

## BEFORE THE TRIAL CHAMBER

## EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**IENG SARY'S RULE 89 PRELIMINARY OBJECTION (STATUTE OF  
LIMITATIONS FOR GRAVE BREACHES)**


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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rule 89 of the ECCC Internal Rules ("Rules"), this preliminary objection to the ECCC's jurisdiction to apply Grave Breaches of the Geneva Conventions ("grave breaches"). This motion is made necessary because the statute of limitations found in the 1956 Penal Code bars the application of Article 6 of the Establishment Law (Grave Breaches). This Preliminary Objection is made subject to the proviso that it is made in the abstract, without the benefit of the Pre-Trial Chamber's reasoning for its Decision on Mr. IENG Sary's Appeal of the Closing Order.<sup>1</sup>

## I. ARGUMENT

1. The application of grave breaches at the ECCC is subject to a statute of limitations which has expired, thus barring the jurisdiction of the ECCC to apply grave breaches. Article 4 of the Establishment Law states in pertinent part: "The acts of genocide, which have no statute of limitations..."<sup>2</sup> Article 5 of the Establishment Law states in pertinent part: "Crimes against humanity, which have no statute of limitations..."<sup>3</sup> However Article 6 of the Establishment Law, which relates to grave breaches, does not have such a caveat. Therefore, a statute of limitations is applicable to grave breaches.
2. The 1956 Penal Code sets out a statute of limitations of 10 years for felonies committed in Cambodia.<sup>4</sup> A felony is described by the 1956 Penal Code as a crime which carries a sentence of a minimum of five years.<sup>5</sup> The crime of grave breaches carries a minimum five year sentence at the ECCC.<sup>6</sup> Grave breaches must be considered to be a felony. As a

<sup>1</sup> Part and parcel of a Decision is its reasoning. Absent such reasoning, part of the Defence's task in making these Preliminary Objections has been to undertake an exercise in clairvoyance, attempting to anticipate the reasons for the Pre-Trial Chamber's rejection of the arguments the Defence made in IENG Sary's Appeal against the Closing Order. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, ERN: 00617486-00617631.

<sup>2</sup> Emphasis added.

<sup>3</sup> Emphasis added.

<sup>4</sup> 1956 Penal Code, Art. 109 states in pertinent part: "A person who committed a felony more than 10 years ago ... that person will not be punished..." (unofficial translation).

<sup>5</sup> *Id.*, Art. 21 states in pertinent part: "There are three types of felonies: 1. Capital punishment; 2. Life imprisonment with severe forced labor; 3. Limited term of imprisonment with severe forced labor... Capital punishment is the third degree felony... Life imprisonment with severe forced labor is second degree felony... Limited term of imprisonment with severe forced labor is first degree felony." Art. 32 states in pertinent part: "Life imprisonment with severe forced labor is only applied to the person whose term of punishment is life imprisonment." Art. 33 states in pertinent part: "Limited term of imprisonment with severe forced labor is imposed for a period at least 5 year and up to 20 years ... for first degree felony." (Unofficial translation).

<sup>6</sup> Establishment Law, Art. 39 states in pertinent part: "Those who have committed any crime as provided in Articles 3 new, 4, 5, 6 [grave breaches], 7 and 8 shall be sentenced to a prison term from five years to life imprisonment."

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result, there is a 10 year statute of limitations for grave breaches. This ten year period would have expired in 1989 for crimes which were allegedly committed in 1979.

3. Article 3 new of the Establishment Law, which relates to national crimes, states in pertinent part: "The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above...." The crimes "enumerated above," in Article 3 new, are solely national crimes. Therefore, this extension, if applicable at all, is explicitly not applicable to grave breaches. The Trial Chamber thus does not have jurisdiction to apply Article 6 of the Establishment Law to Mr. IENG Sary.
4. The applicable statute of limitations for grave breaches has expired and cannot be retroactively extended. This would violate the principle of non-retroactivity of law set out in the 1956 Penal Code,<sup>7</sup> and in the International Covenant for Civil and Political Rights<sup>8</sup> and the Universal Declaration of Human Rights,<sup>9</sup> which the ECCC must respect pursuant to the Cambodian Constitution.<sup>10</sup>
5. Some Civil Law countries, such as the former West Germany<sup>11</sup> and Hungary,<sup>12</sup> have held that prosecutions based on retroactive extensions of statutes of limitations are unconstitutional where the original statutes of limitations had expired. In other jurisdictions, such as the Netherlands, legislatures have abolished statutes of limitations for serious crimes, but have taken care not to apply the change retroactively to time-barred offenses.<sup>13</sup> In Japan, the Diet recently abolished the statute of limitations for murder and extended it for a number of other crimes; the new law only applied to cases in which the previous statute of limitations had not expired.<sup>14</sup>

<sup>7</sup> See 1956 Penal Code, Art. 6.

<sup>8</sup> International Covenant on Civil and Political Rights, Art. 15(1).

<sup>9</sup> Universal Declaration of Human Rights, Art. 11(2).

<sup>10</sup> See Constitution, Art. 31.

<sup>11</sup> See Martin Clausnitzer, *The Statute of Limitations for Murder in the Federal Republic of Germany*, 29 INT'L & COMP. L.Q. 473, 478-79 (1980) ("Clausnitzer").

<sup>12</sup> See RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 289 (2007) ("KOK").

<sup>13</sup> *Id.*, at 299-301.

<sup>14</sup> See Shinichi Kawarada, *Japan Abolishes Statute of Limitations on Murder, Extends Others*, ASAHI SHIMBUN, 28 April 2010.



6. The United States Supreme Court, whose Constitution prohibits the retroactive application of law, was confronted with a similar issue in *Stogner v. California*.<sup>15</sup> In that case, the petitioner Stogner was indicted in 1998 for child sexual abuse which allegedly occurred between 1955 and 1973. At the time the crimes were allegedly committed, the statute of limitations was only three years. A new statute of limitations enacted in 1993 permitted prosecution where the prior statute of limitations had expired if prosecution began within a year from when the victim submitted a report to the police. The Court held that the new statute of limitations could not be applied to Stogner. It explained that the issue was not whether child sexual abuse was criminalized at the relevant time, but “[a]fter (but not before) the original statute of limitations had expired, a party such as Stogner was not ‘liable to any punishment.’ California’s new statute therefore ‘aggravated’ Stogner’s alleged crime, or made it ‘greater than it was, when committed,’ in the sense that, and to the extent that, it ‘inflicted punishment’ for past conduct that (when the new law was enacted) did not trigger any such liability.”<sup>16</sup> The Court concluded:

First, the new statute threatens the kinds of harm that, in this Court’s view, the *Ex Post Facto* Clause seeks to avoid. Long ago the Court pointed out that the Clause protects liberty by preventing governments from enacting statutes with ‘manifestly *unjust and oppressive*’ retroactive effects. Judge Learned Hand later wrote that extending a limitations period after the State has assured ‘a man that he has become safe from its pursuit ... seems to most of us unfair and dishonest.’ In such a case, the government has refused ‘to play by its own rules.’ It has deprived the defendant of the ‘fair warning,’ that might have led him to preserve exculpatory evidence.<sup>17</sup>

7. Evidence that States view the abolition or amendment of a statute of limitations for crimes that have already been time-barred as a violation of the principle of non-retroactivity can be seen from States’ reactions to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Many States considered that this Convention would violate the principle of non-retroactivity, as it was meant to apply to these crimes “irrespective of the date of their commission.”<sup>18</sup> For this reason, this Convention was not widely ratified.<sup>19</sup> The

<sup>15</sup> *Stogner v. California*, 539 U.S. 607 (2003).

<sup>16</sup> *Id.*, at 613.

<sup>17</sup> *Id.*, at 611 (internal citations omitted).

<sup>18</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), Art. 1.

<sup>19</sup> See Christine Van den Wyngaert & John Dugard, *Non-Applicability of Statute of Limitations*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY VOL. 1 874-75 (2002).

Netherlands, for example, would not ratify this Convention for that particular reason,<sup>20</sup> and Mexico and Peru ratified only after attaching reservations stating that the Convention would not apply to crimes committed prior to its entry into force.<sup>21</sup> Cambodia has neither signed nor ratified this Convention.

8. France, whose legal system Cambodia's is modeled after, differentiates between grave breaches, which have a statute of limitations, and crimes against humanity which do not have a statute of limitations. France has stringently defended its statute of limitations on war crimes prosecutions, so long as these do not amount to crimes against humanity. In the *Barbie* case, the *Cour de Cassation* stated:

Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur the acts of brutality which may have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity. There is no principle of law with an authority superior to that of French law which would allow war crimes ... to be declared not subject to statutory limitation.<sup>22</sup>

France, like Cambodia, never became a party to the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity. By explicitly stating that crimes against humanity do not have a statute of limitations and by not including this express provision in relation to grave breaches, the Establishment Law was clearly drafted to model the French approach to differentiating between these crimes.

9. The principle of strict construction requires that when a law is clear, it be applied as drafted. Articles 4 and 5 of the Establishment Law both expressly state "which have no statute of limitations"; Article 6 does not. Therefore, Article 6 has a statute of limitations, as a statute of limitations was applicable to all crimes committed in Cambodia at the relevant time pursuant to the 1956 Penal Code. Should the Trial Chamber determine that there is any ambiguity in the law, such ambiguity must be resolved in favor of the

<sup>20</sup> See Alper Cinar & Sander van Niekerk, *Implementation of the Rome Statute in the Netherlands*, p. 6.

<sup>21</sup> See KOK, at 299.

<sup>22</sup> *Barbie*, France, *Cour de cassation*, decision of 20 December 1985, JCP 1986, II, no. 20655; *Bull. Crim.* 1985, 1038-55 (unofficial English translation).

Accused.<sup>23</sup> This is in accordance with the principle of *in dubio pro reo* as provided by Article 38 of the Cambodian Constitution.

## II. RELIEF REQUESTED

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to FIND that the statute of limitations found in the 1956 Penal Code bars the application of Article 6 of the Establishment Law at 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 14<sup>th</sup> day of February, 2011

<sup>23</sup> “[T]he power to define crimes lies with the legislature rather than the courts. Any ambiguity in the meaning of a statutory provision should, by strict construction, then be resolved in favor of the defendant.” MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 122 (Intersentia 2002).