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

FILING DETAILS

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IENG THIRITH DEFENCE APPEAL FROM THE CLOSING ORDER

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I INTRODUCTION AND PETITION

1. On 16 September 2010, the Office of the Co-Investigating Judges (CIJ) filed its Closing Order, indicting Madame Ieng Thirith (Appellant) for international and domestic crimes, and for various forms of liability.[1] The defence for the Appellant herewith files its appeal against the Closing Order.

II ADMISSIBILITY OF THIS APPEAL

2. Rule 67(3)(a) provides that the CIJ must issue a Dismissal Order if the acts in question do not amount to crimes within the jurisdiction of the ECCC. Rule 67(5) provides, insofar as is relevant, that '[t]he order is subject to appeal as provided in Rule 74.' Rule 74(3)(a) provides that the Appellant may appeal against orders by the CIJ 'confirming the jurisdiction of the ECCC'.

3. In the Pre-Trial Chamber's (PTC) 'Decision on Ieng Sary's Appeal against the Co-Investigating Judges' Order on Ieng Sary's Motion against the Application of Command Responsibility',[2] the PTC ruled that the request was premature and that 'if the Closing Order confirms the jurisdiction of the ECCC over Command Responsibility, the Appellant may consider the effect of Internal Rule 67(5) when read in conjunction with Internal Rule 74(3)(a)'.[3] The defence submits the PTC thus allows the defence to appeal from the Closing Order on jurisdictional grounds.

4. In the PTC's decision on the Appellant's appeal regarding abuse of process, the PTC further ruled that an appeal can also be based on the Appellant's inherent right under Internal Rule 21.[4] The PTC held in paragraph 14 thereof:

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[1] CIJ, Closing Order, 17 September 2010, Document No. D427 (Closing Order). This document was notified to the parties on 16 September 2010.
[22] PTC, Decision on Ieng Sary's Appeal against Co-Investigating Judges' Order on Ieng Sary's Motion against the Application of Command Responsibility, 9 June 2010, Document No. D345/5/11.
[3] Ibid., para. 11.
[4] PTC, Decision on Ieng Thirith's Appeal against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, Document No. D264/2/6.

> The overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a). The Pre-Trial Chamber notes that this appeal raises a serious issue of fairness and the Pre-Trial Chamber therefore has jurisdiction to consider it.

5. The defence thus submits that this appeal is admissible on two grounds, namely lack of jurisdiction and breach of fair trial rights. Since the defence is restricted from appealing on any other ground and, given the limitations imposed regarding the length of this appeal, the defence reserves the right to raise additional jurisdictional arguments during the Initial Hearing, and reserves the right to raise further deficiencies of the Closing Order on another occasion.

III JURISDICTIONAL CHALLENGES

3.1 Introduction

6. The defence submits the ECCC have no jurisdiction to prosecute the Appellant for the following crimes:
   - Genocide (Section 4.3)
   - Crimes against humanity (Section 4.4)
   - Grave breaches of the Geneva Conventions (Section 4.5), and
   - Domestic crimes (Section 5.6).

   Further the defence submits the ECCC have no jurisdiction to prosecute the Appellant on the basis of the following forms of liability:
   - Joint criminal enterprise (Section 5.7), and
   - Command responsibility (Section 5.8).

3.2 The Principle of *Nullum Crimen Sine Lege*

7. Firstly, the defence submits that the principle of *nullum crimen sine lege* prohibits the prosecution of several of the crimes and the forms of responsibility as set out in the Closing Order.

8. Article 33(2) of the Law on the Establishment of the ECCC (Establishment Law or ECCC Establishment Law) stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

9. Article 6 of the 1956 Cambodian Penal Code states that:

> [c]riminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed. Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place.

10. The International Covenant on Civil and Political Rights (ICCPR)[5] stipulates in Article 5(1) that

> [n]o one [shall] be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

11. In addition, Article 15(2) ICCPR states that '[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'.

3.3 Genocide

12. Article 4 of the Establishment Law states that '[t]he [ECCC] shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and

[5] International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI), entered into force 23 March 1976.

which were committed during the period from 17 April 1975 to 6 January 1979'. Article 4 defines 'genocide' as follows:

> [t]he acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children from one group to another group.

13. The Establishment Law adopted the same definition of 'genocide' as the Convention on the Prevention and Punishment of the Crime of Genocide.[6]

14. The defence submits that the ECCC lacks jurisdiction to prosecute the Appellant for the crime of genocide. Such prosecution would violate the fundamental principle of *nullem crimen sine lege*.

3.3.1 Genocide Was Not Criminalized under Cambodian National Law

15. Article 33(2) (new) of the Establishment Law, referring to Article 15 of the International Covenant on Civil and Political Rights (ICCPR), states that the Appellant cannot be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national law, at the time when it was committed.

16. The defence submits that the Appellant cannot be prosecuted over the crime of genocide, as this crime did not constitute a criminal offence under national law at the time of its alleged commission. The 1956 Cambodian Penal Code, which has been officially recognized as the Penal Code in force in Cambodian during 1975-79,[7] does not contain a provision criminalizing genocide.

[6] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Resolution 260 (III) A on 9 December 1948, entry into force: 10 January 1951, Articles 2 and 3.
[7] TC, Information about the 1956 Penal Code of Cambodia and Request Authentification of an Authoritative Code, 17 August 2009.

17. Prosecuting the Appellant over the charge of genocide would therefore breach the principle of *nullem crimen sine lege* which principle the ECCC is bound to respect.[8]

3.3.2 Establishment Law Cannot Create New Law and Apply It Retroactively

18. The CIJ stated that 'in order to be applied before the ECCC, where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law [...]'.[9] The Closing Order states that international law was directly applicable in Cambodia at the relevant time because 'Article 1, 2 and 29(new) of the ECCC Law set out as Cambodian law the violations of international law within its subject matter jurisdiction (genocide [...])'.[10]

19. The defence submits that the CIJ have incorrectly interpreted the ECCC Establishment Law in such a manner that it attempts to create new criminal law and apply such law retroactively to conduct allegedly committed more than 30 years ago.

20. The ECCC Establishment Law cannot create new substantive criminal law. The Agreement and the Establishment law were created in order to 'regulate the cooperation between the United Nations and the Royal Government of Cambodia'[11] and to 'bring to trial senior leaders [...] 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' committed in 1975-79.[12] The ECCC Establishment Law does not create substantive rules of criminal law, but only provides for the definition of those crimes over which the ECCC are endowed with jurisdiction.

21. Further, the ECCC Establishment Law cannot apply new criminal law retroactively. The defence recalls that 'a logical and necessary corollary of the doctrine of strict legality is that criminal rules may not cover acts or conduct undertaken prior to the adoption of such

[8] See Article 33(2) Establishment Law, referring to Article 15 of the ICCPR.
[9] Closing Order, para. 1302.
[10] Closing Order, para. 1304.
[11] 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, 6 June 2003 (Agreement), Article 1.
[12] Establishment Law, Article 1.

rules'.[13] The Agreement and the Establishment Law provide the ECCC with the competence to apply existing law for prosecution of crimes committed at the relevant time and not new law retroactively.

3.3.3 Genocide Not Directly Applicable before ECCC

22. The defence submits that the crime of genocide is not applicable directly before the ECCC and, as a result, the Appellant cannot be prosecuted on this basis.

The ECCC Is Not an 'International' Tribunal Where International Law Is Directly Applicable

23. The CIJ stated that '[t]he question whether the ECCC are Cambodian or international "in nature" has no bearing on the ECCC's jurisdiction to prosecute such crime'.[14] On the contrary, the defence submits that such a question is fundamental when ruling on the jurisdiction of the ECCC.

24. The ECCC is different in origin from the Former Yugoslavia and Rwanda Tribunals (ICTY and ICTR respectively). The ICTY and the ICTR are *ad hoc* institutions established as 'international tribunals' by resolutions adopted by the United Nations Security Council. Both tribunals are required to prosecute individuals for international crimes and, in doing so; they are bound to apply customary international law.[15] The judges of the ICTY and ICTR had to ensure that the relevant acts were recognized as criminal under customary international law and that they were sufficiently defined under that body of law.[16] In other words, the *ad hoc* tribunals do not have jurisdiction over

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[13] Antonio Cassese, *International Criminal Law* (2003), p. 147.
[14] Closing Order, para. 1301.
[15] See *Prosecutor v. Hadzihasanovic et al.*, Decision on Interlocutory Appeal challenging Jurisdiction in relation to Command Responsibility, Case No. IT-01-47-AR72, 16 July 2003, paras. 35, 44-46 and 55.
[16] See *Prosecutor v. Vasiljevic*, Judgment, Case No. IT-98-32-T, 29 November 2002, para. 202; See *Prosecutor v. Ojdanic*, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Entreprise*, Case No. IT-99-37-AR72, 21 May 2003, para. 9, in which the Appeals Chamber stated that '[t]he Tribunal only has jurisdiction over a listed crime [in the Statute] if that crime was recognized as such under customary international law at the time it was allegedly committed. The scope of the Tribunal's jurisdiction *ratione material* may therefore be said to be determined both by the Statute, insofar as it sets out the jurisdictional framework of the International Tribunal, and by customary international law, insofar as the Tribunal's power to convict an accused of any crime listed in the Statute depends on its existence qua custom at the time this crime was allegedly committed'.

violations of treaty law or violations of domestic law unless those conventional or national prohibitions have additionally become part of customary international law.[17]

25. The ECCC also differs from other 'internationalized' tribunals which are more international in nature as they may be established by international agreements. As a result, those 'internationalized' tribunals are not part of the national judiciary.[18]

26. On the contrary, the ECCC were established as a result of an agreement concluded between the United Nations and the Royal Government of Cambodia. It was agreed that the ECCC are courts within the Cambodian judicial system[19] and they have been recognized as such.[20] The ECCC are competent to exercise jurisdiction over both international and national crimes.[21] The ECCC are 'governed by the Cambodian Constitution and domestic laws'[22] and as such are bound to respect Cambodian law. All this demonstrates that the ECCC are not 'international' courts, but hybrid forming also part of the domestic court system.

27. Consequently, and contrary to the CIJ's conclusion,[23] international law and customary international law provide an insufficient basis to prosecute the Appellant before this Court. The ECCC can only prosecute international crimes if the said crimes were properly criminalized under Cambodian domestic law prior to, or at the time of their alleged commission.

The Crime of Genocide Was Not Criminalized under 1956 Penal Code Following Cambodia's Accession to the Genocide Convention

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[17] See Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), p. 6-7.
[18] Antonio Cassese, *International Criminal Law* (2000), p. 343.
[19] See Antonio Cassese, *International Criminal Law* (2000), p. 343.
[20] PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, para. 19: "the ECCC is, and operates as, an independent entity within the Cambodian court structure [...]"; See Closing Order, Closing Order, para. 1300.
[21] Agreement, Article 1.
[22] Suzannah Linton, 'Putting Cambodia's Extraordinary Chambers into Context' (2007) 11 *Singapore Year Book of International Law and Contributors* 195, 225.
[23] See Closing Order, para. 1302: 'where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly and it must have existed under international law applicable in Cambodia at the relevant time'.

28. The Closing Order concludes that 'the international law provisions prohibiting genocide [...], which expressly provide for criminal liability, were legally binding on Cambodia [...]'.[24] The CIJ further added that Cambodia acceded to the Genocide Convention which entered into force in 1951 and, therefore, 'the crime of genocide was part of international law applicable in Cambodia at the relevant time'.[25] Article 5 of the Genocide Convention obliges State Parties to criminalize genocide,[26] without which act genocide is not liable to prosecution in the domestic system. Enabling legislation is required in order to criminalize the international crimes within the domestic setting and to provide the appropriate penalties. The fact that Cambodia, and many other State Parties, have failed to enact enabling legislation at an early stage means that Cambodia may have been in breach of the Genocide Convention. This does not imply that the universal jurisdiction for this crime is thus established without the formal requirements for creating such legal basis.

29. The defence submits that the CIJ cannot rely on Cambodia's accession to the Genocide Convention to justify that genocide was part of international law applicable in Cambodia at the time of the alleged conduct. Because the ECCC are part of the Cambodian judicial system, substantive international criminal law based on international conventions cannot be directly applied. International crimes listed under international conventions can only be directly applicable before courts belonging to the national judicial system if the relevant provisions have been enacted within the national legislation. This was not the case in Cambodia for the crime of genocide in 1975-1979.

30. Although Cambodia acceded to the Genocide Convention in 1950, it enacted no legislation criminalizing genocide and provided no accounting for its absence.[27] As

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[24] Closing Order, para. 1305.
[25] Closing Order, para. 1310.
[26] Article 5 of the Genocide Convention states:"[t]he 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 3': See William A. Schabas, *Genocide in International Law* (2000), p. 346 describing Article 5 of the Genocide convention as an "obligation to enact national legislation" upon Contracting States.
[27] See William A. Schabas, *Genocide in International Law* (2000), p. 350.

previously argued, the ECCC Establishment Law cannot be considered as constituting the implementing legislation necessary for conventions law to be directly applied before the ECCC for actions that allegedly took place in 1975-79, as it has been enacted more than 50 years after Cambodia's accession to the Genocide Convention and 30 years after the commission of the relevant conduct.

31. Whether or not Cambodia had adopted a monist system or a dualist system is irrelevant in this discussion. After accession to the Genocide Convention it was necessary to implement the provisions of the treaty in the national system so as to create jurisdiction to prosecute such crime and to provide sanctions.

32. Contrary to 'dualist' systems,[28] under a 'monist' system 'ratification or accession to an international treaty introduces the norms of the treaty into national law and makes them directly applicable before domestic courts'.[29] However, the convention in question must be 'self-executing' to be directly applicable and implemented within domestic law.[30] A convention is said to be 'self-executing' if 'drafted in such a way as to be applicable without further addition or modification'.[31] Thus, the Genocide Convention cannot be considered self-executive. First, its provisions cannot be implemented without enactment of domestic laws. Article 5 of the Convention explicitly obliges Contracting States to enact legislation criminalizing genocide and other enumerated acts enshrined in the Convention. Second, no effective penalties for persons guilty of genocide had been provided in the Genocide Convention. Because Cambodia did not enact appropriate law, such penalties were also absent from Cambodian domestic law at the relevant time. The defence recalls that it is 'necessary to lay down in law a tariff relating to sentences for each crime, so as [...] to make the addressees cognizant of the possible punishment that

[28] A state that adheres to a dualist system considers international law to be separate from domestic law. As such, international law would only applied in such systems if direct application is explicitly authorized by the Constitution or if national implementing legislation has incorporated the international law into that State's domestic legal system. See Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), p. 129.
[29] William A. Schabas, *Genocide in International Law* (2000), p. 350.
[30] William A. Schabas, *Genocide in International Law* (2000), p. 350.
[31] William A. Schabas, *Genocide in International Law* (2000), p. 350.

may be meted out if they transgress a particular criminal provision'.[32] The defence submits that even if such principle does not have applicability at the international level before international *ad hoc* tribunals,[33] it is applicable before the ECCC which is part of the Cambodian judicial system.

33. The crime of genocide was not criminalized in Cambodian law in 1975-79. In addition to this, no penalty was provided for committing such crime. For this reason, the ECCC lack jurisdiction over this crime and the Appellant cannot be prosecuted and tried for this crime.[34]

34. Finally, the CIJ did not find that genocide formed part of customary international law at the relevant time. In the circumstances, the defence will not make submissions on this point. If the PTC would be assisted by defence arguments this can be dealt with during an oral hearing.

3.3.4 Genocide Was Not Foreseeable and Accessible to the Appellant

35. In line with the principle of *nullum crimen sine lege*, it is essential to determine whether the underlying conduct at the time of its commission was punishable in order to determine whether to prosecute an individual over that conduct.[35] In other words, it must be 'foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable'.[36]

36. The Closing Order states that, because international law provisions prohibiting genocide were legally binding on Cambodia, it can be considered to have been sufficiently

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[32] Antonio Cassese, *International Criminal Law* (2003), p. 157.
[33] Antonio Cassese, *International Criminal Law* (2003), p. 157.
[34] See, for instance, *Nulyarimma v. Thompson* [1999] FCA 1192 in which the Federal Court of Australia has held that 'it is not enough to say that, under international law, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that Australian law permits that result'.
[35] *Prosecutor v. Hadzihasanovic et al.*, Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT, 12 November 2002, par. 62.
[36] *Prosecutor v. Hadzihasanovic et al.*, Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT, 12 November 2002, par. 62.

accessible to the Charged Person.[37] The defence submits that this conclusion is inaccurate. The CIJ failed to make the fundamental distinction between international provisions 'prohibiting' the crime of genocide, which are therefore binding upon State Parties, and the international law provisions 'criminalizing' such crimes, which are binding upon the State Parties' citizens. The defence submits that the CIJ have wrongly concluded that the prohibition made individuals criminally responsible for acts of genocide committed in Cambodia in 1975-79.

37. The defence submits that the provisions prohibiting genocide were not legally binding on Cambodians as no substantive criminal law at the national level criminalized such crime at the time of its alleged commission. In addition, no penalty for its commission was provided at that time. Therefore, the law criminalizing such conduct was not accessible to the Appellant in 1975-79 and the Appellant could not have foreseen that the alleged conduct constituted a crime in 1975-79.

3.4 Crimes Against Humanity

38. The ECCC Establishment Law states that 'the [ECCC] shall have the power to bring to trial all Suspects who committed crimes against humanity' during the period under investigation. The Establishment Law further stipulates that '[c]rimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane treatment'.[38]

39. Article 6(c) of the Charter of the International Military Tribunal (IMT)[39] defines 'crimes against humanity' as follows: 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection

[37] Closing Order, para. 1305.
[38] Establishment Law, Article 5.
[39] Charter of the International Military Tribunal, adopted on 8 August 1945.

with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.

40. The defence submits that the ECCC have no jurisdiction to prosecute the Appellant for crimes against humanity.

3.4.1 Crimes against Humanity Did Not Constitute Criminal Offences under Cambodian National Law

41. Article 33(2) (new) of the Establishment Law recognizes that the Appellant cannot be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national law, at the time when it was committed.

42. The defence submits that crimes against humanity were not criminalized in Cambodia in 1975-79. The 1956 Penal Code, which has been explicitly recognized as the Penal Code in force in Cambodia during the 1975-1979 period,[40] does not contain any provision criminalizing crimes against humanity in Cambodia.

43. Prosecuting the Appellant for crimes against humanity would violate the principle of *nullum crimen sine lege*, which principle requires that punishable acts must have constituted crimes at the time they were conducted.[41]

3.4.2 Establishment Law Cannot Create New Law and Apply It Retroactively

44. The defence hereby refers to its submissions in Section 3.3.2 above, which applies *mutatis mutandis* to this submission relating to the absence of jurisdiction over crimes against humanity before this Court.

45. As crimes against humanity were not criminalized under Cambodian law at the relevant time, the defence submits the CIJ have misinterpreted the Establishment Law in such a way that it creates new criminal law and then applies such law retroactively, therefore

[40] PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alia "Duch", 3 December 2007, para. 19; See Closing Order, para. 1300.
[41] Antonio Cassese, *International Criminal Law* (2003), p. 142.

violating the fundamental principles of *nullum crimen sine lege* and non-retroactivity of new penal laws.

3.4.3 Crimes against Humanity as 'International Crimes' Cannot Be Directly Applied before the ECCC

46. The defence submits that the prohibition of crimes against humanity under customary international law cannot provide a basis for the prosecution of the crimes against humanity before the ECCC.

The ECCC Is Not an 'International' Tribunal in Which International Law Is Directly Applicable

47. Unlike the *ad hoc* tribunals, the ECCC form part of the domestic criminal justice system and therefore, international law, including customary international law, cannot be directly applicable before the ECCC.

48. The defence hereby refers to its analysis of the difference between international tribunals and the ECCC, as set out in Section 3.3.3 above.

The 'Criminalization' of Crimes against Humanity Was Not Part of Customary International Law at the Relevant Time

49. According to the CIJ, a prohibition of crimes against humanity existed under customary law at the relevant time, and such prohibition was 'sufficiently accessible to the Appellant'.[42]

50. The defence submits that the CIJ failed to recognize the fundamental distinction between customary international law 'prohibiting' crimes against humanity, which is binding upon states, and customary international law 'criminalizing' such acts committed by individuals. The distinction is fundamental as 'even where the Tribunal is satisfied that a particular prohibition exists under customary international law, it must still establish that this prohibition applies to individuals (and not only to states) [...] and that the breach of

[42] Closing Order, para. 1306.

that prohibition entails individual criminal responsibility under customary international laws'.[43] The Closing Order fails to do so. Mere reference to World War II trials does not establish that a customary norm criminalizing crimes against humanity existed in 1975-79. This is because there was no corresponding rule of customary international law requiring a state to punish crimes against humanity in 1975-79 in Cambodia.[44]

51. Thus, the CIJ have failed to demonstrate that the scope of the rule of customary international law at the relevant time extended to the criminalization of individual behavior within Cambodia.[45] In deciding that '[c]rimes against humanity were part of the international law applicable in Cambodia at the relevant time',[46] the CIJ referred to the Nuremberg Charter of 1945 and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (CNASL).[47] The defence submits that the CIJ erred in placing reliance of the documents.

52. The Nuremberg Charter did not create a rule of customary international law, nor did it codify any such rule, dictating states to criminalize and prosecute individuals over crimes against humanity. Rather, the Charter was an instrument which merely provided guidelines for determining what a war crime was during World War II. In addition, the Charter dealt with crimes committed in the context of World War II. As a result, this text is not applicable to crimes that allegedly took place in Cambodian in 1975-79. Further, under the Nuremberg Charter, crimes against humanity were considered war crimes and not as a crime *per se*.[48]

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[43] Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), p. 13.
[44] The International Law Commission encountered in the fifties and later between 1982-1996 difficulties in finding a policy of international criminalization for crimes against humanity and the extent to which human rights violations can or should be internationally criminalized. See Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), p. 184.
[45] See Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), p. 14 who stated in the context of the *ad hoc* tribunals that 'it is for judges [...] to evaluate the extent to which a rule may be said to exist under customary international law in light of existing state practice and opinion juris'.
[46] Closing Order, para. 1313.
[47] Closing Order, para. 1313, footnote 5182; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by General Assembly Resolution 2391 (XXIII) on 26 November 1968 , entered into force 11 November 1970, preamble and Article 1.
[48] Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* (1999), p. 41, 77.

53. By 1975, only 17 states had acceded to or ratified the CNASL and Cambodia was not among them and is still not a party to this Convention.[49] As a result, the CNASL was not applicable in Cambodia at the relevant time and fails to create a customary norm in international law which would have criminalized and allowed for the prosecution of crimes against humanity at that time.

Alternative Argument: Customary International Law Norm Is Not Directly Applicable before the ECCC

54. A state cannot prosecute an individual alleged to have committed a crime under customary international law unless it has adopted implementing legislation establishing those violations as offences under domestic law,[50] which domestic law also provides penalties for breaches.[51] This principle is based on the two inter-related principles of *nullum crimen sine lege* and legal certainty. Because the ECCC are part of the Cambodian judicial system, they must abide to these two principles.

55. In that regard, French courts which provided the basis for Cambodia's criminal justice system, have refused to directly apply before French Courts crimes against humanity as customary international law because of the absence of domestic written provisions criminalizing the relevant conduct at the time of the commission of the alleged crimes (1955-1957).[52] Because the French Criminal Code had only written crimes against humanity into domestic law on 1 March 1994, no crimes committed before that date can be prosecuted as crimes against humanity.[53]

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[49] 17 states acceded to or ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity before 1975, namely Albania, Belarus, Bulgaria, Cameroon, Cuba, Guinea, Hungary, India, Kenya, Mongolia, Nigeria, Philippines, Poland, Romania, Russian Federation, Tunisia and Ukraine. Rwanda ratified the Convention in 1975 and Gambia in 1978.

[50] Antonio Cassese, *International Criminal Law* (2003), p. 303 stating that 'national courts do not undertake proceedings for international crimes only on the basis of international customary law, that is, if a crime is only provided for in that body of law'.

[51] Antonio Cassese, *International Criminal Law* (2000), p. 303 stating that states 'instead tend to require either a national statute defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by a State, the passing of implementing legislation enabling courts to fully apply the relevant treaty provisions'.

[52] French Cour de Cassation, Crim., 17 June 2003, Bull. Crim. 2003, No. 122, p. 465.

[53] Supreme Court of the Netherlands, *Hoge Raad der Nederlanden*, The Hague, Judgment of 18 September 2001, LJ Number: AB1471, paras. 4.1-4.6 in which the Dutch Supreme Court has ruled that a prosecution for a crime solely under customary international law would breach the legality principle as included in the

56. The Cambodian Constitutions and any other texts in force before and during the relevant time did not provide for a procedure of implementation of customary international law into domestic law. The principle of *nullum crimen sine lege* therefore prevents the direct application of customary international law into the Cambodian legal system.

57. Articles 1 and 2 of the Establishment Law include 'custom' in their wording, but that law was only enacted in 2001. Allowing the Establishment Law to retroactively incorporate customary international law that may have existed in 1975-79 would violate the principle of *nullum crimen sine lege*.

Crimes against Humanity Were Not Foreseeable and Accessible to the Appellant at the Relevant Time

(i) Uncertainties Regarding the Definition of 'Crimes against Humanity' under Customary International Law

58. Civil law systems uphold the doctrine of strict legality as an overarching principle.[54] One of the basic notions of the doctrine of strict legality is that 'criminal legislation must abide by the principle of specificity'.[55] Under the principle of specificity, 'criminal rules must be as specific and detailed as possible, so as to clearly indicate to their addresses the conduct prohibited, namely, both the objective elements of the crime and the requisite mens rea'.[56] As such, individuals 'may thus foresee the consequences of their action and freely choose either to comply with, or instead breach, legal standards of behaviour'.[57]

Dutch Constitution. See also *Prosecutor v. Bagaragaza*, Decision on the Prosecution Motion for Referral to the Kingdom of Norway – Rule 11bis of the Rules of Procedure and Evidence, Case No. ICTR-2005-86-R11bis, 19 May 2006, para. 13. See also *Prosecutor v. Stankovic*, Decision on Referral of Case under Rule 11 Bis, Case No. IT-96-23/2-PT, 17 May 2005, para. 32 in which the Referral Bench has refused to refer the case before the courts of Bosnia and Herzegovina because there was no 'adequate legal framework which criminalizes the alleged behavior of the Accused so that the allegations can be duly tried and determined and which provides for punishment'.

[54] Antonio Cassese, *International Criminal Law* (2003), p. 141.

[55] Antonio Cassese, *International Criminal Law* (2003), p. 141-142.

[56] Antonio Cassese, *International Criminal Law* (2003), p. 145.

[57] Antonio Cassese, *International Criminal Law* (2003), p. 145.

59. 'Crimes against humanity' have never been the subject of a specialized convention[58] and attempts to define crimes against humanity have repeatedly failed. From the 1954 Draft Code of Offences, which draft was never adopted, to the 1981 General Assembly's call upon the International Law Commission to resume work on the Draft Code of Offences, nothing has happened. It has been stated that before the jurisprudence set up before the *ad hoc* tribunals on the law of crimes against humanity, such crimes were 'a set of abstract concepts'.[59] This demonstrates that no firm definition of 'crimes against humanity' was adopted under customary international law until then. The Appellant, therefore, could not have had access to the definition of crimes against humanity in 1975-79. The crimes against humanity were not sufficiently foreseeable and accessible during the period of the Court's temporal jurisdiction.

(ii) The CIJ's Definition of 'Crimes against Humanity' Goes Far beyond What Crimes against Humanity Might Have Been in 1975-1979

60. In the Closing Order, the CIJ merely referred to the definition of 'crimes against humanity' as defined under the Statute of the International Criminal Court (ICC) of 1998.[60] However, it has been recognized that 'Article 7 [of the ICC Statute] departs from customary law by setting out a notion of crimes against humanity at odds with that body of law',[61] and that the definition substantially enlarges the specific elements and modes of behavior.[62] The definition provided by the ICC Statute was not foreseeable and accessible in 1975-1979, and thus this definition should be rejected.

61. For instance, although the existence of an armed conflict was an element of the definition as set out in Article 6(c) of the Charter of the IMT,[63] the CIJ did not uphold that requirement in the definition of crimes against humanity set out in the Closing Order. Also, the CIJ listed 'rape' as one of the acts of the crime against humanity. However, rape was not listed as a crime against humanity in the IMT Charter, the Nuremberg

[58] Cherif Bassiouni *Crimes Against Humanity in International Criminal Law* 41, 177 (Kluwer 1999).
[59] See Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005), p. 147.
[60] Statute of the International Criminal Court, adopted on 17 July 1998, entry into force 1 July 2002.
[61] Antonio Cassese, *International Criminal Law* (2003), p. 93.
[62] Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), p. p. 177-178.
[63] Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1999), p. 77.

principles, the 1954 Draft Code of Offences Against the Peace and Security of Mankind or the CNASL.[64] In addition, the CIJ asserted that the definition of 'crimes against humanity' as in 1975-1979 comprises 'other inhumane acts, including forced marriage, sexual violence, enforced disappearances'. The defence submits that such 'other inhumane acts' did not constitute crimes against humanity in 1975-79. The distinct category of 'inhumane acts' is not a 'catch-all' category.[65] It has been stated that parameters for the interpretation of 'other inhumane acts' should be used in international standards on human rights such as those laid down in the international conventions.[66] Following such parameters, the defence submits that there were no international conventions outlawing forced marriage,[67] sexual violence[68] and enforced disappearances[69] in 1975-79. Most importantly, there was no domestic legislation in Cambodia proscribing criminal liability for those categories of 'inhumane acts'.

62. The CIJ have therefore erred in widening the scope of conduct which could amount to a crime against humanity at the relevant time. This not only violates the principle of *nullum crimen sine lege* but also means that the specific requirement of foreseeability and accessibility has not been fulfilled.

63. Therefore, the defence concludes that the Appellant should not be prosecuted for crimes against humanity, as formulated in the Closing Order.

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[64] 'Rape' as crime against humanity has been for the first time recognized as such in *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 687-688.
[65] *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, 21 May 1999, para. 583 and 586; See also *Prosecutor v. Kordic and Cerkez*, Appeal Judgment, Case No. IT-95-14/2-A, 17 December 2004, para. 117.
[66] *Prosecutor v. Kupreskic et al.*, Judgment, Case No. IT-96-16-T, 14 January 2000, para. 566.
[67] The Appeals Chamber of the Special Court for Sierra Leone recognized that, in the context of Sierra Leone, forced marriage constituted 'Other inhumane acts' as crime against humanity in 2008. See *Prosecutor v. Brima et al.*, Judgment, case No. SCSL-2004-16-A, 22 February 2008, paras. 196, 200-202.
[68] The Trial Chamber in the *Akayesu* case recognized for the first time in history charges of 'other inhumane acts' in the context of sexual violence. *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, 2 September 1998, para. 697.
[69] It is only in 1992 that the United Nations General Assembly adopted the 'Declaration on Protection of All Persons from Enforced Disappearances', which has no binding character upon states.

3.5 Grave Breaches

64. The application of grave breaches has been limited by the Closing Order to 'the S-21 security centre, at the Au Kanseng security centre, and during incursions into Vietnam by the Revolutionary Army of Kampuchea' (RAK),[70] so its application in the Closing Order is limited. Grave breaches are particular breaches of the four Geneva Conventions of 1949 that require the existence of an international armed conflict, and a nexus therewith.[71] Whilst this is not the forum to appeal from the CIJ's conclusion that there existed an armed conflict for the whole duration of the temporal jurisdiction of this Court, as this relates to the substance of the evidence, the defence reserves the right to challenge that conclusion at trial. As stated by Dieter Fleck in his article on grave breaches: '[t]he conflict [in Cambodia] was only internationalized in its last phase, thereby limiting the relevance of the grave breaches regime'.[72] The defence thus submits that the CIJ's conclusion that there was an international armed conflict[73] is not sufficiently reasoned and therefore premature.

65. A further requirement of grave breaches is that they are committed against so-called 'protected persons'. The CIJ determined that members of the Vietnamese armed forces who had fallen under the control of the forces of the RAK were protected as prisoners of war (POWs) by Article 4 Geneva Convention III, and Vietnamese civilians who had fallen into the hands of the RAK were protected as civilians by Article 4 of Geneva Convention IV.[74] It did not wish to apply the 'allegiance test'[75]

66. The defence submits that the CIJ have erred in holding that the grave breaches provisions have applicability to the ECCC, and relies upon the arguments set out above in Section 4.3 on Genocide.

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[70] Closing Order, para. 1479.
[71] Guénaël Mettraux, *International Crimes and the* Ad Hoc *Tribunals* (2005), p. 54.
[72] Dieter Fleck, 'Shortcomings of the Grave Breaches Regime', in: *Journal of International Criminal Justice* 7 (2009), p. 836.
[73] Closing Order, Chapter VI, para. 150 et seq.
[74] Closing Order, para. 1481.
[75] See for an explanation of this test that the Closing Order does not define, Dieter Fleck, 'Shortcomings of the Grave Breaches Regime', in: *Journal of International Criminal Justice* 7 (2009), p. 843.

3.5.1 Grave Breaches Did Not Form Part of Cambodian Law

67. The defence submits that grave breaches of the Geneva Conventions were not criminalized in Cambodia in 1975-79. The 1956 Penal Code, which has been explicitly recognized as the Penal Code in force in Cambodia during the 1975-1979 period,[76] does not contain any provision criminalizing grave breaches in Cambodia.

68. Prosecuting the Appellant for grave breaches would violate the principle of *nullum crimen sine lege* which principle requires that punishable acts must constitute a crime at the time they were committed.[77]

69. Similar to the provisions of the Genocide Convention, Article 146 of the Fourth Geneva Conventions obliges the State Parties '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'. Cambodia failed to do so, which may result in Cambodia having been in breach of the Geneva Conventions. This failure prevents Cambodia from exercising universal jurisdiction over these alleged crimes.

3.5.2 The Establishment Law Cannot Create New Law and Apply It Retroactively

70. The defence hereby refers to its submissions set out in Section 3.3.2 above, which apply *mutatis mutandis* to the jurisdiction over grave breaches of the Geneva Conventions. The Agreement and the Establishment Law do not create new substantive law that can be applied at the domestic level. The 1956 Penal Code does not codify jurisdiction for grave breaches at the national level. Article 6 of the Establishment Law mentions merely that the ECCC have jurisdiction over the crime, but does not create the actual jurisdiction for such crime. Since there is no other basis in Cambodian law that does in fact create such jurisdiction, the ECCC have no jurisdiction to prosecute the Appellant for grave breaches of the Geneva Conventions.

[76] PTC, Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alia "Duch", 3 December 2007, para. 19; See Closing Order, para. 1300.
[77] Antonio Cassese, *International Criminal Law* (2003), p. 142.

3.5.3 No Direct Application of Grave Breaches As an International Crime

71. The defence hereby refers to its submissions set out in Section 3.3.3 above, which apply *mutatis mutandis* to the jurisdiction over grave breaches of the Geneva Conventions. The Geneva Conventions are not directly applicable in the Cambodian system because the ECCC forms part of the existing domestic court system. Given that the crime of grave breaches needed to be enacted in the domestic laws at the time, irrespective of whether Cambodia had a monist or dualist system (see paragraphs 31-32 above). This is not the case, and hence, the ECCC lack jurisdiction for this category of crimes. The Establishment Law does not constitute implementing legislation as would be necessary to create such jurisdiction.

72. The Closing Order fails to make any connection between the alleged crimes which would fall under grave breaches and the Appellant's alleged connection thereto. This is not the appropriate time, however, to address the substance of the grave breaches allegations, and the defence reserves the right to raise the issue at trial. For now, the defence submits the ECCC lack jurisdiction to prosecute the Appellant on this basis for the reasons set out above.

3.6 Domestic Crimes

73. The defence argued above that the part of the Closing Order relating to the charges of domestic crimes under the 1956 Penal Code should be declared void. In the alternative, the defence submits that the ECCC does not have jurisdiction to prosecute the Appellant for these crimes.

74. In the *Duch* case the Trial Chamber failed to reach a majority decision and thus could not prosecute Duch for domestic crimes.[78] The Prosecutors did not appeal from this decision, and thus acquiesced to this legal finding. The Co-Prosecutors' Rule 66 Submissions[79] fail to make reference to this decision by the Trial Chamber in Case 001 and the fact that the Prosecution did not appeal the decision. The CIJ erred in their conclusions on jurisdiction

[78] Trial Chamber, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, Case 001, 26 July 2010, Document No. E187.
[79] Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, Document No. D390.

for this category of crimes without referring to the Trial Chamber's decision in the *Duch* case.

75. The Trial Chamber in the *Duch* case decided that the 1956 Penal Code was in effect during the temporal jurisdiction of the ECCC.[80] The 1956 Penal Code contains a limitation period and as a result prohibits the prosecution of the crimes specified therein more than ten years after their commission.[81]

76. Article 3(new) of the Establishment Law provides that '[t]he statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers'.

77. The defence submits the prosecution of domestic crimes is barred by the statutory limitation, and to extend the period in which prosecution is permitted amounts to a breach of the general principle of criminal law of *nullum crimen sine lege*. Interestingly, Article 6 of the 1956 Penal Code itself prohibits the retroactive application of law.

78. The defence submits that another general principle of criminal law provides that a criminal law must be devised for the general public, and not target a specific group of individuals. Article 3(new) of the Establishment Law is violation of this principle, and thus violates the Appellant's right to equality where such extension of the statute of limitation only applies for the prosecution of those individuals appearing before the ECCC where they are charged with crimes committed during the 1975-1979 period, and fails to extend such period for all other similar crimes committed between 1979 and 2003. The law is thus devised for a specific group of individuals, and not for the general public which forms a breach of the general principle of the right to equal treatment for equal cases. This amounts to discrimination of the Appellant.

[80] Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code, Case 001, 17 August 2009, E91/5.
[81] 1956 Penal Code, Article 109.

79. On this basis, application of Article 3(new) of the Establishment Law should be dismissed.

3.7 Joint Criminal Enterprise

80. At an earlier stage in the investigation proceedings, the defence raised the issue of lack of jurisdiction for joint criminal enterprise (JCE).[82] The PTC has already ruled on this issue and found that, except for the extended form, JCE is applicable before the ECCC. Therefore, this issue has already been litigated before this Chamber. The defence is intending to challenge the application of this doctrine at the Initial Hearing before the Trial Chamber, and not herein.

3.8 Superior Responsibility

81. The Closing Order charges the Appellant with superior responsibility as an alternative form of liability in relation to three of the crimes defined as crimes against humanity:[83]

a. Other inhumane acts through 'attacks against human dignity' and forced marriage;
b. Rape in the context of forced marriage; and
c. Persecution on racial grounds of the Vietnamese.

82. The Appellant is alleged to have 'failed to take the necessary steps to prevent the commission of these crimes' and 'Ieng Thirith knew or had reason to know of the actual commission of these crimes by her subordinates and she failed to punish the perpetrators'.[84]

83. The Duch Trial Chamber assumed jurisdiction over the doctrine of superior responsibility without assessing the potential challenges thereto,[85] which, the defence presumes, were

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[82] Ieng Thirith Defence Appeal against 'Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise' of 8 December 2009, 18 January 2010, Document No. D97/15/1 and PTC, Decision on Appeals against the Co-Investigative [sic] Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, Document No. D97/15/9.
[83] Closing Order, para. 1561.
[84] Closing Order, para. 1562.
[85] Duch Judgment, Section 2.7.10, p. 186.

not raised by the defence in that case. However, there are several jurisdictional challenges to this form of responsibility, which the defence sets out below.

3.8.1 Superior Responsibility Not Part of Customary International Law

84. There is no customary basis in international law for this doctrine's application in 1975-1979, nor does the CIJ provide a basis for this in the Closing Order. Prosecution of command responsibility is therefore in contravention of the principle of *nullum crimen sine lege*, and the PTC is respectfully requested to quash this part of the Closing Order accordingly.

85. The doctrine of command responsibility was formulated for the first time in the *Yamashita* case by the US Military Commission in Manila in 1945.[86] Mettraux states that it would be wrong to presume that in 1945 the doctrine of command responsibility formed part of customary international law, he warns that '[t]he *Yamashita* precedent stands out in the history of international criminal law as a warning against the unrestrained temptation of making law to fit a preferred judicial result'.[87] He further quotes the UN War Crimes Commission which stated in 1948 that 'the principles governing this type of [command] liability [...] [were] not yet settled'.[88]

86. The ICTY Appeals Chamber accepted the customary international status of the doctrine of command responsibility in the 1990s, considering that '[t]he principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature', referring to the fact that in 1992 some 119 States had ratified this Protocol.[89] However, that Protocol was only created in 1977. At the start of the temporal jurisdiction of this Court the Protocol did not yet exist, and at the end, the beginning of 1979, only three

[86] Trial of Tomoyuki Yamashita, US Military Commission, Manila, and the Supreme Court of the United States, 4 February 1946, can be found on: http://www.ess.uwe.ac.uk/wcc/yamashita1.htm.
87 Guénaël Mettraux, *The Law of Command Responsibility* (2009), p. 7-8.
[88] Guénaël Mettraux, *The Law of Command Responsibility* (2009), p. 13.
[89] See *Prosecutor v. Delalic* et al., Judgement, Appeals Chamber, Case No. IT-96-21-A, 20 February 2001, para. 195. See:
http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf.

states had ratified Additional Protocol I. Most of the States only acceded to the Protocol in the 1980s and 1990s.[90] The ICTY Appeals' Chamber's *obiter dictum* that such a rule of customary international law already existed prior to the creation of Additional Protocol I[91] is not corroborated by any evidence, nor can case law be found proving the existence of state practice and *opinio iuris* of such customary status.

87. In the post-World War II period, until its application at the ICTY and ICTR at the beginning of this century, the doctrine of command responsibility had hardly been applied. Mettraux also states that the most significant development in this period was the creation of Articles 86 and 87 of Additional Protocol I,[92] which, as stated above, were not binding on Cambodia in the relevant period and did not form part of customary international law at the relevant time. It was only the jurisprudence that emanated from the ICTY and ICTR that encouraged national jurisdictions to prosecute on this basis.[93]

88. There is no previous case law to support the finding that superior responsibility formed part of customary international law prior to that period, let alone in the temporal jurisdiction for this Court, in 1975-1979.

89. The doctrine of command responsibility was thus not part of customary international law at the relevant time, that is when the alleged crimes were committed, and therefore, the Appellant cannot be charged with this form of responsibility.

3.8.2 Superior Responsibility Only Applicable to War Crimes

90. In the alternative, the defence submits that at the relevant time, superior responsibility could only be prosecuted in relation to war crimes.

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[90] In 1978 only El Salvador, Ghana and Libya ratified Additional Protocol I, see: http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf.
[91] *Prosecutor v. Hadzihasanovic* et al., Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR72, 16 July 2003, para. 29.
[92] Guénaël Mettraux, *The Law of Command Responsibility* (2009), p. 13, footnote 2.
[93] Guénaël Mettraux, *The Law of Command Responsibility* (2009), p. 14.

91. At the time of its creation, in the wake of World War II, the doctrine of command responsibility was only applicable to the prosecution of war crimes.[94] This remained the position until the ICTY determined that command responsibility could also be linked to any of the other international crimes over which the ICTY has jurisdiction.[95] It also broadened the scope of command responsibility to internal armed conflicts.[96] However, the defence submits that in 1975-1979 there was no rule of customary international law allowing for the prosecution of superior responsibility for crimes against humanity.

92. The Appellant is only charged with superior responsibility for crimes against humanity, not war crimes or grave breaches.[97] Thus, the Court has no jurisdiction to prosecute her for superior responsibility of the alleged crimes against humanity.

3.8.3 Limited Application of Superior Responsibility for Civilians

93. The doctrine of superior responsibility is based on a failure to act. A legal duty to prevent the commission of crimes therefore needs to exist.[98] The Closing Order fails to establish such duty. The ICTR, in considering superior responsibility for civilians, indeed also took into account the domestic law applicable to the superior. In *Kayishema*, the ICTR Trial Chamber held that '[i]n light of this [domestic law] duty to maintain public order [...] Kayishema was under a duty to ensure that these subordinates were not attacking those Tutsi seeking refuge in Muguba Church'.[99] Ronen states in this regard that '[i]nternational criminal law is a distinct and separate system from domestic rubrics, and duties from the former to do not simply permeate the latter.'[100] The CIJ, by failing to establish the existence of such duty and its basis in domestic law, did not succeed in providing a basis for prosecution for superior responsibility of the Appellant in her

[94] See Yael Ronen, 'Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings', in: *Vanderbilt Journal of Transnational Law* 43:313 (2010), at 331.
[95] Article 7(3) of the ICTY Statute.
[96] See *Prosecutor v. Hadzihasanovic* et al., Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case No. IT-01-47-AR72, 16 July 2003, para. 31.
[97] Closing Order, para. 1561.
[98] *Prosecutor v. Oric*, Judgment, Case No. IT-03-68-T, 30 June 2006, para. 326.
[99] *Prosecutor v. Kayishema*, Judgment, ICTR-95-1-T, 21 May 1999, para. 510.
[100] Yael Ronen, 'Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings', in: *Vanderbilt Journal of Transnational Law* 43:313 (2010), at 334.

capacity of Minister of Social Action. Failure to do so invalidates the charge on this form of liability, and the Closing Order should be quashed in this respect.

3.9 Conclusion

94. For these reasons, the defence submits the ECCC has no jurisdiction to prosecute the Appellant for the crimes and forms of liability discussed above. The defence thus respectfully requests the PTC to quash those parts of the Closing Order accordingly.

IV VIOLATION OF FAIR TRIAL RIGHTS

4.1 Insufficiently Reasoned Order Leads to Arbitrariness

95. Pursuant to Internal Rule 67(4) '[t]he Closing Order shall state the reasons for the decision'. The defence submits that certain parts of the Closing Order are in breach of this provision. It is submitted that the PTC should substitute the CIJ's findings with its own reasoning for these specific elements of the Closing Order. The defence limits itself to insufficient reasoning with regard to the jurisdictional issues in this instance.

96. The CIJ, in stating their legal findings on crimes and modes of criminal responsibility in the Closing Order, simply refer to conclusions reached by the Trial Chamber in the *Duch* case (Case 001).[101] Examples of this can be seen at paragraph 1318 of the Closing Order where the CIJ hold that '[a]ll the modes of criminal responsibility set out in Article 29(new) of the Establishment Law were part of international law applicable in Cambodia at the relevant time'. Footnote 5214 simply refers to paragraphs 472 et seq. of the *Duch* Judgment. Also in the section on Grave Breaches of the Geneva Conventions, the CIJ draw conclusions such as: 'The perpetrators of the crimes were aware at all times of both the existence of the international armed conflict as well as the factual circumstances establishing the protected status of the victims'.[102] The two footnotes relating to this information, footnotes 5280 and 5281, refer to the *Duch* Judgment and the ICTY Appeals Chamber Judgment in the case against *Naletilic* and *Martinovic*; not a single reference is

[101] Trial Chamber, Judgement, Case No. 001/18-07-2007/ECCC/TC (Case 001), 26 July 2010, Document No. E188 (Duch Judgment).
[102] Closing Order, para. 1487, footnotes 5280 and 5281 omitted.

made to the facts in the underlying case. Without any further explanation the CIJ refer to the Trial Chamber's considerations and conclusion in a separate case at the ECCC. However, on another occasion, they decide to go against the Trial Chamber's conclusion where that Chamber could not reach the required majority decision on the prosecution of domestic crimes, and thus could not prosecute Duch for this category of crimes. That decision was not appealed by the parties, but the CIJ decide nonetheless to go against the Trial Chamber's final decision.[103]

97. The CIJ provide no reasoned evidential basis in support of their decisions in which they adopt certain legal findings of the Trial Chamber, but ignore others. The Closing Order thus suffers from arbitrariness. The jurisprudence of the European Court of Human Rights has made it clear that 'reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness' and this principle has been recognized by the PTC in its recent decision on an appeal regarding certain investigative requests.[104] It can be demonstrated that on many occasions the CIJ provide no reasoned evidential basis for conclusions set out in the Closing Order.

4.2 Legal Findings Cannot Be Copied Without Appropriate Reasoning

98. Besides the issue of arbitrariness, the defence submits that the CIJ have erred in failing to apply the specific facts of the present case against the Appellant to the issues to be determined. The CIJ have merely referred to adopted legal findings made by the Trial Chamber in the *Duch* case which was separate and distinct from the present case. Furthermore, it would be unfair to proceed in this way when the defence concerned with Case 002 was excluded from making legal submissions in the proceedings which lead up to the legal findings. It follows that the discreet factual matters pertaining to each

[103] See Chapter VII – Crimes Punishable under the Cambodian Penal Code 1956, Closing Order pages 386-389 and see Trial Chamber, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, Case 001, 26 July 2010, Document No. E187.

[104] PTC, Decision on the Ieng Thirith Defence Appeal against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, 14 June 2010, Document No. D353/2/3, para. 26, quoting from *Taxquet v. Belgium*, ECHR, Application No. 926/05, 13 January 2009, paragraph 50.

Appellant were not considered prior to the Trial Chamber determining the issues.[105] Given that the defence in Case 001 chose not to actively participate in the legal proceedings in which submissions were made as to the law to be applied, the CIJ are wrong to merely adopt the Trial Chamber's legal findings from the *Duch* case and apply them to the Closing Order.

4.3 Closing Order Is Partly Void

99. The defence submits that part of the Closing Order, insofar as it indicts the Appellant with crimes under the 1956 Cambodian Penal Code, is void. In paragraph 1574 of the Closing Order, the CIJ conclude with respect to these crimes:

> [T]he Co-Investigating Judges [...] have 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.

100. Internal Rule 67(2) provides that the 'Indictment shall be void for procedural defect unless it sets out [...] a description of the material facts and their legal characterization by the CIJ [...].' However, paragraph 1574 fails to set out the legal characterization of the facts. In a derogation of its function, it refers the issue to be dealt with by the Trial Chamber instead of determining the point.

101. The Appellant is entitled to such specific information as is necessary in order for her to prepare her defence and to avoid prejudicial surprise.[106] The defence thus submits that this element of the Closing Order is void, because it fails to provide the Appellant with the specific basis upon which the CIJ have decided that she should be tried in respect of the said offences.

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[105] Trial Chamber, Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, Case 001, 3 July 2009, Document No. E90.

[106] *Prosecutor v. Krajisnik and Plavsic*, Decision Concerning Preliminary Motion on the Form of the Indictment, Case No. IT-00-39&40-PT, 1 August 2000. See also Vladimir Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights* (2008), p. 33.

V REQUEST FOR AN ORAL HEARING

102. The defence respectfully urges the PTC to organize an oral hearing to deal with the jurisdictional issues raised by the Appellant. These issues are of fundamental importance to the ECCC proceedings, and the issues are of an extremely complicated nature. Given the limitations imposed on the defence in terms of the time allowed for the submission of arguments and the length of the submissions, the issues are addressed concisely. At an oral hearing, the parties could present their arguments fully and would be in a position to respond to questions that will inevitably arise.

VI CONCLUSION

103. For the reasons set out above, the defence submits the ECCC have no jurisdiction to prosecute the Appellant for the various crimes and forms of liability discussed above. The Appellant consequently requests the PTC to quash the Closing Order with regard to those aspects.

104. The defence further submits that the Closing Order is in breach of the Appellant's right to a fair trial, and consequently the defence respectfully requests the PTC to quash the Closing Order in that respect.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	18 October 2010	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh	