

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

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**PRELIMINARY OBJECTIONS CONCERNING TERMINATION OF
PROSECUTION (DOMESTIC CRIMES)**

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Before:

The Trial Chamber
 Judge NIL Nonn
 Judge Sylvia CARTWRIGHT
 Judge THOU Money
 Judge Jean-Marc LAVERGNE
 Judge YA Sokhan

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MAY IT PLEASE THE TRIAL CHAMBER**I. PROCEDURAL BACKGROUND**

1. On 13 January 2011, the Pre-Trial Chamber sent Khieu Samphan for trial before the Trial Chamber¹ for crimes against humanity, genocide, grave violations of the Geneva Conventions of 12 August 1949 and violations of the 1956 Cambodian Penal Code.²

II. INTRODUCTION

2. By way of this preliminary objection, Mr Khieu Samphan seeks termination of the prosecution pursuant to Rule 89(1)(b) of the ECCC Internal Rules (the “Rules”). He has also submitted another preliminary objection today challenging jurisdiction pursuant to Rule 89(1)(a) of the Rules. In light of the page limit, these objections are being filed in summary form. Mr Khieu Samphan reserves the right to expand on them by way of additional submissions.

A. General Principles of Law

3. Mr Khieu Samphan underscores the importance of the principle of equality before the law, the principle of legality and the principle of non-retroactivity of criminal law. According to the first principle – enshrined in Articles 30 and 81 of the current Cambodian Constitution, Article 3 of the 2008 Cambodian Code of Criminal Procedure, Article 7 of the Universal Declaration of Human Rights and Article 14.1 of the International Covenant on Civil and Political Rights (“ICCPR”) – all citizens of the same country are entitled to equal treatment before the law. According to the two latter principles, the Chambers must apply the criminal law in force at the time when the crimes were allegedly committed.³

B. Applicable Law

4. Article 109 of the 1956 Cambodian Penal Code which deals with the statute of limitations provides: “A perpetrator shall not be punishable in respect of a felony committed

¹ Decision on Khieu Samphan’s Appeal Against the Closing Order, D427/4/14.

² Closing Order, 16 September 2010, D427, para. 1613.

³ These principles are enshrined in Article 8 of the Declaration of the Rights of Man and of the Citizen, 1789, Article 11 of the Universal Declaration of Human Rights, and Article 15 of the International Covenant on Civil and Political Rights, Article 33(2) of the Law on the Establishment of the ECCC, Article 6 of the 1956 Cambodian Penal Code.

more than ten years previously.” Article 111 of the same code provides that limitation periods run from the date the offence was committed. Limitation periods may only be interrupted by investigative or prosecutorial action.⁴

5. On 2 January 2001, the National Assembly voted the draft 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 (“2001 ECCC Law”).⁵ The 2001 ECCC Law grants the Chambers jurisdiction over homicide, torture, religious persecution under the 1956 Cambodian Penal Code. This Law also extends the statute of limitations for these crimes by twenty years.⁶

6. On 12 February 2001, the Constitutional Council declared the 2001 ECCC Law to be constitutional, subject to the repeal of all death penalty provisions.⁷ The 2001 ECCC Law entered into force on 10 August 2001, following its promulgation by King Norodom Sihanouk.

7. To comply with 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 (the “Agreement”)⁸, the 2001 ECCC Law was amended and promulgated on 27 October 2004 (after the Constitutional Council determined on 22 October 2004 that it complied with the Constitution). Article 3 (new) of the 2004 ECCC Law further extended “the statute of limitations set forth in the 1956 Penal Code [...] for the crimes enumerated above which are within the jurisdiction of the Extraordinary Chambers [...] for an additional 30 years.”⁹

I – Submissions

8. Article 3 (new) of the 2004 ECCC Law violates the principle of equality before the

⁴ See article 37 of the 1964 Criminal Procedure Code: “[TRANSLATION] Prosecution of any offence punishable by a penalty may only be terminated by (...) limitation, as provided for in Articles 109 and 111 of the Penal Code [...]”; see also Articles 38 and 21 of the same Code (on stay or suspension of prosecution pending a civil court decision on a preliminary matter.)

⁵ See Preamble to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia of 2004 concerning the prosecution of crimes committed during the period of Democratic Kampuchea (“2004 ECCC Law”).

⁶ Article 3 of the 2001 ECCC Law.

⁷ See Preamble of the 2004 ECCC Law.

⁸ 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.

⁹ Article 3 (new) of the ECCC Law.

law and the principle of non-retroactivity of criminal law.

A. Equality before the law

9. Article 3 (new) of the 2004 ECCC Law only applies to crimes within the jurisdiction of the ECCC. The temporal jurisdiction of the ECCC only covers crimes committed during the period from 17 April 1975 to 6 January 1979, while its personal jurisdiction covers only 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. The ECCC does not have general jurisdiction; Article 3 (new) of the ECCC Law does not apply to perpetrators of crimes similar to those with which Mr Khieu Samphan is charged. Article 3 (new) of the ECCC Law therefore offends the principle of equality before the law.

B. The principle of non-retroactivity of criminal law

10. Article 6 of the 1956 Cambodian Penal Code sets forth the principle of non-retroactivity of harsher criminal laws.¹⁰ It applies unless the current penal code provides for a lighter sentence (e.g., non-applicability of the death penalty before the ECCC).

C. Termination of prosecution of domestic crimes

11. The Co-Investigating Judges “decided by mutual agreement to grant the Co-Prosecutors’ requests, leaving it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956.”¹¹

1) Chamber’s questions

12. In Case File 001, the Trial Chamber directed the parties to address the following questions:

Have any legal acts such as prosecution or investigative action or factual circumstances such as temporary non-functioning of the judicial system interrupted or suspended the State of Limitations governing the domestic crimes contained in the Indictment against the accused?

¹⁰ A penal law shall not have retroactive effect. No offence may be punished by a penalty that was not provided for by law prior to the commission of the offence. However, where the law abolishes an offence or reduces a penalty, the new legal provisions shall be applicable to anyone under prosecution, even if the offence charged was committed prior to the promulgation of the new law, provided however that no final conviction has already been entered.

¹¹ Closing Order, D427, para. 1547.

Had the Statute of Limitations governing the offences mentioned above expired against the accused before the promulgation of the 10th August 2001 and 27th October 2004, Article 3 and 3 (new) of the Laws on the establishment of the ECCC, and if so, do those provisions amount to an express reactivation or reinstatement of the right to prosecute?

Is the extension of the Statute of Limitations as described by Article 3 and Article 3 (new) of the Laws on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea ("ECCC Law") a substantive or procedural provision? What legal consequences follow from the respective qualification?

If this provision is considered procedural, does the ECCC Law envisage reference to international standards to effectively invalidate one of its own provisions?; and if so, can you identify any relevant international standard which should apply?

What if any are the legal effects on the ECCC of the Constitutional Council decision of 12 February 2001?¹²

13. For reasons of judicial economy, the Defence has decided to answer these questions in a combined manner in the present motion.

a. First question

14. Clearly, no prosecution or investigative action has been undertaken against Mr Khieu Samphan that would have interrupted or suspended the applicable statute of limitations.

15. Mr Khieu Samphan notes that there was a judicial system in Cambodia after 6 January 1979.¹³ Several judicature laws were promulgated during that period.¹⁴

16. Those who were accused of crimes committed during the Democratic Kampuchea regime were prosecuted, and a trial was held before the Peoples' Revolutionary Tribunal from 15 to 19 August 1979.¹⁵

17. Subsequently, a new United Nations investigative action was undertaken when the ECCC initiated the preliminary investigation on 10 July 2006 into the crimes allegedly committed by leaders of Democratic Kampuchea and those who were most responsible during the period from 17 April 1975 to 6 January 1979.¹⁶ On 17 July 2007, the Introductory

¹² Direction Requesting Written Submission on Preliminary Objection, 20 April 2009, E9/4.

¹³ See "Introduction to the Cambodian Judicial Process", by Koy Neam, The Asia Foundation, 1998, pp. 5-7 (Khmer version) and pp. 3-5. See also: Evan Gottesman, Cambodia after the Khmer Rouge. Basil Fernando, Problems Facing the Cambodia Legal System, the System of Trial under the Vietnamese-Khmer Model (1981-1993) http://www.basilfernando.net/modules.php?name=Content&pa=list_pages_categories&cid=5.

¹⁴ See, in particular, "Law on the organization of the Military Court", Decree No. 5, dated 12 August 1981; "Law on the Organization of the People's Supreme Court and the General Prosecution attached to the People's Supreme Court, Decree No 28 KR dated 31 July 1985.

¹⁵ "Decree-Law on the Establishment of People's revolutionary Tribunal at Phnom Penh to try the Pol Pot-Ieng Sary clique for the crime of genocide", Decree-Law No 1 of 15 July 1979 and "Decree-Law on Punishment of Betrayers of the Revolution", Decree Law No 2 of 15 April 1980.

¹⁶ Closing Order, D427, para. 3

Submission was filed containing allegations against Mr Khieu Samphan.¹⁷

18. The Chambers' temporal jurisdiction covers the period from 17 April 1975 to 6 January 1979. The 1956 Cambodian Criminal [sic] Procedure Code provided that felonies could not be prosecuted after 10 years. Therefore, in theory, the limitation period for the crimes allegedly committed by Mr Khieu Samphan expired on 6 January 1989.

b. Second question

19. The international judges held that, "this limitation period had already expired" before the enactment of Article 3 (new); its "extension" was therefore impossible. This conclusion accords with the general interpretative principles, reflected in the 2009 Penal Code of the Kingdom of Cambodia, that the need for interpretation does not arise where the law is clear, and that criminal provisions must be interpreted strictly.¹⁸

c. Third question

20. Mr Khieu Samphan adopts the submissions made by Ieng Sary at paragraphs 31 to 34 of his Motion Against the Application of Crimes Listed in Article 3 (new) of the Establishment Law (National Crimes) at the ECCC,¹⁹ and Duch's submissions at paragraphs 13 to 25 of his written submissions concerning the defence preliminary objection.²⁰

d. Fourth question

21. Mr Khieu Samphan adopts Duch's submissions at paragraphs 26 to 29 of his written submissions concerning the preliminary objection raised.²¹

22. Furthermore, the international judges emphasized that the notions of foreseeability, legal certainty and fair trial principles had led "some national laws and jurisprudence of the European Court of Human Rights [to] consider that the extension of a limitation period is only possible where the period in question has not expired (footnote omitted). In a decision [...] in the *Komonov* case, the European Court of Human Rights interpreted Article 7 of the

¹⁷ *Ibid.*

¹⁸ Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 para. 44 (footnote omitted).

¹⁹ Ieng Sary's Motion Against the Application of Crimes Listed in Article 3 (new) of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382.

²⁰ Written Submission Concerning the Defence Preliminary Objection, 18 May 2009, E9/9.

²¹ Written Submission Concerning the Defence Preliminary Objection, 18 May 2009, E9/9.

European Convention on Human Rights to prevent the reactivation of criminal action for domestic crimes which had already become subject to limitation.”²²

e. Fifth question

23. The Chamber asked the parties to state whether the Constitutional Council decision of 12 February 2001 had any legal effects on the ECCC. Mr Khieu Samphan submits that the decision has no effect on the ECCC. The decision only addresses the issue as to whether the ECCC Law is constitutionally valid. According to the decision, the principle of non-retroactivity of criminal laws has no constitutional value and is therefore not subject to review by the Council. This does not give licence to the Chambers to violate the principle of non-retroactivity of criminal laws which is enshrined in the international instruments which the Chambers are required to comply with it (Article 11 of the Universal Declaration of Human Rights, Article 15 of the ICPPR). As a general rule, constitutional review is limited to determining whether laws are consistent with the Constitution, and does not entail conventional review. Conventionality review can be undertaken by ECCC judges. Indeed, Article 33 (new) provides: “the Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure[s] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard[s], guidance may be sought in procedural rules established at the international level.”²³

IV - CONCLUSION

24. The purpose of preliminary objections is to determine the jurisdiction of the Chamber prior to the commencement of trial. Mr Khieu Samphan has the right to be informed of the charges against him²⁴ and to have adequate **time** and **facilities** for the preparation of his defence.²⁵ To the extent that he has very little time to file submissions (30 days after the Closing Order becomes final), the Chamber has no basis for deferring its response until the

²² Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 para. 50 (footnote omitted).

²³ Article 33 (new) of the 2004 ECCC Law.

²⁴ Article 92.2 of the International Covenant on Civil and Political Rights.

²⁵ Article 14.3 of the International Covenant on Civil and Political Rights; Article 33 (new) of the 2004 ECCC Law.

judgment. In Case File 001, the Trial Chamber ruled on the preliminary objection concerning termination of prosecution for domestic crimes raised by Duch on 26 July 2010, that is, when it issued its judgment on the merits (pursuant to Rule 89(3) of the Rules).²⁶ Mr Khieu Samphan submits that such a deferral impairs the substantive hearing. Had the Chamber found that there was a “barrier to the continuation of the prosecution against the Accused for domestic crimes” prior to the commencement of trial, it would have been in a position to focus the proceedings on the other charges against the Accused. Accordingly, Mr Khieu Samphan requests that the Chamber address these preliminary objections **prior** to the commencement of trial in order to clarify the proceedings and ensure the quality thereof.

FOR THESE REASONS

25. The Trial Chamber is requested to:

- FIND that this preliminary objection is admissible and that it has merit;
- FIND that prosecution for the offences under the 1956 Cambodian Penal Code is time-barred;
- RENDER its decision prior to the commencement of the trial on the merits.

²⁶ Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187, para. 56.

**WITHOUT PREJUDICE,
AND IT WILL BE JUSTICE**

for for	SA Sovan	Phnom Penh	[signed]
	Jacques VERGÈS	Paris	[signed]
	Philippe GRÉCIANO	Paris	[signed]
Date	Name	Place	Signature