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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 APPLICABILITY OF THE CRIME OF GENOCIDE AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby moves against the application of genocide at the ECCC.[1] The OCIJ has accepted similar jurisdictional motions.[2] This motion is necessary because the crime of genocide is inapplicable before the ECCC as it is contrary to the principle of *nullum crimen sine lege* because: **a.** it is not criminalized under domestic law – it is not stipulated in the 1956 Cambodian Penal Code ("1956 Penal Code") and the Agreement[3] and Establishment Law[4] cannot create substantive law to be retroactively applied; and **b.** international criminal law cannot be directly applied in Cambodia – Cambodia has no legislation to enact the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), and customary international law and *jus cogens* criminalizing genocide cannot be directly applied in Cambodia. Even if the OCIJ determines that it does have jurisdiction over the crime of genocide, despite all of the arguments to the contrary, the Defence submits that Mr. IENG Sary cannot be charged with genocide, as this would violate the provisions of the Royal Decree and Pardon, granting him amnesty from prosecution for genocide and would violate the principle of *ne bis in idem*.[5]

I. APPLICABLE LAW

A. Jurisdictional provisions of the Agreement and Establishment Law

1. Article 1 of the Agreement provides that:

> The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

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[1] *See* Press Release, Statement of the Co-Prosecutors, 18 July 2007 (emphasis added). "The 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."

[2] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Applicability at the ECCC of the Form of Liability Known as *Joint Criminal Enterprise*, 28 July 2008, D97, ERN: 00208225-00208240. *See also* all other relevant submissions concerning JCE filed before the OCIJ.

[3] 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").

[4] 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").

[5] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), IENG Sary's Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, C/22/I/26, ERN: 00177265-00177280. *See also Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on Appeal of Provisional Detention Order of IENG Sary, 17 October 2008, paras. 41-63, C22/I/74, ERN: 00232976-00233004, where the Pre-Trial Chamber held that it could not determine these issues at the time.

2. Article 2(1) of the Agreement provides that:

> The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in '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' ... as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.

3. Article 9 of the Agreement provides in part that:

> 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...

4. Article 1 of the Establishment Law provides that:

> The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

5. Article 2 new of the Establishment Law provides that:

> Extraordinary Chambers shall be established in the existing court structure, namely the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, 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.

6. Article 4 of the Establishment Law provides that:

> 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 any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:
>
> - 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.

B. The principle of *nullum crimen sine lege*

7. The principle of *nullum crimen, nulla poena sine lege*[6] 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.[7]

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.[8]

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[6] 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) [hereinafter CASSESE]

[7] 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."

[8] 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*

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.[9]

11. This strict prohibition of retroactive criminal legislation found in the 1956 Penal Code[10] was also established by the Paris Peace Accords that led to the adoption of the 1993 Cambodian Constitution.[11] The extent of protection which Cambodian legislation affords against the retroactivity of criminal legislation, thus, 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.[12] This is

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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.

[9] Unofficial translation from the French version.

[10] 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.

[11] *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.

[12] 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).

especially true in the present case where the ICCPR has been signed and ratified by Cambodia after the alleged crimes occurred.[13]

12. 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)."[14]

II. ARGUMENT

A. Genocide is not criminalized in domestic Cambodian law

i. Genocide is not stipulated in the 1956 Penal Code

13. The ECCC, as a Cambodian court, is obliged to follow Cambodian law.[15] 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.[16] This Penal Code does not contain any provision criminalizing genocide. It is therefore impossible to use the 1956 Penal Code as a basis for the charge of genocide.

14. To charge and subsequently punish a suspect / accused under this law for actions that do not actually breach this law would violate the principle of *nullum crimen sine lege*, which requires that punishable acts must have constituted crimes at the time they were conducted.[17] Failure to respect the principle of *nullum crimen sine lege* is a violation of the Cambodian Constitution[18] as well as a violation of Article 6 of the 1956 Penal Code.[19]

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[13] 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.

[14] CASSESE, at 142.

[15] *See* Article 12(1) of the Agreement. *See also* Preamble of the Rules, Rev.4, 11 September 2009.

[16] *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.

[17] *See* Helmut Kreicker, *National Prosecution of Genocide from a Comparative Perspective*, 5 INT'L CRIM. L. REV. 313, 320-321(2005) [hereinafter Kreicker], where he 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.

[18] 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."

[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).

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

15. 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.[20] 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."[21] 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 to put into practice exactly how this would be done, including by specifying the subject matter, temporal and personal jurisdiction of the ECCC.

16. Article 4 of the Establishment Law, therefore, merely sets out the definition of genocide over which the ECCC would have jurisdiction, were it punishable under applicable substantive law. It does not create a substantive crime of genocide which can be retroactively applied. Neither does it implement the Genocide Convention in the national legal system of Cambodia. It cannot. To do either of these would violate the principle of *nullum crimen sine lege*, thus breaching Cambodian law.

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

17. The ECCC is a domestic court established within the existing court structure of the national legal system of Cambodia.[22] Substantive international criminal law, whether based on international convention or customary international law, cannot be directly applied in Cambodian courts. This is because Cambodia adheres to a dualist – as opposed

[20] Agreement, Art. 1.
[21] Establishment Law, Art. 1.
[22] 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", Case No.* 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).

to a monist – system[23] in its approach to implementing international law in its domestic legal order.[24]

18. 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.[25] 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.[26] In the case of conventions, if there is no national implementing legislation, a convention must be self-executing to be directly applicable.[27]

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[23] "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, 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 modeled, 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 would not directly apply a convention that was not self-executing. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 146-47 (Cambridge University Press, 2000); TREATY MAKING – EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY 89, 93-94 (Kluwer Law International 2001) [hereinafter AUST].

[24] *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.

[25] 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) [hereinafter 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." An example of this can be seen in the UK, where it has been held that "The obligation ... assumed by ratifying UNCAT is not directly enforceable in the English courts because 'international treaties do not form part of English law and English courts have no jurisdiction to interpret or apply them." Rosemary Pattenden, *Admissibility in Criminal Proceedings of Third Party and Real Evidence Obtained by Methods Prohibited by UNCAT*, 10 INT'L J. EVIDENCE & PROOF 1, 29 (2006).

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

[27] A legal instrument is self-executing if it becomes "effective immediately without the need of any type of implementing action." BLACK'S LAW DICTIONARY 1364 (West Publishing Co., 7th ed. 1999). *See also* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,'* 1 J. INT'L CRIM. JUST. 39, 62 (2003) [hereinafter *National Courts Finally Begin to Prosecute Genocide*]; MALCOLM N. SHAW QC, INTERNATIONAL LAW 263 (5th ed. 2003), both of which note that the Genocide Convention is not self-executing.

19. An example of what occurs when a dualist State[28] is asked to apply international law without any constitutional or legislative authority to do so can be found in the *Nulyarimma v. Thompson* case.[29] In this case, the Federal Court of Australia heard together two joined cases where the appellants, aboriginal Australians, argued that the Prime Minister, along with other members of government, was guilty of genocide for conduct contributing to the destruction of the Aboriginal people as an ethnic or racial group. Australia had ratified the Genocide Convention, but had not enacted implementing legislation. The court held that the crime of genocide did not exist in domestic Australian law and so the government officials could not be tried for genocide. Justice Wilcox stated that

> it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court. If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention. Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. This seems to be the position even where the ratification has received Parliamentary approval, as in the case of the Genocide Convention.[30]

The appellants argued that genocide was a class of crime that could be punished under international law even if the domestic law of a State does not declare it to be punishable. Justice Wilcox stated, however, that "it is not enough to say that, *under international law*, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that *Australian law* permits that result."[31]

20. 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 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 ...

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[28] Australia follows a dualist system. *See* DAVID SLOSS, TREATY ENFORCEMENT IN DOMESTIC COURTS: A COMPARATIVE ANALYSIS 13 (Cambridge University Press 2009).
[29] *Nulyarimma v. Thompson* [1999] FCA 1192 (Federal Court of Australia).
[30] *Id.*, para. 20 (opinion of Wilcox J.).
[31] *Id.*, paras 21-22 (emphasis added).

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 Genocide Convention 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*[32] and would consequently breach Cambodian law.

i. The Genocide Convention is not directly applicable in Cambodian courts

21. The Genocide Convention is not directly applicable in Cambodian courts.[33] The Genocide Convention is not self-executing,[34] and Cambodia did not enact any implementing legislation which would make it applicable in 1975-79. Even if Cambodia were to follow a monist system, where the State envisages international law to be part of its domestic legal order,

> ratification of or accession to an international treaty introduces the norms of the treaty into national law and makes them directly applicable before domestic courts ... Nevertheless, a treaty can only be implemented on this basis within the domestic law to the extent that it is 'self-executing.' ... The Genocide Convention provisions cannot easily be applied within domestic law without some additional legislation and are therefore, in a general sense, not self-executing.[35]

22. Article 5 of the Genocide Convention requires States to implement national legislation in order to give effect to the provisions of the Convention.[36] Cambodia, however, has not

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[32] *See, for example,* 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."

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

[34] *National Courts Finally Begin to Prosecute Genocide*, at 62. *See also* MALCOLM N. SHAW QC, INTERNATIONAL LAW 263 (5th ed. 2003).

[35] WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 341 (Cambridge University Press 2003) [hereinafter GENOCIDE IN INTERNATIONAL LAW].

[36] Article 5 provides that: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III."

enacted any national legislation to incorporate the Genocide Convention.[37] Neither does any provision in the Cambodian Constitutions that were in force at the time when the acts of genocide were allegedly committed refer to the incorporation of the Genocide Convention.[38] A significant number of States have yet to incorporate the terms of the Genocide Convention into their Penal Codes. A recent record of national prosecutions reveals that the lack in criminal legislation in these States has resulted in genocide not being recognized under domestic laws.[39]

23. Although Cambodia acceded to the Genocide Convention on 14 October 1950,[40] it appears that Cambodia was not even a party to the Convention during the time period at issue, and that therefore the Convention could not apply. This is because Cambodia acceded to the Convention when it was still a French colony. Cambodia gained its independence from France on 9 November 1953.[41] "The Convention says nothing about rules applicable to State succession."[42] The general rule in such situations, referred to as the "clean slate" principle, is that newly independent states do not become a party to a convention merely by reason of the fact that the convention had been in force before the date of succession.[43] It has been argued that this principle should not apply to human rights conventions, but this matter has not been determined.[44] Although Cambodia has

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[37] *See* GENOCIDE IN INTERNATIONAL LAW, P. 352 fn. 34, where as of 2003 Cambodia was listed as one of the States that had no domestic implementing legislation for the Genocide Convention. Cambodia may soon pass a new Penal Code. *See* Chun Sakada, *National Assembly Approves Penal Code*, VOA News, 12 October 2009, available at: http://www.voanews.com/khmer/2009-10-12-voa9.cfm?renderforprint=1. Articles 183-87 of this new Code discuss genocide. The passage of implementing legislation in 2009, of course, cannot allow for the retroactive application of the Genocide Convention to crimes which allegedly occurred between 1975-79.

[38] It should be noted that between 17 April 1975 and 6 January 1979, two Constitutions came into force. During the period of the Khmer Republic (1970-1975), a Constitution was promulgated on 10 May 1972. A new Constitution was not promulgated until 5 January 1976, during the period of Democratic Kampuchea (1975-1979). *See* RAOUL M. JENNAR, THE CAMBODIAN CONSTITUTIONS (1953-1993) 57-68, 81 (White Lotus, 1995).

[39] *See National Courts Finally Begin to Prosecute Genocide*, at 62. A good example is seen by U.S. Senator William Proxmire (deceased): although the United States signed the Genocide Convention 11 December 1948, it did not ratify the Convention or create any implementing legislation so that the crime of genocide could be punished in the United States until 25 November 1988. Starting in 1967, William Proxmire made a speech every day Congress convened – a total of 3,211 speeches – over a 21 year period until the United States government ratified the Convention and passed Proxmire's own Genocide Convention Implementation Act. *See* the Wisconsin Historical Society website available at: http://www.wisconsinhistory.org/turningpoints/search.asp?id=1512.

[40] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en#Participants. Unless the convention provides otherwise, accession has the same effect as ratification. *See* AUST, at 90.

[41] *See* Kenneth T. So, *The Road to Khmer Independence*, available at the Cambodian Information Center, http://www.cambodia.org/facts/?page=independence.

[42] GENOCIDE IN INTERNATIONAL LAW, at 508.

[43] MALCOLM N. SHAW QC, INTERNATIONAL LAW 882 (5th ed. 2003); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 308-09 (Oxford University Press, 2000). This general rule has been codified in Article 16 of the Vienna Convention on Succession of States in respect to Treaties, which entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946.

[44] Serbia questioned whether Bosnia was a party to the Genocide Convention in a case before the International Court of Justice ("ICJ"), but the ICJ declined to take a formal position on the matter. GENOCIDE IN

referred to the Convention subsequent to the Democratic Kampuchea period (outside the temporal jurisdiction of the ECCC),[45] which tends to show that it considers itself bound by it, such reference did not occur until after the time period at issue. The fact that it did not refer to the Convention between the period of independence and the end of the Democratic Kampuchea regime, and that it did not enact any implementing legislation to give effect to the Convention demonstrates that it did not consider itself bound. If Cambodia was not bound by the Genocide Convention during 1975-1979, the crimes that allegedly occurred during that time cannot be punished by reference to the Convention.

24. The Genocide Convention cannot serve as the basis for domestic prosecution in Cambodia, since Cambodia did not have any implementing legislation in place at the time of the alleged crimes and nothing in Cambodia's Constitution allows for its direct applicability. Likewise, the Genocide Convention cannot be the basis for domestic prosecution if it was not in force at the time the crimes were allegedly committed.

ii. Customary international law, including *jus cogens*, is not directly applicable in Cambodian courts

1. Customary international law cannot be directly applied by Cambodian courts

25. Customary international law penalizing the crime of genocide 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.[46] 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.

INTERNATIONAL LAW, at 509 "Accordingly, the question of continued application of human rights treaties within the territory of a predecessor state irrespective of a succession is clearly under consideration. Whether such a principle has been clearly established is at the present moment unclear." MALCOLM N. SHAW QC, INTERNATIONAL LAW 889 (5th ed. 2003).

[45] For example, the Genocide Convention was referred to in Decree Law No. 1, Article 8. These Laws, however, were enacted after the end of the period over which the ECCC has jurisdiction. *See* GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 47 (Howard J. De Nike, John Quigley & Kenneth J. Robinson eds., University of Pennsylvania Press, 2000).

[46] *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). *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."

26. Neither of the Constitutions that were in force at the time when the alleged crimes were committed has ever provided for a procedure of incorporation of customary international law into domestic law. Neither has the Cambodian National Assembly passed any legislation which by explicit reference incorporates any rule of customary international law relating to genocide 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 principle of *nullum crimen sine lege* prevents the direct application of customary international law into the domestic legal system in this case.[47]

27. 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."[48]

28. 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*.[49] Similar findings have been reached by courts of Germany,[50] Switzerland[51] and other States. The Max Planck Institute performed a study entitled *National Prosecution of International Crimes*. A paper discussing the results of this study found that:

> in no country under examination [35 states] in the MPI-project is it an option to punish a perpetrator of genocide simply by applying customary

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[47] "[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"(emphasis added). 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).

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

[49] FERDINANDUSSE, at 69.

[50] 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.

[51] 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.

international criminal law. In one way or another a national criminal law provision is required as a basis for national prosecution.[52]

29. An extensive analysis of the application of customary international law generally in Cambodia and in other countries[53] 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.

30. Even assuming that every State possesses a duty to prosecute genocide under customary international law – and this is clearly not a settled obligation[54] – this duty does not fall to the OCIJ 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."[55] Thus, any supposed customary international law obligation to prosecute genocide weighs on Cambodia as a State and not on the OCIJ.

2. The fact that genocide has been referred to as enjoying *jus cogens* status does not mean that it can be directly applied in Cambodian courts

31. *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."[56] The International Court of Justice recognized that the crime of genocide was a *jus cogens* peremptory norm of international law as early as 1951.[57] Nevertheless, the *jus cogens* nature of the crime of genocide does not alter the fact that customary international law cannot be directly applied in Cambodian Courts.

> [N]ational and international practice regarding the domestic legal consequences of peremptory norms of international law is divided at best, and often unclear and poorly reasoned. The lack of analysis and obvious mistakes in many judgments, especially of national courts, notably undercut their authoritative value. A cautious tendency can be discerned

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52 *See* Kreicker, at 320.

53 *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.

54 "Besides there being no customary rule with a general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community." CASSESE, at 302.

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

56 IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510 (Oxford University Press, 7th ed, 2008).

57 *Reservations to the Convention on the Prevention and Punishment of Genocide,* (Advisory Opinion), ICJ Reports 15 (1951), at 23. Academic doctrines and judicial opinions have supported that a body of pre-emptory norms, *jus cogens,* constitutes over-riding principles of international law.

> to accept a privileged position for *jus cogens* norms in the national legal order, but in the absence of firm State practice, a corresponding rule of customary international law currently appears to be only in the (early) formative stages.[58]

32. To say that genocide is *jus cogens* means that a State has an obligation not to participate in genocide. The peremptory status of a corresponding duty to punish is not settled.[59] The status of genocide as *jus cogens* may affect a State's ability to exercise extraterritorial jurisdiction over the crime in question by allowing the State to exercise extraterritorial jurisdiction if it chooses to do so, but will not allow the State to exercise subject matter jurisdiction if it is otherwise lacking.[60]

33. An example of this can be found in the ICTR *Bagaragaza* case.[61] In this case, where the accused was charged with genocide, the Trial Chamber rejected the Prosecution's request for referral of the indictment to the Kingdom of Norway, stating that even though Norway had ratified the Genocide Convention on 22 July 1994, its domestic criminal law did not contain any provision criminalizing genocide.[62] The question was whether Norway had jurisdiction *ratione materiae*. The Chamber stated that in order for it to be able find that Norway could exercise jurisdiction *ratione materiae*, it must be satisfied that "an adequate legal framework exists which would criminalize the alleged behaviour of the Accused, and that if found guilty, an appropriate punishment could be applied based on the offences currently charged before the Tribunal."[63] Both the parties and Norway invoked the principle of universal jurisdiction to establish jurisdiction. The Chamber

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[58] FERDINANDUSSE, at 169.

[59] *Id.* at 182-85. *See also* Michael Scharf, *From the Exile Files: an Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 364-367 (2006), discussing the *jus cogens* nature of crimes against humanity and a State's duty: "Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary."

[60] This situation arose, for example, in the Netherlands. "A domestic statute is ... necessary to 'transform' international law obligations into Dutch criminal law. A Dutch criminal court cannot directly apply international law in the absence of this transformation. Moreover, the relevant international crimes must already have been transformed in this way at the time they were committed. This rule also applies to treaty obligations, even where they represent *jus cogens* norms." Pita Schimmelpennick van der Oije & Steven Freeland, *Universal Jurisdiction in the Netherlands – the right approach but the wrong case? Bouterse and the 'December Murders'*, 20 AUSTL. J. HUM. RTS. (2001) available at:
http://www.austlii.edu.au/au/journals/AJHR/2001/20.html (internal citations omitted) (emphasis added).

[61] *Prosecutor v. Bagaragaza*, ICTR-2005-86-R11*bis*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11*bis* of the Rules of Procedure and Evidence, 19 May 2006.

[62] *Id.*, para. 16.

[63] *Id.*, para. 12. *See also Prosecutor v. Stanković*, IT-96-23/2-PT, Decision on Referral of Case Under Rule 11 *BIS*, 17 May 2005, para. 32, "If this case would be referred to Bosnia and Herzegovina, there would exist an adequate legal framework which criminalizes the alleged behavior of the Accused so that the allegations can be duly tried and determined and which provides for punishment. The Referral Bench must consider, therefore, whether the laws applicable in proceedings before the State Court would permit the prosecution and trial of the Accused, and if found guilty, the appropriate punishment of the Accused, for offences of the type with which he is currently charged before the Tribunal."

noted in this regard that the notion of universal jurisdiction only applies to the establishment of jurisdiction *ratione loci*[64] (i.e. by reason of place)[65] and not to jurisdiction *ratione materiae* (i.e. by reason of the matter involved).[66] The Chamber considered that the fact that Norwegian criminal law did not penalize the crime of genocide meant that the Convention had not been incorporated into its domestic law, thereby making it impossible to use the Convention as a basis for prosecution.[67] Consequently, the Accused's alleged acts could not be given their full legal qualification under Norwegian criminal law and the requirements for jurisdiction were not considered fulfilled.[68]

34. Therefore, even though genocide has been referred to as a crime enjoying *jus cogens* status, this status requires States not to engage in genocide, but does not necessarily require States to punish the crime. States cannot invoke the *jus cogens* nature of the crime to exercise subject matter jurisdiction, if their domestic legal systems do not otherwise provide for this jurisdiction. Cambodia's legal system does not.

III. RELIEF REQUESTED

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

Respectfully submitted,

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ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **30th** day of October, 2009

[64] *Bagaragaza* Decision, para. 13, fn. 11.
[65] BLACK'S LAW DICTIONARY 1269 (West Publishing Co., 7th ed. 1999).
[66] *Id.*
[67] *Bagaragaza* Decision, para. 13, fn. 11.
[68] *Id.*, par. 16.