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IENG SARY'S REPLY TO THE JOINT OBSERVATIONS ON MR. NUON CHEA, MR. IENG SARY AND MRS. IENG THIRITH'S APPEALS AGAINST THE CLOSING ORDER

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits this Reply to the Civil Parties' Joint Observations on Mr. NUON Chea, Mr. IENG Sary and Mrs. IENG Thirith's Appeals Against the Closing Order ("Response").[1] This Reply will address the issues raised in the Response which are relevant to Mr. IENG Sary's Appeal.[2] Factual allegations contained in the Response will not be addressed.

I. SUMMARY OF RESPONSE

1. The Civil Parties assert the following:
   a) Mr. IENG Sary is incorrect to argue that the international crimes with which he is charged are not applicable before the ECCC, because:
      i. international treaty law is applicable before the ECCC;
      ii. customary international law, especially *jus cogens*, is applicable before the ECCC; and
      iii. he is wrong to argue that the exception under Article 15(2) of the International Covenant on Civil and Political Rights ("ICCPR") is not applicable before the ECCC;
   b) the principle of legality is not violated by the application of international law, because the *Duch* Trial Chamber applied international law and because it does not violate the principle of legality to retroactively transpose international law into domestic law as this is a procedural matter;
   c) Mr. IENG Sary is wrong to assert that he was not aware of the international crimes for which he is being prosecuted, because of the appalling nature of the crimes and his position of leadership within Democratic Kampuchea.

II. SUMMARY OF THE REPLY

2. The Defence will show that the Civil Parties err:
   a) by placing reliance upon the *Duch* Trial Chamber Judgement;
   b) in concluding that international conventions may be directly applied at the ECCC. The Civil Parties confuse a State's rights and obligations under international law with an individual's rights and obligations within a State and

[1] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ (PTC 146), Joint Observations on Mr. NUON Chea, Mr. IENG Sary and Mrs. IENG Thirith's Appeals Against the Closing Order, 29 November 2010, D427/3/8, ERN: 00633280-00633296.

[2] *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 ("Appeal").

misunderstand the Defence's argument concerning State succession to conventions;

c) in concluding that customary international law may be directly applied at the ECCC;

d) in concluding that the principle of legality does not bar prosecution for international crimes; and

e) in their analysis of foreseeability and accessibility.

III. REPLY

A. The Civil Parties err by placing reliance upon the *Duch* Trial Chamber Judgement

3. Throughout the Response, the Civil Parties approvingly cite the *Duch* Trial Judgement.[3] The Civil Parties even allege that the Defence erred in law "by not taking into consideration the jurisprudence of the ECCC."[4] The *Duch* Trial Judgement is not binding on the OCIJ or Pre-Trial Chamber in Case 002. It is of limited, if any, persuasive value: the *Duch* Trial Chamber was not requested to consider whether conventional or customary international law was directly applicable in Cambodia.[5] The *Duch* defence's challenges to applicable law and forms of liability were extremely limited. Effectively, the *Duch* trial was merely a prolonged change of plea hearing.[6] The *Duch* Trial Chamber simply applied the crimes which were included in the Establishment Law without considering whether this would violate the principle of legality in Cambodian law. The Defence was forbidden to intervene in Case 001 to address questions of applicable law –

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[3] *See* Response, paras. 7, 15, 16, 19, 21, 23, 26, 27, 28, 29, 30.

[4] *Id.*, p. 12.

[5] As the Pre-Trial Chamber has noted, "it is inherent to courts where several proceedings are pending that a decision in one case on a legal issue will guide the court in future similar cases where no new circumstances or arguments are raised." *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ(PTC02), Decision on IENG Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 5 December 2008, D99/3/19, ERN: 00226067-00226070, para. 14 (emphasis added).

[6] "Duch's trial may prove unique in the history of the ECCC, in that he is the only defendant to date who has admitted to the vast majority of the factual allegations against him. Although Duch requested that he be acquitted during his final week at trial, he largely cooperated with the Chamber throughout the proceedings and, until that point, had plead for remorse and been willing to accept punishment. As a result, certain procedural rights guaranteeing the presumption of innocence (or which seemingly prevent a shift in the burden of proof from the Prosecution to the Defense) have not been called into question. For instance, the Defense did not challenge the nature of the evidence being brought against Duch (largely archival and hence, open to being tampered with, in light of the 30 years since the DK era ended). Additionally, issues relating to translation were swiftly resolved, despite further efforts being needed to improve translation and interpretation at the ECCC." Michelle Staggs Kelsall et al., *Lessons Learned from the "Duch" Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia*, KRT TRIAL MONITORING GROUP, December 2009, p. 6.

for example the application of JCE – in order to protect its interests in Case 002.[7] The *Duch* Trial Chamber made no independent analysis of the applicability of JCE and its application of JCE was carried out in two paragraphs.[8] The *Duch* Trial Chamber's application of international law, therefore, must not be considered to have any precedential value.

B. The Civil Parties err in concluding that international conventions may be directly applied at the ECCC

1. The Civil Parties confuse a State's rights and obligations under international law with an individual's rights and obligations within a State

4. The Civil Parties argue that the Geneva Conventions and the Genocide Convention were applicable to Cambodia during the Democratic Kampuchea period because Cambodia ratified these conventions prior to 1975.[9] Whether Cambodia is bound by international conventions is a different matter from whether these Conventions are able to create individual criminal liability in a domestic court. If Cambodia becomes party to a Convention, it may undertake certain obligations as a State. This is a completely separate matter from whether that Convention may be directly applied to impose criminal liability on individuals within the State. The Civil Parties do not appear to recognize this distinction.[10] Cambodia has not been charged with failing to abide by its treaty obligations.

5. Whether individual criminal liability may be imposed by a Cambodian court depends on whether Cambodia considers international conventions to automatically be a part of Cambodian law, or whether it considers that they must first be incorporated into domestic law to have effect (essentially, whether Cambodia takes a monist or dualist approach to

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[7] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ(PTC02), Decision on IENG Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 5 December 2008, D99/3/19, ERN: 00226067-00226070.

[8] *Case of Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188, ERN: 00226067-00226070, paras. 511-12.

[9] Response, paras. 8-12.

[10] For example, the Civil Parties assert that the Genocide and Geneva Conventions were in force during the period of Democratic Kampuchea and erroneously state that "Although they are fully aware of this state of affairs, the Accused Persons argue that the fact that the Cambodian Government did not refer to the said international conventions during the 1975-1979 period is proof that it did not consider itself bound by them." Response, para. 10. The Defence argued that the Cambodian government did not enact any implementing legislation which would impose individual criminal liability for breaches of these conventions in the period prior to 1979. The issue is not simply that the government did not "refer" to the conventions during this time period.

international law).[11] If Cambodia takes a monist approach, the Pre-Trial Chamber must determine whether the convention **a.** provides for individual criminal liability and **b.** is self-executing. If Cambodia takes a dualist approach, the Pre-Trial Chamber must determine whether Cambodia enacted the necessary implementing legislation to convert the Convention into applicable domestic law and whether this domestic law provides for individual criminal liability.

6. Cambodia takes a dualist approach to its implementation of international law.[12] In the period of 1975-79, there was no implementing legislation which would provide for individual criminal liability for violations of the Genocide or Geneva Conventions. Even if Cambodia followed a monist approach, the Genocide and Geneva Conventions are not self-executing[13] and may not be directly applied as a basis for individual criminal liability. This is clear from their express provisions which require States to implement legislation to provide for criminal liability.[14] Therefore, individual criminal liability may not be based simply on whether Cambodia was a party to the Genocide or Geneva Conventions.

7. Because the Civil Parties misunderstand the difference between Cambodia's obligations as a State party to a convention and that convention's internal domestic effect, the Civil Parties find it necessary to argue that the Conventions were not denounced.[15] It is not necessary to respond to this argument, because the Defence did not argue that Cambodia had denounced the conventions and any such denunciation would affect Cambodia's obligations as a State.

2. The Civil Parties misunderstand the Defence's argument concerning State succession to conventions

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[11] *See* Appeal, paras. 111-14 for a discussion of the difference between monist and dualist States.
[12] *See* Appeal, para. 111.
[13] *See* William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,'* 1 J. INT'L CRIM. JUST. 39, 62 (2003); MALCOLM N. SHAW QC, INTERNATIONAL LAW 263 (5th ed. 2003) ("SHAW"), both of which note that the Genocide Convention is not self-executing. The Geneva Conventions must not be considered self-executing for the same reasons.
[14] Article 5 of the Genocide Convention provides that: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III." Article 49 of Geneva Convention I, Article 50 of Geneva Convention II, Article 129 of Geneva Convention III, and Article 146 of Geneva Convention IV each provide that: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article."
[15] Response, para. 10.

8. The Civil Parties confuse the issue of State succession to conventions. They assert that because the Conventions "went into force before the period in question, the succession of governments does not affect their applicability. As Shaw points out, 'the issue of state succession should be distinguished from the question of succession of governments, particularly revolutionary succession.' As such, the takeover of power by the Khmer Rouge did not affect the maintenance of those treaties in force..."[16] The Defence did not argue that the issue of State succession arose with respect to the Geneva Conventions,[17] but only with respect to the Genocide Convention.[18] It did not argue that the issue arose because of the takeover of power by the Khmer Rouge, but because Cambodia became a party to the Genocide Convention before it gained independence from France.

9. The "clean slate" principle refers to the fact that newly independent States do not become a party to a convention merely by reason of the fact that the convention had been in force before the date of succession.[19] The Civil Parties' assertion that the Khmer Rouge did not practice the "clean slate" policy,[20] therefore, need not be addressed. The issue is not whether the Khmer Rouge practiced a "clean slate" policy but whether Cambodia remained bound by a convention to which it became a party prior to becoming and independent State. The Civil Parties err in any case in concluding that a request by the Khmer Rouge for "application of international rules" equates to agreement to be bound by the Genocide Convention.

C. The Civil Parties err in concluding that customary international law may be directly applied at the ECCC

10. The Civil Parties assert that "[e]ach of the Accused Persons argued that international customary law was not directly applicable under Cambodian law and, therefore, could not be a basis for criminal proceedings, the more so as at the time of the events, the prohibitions were not yet customary international law norms."[21] The Defence did not

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[16] *Id.*

[17] Because the Defence did not argue that the issue of State succession arose with respect to the Geneva Conventions, it is unnecessary to consider the Civil Parties argument in this regard. However, the Defence notes that it is clear from the quote cited by the Civil Parties that any obligation arising from the Geneva Conventions is an obligation on States rather than individuals. The Civil Parties quote Professor Cassese: "Punishment is no longer left to the goodwill of States; it is an obligation *imposed* on them." Response, para. 12 (emphasis added).

[18] *See* Appeal, para. 117.

[19] SHAW, at 308-09. This general rule has been codified in Article 16 of the Vienna Convention on Succession of States in respect to Treaties, which entered into force on 6 November 1996. United Nations, *Treaty Series*, vol. 1946.

[20] Response, para. 11.

[21] *Id.*, para. 13.

argue that genocide, crimes against humanity, or grave breaches of the Geneva Conventions were not crimes under customary international law in 1975-79. The Defence simply argued that certain underlying acts did not constitute crimes against humanity in 1975-79.[22]

11. The Civil Parties advance no arguments to support their position that customary international law may be directly applied in Cambodian courts apart from noting that the *Duch* Trial Chamber applied customary international law directly.[23] The problem with reliance on the *Duch* Trial Chamber's decision in this regard has been discussed *supra*.

12. The Civil Parties mistake the relevance of *jus cogens* status. They assert that "the nature of these norms lies in their applicability *erga omnes*. It is not simply a matter of a 'privileged position', but it also entails an obligation that supersedes the notion of State sovereignty."[24] No authority is provided for this assertion. The *jus cogens* nature of a crime may lead to a duty imposed on States,[25] but does not lead to direct individual criminal liability. Furthermore, while it may impose a duty on States not to engage in acts of genocide, crimes against humanity, or grave breaches of the Geneva Conventions, a duty to prosecute such crimes is not settled.[26]

D. The Civil Parties err in concluding that the principle of legality does not bar prosecution for international crimes

1. The Civil Parties err in their analysis of the applicability of Article 15(2) of the ICCPR

13. The Civil Parties appear to misunderstand or ignore the Defence argument that the principle of legality in Cambodian law is stricter than the principle of legality at the international level. They do note that the Defence takes the position that the principle of legality contained in the 1956 Penal Code is stricter than that contained in the ICCPR,[27]

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[22] *See* Appeal, paras. 200-31.
[23] Response, paras. 15-16.
[24] *Id.*, para. 17.
[25] MALCOLM N. SHAW, INTERNATIONAL LAW 930 (Cambridge University Press, 2008 6th ed.) "Further, particular kinds of treaties may create obligations or rights *erga omnes* and in such cases, all states would presumptively be bound by them and would also benefit." (emphasis added).
[26] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 182-85 (T.M.C. Asser Press 2006). *See also* Michael Scharf, *From the Exile Files: an Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 364-367 (2006), discussing the *jus cogens* nature of crimes against humanity and a State's duty: "Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary."
[27] Response, para. 18.

but they fail to explain why they do not find this to be the case. They simply assert that Article 15(2) of the ICCPR allows for the trial and punishment of people for violations of general principles of international law regardless of the crimes status in domestic law.[28] This is true, but it does not change the fact that the principle of legality is stricter in Cambodian law. As expressly provided by Article 5(2) the ICCPR, "[t]here shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

14. The Civil Parties quote the *Duch* Trial Chamber, which stated that it "must determine whether the offences and modes of participation charged in the Amended Closing Order were recognized under Cambodian **or** international law between 17 April 1975 and 6 January 1979."[29] The Civil Parties then assert that "[t]he use of the coordination conjunction 'or' and not 'and' proves that the existence of such a crime under international law, as the one the Accused Persons are charged with, is in itself sufficient to allow for the judgement to be pronounced."[30] As explained above, no weight can be accorded to the *Duch* Trial Judgement on this point. The *Duch* Trial Chamber was not asked to consider the principle of legality under domestic law and there is nothing in the judgement from which to conclude that the Trial Chamber *proprio motu* or *sua sponte* exercised its inherent powers to do so. As noted, Duch confessed prior to trial and the *Duch* defence raised extremely limited jurisdictional challenges to the applicable law and forms of liability.

2. The Civil Parties err in concluding that the principle of legality has not been violated

15. The Civil Parties advance two arguments in support of their assertion that the principle of legality has not been violated. First, they assert that the principle of legality has not been violated because "the Trial Chamber has already indicated that 'the fact that the ECCC was established and confirmed with jurisdiction over offences after they were allegedly committed does not violate the principle of legality.'"[31] The fact that the ECCC was

[28] *Id.*, para. 19.
[29] Emphasis added by Civil Parties.
[30] Response, para. 21.
[31] *Id.*, para. 23, *quoting Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 34.

established after the commission of the crimes is not the issue. The principle of legality is not violated by the fact that the ECCC was established and conferred with jurisdiction after the crimes allegedly occurred. The principle of legality has been violated because the crimes currently being charged were not criminalized in Cambodia at the relevant time.

16. Second, the Civil Parties assert that the Establishment Law does not create new law, but rather "transposes international treaty and customary international law existing at the time of Democratic Kampuchea into Cambodian domestic law."[32] They cite an article by David Boyle for this proposition.[33] The Civil Parties fail to recognize that this "transposition" would create new domestic Cambodian law. Consider if the ECCC attempted to "transpose" a piece of American domestic criminal legislation into domestic Cambodian law. This would not be a procedural matter. This would be the introduction of a new piece of substantive law. This analysis does not change when the law one is attempting to introduce is international, rather than from any other foreign jurisdiction.

17. The Civil Parties cite international jurisprudence which has considered the "issue of whether the retroactive effect of a jurisdictional rule regarding international crimes violates human rights..."[34] The Civil Parties note that the ICTY *Delalić* Trial Chamber "held that its status 'does not create substantive law but a judicial authority and context for the application of international humanitarian law.'"[35] This confuses the issue, because the ECCC is not an international court which may simply determine whether it has jurisdiction over certain crimes which were already criminalized in international law. In order to apply international crimes without violating the principle of legality recognized by Cambodian law,[36] the ECCC must find that these crimes were criminalized in Cambodia in 1975-79.

E. The Civil Parties err in their analysis of foreseeability and accessibility

18. The Civil Parties assert that the appalling nature of international crimes must be considered when determining whether criminal liability was foreseeable to a Charged Person/Accused.[37] The Defence does not dispute that the appalling nature of crimes has

[32] Response, para. 23.
[33] *Id.*, n. 35.
[34] *Id.*, para. 24.
[35] *Id.*
[36] *See* 1956 Penal Code, Art. 6.
[37] Response, paras. 29-32.

been considered to be a factor in determining foreseeability. However, "the immorality or appalling character of an act is not a sufficient factor to warrant its criminalisation under customary international law."[38]

19. The Civil Parties also assert that liability must have been foreseeable to Mr. IENG Sary based on his position of leadership within Democratic Kampuchea.[39] Mr. IENG Sary's position of leadership during Democratic Kampuchea does not lead to a conclusion that he could have foreseen criminal liability for crimes which did not exist in Cambodian law at the time. That criminal liability would not have been foreseeable is especially true when considering his position of leadership. It may be the case that if an Accused personally commits an act that would amount to genocide, crimes against humanity, or grave breaches, he could foresee that such conduct is criminal. When forms of liability such as JCE and command responsibility are involved, however, it is much more difficult to assume that liability is foreseeable.

> Perhaps no concept stretches traditional notions of individual criminal responsibility as far as superior or command responsibility for criminal conduct by underlings. Superior responsibility is omissions liability, in that offenders are punished for *not* acting. But it goes much further. The superior is held liable for a particular crime not because his conduct falls within its definition, but because he failed to prevent its commission by others. What is significant is that the superior is held liable for the *actual crime* of the subordinate -- not for a separate offense focused upon the commander's dereliction of duty.[40]

20. It is not enough therefore to state that criminal liability would have been foreseeable based on the nature of the crimes alleged or Mr. IENG Sary's position of responsibility. The Pre-Trial Chamber should continue its previous practice of determining whether an Accused could actually foresee liability, rather than simply exploring whether liability existed in customary international law.[41]

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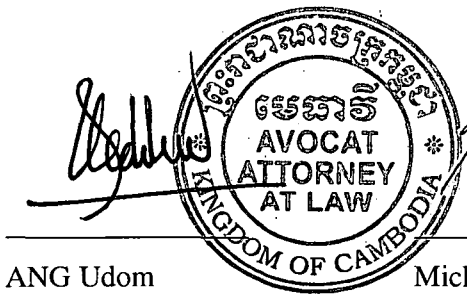
[38] *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, ICTY Appeals Chamber, 21 May 2003, para. 42.
[39] Response, paras. 33-39.
[40] David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 88-89 (2006).
[41] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC35), Decision on the Appeals Against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, ERN: 00486521-00486589, para. 45.

WHEREFORE, for all the reasons stated in the Appeal and herein, the Defence respectfully requests the Pre-Trial Chamber to grant the Appeal and the relief requested therein.

Respectfully submitted,



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Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4th day of **January, 2011**