

**BEFORE THE PRE-TRIAL CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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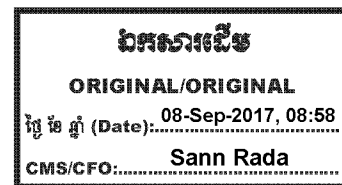
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**CIVIL PARTY CO-LAWYERS' SUBMISSION ON THE POSITION OF THE ECCC  
WITHIN THE CAMBODIAN LEGAL SYSTEM**

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1. The Civil Party Co-Lawyers hereby respectfully submit their *Submission on the Position of the ECCC Within the Cambodian Legal System* to the Pre-Trial Chamber.

### PROCEDURAL HISTORY

2. On 22 February 2017, the Co-Investigating Judges issued the disposition of their Closing Order dismissing all charges against IM Chaem in Case File 004/1.<sup>1</sup> On 10 July 2017, the Co-Investigating Judges issued the Closing Order (Reasons) (the “Closing Order”),<sup>2</sup> against which the International Co-Prosecutor filed an appeal on 9 August 2017.<sup>3</sup> On 18 August 2017, the National Civil Party Co-Lawyer filed a request for an extension of time and for leave to file a Response to the International Co-Prosecutor’s Appeal (the “Request”).<sup>4</sup> On 21 August 2017, the Co-Lawyers for IM Chaem filed a response to the Request<sup>5</sup> and, on 23 August 2017, the National Civil Party Co-Lawyer<sup>6</sup> and the International Co-Prosecutor<sup>7</sup> filed replies. On 29 August 2017, the Pre-Trial Chamber denied the Request but invited the National Civil Party Co-Lawyer to file submissions before the Pre-Trial Chamber on the issue of the position of the ECCC within the Cambodian legal system by 8 September 2017, in English first with Khmer translation to follow at the earliest opportunity.<sup>8</sup>

### SUBMISSION

3. Preliminary to findings on the personal jurisdiction of the ECCC over IM Chaem, the Closing Order discusses the *Position of the ECCC within the Cambodian Legal System – Exclusive Personal, Temporal and Subject-matter Jurisdiction* (Section 2.1.1). In this Section, the Closing Order concludes that one of the effects of the ECCC Law is that it “excludes any

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<sup>1</sup> D308, Closing Order (Disposition), 22 February 2017.

<sup>2</sup> D308/3, Closing Order (Reasons), 10 July 2017.

<sup>3</sup> D308/3/1/1, International Co-Prosecutor’s Appeal of Closing Order (Reasons), 9 August 2017.

<sup>4</sup> D308/3/1/4, National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor’s Appeal of Closing Order Reasons in English with Khmer to Follow, 18 August 2017.

<sup>5</sup> D308/3/1/5, Im Chaem’s Response to the National Civil Party Co-Lawyer’s Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor’s Appeal of Closing Order Reasons in English with Khmer to Follow, 21 August 2017.

<sup>6</sup> D308/3/1/6, National Civil Party Co-Lawyer’s Reply to Im Chaem’s Response to the Request for an Extension of Time and for Leave to File a Response to the International Co-Prosecutor’s Appeal of Closing Order Reasons in English with Khmer to Follow, 23 August 2017.

<sup>7</sup> D308/3/1/7, International Co-Prosecutor’s Reply to Im Chaem’s Response to Civil Party Co-Lawyer’s Request, 23 August 2017.

<sup>8</sup> D308/3/1/8, Pre-Trial Chamber Decision on the National Civil Party Co-Lawyer’s Request Regarding the Filing of a Response to the Appeal Against the Closing Order and Invitation to File Submissions, 29 August 2017. Given the importance of the issue for all Civil Parties, International Civil Party Co-Lawyers Emmanuel JACOMY and Lyman Nguyen hereby also join the present Submission.

personal or subject matter jurisdiction by the ordinary Cambodian courts over the events under the ECCC's temporal jurisdiction."<sup>9</sup> The Closing Order thus purports to legally strip ordinary Cambodian courts of their jurisdiction to adjudicate *any* Khmer Rouge-era crimes, including those that fall outside the ECCC's limited jurisdiction. The Civil Party Co-Lawyers respectfully submit that the Pre-Trial Chamber should redress the Closing Order's erroneous findings on the jurisdiction of ordinary Cambodian courts given that: (I) they were unwarranted, internally inconsistent and would profoundly harm the interests of Civil Parties along with the ECCC's own legacy; and (II) they contravene international and Cambodian law.

**I. THE CLOSING ORDER FINDINGS ON JURISDICTION WERE UNWARRANTED, INTERNALLY INCONSISTENT AND WILL PROFOUNDLY HARM THE INTERESTS OF CIVIL PARTIES AND THE ECCC'S LEGACY IF LEFT UNADDRESSED BY THE PRE-TRIAL CHAMBER**

4. As a threshold matter, there was no need for the Closing Order to address whether ordinary Cambodian courts could theoretically exercise jurisdiction over Khmer Rouge-era crimes committed by individuals not before the ECCC. The Closing Order's broad findings on the jurisdiction of ordinary Cambodian courts were entirely unnecessary to a determination of whether IM Chaem was within the ECCC's own limited personal jurisdiction. These findings also go squarely beyond the ECCC's mandate. The jurisdiction of Cambodian courts is an issue to be determined by the Cambodian courts themselves, not the ECCC. While the ECCC Trial Chamber has acknowledged that "there is no line of authority between the ECCC and national courts,"<sup>10</sup> the Closing Order essentially seeks to strip ordinary Cambodian courts of their jurisdiction by judicial fiat.

5. Further, the Closing Order's findings on the jurisdiction of ordinary Cambodian courts are themselves internally inconsistent. The Closing Order begins its discussion by noting that the exclusivity of the ECCC's jurisdiction extends to persons or events that "are within the personal,

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<sup>9</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶ 23.

<sup>10</sup> Case File No 001/18-07-2007/ECCC/TC, E39/5, Trial Chamber Decision on Request for Release, 15 June 2009, ¶ 13; *see also* Case File No 001/18-07-2007/ECCC/OCIJ (PTC), C5/45, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias 'Duch', 3 December 2007, ¶ 19 ("For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure and *therefore has no jurisdiction to judge the activities of other bodies.*") (emphasis added).

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temporal *and* subject-matter jurisdiction of the ECCC.”<sup>11</sup> According to a plain reading of this language, ordinary Cambodian courts would be barred solely from exercising jurisdiction over cases that fell within the limited jurisdiction of the ECCC, though they could still potentially adjudicate other Khmer Rouge-era cases, including against perpetrators who were neither senior leaders nor most responsible. A similar principle is reflected in the Pre-Trial Chamber decision relied upon by the Closing Order in Section 2.1.1,<sup>12</sup> namely that the ECCC was “delegated” a limited scope of exclusivity of jurisdiction during its lifetime over the prosecution of senior leaders and those most responsible for Khmer Rouge-era crimes.<sup>13</sup>

6. Despite adopting this principle, the Closing Order then significantly broadens its scope, concluding that the ECCC Law serves to “exclud[e] any personal or subject-matter jurisdiction by the ordinary Cambodian courts over the events under the ECCC’s temporal jurisdiction.”<sup>14</sup> In doing so, the Closing Order purports to categorically bar ordinary Cambodian courts from exercising jurisdiction over *any and all* crimes committed between April 1975 and January 1979, regardless of whether the case would otherwise fall within the ECCC’s own limited jurisdiction. If left to stand, such a sweeping pronouncement could have a profound adverse impact on the interests of Civil Parties and the broader class of victims of the Khmer Rouge. By seeking to prohibit ordinary Cambodian courts from serving as future forums of redress for victims, the Closing Order severely tarnishes the ECCC’s legacy by recasting the tribunal as the mechanism through which a near total amnesty for Khmer Rouge-era atrocity crimes was implemented in Cambodia.

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<sup>11</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶ 12 (emphasis added). *See also* Section Header of Section 2.1.1. (entitled “The Position of the ECCC within the Cambodian Legal System – Exclusive Personal, Temporal and Subject-matter Jurisdiction”).

<sup>12</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶ 15 (quoting Case File No 002-D427/2/15, Pre-Trial Chamber Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, ¶ 103.)

<sup>13</sup> Case File No 002-D427/2/15, Pre-Trial Chamber Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, ¶ 103 (“The ECCC Law did not empower the Royal Government of Cambodia to *prosecute senior leaders of the Democratic Kampuchea or those alleged to be mostly responsible for such international crimes*. This was not needed. The Cambodian’s Royal Government was not only free to prosecute such crimes which occurred within its territorial jurisdiction, as a basic exercise of its jurisdiction, it was its obligation under international law to do so. However, rather than using its pre-existing court structure, the Royal Government of Cambodia agreed with the United Nations to establish the ECCC for its international expertise and delegated it jurisdiction to hear *these cases*.”) (emphasis added and citations omitted). The Pre-Trial Chamber’s use of the term “delegated” would further imply that those inherent jurisdictional powers would revert back to the Royal Government of Cambodia once the ECCC ceases to exist.

<sup>14</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶ 23(b).

7. The Pre-Trial Chamber is the only judicial forum through which to redress the Closing Order's conclusions on the jurisdiction of ordinary Cambodian courts over Khmer Rouge-era crimes. Ordinary Cambodian courts have no right of review over the Closing Order.<sup>15</sup> Given that the jurisdiction of ordinary Cambodian courts is not otherwise relevant to the decisions of the ECCC Chambers, the issue is unlikely to be addressed by any of them in the future. The Civil Party Co-Lawyers respectfully submit that it is therefore incumbent on the Pre-Trial Chamber to address the matter within its decision on the appeal of the Closing Order. Failure to do so would leave the Closing Order's conclusion as the definitive position of the ECCC on the matter, with the consequent harm to the Civil Parties' interests and the tribunal's legacy. Moreover, as detailed in Section II *infra*, the Closing Order's determination that ordinary Cambodian courts are stripped of jurisdiction over all Khmer Rouge-era crimes contravenes international and Cambodian law.

## II. AN INTERPRETATION OF THE AGREEMENT AND LAW ESTABLISHING THE ECCC AS PRECLUDING THE JURISDICTION OF THE ORDINARY CAMBODIAN COURTS OVER PERSONS OR EVENTS OUTSIDE OF THE ECCC'S LIMITED JURISDICTION WOULD CONTRAVENE INTERNATIONAL AND CAMBODIAN LAW

8. A plain reading of the Agreement establishing the ECCC,<sup>16</sup> interpreted in the context of the ECCC Law,<sup>17</sup> leads to the conclusion that ordinary Cambodian courts maintain jurisdiction over crimes that do not fall within the limited jurisdiction of the ECCC. A contrary interpretation contravenes international and Cambodian law in that it: (A) runs contrary to an interpretation of the plain terms of the ECCC Agreement's object and purpose; (B) conflicts with the preparatory work and parties' subsequent conduct; and (C) contravenes Cambodian law.

### **A. Article 1 Of The ECCC Agreement And The ECCC Law Must Be Interpreted In Accordance With International Law Principles Of Treaty Interpretation**

9. Under the fundamental principles of treaty interpretation codified in the Vienna Convention on Law of Treaties, ("VCLT") – generally applicable to all treaties and specifically

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<sup>15</sup> Case File No 001/18-07-2007/ECCC/OCIJ (PTC), C5/45, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias 'Duch', 3 December 2007, ¶ 18 ("There is no right to have any decision of the ECCC reviewed by courts outside its structure, and equally there is no right for any of its Chambers to review decisions from courts outside the ECCC.").

<sup>16</sup> Agreement between the United Nations and Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, Phnom Penh, 6 June 2003 ("ECCC Agreement").

<sup>17</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 19 Aug. 2001, with inclusion of amendments as promulgated on 27 October 2004 (NS RKM 1004 006) ("ECCC Law").

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incorporated by Article 2(2) of the ECCC Agreement – a treaty must be interpreted based on its plain meaning taken in the context of its object and purpose.<sup>18</sup> Article 31(1) of VCLT requires that a treaty be interpreted “in good faith in accordance with the ordinary meaning to be given to [its] terms [] in their context and in the light of its object and purpose.”<sup>19</sup> A supplementary means of interpretation is available under Article 32, in light of the preparatory work of the treaty and its context to confirm the meaning where an interpretation under Article 31 results in an “ambiguous or obscure” meaning or a “manifestly absurd or unreasonable” result.<sup>20</sup> Finally, State practice, including any subsequent agreement between the parties or any subsequent practice in the treaty’s application is an authentic method of treaty interpretation and, where present, could be determinative.<sup>21</sup> An analysis under the VCLT follows.

**1. *The OCIJ’s Interpretation Ignores the Plain Meaning and Context of the ECCC Agreement While Displacing Cambodia’s Sovereignty in Contravention of VCLT Article 31***

10. The OCIJ’s interpretation ignores the plain meaning and context of the ECCC Agreement, of which the ECCC Law is an integral part, and is contrary to its object and purpose. Article 1 of the ECCC Agreement provides the “legal basis and the principles” for establishing cooperation between the UN and Cambodia in “bringing to trial senior leaders . . . and those who were most responsible” for serious violations of Cambodian and international law committed during the Khmer Rouge period. Article 2 recognizes that the ECCC has personal jurisdiction over senior leaders and those most responsible for these crimes.<sup>22</sup> There is no provision in the ECCC Agreement governing crimes committed by lower-level officials of the Khmer Rouge regime or by individuals outside of ECCC’s personal jurisdiction. There is also no provision constituting a jurisdictional waiver of the ordinary Cambodian courts over crimes committed by lower-level individuals during the Khmer Rouge period. The natural reading, therefore, is that

<sup>18</sup> Vienna Convention on the Law of Treaties (with annex) (23 May 1969), 1155 U.N.T.S. 331 (“VCLT”), art. 31-32.

<sup>19</sup> *Id.* Article 31 VCLT reflects customary international law. See, e.g., *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment (13 Dec. 1999), ICJ Reports 1999, p. 1059, ¶ 18.

<sup>20</sup> VCLT, Art. 32.

<sup>21</sup> See *id.*, Art. 31 (3) (a) & (b).

<sup>22</sup> See also ECCC Agreement Preamble (to aid in inferring the ECCC’s object and purpose the Preamble similarly provides “[...] WHEREAS the Cambodian authorities have requested assistance from the United Nations 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.”).

there is no prohibition on the inherent exercise of jurisdiction by the ordinary Cambodian courts over crimes outside the ECCC's limited scope.

11. Indeed, States have the inherent authority to regulate and prescribe their own domestic jurisdiction under Article 2(7) of the UN Charter. Numerous resolutions passed by the General Assembly ("GA") and other UN organs have recognized that respect for a State's domestic jurisdiction and sovereignty are fundamental tenets of international law.<sup>23</sup> What is more, state practice also establishes domestic jurisdiction over crimes that may be regarded as a violation of international criminal law as a norm of customary international law.<sup>24</sup>

12. The Closing Order leads to an absurd result under Article 31 of the VCLT, displacing Cambodia's sovereignty by surrendering its core right to regulate activities within its territory and acts committed by its nationals – without Cambodia's explicit consent to do so.

**2. The OCIJ's Interpretation Leads to a Further Absurd Result, Creating Blanket Amnesty in Contravention of the Object and Purpose of the ECCC Law**

13. The OCIJ's expansive interpretation of the ECCC's exclusive jurisdiction essentially grants *implied* impunity for virtually all atrocity crimes committed during the Khmer Rouge era, an additional absurd result under Article 31 of the VCLT. There is wide agreement that domestic amnesties for serious international crimes are invalid under international law.<sup>25</sup> As the ECCC Trial Chamber itself has observed, Cambodia has the obligation to prosecute or extradite persons who commit grave breaches under the 1949 Geneva Conventions and genocide under the 1948

<sup>23</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N.G.A. A/RES/25/2625 (24 October 1970); Declaration and Programme of Action on a Culture of Peace, U.N. GAOR, 53<sup>rd</sup> Sess., U.N. Doc. A/RES/53/243 (1999).

<sup>24</sup> See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, Art 5; UN Human Rights Committee General Comment No. 31 (80), UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 ("General Comment No. 31"), ¶¶ 15, 18 (The nature of the legal obligation imposed on States parties); *Bautista de Arellana v. Colombia*, Comm. No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 (1995), Views, Human Rights Committee, 27 October 1995, ¶¶ 8.6 ("the State party is under a duty to investigate thoroughly alleged violations of human rights ... and to prosecute criminally, try and punish those held responsible for such violations").

<sup>25</sup> See e.g., Office of the United Nations High Commissioner for Human Rights ("OHCHR"), RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: AMNESTIES (2009), Chap. II, p. 11 (noting that "amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations); *Prosecutor v. Furundzija*, Case IT-95-17-11-T, Judgement, ICTY Trial Chamber, 10 December 1998, ¶¶ 155-156 (noting in its analysis of torture as a *jus cogens* crime that "perpetrators of torture acting upon or benefiting from [national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law] may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime.").

Genocide Convention.<sup>26</sup> There is also growing consensus that domestic amnesties for other serious crimes, such as crimes against humanity, are likewise invalid under customary international law.<sup>27</sup> In the face of these international norms and obligations, the Closing Order nevertheless ascribes to the U.N. and Cambodia a willingness to sign, and thus provide their imprimatur to, an agreement that enshrines widespread *de facto* impunity for atrocity crimes.

14. As detailed in Annex A, the Statement of Professor David Scheffer, the former United States Ambassador at Large for War Crimes Issues who played an instrumental role in the creation of the ECCC, the ECCC Agreement and ECCC Law “were the result of exacting deliberations over several years.”<sup>28</sup> It stretches credulity that an implied intent to strip ordinary Cambodian courts should be read into these documents, particularly given the position of the United Nations on blanket amnesties and the otherwise consistently vocal position of the Cambodian government on issues pertaining to its sovereignty.<sup>29</sup> “Nor did any parties ever suggest during the course of [then U.S. Ambassador at Large for War Crimes Issues Scheffer’s] extensive negotiations with them that this intent was to be implied.”<sup>30</sup>

15. In sum, the OCIJ’s interpretation not only runs afoul of the plain meaning of the terms of the ECCC Agreement and ECCC Law, but also runs contrary to their stated object and purpose of limiting the jurisdiction of the ECCC to senior leaders and those most responsible for serious violations of Cambodian and international law. The OCIJ’s interpretation is a classic example of judicial overreach, which purports to deprive Cambodia of the sovereign right to prosecute members of the Khmer Rouge for acts committed within its territory and enshrines *de facto* impunity. Such an interpretation must be rejected as being inconsistent with the principles of treaty interpretation codified under Article 31 of the VCLT.

#### **B. The Negotiating History And Subsequent Practice Of The Parties Do Not Confirm OCIJ’s Interpretation**

<sup>26</sup> Case File No. 002/19-09-2007/ECCC/TC, E51/15, Decision on Ieng Sary’s Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), 3 Nov. 2011, ¶¶ 37-52.

<sup>27</sup> OHCHR, Chap. II, p. 11; General Comment No. 31, ¶ 18; *Prosecutor v. Erdemovic*, Case No. IT -96-22-T, Sentencing Judgement, Trial Chamber, 29 November 1996, ¶ 28; *Case of Almonacid-Arellano et al v. Chile*, Inter-American Court of Human Rights, Judgement of September 26, 2006, ¶ 114 (determining “that the States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions”).

<sup>28</sup> Statement of Professor David Scheffer, 6 September 2017, ¶ 8 (Annex A).

<sup>29</sup> Statement of Professor David Scheffer, 6 September 2017, ¶ 8 (Annex A).

<sup>30</sup> Statement of Professor David Scheffer, 6 September 2017, ¶ 8 (Annex A).



16. The conclusion that the ECCC has exclusive jurisdiction over all Khmer Rouge-era crimes is not supported by supplementary means of interpretation under Article 32 of the VCLT, detailed above. The OCIJ's interpretation is contradicted by the negotiating history of the ECCC and subsequent practice, as well as generally accepted principles of international law.

***1. Exclusive Jurisdiction Over All Khmer Rouge-Era Crimes is Contrary to the Preparatory Work and Circumstances of the Conclusion of the ECCC Agreement***

17. The preparatory work confirms that the drafters of the ECCC Agreement and ECCC Law envisioned establishing an internationalized tribunal that would try senior leaders and those most responsible for crimes during the Khmer Rouge regime. That the drafters did not envision that the ECCC would try *every* individual who violated international law during the relevant time-period *does not*, however, lead to the conclusion that those are the *only* persons who could be ever tried. As outlined below, the Government of Cambodia and the United Nations designed a response to the crimes of the Khmer Rouge to address the problem of impunity, to proceed in accordance with international standards and to draw upon lessons learned from the international *ad hoc* tribunals for Rwanda and the former Yugoslavia.

18. In 1997, the Special Representative of the Secretary-General for Human Rights in Cambodia submitted a report, which documented his “grave concern[s]”, as well as those of the Commission on Human Rights, over continued impunity for atrocities committed by the Khmer Rouge.<sup>31</sup> The Commission on Human Rights “called upon the Government of Cambodia to prosecute, in accordance with due process of law and international standards relating to human rights, all those who had perpetrated human rights violations.”<sup>32</sup> It is clear that blanket amnesties for crimes committed by the Khmer Rouge were never envisioned in the Special Representative's report.<sup>33</sup>

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<sup>31</sup> Situation of human rights in Cambodia, Rep. of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr. Thomas Hammarberg, submitted in accordance with Commission resolution 1996/54 (“1997 Hammarberg Report”), ¶ 8, E/CN.4/1997/85 (Jan. 31, 1997).

<sup>32</sup> 1997 Hammarberg Report ¶ 8; *see also id.* ¶ 71 (“The most crucial challenge in the promotion and protection of human rights in Cambodia is impunity.”).

<sup>33</sup> 1997 Hammarberg Report ¶ 74 (“A thorough discussion of the issue of impunity is also desirable in Cambodia against the background of the gross human rights violations committed in the 1970s. It may in the short run be politically inconvenient to insist on thorough investigations into what happened and who was responsible, but the Special Representative believes such efforts are necessary in order to demonstrate that crimes of that horrendous character can never be accepted. It would undermine the sense of justice in society if the Khmer Rouge killings and other atrocities were amnestied in a manner that pre-empted and hindered a judicial process.”).

19. In identical letters dated June 21, 1997, Co-Prime Ministers Hun Sen and Prince Rannarid requested assistance from the UN to bring to justice those responsible for the crimes committed by the Khmer Rouge regime from 1975 to 1979.<sup>34</sup> The Co-Prime Ministers were “aware of similar efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia, and ask that similar assistance be given to Cambodia.”<sup>35</sup>

20. The GA adopted Resolution 52/135 to address the human rights situation in Cambodia and to respond to the Government’s request for assistance. Of concern to the GA was “the continuing problem of impunity.”<sup>36</sup> It “call[ed] upon the Government of Cambodia to prosecute, in accordance with due process of the law and international standards relating to human rights all those who have perpetrated human rights violations.”<sup>37</sup> The GA further “urge[d] the Government of Cambodia as a high priority to investigate thoroughly and impartially and to bring to justice those responsible for such serious crimes.”<sup>38</sup>

21. A group of experts was convened pursuant to GA Resolution 52/135. In a preface to the Report of the Group of Experts for Cambodia, then-UN Secretary General Kofi Annan observed “impunity is unacceptable in the face of genocide and other crimes against humanity.”<sup>39</sup> He strongly advocated for any tribunal to be international in character, expressing doubts at the ability of the domestic courts in their then state to carry out trials compliant with international standards of justice.<sup>40</sup> Although Cambodia ultimately rejected the recommendation that the UN establish an *ad hoc* international tribunal to try Khmer Rouge officials in favor of an internationalized domestic tribunal, the Report of the Group of Experts forms an integral piece of the legislative history of the ECCC Agreement and ECCC Law.

22. The experts examined the options for bringing individuals to justice. Through their interviews, they observed that “Cambodian society will only be able to understand and move beyond its past when it sees those who undertook massive atrocities brought before impartial

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<sup>34</sup> Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, U.N. Doc A/51/930 (June 24, 1997).

<sup>35</sup> *Id.*

<sup>36</sup> G.A. Res. 52/135, ¶ 9, U.N. Doc. A/RES/52/135 (Feb. 27, 1998).

<sup>37</sup> G.A. Res. 52/135, ¶ 5, U.N. Doc. A/RES/52/135 (Feb. 27, 1998).

<sup>38</sup> G.A. Res. 52/135, ¶ 6, U.N. Doc. A/RES/52/135 (Feb. 27, 1998).

<sup>39</sup> Identical letters dated 15 March 1999 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, p. 3, U.N. Doc A/53/850 (March 16, 1999).

<sup>40</sup> *Id.*

justice.”<sup>41</sup> The Group of Experts recommended, *inter alia*, that the proposed international tribunal should not attempt “to bring to justice all or even most people who committed violations of international or Cambodian law during the relevant period”.<sup>42</sup> That the Group of Experts envisioned a limited jurisdiction at the proposed international tribunal to senior officials and those most responsible does not lead to the conclusion that it intended blanket amnesty for those outside of the ECCC’s jurisdiction. The solution proposed was in the context of a broad understanding of the then limited capacity of Cambodian courts to investigate and prosecute these cases, as well as a recognition of the limitations for funding for international tribunals. Should the Cambodian courts increase their capacity to try those responsible for violations of international law under the Khmer Rouge regime, the Report in no way precludes them from doing so. Thus, even though the experts concluded that an attempt should not be made to bring all individuals to justice at the proposed international tribunal,<sup>43</sup> the legislative history does not suggest that anyone falling outside of the jurisdiction of the ECCC *may not* be brought to justice within the ordinary Cambodian courts if and when they should develop the capacity to hear such cases.

23. Additional reports by the Special Representative as well as GA Resolutions reinforce the notion that the UN and UN Member States never envisioned blanket amnesty for perpetrators of grave human rights violations and that Cambodia intended to preserve its sovereign rights with respect to the administration of justice.<sup>44</sup> Further, as detailed in Annex A, Professor David Scheffer affirms that the citations to his research in the Closing Order (Reasons) are inapposite and “do not support the Co-Investigating Judges’ findings on the exclusivity of the ECCC jurisdiction.”<sup>45</sup> Rather, “the available negotiating history of the ECCC undercuts the conclusion

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<sup>41</sup> *Id.*, ¶ 100.

<sup>42</sup> *Id.*, ¶ 106.

<sup>43</sup> *Id.*, ¶ 106.

<sup>44</sup> *See, e.g.*, Situation of human rights in Cambodia, Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr. Thomas Hammarberg, submitted in accordance with Commission resolution 1998/76, p. 3 E/CN.4/2000/109 (Jan. 13, 2000) (Reporting that “[t]he Prime Minister reiterated his concern that arrangements for the tribunal should respect Cambodian sovereignty.”); G.A. Res. 54/171, U.N. Doc. A/RES/54/171 (Feb. 15, 2000) (General Assembly Resolution stressing that “accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State.”).

<sup>45</sup> Statement of Professor David Scheffer, 6 September 2017, ¶¶ 6-8 (Annex A) (emphasis in the original).

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that the creation of the ECCC was intended to deprive ordinary Cambodian courts of *all* residual jurisdiction over Khmer Rouge-era crimes.”<sup>46</sup>

24. Despite the foregoing indications to the contrary, the Closing Order nevertheless interprets the lack of a *ne bis in idem* or primacy clause in the ECCC Agreement and ECCC Law as indicative of an implicit intent by the parties to deprive ordinary Cambodian courts of their jurisdiction over all Khmer Rouge-era crimes.<sup>47</sup> The Closing Order misinterprets the absence of such clauses in the ECCC’s constitutive documents. At the time of the ECCC negotiations, the Cambodian judicial system lacked the resources and capacity to properly handle Khmer Rouge-era atrocity trials. Indeed, it was precisely because of the impossibility of conducting these trials domestically that Cambodia first requested United Nations assistance.<sup>48</sup> The lack of a provision regulating the relationship between the ECCC and the ordinary Cambodian courts reflects the reality at the time, namely that the Cambodian courts were functionally unequipped to handle these trials. There was thus no need to delineate their respective responsibilities with regard to Khmer Rouge-era cases, particularly given the short time frame over which it was anticipated the ECCC would complete its mandate.<sup>49</sup> For the same reasons, the Closing Order’s reliance on the Supreme Court Chamber’s jurisprudence in support of its overbroad interpretation of the exclusivity of the ECCC’s jurisprudence is misplaced.<sup>50</sup> Unsurprisingly, the Supreme Court Chamber has acknowledged the lack of a referral mechanism before the ECCC and, like the Pre-Trial Chamber, has noted that the ECCC was delegated a degree of exclusivity of jurisdiction, though it has never fully defined its scope.<sup>51</sup>

25. The Expert Report, the negotiation of the ECCC Agreement and the ECCC Law occurred against the backdrop of the ICTY and the ICTR’s progression of work. It was always the design of Cambodia as well as the UN to draw upon the experience of other tribunals. Both the UN and Cambodia gave particular reference to the ICTY and the ICTR. The jurisdictional provisions of the statutes of the ICTY and the ICTR were far broader than that contained in the ECCC law,

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<sup>46</sup> Statement of Professor David Scheffer, 6 September 2017, ¶ 8 (Annex A) (emphasis in the original).

<sup>47</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶ 17.

<sup>48</sup> Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, U.N. Doc A/51/930 (June 24, 1997) (“Cambodia does not have the resources or expertise to conduct this very important procedure. Thus, we believe it is necessary to ask for the assistance of the United Nations.”). See also Statement of Professor David Scheffer, 6 September 2017, ¶¶ 8-9 (Annex A).

<sup>49</sup> Report of the Secretary-General on Khmer Rouge trials, U.N. Doc A/57/769, para. 56 (31 March, 2003).

<sup>50</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶¶ 12-14.

<sup>51</sup> Case File 001-F28, *Appeal Judgment of Case 001*, 3 February 2012, ¶ 71.

including no limitation in either statute to senior leaders or those most responsible.<sup>52</sup> During the late 1990s and early 2000s, it became apparent however that the *ad hoc* tribunals did not have the capacity to handle the caseload required to bring to justice all those who fell within their personal jurisdiction. Thus, the tribunals devised Completion Strategies to allow them to conclude their work.<sup>53</sup> These strategies provided for the transfer of cases of intermediate and lower-ranking officials to competent national jurisdictions that had increased capacity. The Completion Strategies of the ICTY and the ICTR had the tribunals concentrate on the “prosecution and trial of the most senior leaders suspected of being most responsible” for the crimes committed.<sup>54</sup> The recommendation of the Group of Experts that any tribunal constituted “focus upon those persons most responsible for the most serious violations of human rights during the reign of Democratic Kampuchea” was drafted at a time when it was understood that existing *ad hoc* tribunals were struggling with their caseload. The shift to a more limited scope of cases for the ECCC – focusing on senior leaders and those most responsible rather than the broad conception of personal jurisdiction originally envisioned in the *ad hoc* tribunal statutes – was thus a product of lessons learned, not the result of an intent to provide impunity to all other Khmer Rouge-era perpetrators.

## ***2. Subsequent Statements and Practices Following the Creation of the ECCC Similarly Fail to Support the OCIJ’s Interpretation***

26. The Closing Order fails to cite to any statements made by the UN or the Cambodian government following the creation of the ECCC that would support its interpretation. If anything, the available public statements run counter to the OCIJ’s interpretation as both the Cambodian government and the UN have continued to highlight combatting impunity as critical to addressing the legacy of the Khmer Rouge.<sup>55</sup>

27. Notably, numerous organs of the ECCC have taken the position that a prosecution for Khmer Rouge-era crimes before the ordinary Cambodian courts *is* possible. The Co-Prosecutors

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<sup>52</sup> Under Article 6 of the Statute of the ICTY, the tribunal had jurisdiction over “all natural persons.” Statute of the International Criminal Tribunal for the former Yugoslavia, art. 6, 25 May 1993, 32 I.L.M. 1192. Likewise, under the Statute of the ICTR, the tribunal had “jurisdiction over natural persons.” Statute of the International Criminal Tribunal for Rwanda, Art. 5, 8 Nov. 1994, 33 I.L.M. 1602.

<sup>53</sup> S.C. Res. 1503, U.N. Doc S/RES/1503 (Aug. 28, 2003).

<sup>54</sup> *Id.*

<sup>55</sup> See, e.g., Joint Statement by H.E. Deputy Prime Minister Sok An and Ms. Patricia O’Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel, UNAKRT (19 April 2010) (stating “Both the Government and the United Nations are committed to ending impunity for the atrocities of the former Khmer Rouge regime, and fully support and respect the ECCC and its independent judicial process.”).

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and separate sets of lawyers for ECCC defendants have repeatedly briefed the issue of the right against self-incrimination and the extent to which the ECCC can provide assurances of non-prosecution before the ECCC or in any other Cambodian court under current Cambodian law. In this context, counsel for ECCC defendants have repeatedly highlighted the possibility of prosecutions before the ordinary Cambodian courts.<sup>56</sup> Similarly, the Office of the Co-Prosecutors has acknowledged the possibility, albeit remote, of these prosecutions.<sup>57</sup> Moreover, the ECCC Trial Chamber has, on the basis of the possibility of such future prosecutions, allowed witnesses not to answer questions for fear of self-incrimination.<sup>58</sup> Indeed, the Trial Chamber has explicitly stated that it “considers it inappropriate given the ECCC's role and legal framework to provide assurances of non-prosecution before other Cambodian courts.”<sup>59</sup>

28. The empirical fact that, to date, there have been no investigations or prosecutions of Khmer Rouge-era crimes within the Cambodian legal system, as highlighted by the OCIJ,<sup>60</sup> does not mean that these are impossible as a *legal* matter.

### **C. The OCIJ's Interpretation Is Contrary To Cambodian Law**

29. The Closing Order is contrary to Cambodian law in that it purports to deprive ordinary Cambodian courts of core functions attributed to them by the 1993 Constitution of Cambodia. The 1993 Constitution of Cambodia guarantees its citizens the right to “denounce, make complaints, or claim for compensation for damages caused by any breach of the law by

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<sup>56</sup> See, e.g., Case No: 002/19-09-2007-ECCC/TC, E200/1/1, Ieng Sary's Response to the Co-Prosecutors' Request for Leave to Provide Assurances With Respect to Non-Prosecution for Witnesses (“... the Co Prosecutors assert that the [Assurance Regarding Non-Prosecution (“ARNP”)] informs witnesses that with respect to events which took place in the 1975-79 period they will not be prosecuted at the ECCC or in any other Cambodian court under current Cambodian law. This assertion is deceptive the ARNP cannot be made with any degree of intellectual honesty and judicial integrity if its purpose is to assure witnesses that there remains ‘[no] possibility of prosecution however unlikely.’”); see also Transcript, Trial Chamber, Case 002, 18 April 2012, E1/63.1, p. 17, In: 21-25 (“So this Court ... is capable of providing assurances that there will be no prosecutions here. It's our position that it is not capable – it is not competent to provide assurances that this witness will not be prosecuted by the National Court ...”).

<sup>57</sup> Transcript, 3 April 2012, Trial Chamber, Case 002, E1/58.1, p. 74, In: 20 – 25 (“Your Honour, in relation to S-21, I mean, this witness has given significant evidence of his criminal involvement ... in his testimony to date, so I think it may be appropriate on those questions that he answer, but certainly, in relation to M-13, there has been no conviction for this ... witness, and there always remains a possibility of a prosecution, however unlikely.”).

<sup>58</sup> Transcript, 4 April 2012, Trial Chamber, Case 002, E1/59.1, p. 10, In: 5 - 7

<sup>59</sup> Case File 002, E200/4, Memorandum from NIL Nonn, President of the Trial Chamber to All Parties in Case 002 regarding Permitted form of assurances of non-prosecution, 19 July 2012, ¶ 2. See also Case File 002, E200/3, Memorandum from NIL Nonn, President of the Trial Chamber to All Parties in Case 002 regarding Trial Chamber Response to Co-Prosecutors' Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses (E200), 19 June 2012, ¶ 2.

<sup>60</sup> D308/3, Closing Order (Reasons), 10 July 2017, ¶ 24.

institutions of the state.”<sup>61</sup> The Constitution recognizes the judiciary as an “independent power” that “shall [...] protect the rights and freedoms of citizens.”<sup>62</sup> It states that the Judiciary “shall consider all legal cases including administrative cases” and that “this power shall be vested in the Supreme Court and in all courts of all sectors and levels.”<sup>63</sup>

30. Further, if left to stand, the findings of the Closing Order would force the Cambodian government to default on its international law obligation as enshrined in the 1993 Constitution of Cambodia.<sup>64</sup> Indeed, as discussed *supra*,<sup>65</sup> the widespread *de facto* amnesty envisioned by the Closing Order violates international law and Cambodia’s own treaty obligations. Given the domestic incorporation of human rights obligations pursuant to the 1993 Constitution of Cambodia, these violations are also inherently violations of Cambodia’s internal law.

31. The Closing Order is dismissive of whether any domestic legal bases would permit ordinary Cambodian courts to adjudicate Khmer Rouge-era crimes. Whether, and on what domestic legal bases, ordinary Cambodian courts might determine that they are able to adjudicate these crimes is a matter for these courts to resolve themselves however, and is beyond the purview of the Co-Investigating Judges.<sup>66</sup> Cambodian courts may decide that the 1993 Constitution of Cambodia allows for, or even requires, the direct application of offences recognized under customary international criminal law for Khmer Rouge-era crimes. Similarly, they may, emulating the courts of a number of other countries,<sup>67</sup> rule to permit prosecutions for crimes on the basis of provisions (like those in Articles 183 to 198 of the 2009 Cambodian Penal Code criminalizing genocide, crimes against humanity and war crimes) that were enacted after

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<sup>61</sup> The Constitution of the Kingdom of Cambodia (1993, with amendments through 2008), Article 39.

<sup>62</sup> *Id.*, Article 128.

<sup>63</sup> *Id.*

<sup>64</sup> The Constitution of the Kingdom of Cambodia (1993, with amendments through 2008), Article 31 (which “recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights and the covenants and conventions related to human rights, women’s rights and children’s rights.”).

<sup>65</sup> See Section II.A.2.

<sup>66</sup> Case File No 001/18-07-2007/ECCC/OCIJ (PTC), C5/45, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias ‘Duch’, 3 December 2007, ¶ 19 (“For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure and *therefore has no jurisdiction to judge the activities of other bodies.*”) (emphasis added).

<sup>67</sup> See e.g., United Kingdom, R. v. Sawoniuk, Court of Appeal (Criminal Division) (10 February 2000) (affirming a conviction of two counts of murders constituting war crimes committed in 1942 under the War Crimes Act of 1991); France, The Prosecutor v. Klaus Barbie, Court of Cassation (Criminal Chamber), Appeal No: 85-95166 (20 December 1985) (holding that a lower court could proceed against the defendant on charges of crimes against humanity committed in 1943-44 per, inter alia, the Law of 26 December 1964 and a 1983 provision of the French Code of Criminal Procedure); Israel, Attorney General v. Adolf Eichmann, Supreme Court of Israel, Criminal Appeal 336/61 (29 May 1962) (holding that the defendant could be found guilty of international crimes based on the Law of 1950).

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the commission of the crimes. Or, they might profess a different interpretation of the tolling possible for the statute of limitations under the 1956 Penal Code. Going forward, Cambodia may even enact additional laws that provide its national courts more express jurisdiction over Khmer Rouge-era crimes. As it stands however, the Closing Order purports to categorically bar the ordinary Cambodian courts from ever addressing for themselves whether they can exercise jurisdiction over this period. The Civil Party Co-Lawyers respectfully submit that the Pre-Trial Chamber should not condone the Co-Investigating Judges' attempts to usurp the sovereignty of Cambodia, in violation of international and Cambodian law, on such a significant matter.

### CONCLUSION

32. In light of the foregoing, the Civil Party Co-Lawyers respectfully request that the Pre-Trial Chamber redress the Closing Order's erroneous findings on the scope of the ECCC's exclusive jurisdiction and declare that the extent to which ordinary Cambodian courts have the legal and institutional capacity to adjudicate Khmer Rouge-era crimes is an issue entrusted to those courts' own determination.

Respectfully submitted,

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