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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S SUPPLEMENTAL ALTERNATIVE SUBMISSION TO HIS MOTION AGAINST THE APPLICABILITY OF GENOCIDE AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits this Supplemental Alternative Submission to his Motion against the Applicability of Genocide at the ECCC. This Motion is accompanied by an Annex which comprehensively sets out the law on the crime of genocide as it has evolved through the jurisprudence of the *ad hoc* tribunals. The Defence has previously filed a motion which explains that the crime of genocide is not applicable before the ECCC.[1] Since the OCIJ has determined that the ECCC has jurisdiction to apply the crime of genocide, the Defence now submits this Motion and its accompanying Annex to assist the OCIJ and Chambers in applying the law on genocide, as it existed in international law during the jurisdictional period of the ECCC. This Motion will explain that: a.) only the definition of the crime of genocide which accords with the Genocide Convention, and the punishable acts specifically enumerated in the Establishment Law are punishable at the ECCC; b.) genocide is a crime which requires specific intent,[2] and therefore liability for genocide cannot attach when such intent is not proved; c.) the jurisprudence of the ICTY and ICTR is only relevant to the extent it comports with the law of genocide as it existed in 1975-79; and, finally d.) the ECCC must follow a "purpose-based" approach to the *mens rea* required for genocide, rather than a "knowledge-based" approach.

I. BACKGROUND

1. On 21 June 1997, Cambodia requested the United Nations' assistance in organizing a process for the Khmer Rouge Trials.[3] "The 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."[4]
2. On 6 June 2003 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 ("Agreement") was

[1] *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.
[2] The *mens rea* required for the crime of genocide is variously referred to in the relevant jurisprudence and commentary as "specific intent," "special intent," "special genocidal intent," or "*dolus specialus.*"
[3] *See* Chronology of Establishment of ECCC, available on the ECCC website: http://www.eccc.gov.kh/english/backgroundECCC.aspx.
[4] Introduction to the ECCC, available on the ECCC website: http://www.eccc.gov.kh/english/about_eccc.aspx.

signed. It was ratified on 19 October 2004, and entered into force on 29 April 2005.[5] The purpose of the Agreement was:

> 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. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.[6]

3. The judicial investigation into Mr. IENG Sary was initiated on 18 July 2007 with the filing of the Introductory Submission by the Office of the Co-Prosecutors ("OCP"),[7] which was then separated from the case against Kaing Guek Eav "Duch" on 19 September 2007.[8]

4. Although the allegations in the Introductory Submission are confidential, the OCP has publicly confirmed that "[t]he factual allegations in this Introductory Submission constitute crimes against humanity, genocide, grave breaches of the Geneva Conventions, homicide, torture and religious persecution. The Co-Prosecutors, therefore, have requested the Co-Investigating Judges to charge those responsible for these crimes."[9]

II. RELEVANT LAW

5. Articles II and III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention")[10] state:

> **Article II**
> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[11]

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[5] *See* Chronology of Establishment of ECCC, available on the ECCC website at: http://www.eccc.gov.kh/english/backgroundECCC.aspx.
[6] Agreement, Art. 2(1).
[7] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007, D3, ERN: 00141011-00141166.
[8] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Separation Order, 19 September 2007, D18, ERN: 00148803-00148804.
[9] *See* Press Release, Statement of the Co-Prosecutors, 18 July 2007 (emphasis added).
[10] Convention on the Prevention and the Punishment of the Crime of Genocide of 9 December 1948, (1951) 78 UNTS 277.

Article III
The following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

6. Article 9 of the Agreement states in relevant part:

> **Crimes falling within the jurisdiction of the Extraordinary Chambers**
> The subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide...

7. The Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea ("Establishment Law"), is quite similar to Article II of the Genocide Convention,[12] but departs from Article III. Article 4 of the Establishment Law states:

> The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.
>
> The acts of genocide, which have no statute of limitations, mean <u>any acts</u> committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, <u>such as</u>:
>
> • killing members of the group;
> • causing serious bodily or mental harm to members of the group;
> • deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> • imposing measures intended to prevent births within the group;
> • forcibly transferring children from one group to another group.
>
> The following acts shall be punishable under this Article:
> • attempts to commit acts of genocide;
> • conspiracy to commit acts of genocide;
> • participation in acts of genocide.[13]

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[11] Emphasis added.
[12] Note that the English version of Article 4 differs from the Genocide Convention in that it states that "any acts" "such as" the listed acts can constitute genocide, whereas the Genocide Convention states that genocide means "<u>any of the following acts</u>" committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, "<u>as such</u>." The French version of the Establishment Law does not contain this discrepancy. See further discussion in Argument A.
[13] Emphasis added.

8. Also relevant is Article 29 of the Establishment Law, which lists the modes of liability under which an individual can be held criminally responsible at the ECCC:

> Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.
>
> The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.
>
> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.
> The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

III. ARGUMENT

A. Only the definition of the crime of genocide which accords with the Genocide Convention, and the acts specifically enumerated in the Establishment Law are punishable at the ECCC

1. The definition of the crime of genocide at the ECCC must accord with the Genocide Convention

9. The Agreement states that "[t]he subject-matter jurisdiction of the Extraordinary Chambers shall be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide..."[14] The Agreement also states that the ECCC has subject matter jurisdiction as set forth in the Establishment Law.[15] The Agreement is to be implemented through the Establishment Law.[16]

10. The Establishment Law sets out the definition of the crime of genocide in basically the same terms as Article II of the Genocide Convention, which defines the crime of genocide for purposes of the Convention. The English version of the definition of genocide in the Establishment Law, however, differs from the English version of the Genocide Convention in two respects.

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[14] Agreement, Art. 9 (emphasis added).
[15] *Id.*, Art. 2(1).
[16] *Id.*, Art. 2(2).

11. First, Article II of the Genocide Convention states "genocide means any of the following acts committed..."[17] whereas Article 4 of the Establishment Law states "The acts of genocide, ... mean any acts committed... such as:..."[18] The list of enumerated acts found in the Genocide Convention thus appears to be exhaustive, while the list of acts found in the Establishment Law does not.

12. Second, Article II of the Genocide Convention states, "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such";[19] whereas Article 4 of the Establishment Law states, "The acts of genocide ... mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as..."[20] The Establishment Law would thus appear to lower the *mens rea* required for the crime of genocide: a perpetrator could commit an act with the intent to destroy a national, ethnical, racial or religious group, without intending to destroy the group "as such" and still be liable for genocide.

13. The phrase "as such" is of particular significance to the definition of genocide: it must be demonstrated that the alleged perpetrator not only sought to kill individuals belonging to a particular group, but did so while possessing the intent to destroy, in whole or in part that group *as such*. Indeed, this is where genocide differs particularly from persecution as a crime against humanity.[21] The *Sikirica* Trial Chamber at the ICTY noted that "[t]he evidence must establish that it is the group that has been targeted, and not merely specific individuals within that group. That is the significance of the phrase 'as such' in the chapeau."[22]

14. It would appear that these discrepancies are the result of a simple scrivener's error. The official French or English version of the Genocide Convention definition would have been translated into Khmer for purposes of Article 4 of the Establishment Law, since the Agreement states that the definition of the crime of genocide is to be that found in the Genocide Convention. The Khmer version of the Establishment Law

[17] Emphasis added.
[18] Emphasis added.
[19] Emphasis added.
[20] Emphasis added.
[21] *Prosecutor v Jelisić*, IT-95-10, Trial Judgement, 14 December 1999 ("*Jelisić* Trial Judgement"), para. 79.
[22] *Prosecutor v. Sikirica et al.*, IT-95-8, Judgement on Defence Motions to Acquit, 3 September 2001, para. 89.

would then have been translated back into English and French, for the French. The French text does not contain these discrepancies.

15. It is axiomatic that the Establishment Law drafters would not have intended to change the established *mens rea* for the crime of genocide, being fully cognizant of the Agreement's expressed reference to the Genocide Convention. Thus, this discrepancy appears to be a simple scrivener's error. The OCIJ should follow the definition set out in the Genocide Convention as intended by the UN and the Cambodian Government, and set out in their Agreement. It is beyond cavil that the unique *mens rea* is what distinguishes genocide from lesser crimes.[23]

2. Only the punishable acts specifically enumerated in the Establishment Law are punishable at the ECCC

16. Although the Establishment Law takes the definition of genocide from the Genocide Convention, with the exception of the errors outlined above, it differs from Article III of the Genocide Convention, which sets out punishable acts. Unlike Article III, the Establishment Law does not list "direct and public incitement to commit genocide" or "complicity in genocide" as punishable.[24]

17. There can be no argument that the Establishment Law changes the definition of the crime of genocide and thus contravenes Article 9 of the Agreement, which states that the crime of genocide shall be that defined by the Genocide Convention. The definition of the crime of genocide is that found in Article II of the Genocide Convention, which is replicated in Article 4 of the Establishment Law.

18. If the Establishment Law's drafters had wished to include "direct and public incitement to commit genocide" and "complicity in genocide" as punishable acts of genocide, they would have simply copied Article III of the Genocide Convention, as they did with Article II. This is what the drafters of the ICTY and ICTR Statutes did,. Undoubtedly, the Establishment Law's drafters would have been aware of this.

19. Since the Agreement states that the ECCC's subject matter jurisdiction would be that set forth in the Establishment Law,[25] and since the Establishment Law does not

[23] This specific intent *mens rea* will be discussed in greater detail *infra*.
[24] Establishment Law, Art. 4.
[25] Agreement, Art. 2(1).

include "direct and public incitement to commit genocide" or "complicity in genocide," the ECCC cannot consider these to be punishable acts of genocide.

B. Genocide is a crime which requires specific intent, and therefore liability for genocide cannot attach when such intent is not proved

20. Article II of the Genocide Convention, reproduced in Article 4 of the Establishment Law, states that for genocide to occur, acts must be "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group..."[26] It is this special intent to destroy, in whole or in part, a protected group which affords genocide its status as "the crime of crimes."[27] As the *Jelisić* Trial Chamber at the ICTY has noted, specific intent is what "gives genocide its specialty and distinguishes it from an ordinary crime."[28] Without such intent, grave as the underlying crime may be, genocide cannot be said to have occurred.

21. Despite the Genocide Convention's clear requirement of specific intent, ICTY and ICTR jurisprudence has diluted the requisite *mens rea*, by allowing convictions in situations where the specific intent to commit genocide was not proved. The genocide jurisprudence which has emerged at the ICTY and ICTR[29] is thus precariously clashing with the principle of legality: an accused charged with genocide can be convicted without evidence of the existence of special genocidal intent based on aiding and abetting genocide, complicity in genocide, superior responsibility, and joint criminal enterprise ("JCE") liability.[30]

22. The dilution of the special genocidal intent before the *ad hoc* Tribunals seems evident in the ease with which guilty pleas are accepted where the factual basis may not necessarily support the *mens rea* requirements, or where the guilty plea is used as a vehicle to lower the *mens rea* threshold. In *Serushago*, for example, the Trial Chamber accepted a guilty plea to genocide under both ICTR Articles 6(1) (individual

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[26] Emphasis added.

[27] *See e.g.* F.M. Palombino, *Should Genocide Subsume Crimes Against Humanity,* 3(3) J. INT'L CRIM. JUST. 778 (2005).

[28] *Jelisić* Trial Judgement, 14 December 1999, para. 66.

[29] A more complete discussion of the relevant ICTY and ICTR cases can be found in Section II. D of the Annex.

[30] JCE III extends the liability of a perpetrator involved in a common plan to all the crimes that are a "natural and foreseeable consequence" of the criminal enterprise, irrespective of the perpetrator's participation in the crime itself. The *mens rea* is more than "negligence" but far from the special genocidal intent. While the perpetrator need not intend to bring about a certain result, he must be "aware that the actions of the group were likely to lead to the result but nevertheless willingly [take] the risk." *See Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 220. The Defence position is that JCE liability is not applicable for any crime under the jurisdiction of the ECCC. This matter is currently the subject of an appeal. *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC), Record of Appeals, 14 December 2009, D97/14, ERN: 00414559.

responsibility provision) and 6(3) (superior responsibility provision) from the accused who was a *de facto* leader of the Interahamwe. However, the facts supported a conviction only under Article 6(1).[31] Additionally, in *Kambanda*,[32] the Trial Chamber accepted a guilty plea to genocide and complicity in genocide, though the facts supported only a conviction for genocide under Article 6(1) as a principal offender and not for superior responsibility under Article 6(3). By accepting the plea under Article 6(3) as well as 6(1), the Trial Chamber suggests that a superior of a principal perpetrator of genocide need not possess special genocidal intent.

23. Application of JCE III to genocide is a further example of the dilution of genocidal intent in the *ad hoc* Tribunals' jurisprudence. An instructive interpretation of this can be found in *Stakić*.[33] In that case, the Trial Chamber acquitted the accused of genocide and complicity in genocide having found that genocide as set forth in the Indictment did not occur.[34] The Trial Chamber's *dictum* is nevertheless instructive because it gives a well-reasoned approach to interpret the crime of genocide. After noting that Article 4 of the ICTY Statute was taken verbatim from the Genocide Convention,[35] the Trial Chamber listed four sources to rely on when interpreting genocide because of the "non-retroactivity principle of substantive criminal law": i) the Genocide Convention according to the rules of interpretation set out in the Vienna Convention on the Law of Treaties; ii) the purpose of the Genocide Convention as evidenced by the *travaux préparatoires*; iii) subsequent jurisprudence of the *ad hoc* Tribunals and national courts; and iv) the publications of international authorities.[36] Importantly, the Trial Chamber found that Article 4 of the ICTY Statute must be interpreted within the context of the unique nature of the crime of genocide.[37] Discussing criminal liability under JCE III as it relates to the crime of genocide, the Trial Chamber commented on the interplay between Article 4(3)(e) (the punishable act of complicity in genocide) and Article 7(1) (the individual responsibility provision) of the ICTY Statute. It noted that when considering the relationship between Articles 4(3) (which lists punishable acts specific to the crime of genocide) and 7(1) (which lists forms of individual criminal responsibility applicable to each

[31] *Prosecutor v. Serushago*, ICTR-98-39-S, Sentence, 5 February 1999, paras.25, 28–29.
[32] *Prosecutor v. Kambanda*, ICTR 97-23-S, Judgement and Sentence, 4 September 1998, paras 39-40.
[33] *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement"), para. 561.
[34] *Id.*
[35] *Id.*, para. 500.
[36] *Id.*, para. 501. This outline of how genocide should be interpreted is not found in most ICTY and ICTR jurisprudence, specifically the *Krstić* Appeal Judgement and the *Blagojević* Trial Judgement.
[37] *Id.*, para. 502.

crime over which the ICTY has jurisdiction) of the ICTY Statute, Article 4(3), can be regarded as *lex specialis* in relation to Article 7(1) as *lex generalis*.[38] Accordingly, "reading the modes of participation under Article 7(1) into Article 4(3) whilst maintaining the *dolus specialis* prerequisite, would lead to the same result."[39] Thus, the Trial Chamber proclaimed that modes of participation cannot replace core elements of a crime, and importing JCE III into genocide would result in diluting the special genocidal intent.[40]

24. In *Brđanin*, the Appeals Chamber, disagreeing with the logic expressed by the *Stakić* Trial Chamber, extended liability for genocide without the special genocidal intent to JCE. The *mens rea* for JCE III is based on *dolus eventualis*; it confers liability on an accused who did not intend to commit the crime or even know with certainty that the crime was to be committed, but who only entered into a common plan to commit a different crime with the awareness that the commission of that agreed upon crime made it reasonably foreseeable to him that the crime would be committed by other members of the JCE, and that it was in fact committed.[41] In an interlocutory appeal in *Brđanin*, the Appeals Chamber found that JCE III could be imported into genocide without a finding of the special genocidal intent.[42] Judge Shahabuddeen dissented, stating that "genocide is a crime of specific intent, a conviction for it is therefore not possible under the third category of joint criminal enterprise."[43]

25. Professors Danner and Martinez have cautioned that:

> liability under Category Three JCEs should not be permitted for the specific intent crimes of genocide and persecution. ... The ICTY and ICTR have made it clear that the most salient feature of these crimes, and the source of the enhanced stigma associated with them, is their elevated mens rea. This distinctive feature of these serious crimes is weakened by the lowering of the mental state to recklessness or negligence, as would

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[38] It is apparent that there is some overlap between acts of genocide and the separate modes of liability enumerated in the Statutes of the *ad hoc* Tribunals. While specific intent is the cornerstone of genocide, the modes of liability through which international crimes may be committed contain their own physical and mental elements. A clear tension exists between genocide as a *substantive* crime and some modes of liability as a *means* through which this crime might be committed.

[39] *Prosecutor v. Stakić*, IT-97-24-T, Decision on Rule 98*bis* Motion for Acquittal, 31 October 2002, para. 48.

[40] *Stakić* Trial Judgement, para. 530.

[41] *Prosecutor v. Brđanin*, IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, para. 5.

[42] *Id.*, paras. 7–10.

[43] *Id.*, Separate Opinion of Judge Shahabuddeen, paras. 2–4. Judge Shahabuddeen reasoned: "The third category of Tadić does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that the specific intent always has to be shown; if it is not shown, the case has to be dismissed."

occur in a Category Three JCE or under the looser versions of command responsibility.[44]

26. The jurisprudence from the ICTY and ICTR as it relates to genocide and the modes of liability such as JCE and superior responsibility does not follow the natural and ordinary meaning of the language in the Genocide Convention or the Establishment Law. The special genocidal intent forms an element of the *chapeau* of the offense of genocide. As such, for an interpretation to be true to the intentions of the drafters of the Genocide Convention and to respect the plain language of the Establishment Law, it must provide for a strict requirement of special genocidal intent.

C. The jurisprudence of the ICTY and ICTR is only relevant to the extent that it comports with the law on genocide as it existed from 1975-79

27. According to the principle of *nullum crimen sine lege*, the law that must be applied by the ECCC is the law as it existed at the time the offenses were allegedly committed.[45] The law of genocide as it existed in international law between 1975-79 is the law set out in the 1948 Genocide Convention.[46] Article II of the Genocide Convention states that for genocide to occur, certain acts must be "committed with intent to destroy..." The Genocide Convention does not provide for any exceptions which would allow a person to be liable for genocide if he does not have this specific genocidal intent.

28. As discussed in the previous section, and set out more fully in the attached Annex, in certain areas, such as liability for genocide through participation in a JCE or through superior responsibility, ICTY and ICTR jurisprudence has expanded the liability for genocide envisaged by the drafters of the Genocide Convention.[47] This jurisprudence does not reflect the law as it existed in 1975-79. Professor William Schabas, a genocide expert, has observed that while the definition of genocide has remained intact, it is being interpreted with "considerable dynamism" with the trend being towards a "large and liberal interpretation [that] may dilute the terrible stigma that is

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[44] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 151 (2005).

[45] *See 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, *especially* paras. 7-12.

[46] This is because there were very few genocide cases in the years between the entry into force of the Genocide Convention and the establishment of the ICTR. *See* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, The 'Crime of Crimes'*, 1 J. INT'L CRIM. JUST. 39, 39-40 (2003).

[47] *See* Annex, Section II. D, for a discussion of the relevant jurisprudence.

attached to the crime of genocide."[48] This changing and developing ICTY and ICTR jurisprudence, since it does not reflect the law as it existed at the relevant time, cannot be considered as persuasive authority by the ECCC.[49]

D. The ECCC must follow a "purpose-based" approach to the *mens rea* required for genocide, rather than a "knowledge-based" approach

29. The object and purpose of the Genocide Convention is to prevent genocide and to punish all perpetrators of genocide. Amongst academics, there has been an ongoing debate as to whether this object and purpose is best served by employing a "purpose-based" standard of intent or a "knowledge-based" standard of intent when considering the *mens rea* required for the crime of genocide. The ECCC will best uphold the object and purpose of the Genocide Convention by following the "purpose-based" standard, as the *ad hoc* tribunals have done.

30. The "purpose-based" standard most accurately follows the text of the Genocide Convention in that it requires genocidal intent: during the commission of the underlying offense, the perpetrator must possess *the intent to destroy, in whole or in part, a protected group, as such.*[50] This was categorically affirmed by the *Krstić* Trial Chamber at the ICTY, which stated that: "The intent to destroy a group as such, in whole or in part, presupposes that the victims were chosen by reason of their membership in the group whose destruction was sought. Mere knowledge of the victim's membership in a distinct group on the part of the perpetrators is not sufficient

[48] William A. Schabas, *The "Odious Scourge": Evolving Interpretations of the Crime of Genocide,* 9-11, Paper presented at "Ultimate Challenge, Human Rights and Genocide," International conference, Yerevan, Armenia, 20-21 April 2005.

[49] The ECCC may instead wish to consider genocide cases which predate the time period at issue, such as the *Eichmann* Trial. Professor Alexander Greenawalt explains that in this trial, "the Jerusalem court treated genocidal mens rea as a core requirement of Eichmann's culpability." Alexander K. A. Greenawalt, *Rethinking Genocide Intent: The Case for a Knowledge Based Interpretation,* 99 COLUM. L. REV. 2259, 2259 (1999).

[50] *See* Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such,* 14 LEIDEN J. INT'L L. 399, 404 (2001). "It is the 'intent to destroy [...]' that shapes the crime of genocide and differentiates this crime, for instance, from an 'ordinary' killing. It is the intent to destroy that makes the perpetrator so dangerous and the expected harm so tantamount, compared, for instance, with a mere murder, even mass murder."

to establish an intention to destroy the group as such."[51] This holding was later affirmed by the *Krstić* Appeals Chamber.[52]

31. The "knowledge-based" standard advocated by some academics, on the other hand, calls for a lower *mens rea* threshold: the requirement of genocidal intent could be met "if the perpetrator acted in furtherance of a campaign targeting members of a group and knew that the goal or manifest effect of the campaign was the destruction of the group in whole or in part."[53] Advocates of the "knowledge-based" standard admit that it is currently the minority view: "the prevailing interpretation assumes that genocide is a crime of specific or special intent, involving a perpetrator who specifically targets victims on the basis of their group identity with a deliberate desire to inflict destruction upon the group itself."[54]

32. The "knowledge-based" standard of intent has been rejected in the jurisprudence of the *ad hoc* Tribunals,[55] and should likewise be rejected by the ECCC. "[One] argument against broadening the intent requirement is that genocide is distinguished from homicide by the mental element. The systematic and intentional murder of ethnic, racial, and religious minorities, absent the intent to exterminate such groups, remains punishable as mass murder under domestic law as well as a crime against humanity and war crime."[56]

33. Another argument is that lowering the *mens rea* to a "knowledge-based" standard smacks of the highly controversial and now internationally unacceptable doctrine introduced by the International Military Tribunal (IMT) at Nuremberg of guilt resulting from "membership in a criminal organization."[57] This concept was first discussed at the end of World War II in relation to prosecuting Nazis. The idea behind this concept was that the IMT tried "the criminality of the organizations

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[51] *Prosecutor v. Krstić*, IT-98-33-T, ICTY Judgement, 2 August 2001, para. 561. *Cf. Prosecutor v. Akayesu*, ICTR 96-4-T, Judgement, 2 September 1998, para. 520, where the Trial Chamber held that: (a) proof of "clear intent to destroy, in whole or in part, a particular group" is required in order for an offender having committed one of the prohibited acts to be held responsible for genocide; and (b) an offender may be culpable if "he knew or should have known that the act committed would destroy, in whole or in part a group." (emphasis added).

[52] *See, e.g., Prosecutor v. Krstić*, IT-98-33-A, Judgement, 19 April 2004, para. 104: "The Trial Chamber's reliance upon Radislav Krstić's knowledge from this intercept as establishing intent on the part of Krstić to participate in a genocidal plan is unreasonable."

[53] *See* Greenawalt, at 2269. *See also* Otto Triffterer, *Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT'L L. 399, 405 (2001).

[54] Greenawalt, at 2259.

[55] *See, e.g., Jelisić* Trial Judgement, para. 66.

[56] Matthew Lippman, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMP. L. 415, 464 (1998).

[57] Article II of the Control Council Law No. 10 reads in pertinent part: "1. Each of the following acts is recognized as a crime: ... (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal." *Available at* http://avalon.law.yale.edu/imt/imt10.asp.

themselves"[58] (e.g. the SS) and, in subsequent trials, members who had joined the criminal organization voluntarily and possessed knowledge of the criminal purpose of the organization could be convicted.[59] The OCIJ must keep in mind that "[t]he danger of the word 'genocide' is that it can slide from its wider, legally specific meaning, to a branding of the perpetrators' group as collectively evil."[60]

34. This concept of collective guilt by association has been found to be inconsistent with the fundamental human and fair trial rights that any accused is entitled to enjoy to the full extent, no matter the nature of the alleged crimes involved. Simply, "[c]ollective criminal responsibility means denial of fundamental justice and violates international law."[61] Criminal guilt is individual and not based on membership in, or an association with, an organization which is assumed or declared to have acted criminally.

IV. CONCLUSION

35. The Defence, as previously submitted, maintains that the crime of genocide cannot be applied by the ECCC.[62] If, however, the OCIJ should hold otherwise, the OCIJ must only apply the crime of genocide as it is defined in the Genocide Convention and set out in the Establishment Law (without the drafting errors discussed above). To do otherwise would contravene the very Agreement which established this Court.
36. The OCIJ must also follow the clear wording of the Establishment Law and the Genocide Convention and require that specific genocidal intent be proved before finding that genocide occurred. When determining whether a Charged Person held the requisite *mens rea* for the crime of genocide, the OCIJ must not be swayed by any jurisprudence of the *ad hoc* tribunals which (a) departed from this clear requirement

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[58] *See* Danner & Martinez, at 113.

[59] TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 75, 113 (Alfred A. Knopf Inc. 1992) ("TAYLOR"). *See also* IMT Judgement: The Accused Organizations, *available at* http://avalon.law.yale.edu/imt/judorg.asp, which states that "Since the declaration with respect to the organisations and groups will ... fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations." *See also* TAYLOR, p. 557-58: "Conviction of a defendant, prosecuted for membership in an organization declared criminal, required proof that the defendant had joined voluntarily *and* that the defendant knew that the organization engaged in crime as defined in Article 6 of the Charger. Failing that proof, the defendant could be convicted only upon proof that the defendant had personally participated in such crimes."

[60] Alex de Waal, *Reflections on the Difficulties of Defining Darfur's Crisis as Genocide,* 20 HARV. HUM. RTS. J. 25, 31 (2007).

[61] S. Pomorski, *Conspiracy and Criminal Organization, in* THE NUREMBERG TRIAL AND INTERNATIONAL LAW 240 (G. Ginsburgs & V.N. Kudriavtsev, ed., 1990).

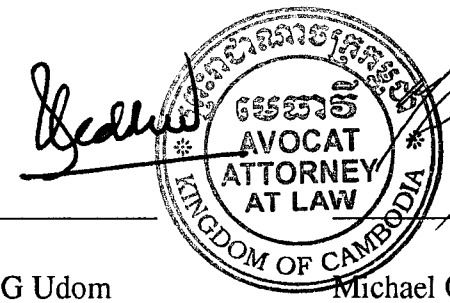
[62] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940.

and (b) which was developed after the jurisdictional period of the ECCC. The OCIJ must remain true to the intent of the drafters of the Genocide Convention, and later the Establishment Law, by following a "purpose-based" approach.

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the OCIJ to:

a. APPLY the law on genocide as found in the Establishment Law, excluding those punishable acts which are not enumerated in the Establishment Law;
b. DISREGARD the jurisprudence of the ICTY and ICTR relating to liability for the crime genocide which lower the *mens rea* to something below specific intent;
c. LIMIT any reliance on ICTY and ICTR jurisprudence to that which comports with the law on genocide as it existed between 1975 and 1979; and
d. EMPLOY a "purpose-based" approach to determining the required *mens rea* for the crime of genocide.

Respectfully submitted,



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Signed in Phnom Penh, Kingdom of Cambodia on this **21th** day of **December, 2009**