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BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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JOINT RESPONSE OF IENG SARY, IENG THIRITH AND NUON CHEA TO CO-PROSECUTORS' SUBMISSION ON STATUTE OF LIMITATIONS FOR NATIONAL CRIMES

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Mr. IENG Sary, Ms. IENG Thirith and Mr. NUON Chea, through their respective Co-Lawyers ("the Defence"), hereby submit, pursuant to the Trial Chamber's Directions to Parties Concerning Preliminary Objections and Related Issues,[1] this Joint Response to the Co-Prosecutors' Submission on Statute of Limitation for National Crimes ("OCP Submission").[2] This Response will address only the arguments made by the OCP in its Submission; it will not address the arguments previously made by the OCP but not raised in this Submission.[3] The Defence does not waive any previous arguments made which were not addressed by the OCP. In particular, the IENG Sary Defence does not waive its position that: **a.** it violates Mr. IENG Sary's right to be presumed innocent to send him to trial for national crimes despite the fact that the Co-Investigating Judges could not agree as to whether national crimes applied; and **b.** it violates Mr. IENG Sary's right to equal treatment to apply national crimes since the statute of limitations for these crimes was extended at the ECCC but for no other Cambodian court.[4]

I. SUMMARY OF OCP SUBMISSION

1. The OCP submits that the applicable 10 year statute of limitations for Establishment Law Article 3 new national crimes was suspended until at least 23 October 1991,[5] and thus was extended prior to its expiry, because:

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[1] Directions to Parties Concerning Preliminary Objections and Related Issues, 5 April 2011, E51/7, p. 2.
[2] Co-Prosecutors' Submission on Statute of Limitation for National Crimes, 27 May 2011, E51/7/1.
[3] *Id.*, para. 4.
[4] The IENG Sary Defence requested leave to file supplemental submissions on these two issues, because the Defence was unable to address errors in the Pre-Trial Chamber's Decision on IENG Sary's Appeal Against the Closing Order since it was required to file its preliminary objections prior to receiving this reasoned Decision. *See* IENG Sary's Request for Leave to File a Supplemental Submission to his Rule 89 Preliminary Objection (National Crimes), 8 June 2011, E94. The Trial Chamber had previously informed the Defence that, because of prejudice stemming from the lack of a reasoned decision by the Pre-Trial Chamber, supplementary submissions would in principle be accepted, but the Trial Chamber would instruct the Defence further as to page and time limits after the Pre-Trial Chamber's reasoning was received. *See* email from Tanya Pettay to the Senior Legal Officer 23 February 2011 confirming the points raised in the meeting and adding some additional clarifications and the Senior Legal Officer's response of 24 February 2011. After the Pre-Trial Chamber's reasoned Decision was issued, the Trial Chamber invited the Co-Prosecutors "to indicate the basis of [their] contention that national crimes are not statute-barred in relation to all accused in Case 002" and authorized the Defence teams to respond to this submission. *See* Directions to Parties Concerning Preliminary Objections and Related Issues, 5 April 2011, E51/7, p. 2. The Co-Prosecutors did not address certain errors made by the Pre-Trial Chamber, and the Defence will therefore be unable to address these issues in this response. The Trial Chamber has rejected the IENG Sary Defence's Request for Leave to File a Supplement, stating that "[t]he Chamber notes the request of the IENG Sary Defence to file supplementary submissions to its preliminary objection to the ECCC's jurisdiction over national crimes (E94). The Chamber advises that it does not require further written submissions in these areas. The IENG Sary Defence may, however, address these issues in oral argument at the Initial Hearing if it so chooses." Agenda for Initial Hearing, 14 June 2011, E86/1, para. 5. The IENG Sary Defence intends to present a comprehensive analysis of these issues at the Initial Hearing.
[5] OCP Submission, para. 21.

A. "there was no functional judicial system in Cambodia that could conduct a fair trial of the Accused until at least the mid-1990s";[6]

B. "the ongoing civil war made it practically impossible to prosecute the Accused until their surrender to the Cambodian government in 1996 and 1998;"[7] and

C. "the Accused were directly responsible for the conditions that prevented their prosecution during this time period."[8]

2. The Defence will address each of these arguments in turn.

II. ARGUMENT

3. The statute of limitations for Article 3 new national crimes expired at the latest in 1989,[9] for crimes allegedly committed in 1975-79. The OCP asserts that based on the principle *contra non valentem agere nulla currit praescriptio* ("*contra non valentem*"),[10] "[S]tates have universally concluded that conditions which make it practically impossible to proceed with legal action, such as a state of war, impeded court functions or conduct of the defendant, suspend the running of the statute of limitations."[11] The principle referred to is not a Cambodian constitutional principle and is not set out in applicable Cambodian law. The OCP claims that *contra non valentem* is a "natural law principle" based upon one United States of America ("USA") case from 1822 dealing with the purchase of slaves.[12] Natural law principles espoused by political and legal philosophers are not a substitute for positive laws adopted by duly elected legislative bodies, especially when natural law principles – however noble – are at odds with the public policy underlying the doctrine of prescription which favors certainty.[13]

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[6] *Id.*, para. 3.
[7] *Id.*
[8] *Id.*
[9] *See* 1956 Penal Code, Art. 109. Note that Article 3 new of the Establishment Law "extends" the applicable statute of limitation for an additional 30 years. However, since the statute of limitations has already expired, there is no valid limitation period to extend.
[10] This principle is translated as "No prescription runs against a person unable to act (or bring an action)." BLACK'S LAW DICTIONARY 1626 (7th ed. 1999).
[11] OCP Submission, para. 3.
[12] *Id.*, note 61, *citing Morgan v. Robinson,* 12 Mart. (0. S.) 77, 13 Am. Dec. 366.
[13] Note that in *Hatch v. Gilmore*, cited by the OCP, it was found that "This maxim, *contra non valentem agree nulla currit prescriptio* which has been lauded by some jurists, has been found fault with by others as opening the door to abuse, by reason of its vagueness and generality." *Hatch v. Gilmore,* 3 La. Ann. 508, 509 (1848). Note too, that the OCP relies on this case to support its argument that French-derived jurisprudence applies this principle. This case is an 1848 case from Louisiana, in the United States of America. It is a civil, rather than a criminal case. It furthermore did not find that the principle was applicable, based on the facts of the case and even stated that "[i]n the views we have expressed we have taken it for granted, for the purpose of argument, that the maxim, *Contra non valentem, &c.* would apply to the case before us.... We do not wish, however, to be considered as expressing an opinion upon that point, as it is not necessary now to do so." *Id.*, at 510.

4. *Contra non valentem* has not been applied often and its threshold of application is very high. In France, "the courts always regarded this maxim as an exception and applied it very carefully, which can be seen in the conditions upon which the maxim was applied.... [T]he impossibility of acting has to be absolute, or in other words, the source of this impossibility must be comparable to *force majeure*."[14] A state of war will not cause States "universally" to conclude that statutes of limitation are suspended.[15] As the OCP has indicated,[16] and as previously held by the national and international Trial Chamber Judges, it must be "impossible" to proceed with legal action before the statute of limitations will be suspended.[17] It was possible to proceed with legal action throughout 1979-1989, as shown below. The statute of limitations cannot be considered to have been suspended during this period.

A. The judicial system functioned during the entire period after the crimes allegedly occurred

5. The OCP asserts that "where ... factors exist that impede 'the fair administration of justice,' the running of the statute of limitations will be suspended."[18] The OCP mistakes a functioning judicial system for a perfect judicial system. A judicial system must fail to function in order for a statute of limitations to be tolled[19] – and even in such situations,

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[14] Benjamin West Janke & François-Xavier Licari, Contra Non Valentem *in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LA. LAW REV. 503, 515 (2011) ("Janke & Licari") (emphasis added).

[15] As the international Trial Chamber Judges explain, "Some national practice suggests that limitation periods may not run during periods in which a judicial system was incapacitated due to war, or where the crimes in question were themselves committed by State officials. However, much of this State practice follows from national legislation expressly designed to enable the prosecution of offences that would otherwise be time-barred." *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 ("Case 001 National Crimes Decision"), para. 29. In Hungary, it was found to be unconstitutional to retroactively extend an expired statute of limitations. RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 301-02 (2007). In South Korea, five of the nine justices of the Constitutional Court of South Korea have found that a law suspending the statute of limitations "during the period in which there existed a cause preventing the nation from exercising its prosecutorial powers" was unconstitutional if applied to prosecute individuals for whom the statute of limitations had already expired. *See* James M. West, *Martial Lawlessness: The Legal Aftermath of Kwangju*, 6 PAC. RIM L. & POL'Y 85, 121-24 (1997). *See also* Janke & Licari, at 526 (discussing French law). "[T]he mere existence of a war or illness does not suffice to invoke the maxim; the impossibility of acting must be absolute, for example, because the courts were closed or inaccessible. This requires a case-by-case appraisal that is out of the control of the *Cour de cassation*, as the inquiry is no longer just a legal one. The *Cour de cassation*'s adoption of a strict conception of *force majeure*, which is encouraged and approved by the authors of this Article, is consistent with the writings of the great jurist of Orléans, Robert-Joseph Pothier, whose writings on prescription predate the *Code Napoléon* and remain relevant even today." (emphasis added).

[16] OCP Submission, para. 3.

[17] Case 001 National Crimes Decision, paras. 16, 31.

[18] OCP Submission, para. 23.

[19] According to the national Trial Chamber Judges, "[w]hen circumstances are such that objectively, an investigation of crimes committed by an alleged perpetrator is impossible, the statute of limitations cannot apply. Further, practice from other national systems shows that a functioning judicial system is a prerequisite

courts do not always find that tolling a statute of limitations is appropriate.[20] At the ECCC today, there have been allegations that the fair administration of justice has been impeded by the OCIJ's handling of the judicial investigation into Case 003.[21] Indeed, the Asian Human Rights Society issued a press release stating that "The recent developments at the ECCC pertaining to Cases 003 and 004 compounds our grave concerns that the impartiality, integrity, and the independence of the ECCC judges are being tainted."[22] While this may indicate serious problems with the ECCC and call into question the quality of justice forthcoming, it does not indicate that the ECCC has ceased to function entirely.

6. The OCP cites only two cases to support its claim that "even in countries where court systems are functioning, where other factors exist that impede 'the fair administration of justice,' the running of the statute of limitations will be suspended."[23] Both cases are civil cases brought in the USA under the Torture Victims Protection Act ("TVPA"). Unlike the relevant provision of the 1956 Penal Code, the TVPA "provides for a 10-year statute of limitations, but explicitly calls for consideration of all equitable tolling principles in calculating this period with a view toward giving justice to plaintiff's

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for the running of a statute of limitations." Case 001 National Crimes Decision, para. 16-17 (emphasis added). *See also* Janke & Licari, at 515.

[20] As the international Trial Chamber Judges noted, "Some national practice suggests that limitation periods may not run during periods in which a judicial system was incapacitated due to war, or where the crimes in question were themselves committed by State officials. However, much of this State practice follows from national legislation expressly designed to enable the prosecution of offences that would otherwise be time-barred." Case 001 National Crimes Decision, para. 29 (emphasis added).

[21] The international Co-Prosecutor even issued a recent press release in which he found it necessary to remind the OCIJ that "[t]he Co-Investigating Judges have an obligation under Internal Rule 55 and the Law of the ECCC to conduct their investigation impartially and to take investigative action conducive to ascertaining the truth." Press Release, Statement by the International Co-Prosecutor (14 June 2011).

[22] Press Release, Asian Human Rights Commission, Cambodia: Civil Society Expresses Concern over Recent Developments in the Extraordinary Chambers in the Courts of Cambodia, and Urges the International Community to Speak Out (20 May 2011). *See also* James O'Toole, *Judges Dismiss Case 003 Request*, PHNOM PENH POST, 8 June 2011. "Anne Heindel, a legal adviser at the Documentation Centre of Cambodia, said that with yesterday's decision, the judges were 'trying to kill [Case 003] on a technicality that they've invented for this purpose'"; Jared Ferrie, *Leaked Document Casts Doubt on Impartiality of Khmer Rouge Judges*, CHRISTIAN SCIENCE MONITOR, 8 June 2011, "'Any appearance of independence at this institution is long since gone,' says Ou of the Cambodian Centre for Human Rights. The judges strongly denied such claims in a May 26 statement, saying they 'have worked independently from outside interference, and will continue to resist all such attempts and are resolved to defend their independence against outside interference, wherever it may come from.' Close observers of the court, however, have noted difficulties prosecutors have faced in bringing more than five Khmer Rouge leaders to trial. 'The Cambodian government doesn't want the cases to move forward, the Cambodian prosecutor is under pressure from that side, and the international community doesn't want to pay for it,' said Ann Heindel, a legal advisor with the Documentation Centre of Cambodia, which researches Khmer Rouge history."

[23] OCP Submission, para. 23.

rights."[24] In *Arce v. Garcia*, plaintiffs sued defendants in a USA court in May 1999, alleging that they were tortured by military personnel in El Salvador during a campaign of human rights violations by the Salvadorian military from 1979 to 1983. A United States District Court found that the statute was tolled. This was upheld on appeal because "[u]ntil the end of civil war in 1992, the military would have used its significant power to thwart any efforts to redress the human rights violations that it perpetrated. Evidence of those violations would have been suppressed. Potential witnesses would have been intimidated and perhaps tortured if they came forward. The plaintiffs legitimately feared that their family members and friends remaining in El Salvador would be subject to harsh reprisals and the same brutalities that the plaintiffs suffered. ... The evidence reveals a judiciary too meek to stand against the regime."[25] In *Cabello v. Fernandez-Larios*, a case dealing with an alleged murder in Chile in 1973 following a coup d'état, the court found that "the cover-up of the events surrounding Cabello's death made it nearly impossible for the Cabello survivors to discover the wrongs perpetrated against Cabello. As a result of this deliberate concealment by Chilean authorities, equitable tolling is appropriate in this case."[26] Neither case provides sufficient traction to support the OCP's claims.

7. Even if the Trial Chamber were inclined to follow domestic USA civil jurisprudence, both of these cases are clearly distinguishable from the present case. The OCP presented no evidence that the Cambodian judiciary was too weak to stand against the Accused or that the government or Accused would be involved in the suppression of evidence. As the international Trial Chamber Judges in Case 001 have pointed out:

> Although civil war and effective control by the Khmer Rouge over certain areas of the country presented genuine constraints in initiating prosecutions or judicial investigations, the international judges conclude that prosecutions or investigations were not precluded in all parts of the country. The international judges note that a large volume of material found at S-21 was collated and held from the period shortly after ... 6 January 1979, at S-21 itself and later at the Documentation Center of Cambodia. This material was used by scholars and authors from the early 1980s and was the basis for the expert testimony given at trial by Expert David CHANDLER. It was therefore available as the basis for investigation and trial during this time.[27]

The international Trial Chamber Judges also found:

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[24] *Arce v. Garcia*, 434 F.3d 1254, 1262 (11th Cir. Fla. 2006).
[25] *Id.*, at 1263-64 (emphasis added). The court also stated, "Statutes of limitations serve important purposes in our legal system and should be strictly enforced in all but the most egregious of circumstances." *Id.*, at 1265.
[26] *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. Fla. 2005) (emphasis added).
[27] Case 001 National Crimes Decision, para. 33.

> there is evidence to indicate that from 1979 onwards, laws and decrees were progressively enacted. For instance, in 1980 and 1982, decrees were issued concerning the organisation of the judiciary, and in 1985 and 1987, in relation to the establishment of the Supreme Court. A specific decree relevant to criminal law was also issued by decree in 1980 with retroactive effect as of 7 January 1979.[28]

As S-21 is a crime site referred to in Case 002, this statement may apply to the present case as well. A significant amount of evidence was also gathered for the 1979 trial of Pol Pot and Mr. IENG Sary. This material now forms part of the Case 002 Case File.[29]

8. The OCP asserts that "[t]he accused must have the rights and the resources available to mount a sufficient defence, including access to counsel of their choice. Without meeting such minimal requirements, a body cannot be considered a functional court capable of hearing a matter, and a practical impossibility of bringing a case exists which warrants the suspension of the limitations period."[30] The OCP's concern for the fair trial rights[31] of the Accused is laudable, but this is not the appropriate test to determine whether a statute of limitations may be tolled. The appropriate test is whether it would have been possible to prosecute the Accused in the period prior to the expiration of the statute of limitations. Even today, there are concerns that trials in Cambodia may be unfair. As Presiding Judge Nil Nonn indicated in a recent interview, "*We also have problems because judges aren't independent in Cambodia – [the government] threaten and put pressure on judges, the judges accept money, so all this is not very good.*"[32] This does not indicate that the judicial system in Cambodia is not functioning such that it is impossible to institute prosecutions. It merely highlights the systemic and pervasive weaknesses within the Cambodian judiciary – the ECCC inclusive.
9. The OCP asserts that the "court system that was established by the PRK, and remained in effect until the process of rebuilding legitimate courts began in 1992 and 1993, was based on the Soviet socialist model that had been implemented in Vietnam."[33] The OCP

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[28] *Id.*, para. 32.
[29] *See* C22/I/32.34, GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY (Howard J. De Nike, John Quigley, & Kenneth J. Robinson eds., University of Pennsylvania Press, 2000).
[30] OCP submission, para. 24.
[31] Note that in footnote 77 to the OCP Submission, the OCP asserts that "[t]he public vilification of the 'Pol Pot-Ieng Sary clique' by the PRK would have made any presumption of innocence impossible, especially given that the decree establishing the People's Revolutionary Tribunal expressly proclaimed their guilt." The Defence maintains that the OCP may not apply a fundamental fair trial right of the Accused to violate his other fair trial rights, such as the right to legal certainty. Moreover, public vilification continues today, making it a difficult task for the Trial Chamber to assure that the Accused are accorded the presumption of innocence.
[32] *See* Alex Bates, *Transitional Justice in Cambodia: Analytical Report*, ATLAS PROJECT, October 2010, para. 145.
[33] OCP Submission, para. 6.

insinuates that the Soviet socialist model of justice may not be "legitimate." This insinuation denigrates these judicial systems; the OCP offers no proof in support of its claim that the in the Soviet socialist model was illegitimate. It bears recalling that several Cambodian judges, including ECCC Judges, were trained in Vietnam or in other Soviet influenced judicial systems and began their legal careers in Cambodia during the 1979-91 period.[34] If indeed the judicial system adopted by Cambodia post-1979 was illegitimate, then it stands to reason that all the judicial proceedings up until 1993, when the OCP claims Cambodia began to rebuild a legitimate judiciary, are illegitimate. To the knowledge of the Defence, no statutes of limitation in Vietnam have been suspended on the basis that the country, because of its socialist system, lacks a functioning judicial system. Whether the judicial system in Vietnam is fair and impartial or whether the judicial training provided by Vietnam is adequate is not a matter at issue for this submission.

10. The OCP asserts that "[n]either the French civil system nor the procedures of the 1956 Penal Code were followed in the 1979-1991 time period. Rather, the operative criminal code was contained in a 1980 decree entitled 'Law on the Penalty for Betraying the Revolution,'"[35] and that "a comprehensive law that would have allowed an effective prosecution of homicide, torture or religious persecution" did not exist.[36] This is not true. The 1956 Penal Code remained in effect throughout this period, whether or not applied. It was never repealed during this time. Furthermore, the "Law on the Penalty for Betraying the Revolution" referred to by the OCP has two parts. The full title is "Law on the Penalty for Betraying the Revolution and the Penalty for Commission of Other Crimes." The first part of this law deals with crimes which betray the revolution. The second part – pertinent to the issue before the Trial Chamber – covers ordinary crimes, including murder, rape, battery, and crimes against property.[37] The IENG Sary Defence has visited the Phnom Penh municipal court of first instance and was orally informed that

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[34] For example, according to the ECCC website, Presiding Pre-Trial Chamber Judge Prak Kimsan began working as Deputy Prosecutor in Kampong Cham in 1987 and Judge Ney Thol has been the president of the military court since 1987. *See* ECCC website, *available at* http://www.eccc.gov.kh/english/pre-trial_chamber.aspx.

[35] OCP Submission, para. 6. Note that the OCP states that this law "was drafted by a non-lawyer in one week" apparently to support its position that the judicial system was not functioning. Legislation is not required to be drafted by attorneys and the fact that a non-attorney drafted this particular piece of legislation cannot be considered evidence that the judicial system did not function.

[36] *Id.*, para. 10.

[37] Law on the Penalty for Betraying the Revolution and the Penalty for Commission of Other Crimes, Decree Law 02, 15 May 1980.

there were many judgements during the period 1979 through 1991, including murder cases, but attempts to obtain copies of these judgements have, to date, been unsuccessful.[38] Since review of these cases and judgements *will*, unquestionably, assist the Trial Chamber in determining whether the judicial system functioned during this period, the Trial Chamber *should* make all necessary efforts to compel the Phnom Penh municipal court and any other national court to provide access to its court records. This is the best evidence, as opposed to the unsubstantiated claims by the OCP. The alternative may be for the Cambodian Judges of the Trial Chamber to take judicial notice – based on their knowledge and experience – that courts throughout Cambodia during the relevant period at issue (1979-1991) were judging cases involving the aforementioned crimes.

11. Professor Michael Leifer writing in 1981, states that in June 1980, Phnom Penh radio announced the trial of 17 non-communist agents associated with the leader Haem

[38] On 10 June 2011, Ms. Udom Arey, a 2010 graduate of the Royal University of Law and Economics in Phnom Penh and intern with the IENG Sary Defence team, visited the Phnom Penh Municipal Court of First Instance. Ms. Udom Arey spoke with Mr. Heng Sophea, Chief of the Court Clerks, who informed her that there were many cases, including murder and torture, from 1982-1991; however she would need to provide a letter from the ECCC setting out the purpose of her research and its use. Following this, the President of the Court would determine whether her request was authorized and whether she could be provided with a list of cases and samples of the judgements. On 14 June 2011, Ms. Udom Arey returned to the Phnom Penh Municipal Court of First Instance with a letter signed by Ms. Nisha Valabhji, Officer in Charge of the Defence Support Section ("DSS"), and requested to be provided with "1. a list of criminal cases initiated in the period 1979-1991. If a full list is not possible, a representative sample would be acceptable. This sample should especially include murder and torture cases, and if possible should include names, file numbers, charges, judges, prosecutors and lawyers/representatives involved, and disposition. 2. a sample of some judgments of murder cases during the period 1979-1991." *See* Letter from DSS to the President of the Phnom Penh Municipal Court of First Instance, 13 June 2011. Ms. Udom Arey spoke to an official working in administration who stamped the letter as received and informed her that she should come back again on 16 June 2011 to find out if the President of the Court authorized the request. On 14 June 2011, Ms Udom Arey also visited the Ministry of Justice and requested the same information. She provided a letter from DSS addressed to the Minister of Justice, which was otherwise identical to the letter provided to the President of the Phnom Penh Municipal Court. Ms. Udom Arey spoke to the Director of the Criminal Department at the Ministry of Justice, Mr. Phov Samphy. This person asked Ms. Udom Arey to meet with his assistant on 15 June 2011. On 15 June 2011, she called and spoke with the assistant to Mr. Phov Samphy at the Ministry of Justice. She was informed that he had not received any authorization from the Cabinet of the Minister of Justice to provide this information. He asked her to contact him again on 16 June 2011. On 14 June 2011, Ms. Udom Arey also visited the Kandal Provincial Court of First Instance and requested the same information, providing a letter from DSS addressed to the President of the Kandal Provincial Court of First Instance which was otherwise identical to the other two letters. She spoke with the Court Clerk and was informed that she must meet directly with the President of the Court on 15 June 2011 to receive a decision. On 15 June 2011, Ms. Udom Arey returned to the Kandal Provincial Court. The President of the Court was not present because he was in a meeting. She waited for one and a half hours before leaving. On 16 June 2011, Ms. Udom Arey returned to the Phnom Penh Municipal Court and was informed that she could be provided with some of the requested information if she returned the following day, which she did. However, when Ms. Udom Arey returned, she was informed that the President of the Court was unavailable to provide her with an official version of the requested material and the clerk would not provide her with an unofficial version. Ms. Udom Arey waited for several hours for the President to return, but he did not return by the time of this filing.

Kroesnea. They were sentenced to 3 to 20 years in prison.[39] In an article written in 1990, historian Michael Vickery writes:

> An item in the Phnom Penh Kampuchea newspaper on 28 July 1988 may serve as an illustration. On page 11, [there is] a list of 61 lawsuits reported as pending in the courts... The 61 cases listed by Kampuchea range from the trivial civil suits for libel and fraud to the very serious - murder and torture by police agents. Included are several cases of murder, rape, physical abuse, and nonpayment of debts. One was a complaint by an individual against the police and provincial court of Kandal for having released three alleged murderers. It is clear that courts in Cambodia are functioning according to laws and that individuals willingly enter into litigation, even bringing charges against state organs.[40]

12. The OCP asserts that the judicial system was not functioning because there "was neither an appellate court nor a right of appeal during the 1979-1991 period. While the Supreme Court was established by a 1985 decree and operational by 1987, it had limited authority and no effective judicial function prior to 1994."[41] The OCP does not explain why it considers a right of appeal to be a necessary prerequisite to a functioning judicial system. The right to an appeal is an important fair trial right, but the lack of such a right does not indicate that the judicial system did not function.[42] Furthermore, the assertion that the Supreme Court did not function does not demonstrate that it could not function if someone had brought a case before it. As the OCP indicates, the Supreme Court was established in 1985. According to the ECCC website, ECCC Supreme Court Chamber Judge Som Sereyvuth "has been a Judge of the Supreme Court of Cambodia since 1988. Prior to that, he was an Officer of the Supreme Court from 1986 to 1988, and acting President of the Cabinet of the Ministry of Interior from 1979 to 1986."[43] The OCP

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[39] Michael Leifer, *Kampuchea in 1980: The Politics of Attrition*, 1 ASIAN SURVEY 21, 98 (1981).

[40] Michael Vickery, *The Rule of Law in Cambodia*, 14.3 CULTURAL SURVIVAL Q. (1990), *available at* http://www.culturalsurvival.org/publications/cultural-survival-quarterly/cambodia/rule-law-cambodia (emphasis added). *See also* MICHAEL VICKERY, KAMPUCHEA: POLITICS, ECONOMICS AND SOCIETY 120 (Frances Pinter 1986), where Vickery states, "One non-political trial which was reported involved five men accused in May 1982 of robbery and in one case murder, who were sentenced to prison for terms of eighteen years up to life for the murderer."

[41] OCP Submission, para. 9.

[42] The International Covenant on Civil and Political Rights contains a right to appeal in Article 14(5), but Cambodia did not accede to the ICCPR until May 1992. According to the Max-Planck Encyclopedia of Public International Law, "International humanitarian law does not provide for an absolute right to an appeal.... As an increasing number of States provide for a right to an appeal, there is clearly a trend towards such a customary right." Louise Doswald-Beck, *Fair Trial, Right to, International Protection*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *available at* http://www.mpepil.com/sample_article?id=/epil/entries/law-9780199231690-e798&recno=16&#law-9780199231690-e798-titleGroup-37 (emphasis added). This indicates that a right of appeal would not have been customary international law from 1979 until the statute of limitations expired.

[43] *See* http://www.eccc.gov.kh/en/judicial-person/scc/som-sereyvuth.

seems to suggest – *erroneously* – that Judge Som Sereyvuth's position was illusory and he had no actual function for almost 8 years while employed at the Supreme Court.

13. The OCP asserts that "[t]he 1992 UNTAC Law also expressly referenced a number of the deficiencies in the existing legal system. For example, Article 7(2) provided that '[d]ue to the small number of attorneys in Cambodia, during the transition period, any Cambodian holding a diploma of completion of secondary school education may represent an accused person in court,' and 'accused persons may ask a member of their family to represent them, regardless of level of education.'"[44] This Law may indicate weaknesses in the Cambodian judicial system, but it does not indicate that the system did not function. Criminal defendants today in Cambodia, as in other jurisdictions, have the right to self-representation, regardless of whether they hold any certain level of education. When they exercise this right, it does not demonstrate that the judicial system does not function because they are not represented by educated lawyers. The right to a defence (whether through self representation or through a defender appoint by the court) was guaranteed by Decree Law 1 in May 1980, much earlier than this 1992 UNTAC Law.[45]
14. The OCP asserts that "[t]he effort to establish a legitimate legal system in Cambodia is also reflected in the September 1993 Constitution, which contained a commitment to recognize and respect a broad array of human rights established by international law."[46] A constitution's commitment to recognize and respect human rights is not a requirement for a functioning judicial system.[47] Even so, the 1993 Constitution did reflect a commitment to recognize and respect human rights, but it was not the first post-1979 Cambodian Constitution to do so. The 1979 Constitution contained Articles indicating the respect for human rights as well.[48] Importantly, it contains a chapter on "The Jurisdictions and Courts."[49] The 1989 Constitution also provided for the recognition and

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[44] OCP Submission, para. 12.
[45] Decree Law 1 on Organization of the People's Revolutionary Court of Provinces or Cities, 15 May 1980. Art. 7. This right was also guaranteed in the military courts in 1981, through Decree Law 5 on the Organization of Military Courts, 12 august 1981, Art. 6.
[46] OCP Submission, para. 14.
[47] Australia's constitution is notably weak on human rights, *See* Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29 (2005), and yet it is not claimed that its judicial system does not function.
[48] *See, e.g.*, Articles 5-8, 15, and 30-44 of the 1979 Constitution, *English translation available in* RAOUL M. JENNAR, CAMBODIAN CONSTITUTIONS (1953-1993) 93-95, 98-100, (White Lotus, 1995).
[49] *Id.*, at 108-09.

respect for human rights and contained a chapter on "The Courts and the Office of the Prosecutor-General."[50]

15. The OCP asserts that significant efforts to create a body of qualified legal professionals took place in the post-1991 period. It refers to the formation of a bar association and the institution of a 4-year law program, noting that there was a 3-5 month law course prior to 1989 and a 2-year law program from 1989-92.[51] The OCP cites an article by Dolores Donovan for this proposition.[52] Another source cited by the OCP in other portions of its Submission, and which cites a different article by Donovan,[53] states that a 3-month legal study program was instituted as early as 1982, and a 2-year diploma course by 1986.[54] The fact that there was a formalized legal study program during this period indicates that the judicial system functioned. A 4-year program is certainly not a requirement for a functioning judicial system, as this is longer than the legal studies programs of many developed States with functioning judicial systems. Furthermore, lawyers and judges may have trained abroad and then participated in the functioning judicial system in Cambodia upon their return.[55] Even if Cambodia had no legal training program whatsoever, this would not demonstrate that the legal system was unable to function.
16. If the OCP's arguments are accepted, this means that during the entire 1979-1993 period, it was <u>impossible</u> bring about investigations and prosecutions, or at least investigations and prosecutions which would be conducted fairly. If this were true, it would mean that several of the ECCC's national judges participated in trials which were not governed by the rule of law, which were unfair and where accuseds' rights were violated. It would call into question these Judges' current ability (i.e., it would demonstrate a lack of judicial

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[50] *Id.*, p. 118-20, 131-32 (listing Articles 30-42, which are in a Chapter entitled "Rights and Duties of Citizens" and Chapter VIII on "The Courts and the Office of the Prosecutor-General").
[51] OCP Submission, para. 15.
[52] "For the most part, the judges are persons with a high school education or a year or two of university level education who successfully completed a three- or five-month law course offered by the Institute of Public Administration and Law between 1982 and 1989." The footnote to this statement states, without referring to any authority, that "[i]n 1989, the Institute of Public Administration and Law began to offer a two-year law course. The few graduates of the two-year course appear to have been assigned to government ministries rather than to the courts. In the fall of 1992, a four-year course began, replacing the two-year program. This four-year program in the study of law will eventually become part of the University of Phnom Penh. Graduates will receive the *license en droit,* the equivalent of a B.A. in law." Dolores Donovan, *Cambodia: Building a Legal System from Scratch*, 27 INT'L LAWYER 445, 450, n. 20 (1993). Note that this is not the footnote referred to by the OCP (fn 17 of the Donovan article) to support its proposition. The footnote cited by the OCP appears to have been cited in error as it does not refer to training of the judiciary.
[53] Dolores Donovan, *The Cambodian Legal System: An Overview, in* REBUILDING CAMBODIA: HUMAN RESOURCES, HUMAN RIGHTS, AND LAW 81-83 (1993).
[54] Kathryn Nielson, *They Killed the Lawyers: Rebuilding the Judicial System in Cambodia*, D22/6.9/5.26, p. 3.
[55] According to the ECCC website, Trial Chamber Judge Ya Sokhan, for example, trained in the former Soviet Union, Judge Thou Mony trained in Germany, and Judge Nil Nonn trained in Vietnam.

integrity manifested from a lack of appreciation of the fundamental human rights associated with the norms of fair trials) to judge Case 002. It would further mean, as noted above, that all trial judgments rendered during that period must be considered void; the product of an illegitimate judicial system by illegitimate judges. Such a conclusion is logically drawn from the OCP's submissions.

B. The civil war did not toll the statute of limitations

17. The OCP asserts that "[i]t is well established under national and international practice that a state of war which interrupts judicial functions, whether external or internal, necessitates the suspension of the statute of limitations."[56] The OCP has not demonstrated that the civil war in Cambodia interrupted judicial functions. Instead, the OCP attempts to demonstrate that it would have been impossible to prosecute these particular Accused at that time.[57] This is not a relevant consideration when determining whether a statute of limitations may be suspended due to civil war. The applicable test is whether the war made prosecution impossible by disrupting the functioning of the judicial system.

18. The civil war in Cambodia did not interrupt judicial functions. As discussed above, judicial functions continued throughout this period. The fighting was not constant and took place mainly in the dry season.[58] Furthermore, it was confined to certain areas near the Thai border[59] and was of decreasing intensity between 1979-91, as evidenced by the Vietnamese drawdown,[60] and the progress of the peace negotiations during this period.[61]

19. The OCP asserts that the "principle" that war which interrupts judicial functions may suspend statutes of limitations "has been extended to repressive authoritarian regimes in which access to courts may be impeded."[62] The OCP does not explain whether it considers the government in power at the time to be a repressive authoritarian regime which impeded access to the courts. It has certainly not demonstrated that this is the case. The OCP cites only one Czech Decision and several USA cases. The United States cases are all civil cases brought under the Alien Tort Claims Act ("ATCA") or the TVPA.

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[56] OCP Submission, para. 27 (emphasis added).
[57] *Id.*, paras. 17-18.
[58] MICHAEL VICKERY, CAMBODIA 1975-1982 313 (Silkworm Books, 1984, 2nd ed. 1999).
[59] *Id.*, at 318.
[60] Historian Michael Vickery has observed that the PRK's increasing confidence was shown by the annual withdrawals of Vietnamese troops, which by 1983 were undoubtedly underway, an increasingly Khmer administration, particularly after the 5th Party Congress in 1985 and a gradual, even if limited, political relaxation within Cambodia. *Id.*, at 310.
[61] *See* Ben Kiernan's Foreword in BENNY WIDYONO, DANCING IN THE SHADOWS: SIHANOUK, THE KHMER ROUGE, AND THE UNITED NATIONS IN CAMBODIA xx-xxiv (Rowman & Littlefield 2008).
[62] OCP Submission, para. 28.

These cases are not analogous to the present case because they: **1.** are civil, rather than criminal cases, where different rights and interests must be considered;[63] **2.** deal with particular pieces of domestic US legislation which US courts have found to require consideration of equitable tolling principles;[64] and **3.** deal with situations where the plaintiff was in the USA and necessary investigation could not be performed in his home country or the defendants were immune from prosecution in the home country.[65]

20. The OCP asserts that the "international principle" that a statute of limitations is suspended between two powers at war is applicable here because of the civil war in Cambodia.[66] A principle that a statute of limitations does not apply between two States at war is inapplicable to a civil war situation. Furthermore, as already explained, the fighting within Cambodia did not affect most of the country and did not significantly impede the functioning of the judicial system.
21. The OCP's assertions that the Accused "continued to serve as leaders of the Khmer Rouge opposition force actively resisting the jurisdiction of the PRK (and later State of Cambodia) government" and that "the United Nations continued to recognize the DK leaders as the legitimate heads of state" do not demonstrate that judicial functions were interrupted such that prosecution was a "physical, political and practical impossibility."[67]
22. Concerning the purported physical and practical possibility to prosecute the Accused, it merits recalling that Cambodian law allowed trials *in absentia* during this period.[68] Trials

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[63] "The TVPA and the [ATCA] share a common purpose in protecting human rights internationally. The TVPA grants relief to victims of torture, 28 U.S.C. § 1350, and the [ATCA] grants access to federal courts for aliens seeking redress from torts 'committed in violation of the law of nations.' 28 U.S.C. § 1350. Both statutes use civil suits as the mechanism to advance their shared purpose and both can be found in the same location within the United States Code." *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. Tenn. 2009).

[64] Equitable tolling is the "doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired." BLACK'S LAW DICTIONARY 560 (7th ed. 1999). "[T]he justifications for the application of the doctrine of equitable tolling under the TVPA apply equally to claims brought under the [ATCA]. Congress provided explicit guidance regarding the application of equitable tolling under the TVPA. The TVPA 'calls for consideration of all equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights.'" *Chavez v. Carranza*, 559 F.3d 486, 492 (6th Cir. Tenn. 2009).

[65] *See Jeav v. Dorelien*, 431 F.3d 776, 780 (11th Cir. Fla. 2005); *Arce v. Garcia*, 434 F.3d 1254, 1262 (11th Cir. Fla. 2006); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9th Cir. Haw. 1996); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1155 (11th Cir. Fla. 2005); *Chavez v. Carranza*, 559 F.3d 486, 493 (6th Cir. Tenn. 2009).

[66] OCP Submission, para. 29.

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

[68] *See* Decree 2 Law on Organization of the Court and Prosecution Department, 10 February 1982, Art. 11; 1989 Law on Criminal Procedure, 26 July 1989, Art. 38. Trials *in absentia* occurred prior to 1982 as well, as evidenced by the 1979 trial of Pol Pot and IENG Sary, which was conducted *in absentia*, pursuant to the 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, 15 July 1979, Arts. 6-7.

in absentia are allowed in Cambodia today,[69] as they are in other courts.[70] If the government had wished to institute proceedings against any of the Accused for violations of national law prior to the expiry of the applicable statute of limitations, it could have done so. The judicial system was functioning and it was possible to make the necessary investigations. The OCP has not shown that the government was incapable of instituting *in absentia* proceedings.

23. The government's failure to institute proceedings cannot be explained by physical or practical impossibility. The government for whatever reason choose not to institute proceedings. Three possibilities, however, readily emerge: **1.** the government considered its previous proceedings valid in the case of Mr. IENG Sary; **2.** the government did not consider the Accused to be responsible for committing, inciting, ordering or aiding and abetting murder, torture or religious persecution under the 1956 Penal Code; or **3.** the government otherwise lacked the political will to follow through with prosecutions.

24. The OCP asserts that prosecution was politically impossible because the United Nations recognized the leaders of Democratic Kampuchea ("DK"). This assertion is unsupported and incorrect. The People's Republic of Kampuchea ("PRK") was at war with DK forces. If the United Nations' recognition of the DK government did not deter the PRK from fighting DK forces, it can hardly be claimed that this recognition would deter the PRK from prosecuting DK leaders. There is no indication that the government refrained from instituting prosecutions because of the United Nations' recognition. Even if this were the case, lack of political will to prosecute does not demonstrate that a judicial system is not functioning. Consider Case 003 at the ECCC. It may not go to trial because, as many ECCC observers note, there is a lack of political will (i.e. the ECCC is not free from political interference and not all judges are independent) for the case to proceed.[71] This may indicate severe problems within the ECCC which may ultimately impact on the legacy of the ECCC, but it does not demonstrate that the ECCC is not functioning.

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[69] *See* Code of Criminal Procedure, Art. 333.

[70] *See* Statute of the Special Tribunal for Lebanon, Art. 22.

[71] *See, e.g., Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE, June 2011, p. 3. "[Certain] statements [by the Cambodian Co-Prosecutor] raise the question of whether the desk-based investigations [of Cases 003 and 004] have been tailored to provide legal cover for the politically-determined dismissal of politically opposed cases." *See also* Ou Virak, *Open Letter to Tribunal's Clint Williamson*, PHNOM PENH POST, 27 May 2011, "Recent developments at the Extraordinary Chambers in the Courts of Cambodia (ECCC) with regards to cases 003 and 004 are a cause for serious concern and raise the question of whether the United Nations is conceding to the demands of the Royal Government of Cambodia to close down the doors of the ECCC with the conclusion of Case 002."

C. Since there were no conditions which prevented prosecution of the Accused, the statute of limitations was not tolled and expired prior to its extension

25. The OCP asserts that statutes of limitation may be suspended where a practical impossibility was caused by the fault or fraud of the Accused.[72] The OCP relies upon one civil case from Louisiana, a French civil case, and a law review article about good faith in contract negotiations.[73] This is insufficient to demonstrate that Cambodian law requires suspension of statutes of limitation in the present case. Nevertheless, this argument need not even be addressed, as it has already been explained that there was no practical impossibility to prosecute the Accused within the statutorily prescribed period. The judicial system was functioning, the civil war did not cause judicial functions to cease, and the government could have carried out prosecutions *in absentia* had it wished to do so and had it found itself unable to arrest the Accused. The Defence contests the OCP's allegations that the Accused sought "the eradication of judges, lawyers and other professionals or intellectuals considered to be class enemies" or were in any other way directly responsible for the state of the judicial system following the DK regime.[74] This will be a matter for trial.

III. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to FIND that Article 3 new cannot be applied at the ECCC.

Respectfully submitted,

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Signed in Phnom Penh, Kingdom of Cambodia on this **17th** day of **June, 2011**

[72] OCP Submission, para. 31.
[73] *Id.*, note 89.
[74] *Id.*, para. 32.