJN & LEO ZWAAK, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 660 (4th ed. Intersentia 2006); commenting on *K. -H. W. v. Germany*, paras. 91-93.

[78] "In the view of the Secretary-General, the application of the principle of nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law..." Report of the Secretary-General pursuant to paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 34 (emphasis in original); *See also Prosecutor v. Tadić*, IT-94-01, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 60, where the Trial Chamber held that "unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law."

[79] *See* Rule 101(B)(iii) of the ICTY Rules of Procedure and Evidence, 28 February 2008, IT/32/Rev. 41.

[80] *See* Section III(A) *supra*.

[81] JCE Decision, para. 45.

public."[82] The accessibility of customary international law is immediately difficult due to its unwritten nature.

4. Any crime or mode of liability existing under customary international law was not sufficiently foreseeable at the relevant time

36. The Cambodian Penal Code in force from 1975-79 was the 1956 Penal Code. The ECCC recognizes this.[83] In 1975-79, the 1956 Penal Code was the only code for criminal liability in Cambodia. Therefore, it could not be foreseeable to a Charged Person that he could be found criminally liable under any other law from 1975-79. However, it would have been foreseeable for a Charged Person that criminal law could not be applied retroactively. Article 6 of the 1956 Penal Code explicitly states that "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."[84] In 1975-79, an individual would have been expressly informed that criminal law does not apply retroactively. A retroactive application of the law would not have been foreseeable to a Charged Person.

37. In 1975-79 Cambodia, there was no national legal provision or a directly applicable international legal provision with internal effect criminalizing the crimes set out in the Establishment Law and modes of liability therein.[85] Hence, a Charged Person could not have sufficiently foreseen customary international law being applied to them. Indeed, the Pre-Trial Chamber is aware that provisions in Cambodian law are necessary to give notice of criminal liability applicable at the relevant time.[86]

38. The continuing evolution of customary international law as well as the questionable status of customary international law makes it extremely difficult to access what is customary international law at a requisite point in time.[87] Indeed, this issue is highlighted in the JCE Decision, where the Pre-Trial Chamber correctly found that JCE III did not form part of customary international law in 1975-79.[88]

D. Whether certain customary international law norms have achieved a *jus cogens* status does not affect the non-applicability at the ECCC

---

[82] FERDINANDUSSE, at 237.
[83] *See* Establishment Law, Art. 3 new.
[84] Unofficial translation from French.
[85] *See* Section III(B) *supra*.
[86] "The Pre-Trial Chamber has not been able to identify in the Cambodian law, applicable at the relevant time, any provision that could have given notice to the Charged Persons that such an extended form of responsibility was punishable as well." JCE Decision, para 87.
[87] "[T]he need to compromise in international law-making often inhibits the formulation of clear, unambiguous offences. Consequently, many international offences lack a detailed description of the prohibited conduct, applicable penalties, and even references to its character as a crime or its intended prosecution." FERDINANDUSSE, at 239.
[88] *Id.*, para. 83.

39. *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 contrary effect."[89] There is no peremptory norm requiring a State to punish *jus cogens* norms. 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.[90] Cambodia's legal system, as explained above, does not.

40. Even assuming that every State did possess a duty to prosecute *jus cogens* norms under customary international law, this duty does not fall to the ECCC but to 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."[91] Thus, any supposed customary international law obligation to prosecute *jus cogens* norms weighs on Cambodia as a State and not on the ECCC.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to REJECT the direct application of customary international law before the ECCC.

Respectfully submitted,

ANG Udom — Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 22nd day of July, 2010

[89] BROWNLIE, at 510.

[90] In *Pinochet*, Lord Millet attempted to use the argument that a State has universal jurisdiction over a violation of a *jus cogens* norm. However, his opinion was not accepted by the rest of the House of Lords. Lord Hope declared that: "prior to the coming into force of section 134 of the Criminal Justice Act 1988 ... there is no basis upon which [Pinochet] could have been tried extraterritorially in this country," thereby requiring the English domestic legal system to provide for jurisdiction, even for a violation of a *jus cogens* norm. *See Pinochet*, at 237, 275.

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