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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S INDICATION OF THE PORTIONS OF THE PRE-TRIAL CHAMBER'S DECISION ON IENG SARY'S APPEAL AGAINST THE CLOSING ORDER WHICH REQUIRE SUPPLEMENTARY SUBMISSIONS RELATED TO THE APPLICATION OF INTERNATIONAL CRIMES AND FORMS OF LIABILITY AT THE ECCC

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby identifies portions of the Pre-Trial Chamber’s Decision on IENG Sary’s Appeal Against the Closing Order (“PTC Decision”)¹ which necessitate supplementary submissions related to the application of international crimes and forms of liability at the ECCC, pursuant to the Trial Chamber’s request.² This submission merely indicates to the Trial Chamber where further submissions are required to supplement Mr. IENG Sary’s initial indication of preliminary objections.³

I. PROPOSED SUPPLEMENTARY SUBMISSIONS

A. Principle of Legality

i. Whether the national or international principle of legality applies at the ECCC

1. The Defence submits that the fundamental flaw with the PTC Decision regarding the principle of legality is its erroneous determination that the principle of legality set out in Article 15 of the International Covenant on Civil and Political Rights (“ICCPR”) is applicable rather than that set out in the 1956 Penal Code. The Pre-Trial Chamber determined that “[g]iven its express reference to Article 15 of the ICCPR, there is no doubt that, insofar as international crimes are concerned, the principle of legality envisaged by the ECCC Law is the international principle of legality which allows for criminal liability over crimes that were either national or international in nature at the time they were committed.”⁴ Supplementary submissions are necessary to explain why the principle of legality which must be applied by the ECCC in relation to all crimes and forms of liability is the principle of legality set out in the 1956 Penal Code and to explain that the Establishment Law’s reference to Article 15 of the ICCPR does not change this.

ii. Whether the ECCC is domestic, international, or “internationalized”

2. The Pre-Trial Chamber’s erroneous determination that the Establishment Law provides for the application of the international principle of legality led the Pre-Trial Chamber to conclude erroneously that it did not need to determine whether the ECCC was an international or domestic court. The Pre-Trial Chamber found that “the nature of the

¹ Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30.

² Directions to Parties Concerning Preliminary Objections and Related Issues, 5 April 2011, E51/7, para. 2. The Trial Chamber requested the Defence “to identify, in a filing of no greater than 5 pages in length ... the portions of [the PTC Decision] for which supplementary submissions are proposed.” The Trial Chamber stated that it would “then issue further directions in relation to these submissions in due course. Opportunity for oral argument in relation to preliminary objections will be afforded at the Initial Hearing.”

³ See Summary of IENG Sary’s Rule 89 Preliminary Objections & Notice of Intent of Non-Compliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4. Note also that this motion is not itself a supplementary submission. The Defence will not address every error which it submits that the Pre-Trial Chamber made, but proposes to limit its forthcoming supplementary submissions to those errors which, if relied upon, may cause the Trial Chamber to determine inaccurately the issue of whether international crimes and forms of liability may be applied by the ECCC and how these crimes and forms of liability are applied.

⁴ PTC Decision, para. 213.



ECCC as a court has no bearing on the ECCC's jurisdiction over the crimes and modes of liability enumerated in the ECCC Law..."⁵ Despite this, the Pre-Trial Chamber went on to conclude that the ECCC was "internationalised."⁶ It is necessary to determine whether the ECCC is domestic or international because, as the Establishment Law did not change the applicable principle of legality, the principle of legality must be determined by reference to whether the ECCC is domestic or international (and, if domestic, whether it may directly apply international law). The determination that the ECCC is "internationalized" also has implications for other preliminary objections the Defence has raised,⁷ further indicating that supplementary submissions are necessary. Supplementary submissions are necessary to explain in greater detail why this distinction is relevant and must be determined, and to further explain that the Pre-Trial Chamber's determination that the ECCC is "internationalized"⁸ is both unclear and unhelpful to this analysis.

iii. Whether the test for foreseeability and accessibility requires that the crimes and forms of liability exist in applicable domestic law

3. The Pre-Trial Chamber's erroneous determination that the Establishment Law provides for the application of the international principle of legality led to the erroneous conclusion that "for the standard of the principle of legality to be met in the ECCC the requirement for existence of the crime in domestic law is not absolute, it is rather optional. It is sufficient to find that the crime or mode of liability existed in [national law, international law, or general principles of law recognized by the community of nations at the time it was committed]."⁹ Supplementary submissions are necessary to explain why the foreseeability and accessibility test requires that the crimes and forms of liability must have existed in applicable domestic legislation at the time.
4. The Pre-Trial Chamber also held that, at the pre-trial stage of proceedings, it was only necessary to determine whether the crimes and forms of liability would pass an objective test.¹⁰ Supplementary submissions are necessary to explain why the Trial Chamber must also employ a subjective test and whether foreseeability and accessibility of criminal liability should or must be determined prior to trial.

iv. Whether the Pre-Trial Chamber incorrectly relied on State obligations

5. In certain portions of its Decision, the Pre-Trial Chamber refers to obligations Cambodia may possess as a State to support its conclusions concerning the individual criminal

⁵ *Id.*, para. 212.

⁶ *Id.*, para. 215.

⁷ *See id.*, para. 131.

⁸ *Id.*, paras. 215-22.

⁹ *Id.*, para. 238.

¹⁰ *Id.*, paras. 210, 237.

liability of individuals.¹¹ Supplementary submissions are necessary to explain that an obligation of a State must be distinguished from an obligation of an individual, and further, that a State's international obligations must be distinguished from what a State does domestically.

B. Statute of limitations for grave breaches

6. The Pre-Trial Chamber rejected the Defence's argument that the statute of limitations bars the application of grave breaches at the ECCC because "[t]he Geneva Conventions, which are the applicable law under Article 6 of the ECCC Law, provide that war crimes are not subject to any statute of limitations, which indicates that there is no statute of limitations applicable."¹² Article 6 of the Establishment Law states that the ECCC "shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949...." Article 6 criminalizes grave breaches as defined in the Geneva Conventions; it *does not* provide for direct application of all provisions of the Geneva Conventions. Supplementary submissions are necessary to explain the error of the Pre-Trial Chamber's analysis.

C. The application of crimes against humanity

i. Whether challenges to the scope of crimes against humanity are admissible as jurisdictional challenges

7. The Pre-Trial Chamber held that it had no jurisdiction to consider whether the OCIJ was correct to exclude the existence of a State or organizational policy as an element of crimes against humanity on the basis that "the Co-Lawyers' argument is related to the contours of elements of the crime and therefore to the pleading practice and does not represent a jurisdictional challenge."¹³ Supplementary submissions are necessary; if the Trial Chamber accepts the Pre-Trial Chamber's erroneous determination that this challenge is not jurisdictional, it may reject this issue as a proper preliminary objection.¹⁴

ii. Whether a challenge to the classification of "forcible transfer" is a jurisdictional issue

8. The Pre-Trial Chamber held that a challenge to the "wrong classification" of forcible transfer "as an element of one or other crime ... is an argument that goes to the pleading practice and therefore does not represent an admissible jurisdictional challenge."¹⁵ The Pre-Trial Chamber's erroneous determination that this challenge is not jurisdictional *may* cause the Trial Chamber to reject this issue as a proper preliminary objection.¹⁶

¹¹ See, e.g., *id.*, paras. 244-45, 256-57.

¹² *Id.*, para. 73.

¹³ *Id.*, paras. 83(4) and 86.

¹⁴ The Defence has submitted these preliminary objections under Rule 89(a) (the jurisdiction of the Chamber).

¹⁵ PTC Decision, para. 91.

¹⁶ The Defence has submitted these preliminary objections under Rule 89(a) (the jurisdiction of the Chamber).

Supplementary submissions are necessary to explain why this holding is not only erroneous, but also inconsistent with the Pre-Trial Chamber's own holdings.¹⁷

iii. Whether torture constituted a crime against humanity in 1975-79

9. The Pre-Trial Chamber stated that the "Declaration on Torture codified the pre-existing customary law and finds that by 1975-79 ... such conduct was considered to be criminal in the sense generally understood and therefore foreseeable from that point in time."¹⁸ Supplementary submissions are necessary to demonstrate why the Declaration on Torture cannot be relied upon as evidence of torture's purported status as a crime against humanity in customary international law in 1975-79.

iv. Whether the principle of legality attaches to the entire category of "other inhumane acts" but not to each sub-category thereof

10. The Pre-Trial Chamber held that the "requirements of the principle of legality attach to the entire category of 'other inhumane acts' and not to each sub-category thereof."¹⁹ The Pre-Trial Chamber's position does not take into account either its own recognition of the dynamic evolution of the categories of crimes against humanity between the World War II jurisprudence and the present day, nor the impact that this evolution has had on the interpretation of which acts are "of a similar nature and gravity" to the other enumerated crimes against humanity, and therefore constitute "other inhumane acts." This evolution impacts upon the interpretation of which acts are "of a similar nature and gravity" to the other enumerated crimes against humanity, and therefore constitute "other inhumane acts." Supplementary submissions are necessary to demonstrate that notwithstanding judicial consideration of "other inhumane acts" as a crime under international law *in itself*,²⁰ sub-categories thereof must also be considered subject to the principle of legality.

v. Whether the *nullum crimen sine lege scripta* principle is protected by the Pre-Trial Chamber's application of "other inhumane acts"

11. The Pre-Trial Chamber held that "the word 'other' imports an *ejusdem generis* rule of interpretation" to the category "other inhumane acts."²¹ The civil law requirement applicable at the ECCC that penalties be specifically pronounced by law is inconsistent

¹⁷ See, e.g., PTC Decision, para. 370, where the Pre-Trial Chamber held that because "rape as a crime against humanity is necessarily composed of *chapeau* elements common to all crimes against humanity, such as the requirement that the act form part of a 'widespread or systematic attack,'" it was unable to find that the widespread criminalization of rape in domestic criminal codes in 1975-79 supported the proposition that rape can "simply be imported into international law as a crime against humanity in its own right by recourse to the general principles of law recognized by civilized nations." The Defence will submit that the criminalization of the forcible transfer of children as an act of genocide does not provide support for the proposition that its purported status as a crime against humanity in 1975-79 is consistent with the principle of legality.

¹⁸ *Id.*, para. 355.

¹⁹ *Id.*, para. 378.

²⁰ See *id.*, citing *inter alia* *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Judgement, 17 January 2005, para. 624.

²¹ *Id.*, para. 388.



with the *ejusdem generis* rule. Supplementary submissions are necessary to demonstrate why, in the civil law context of the ECCC, wholesale importation of common law rules of interpretation violate the *nullum crimen sine lege scripta* principle.

D. The application of command responsibility

i. Whether command responsibility existed in customary international law in 1975-79


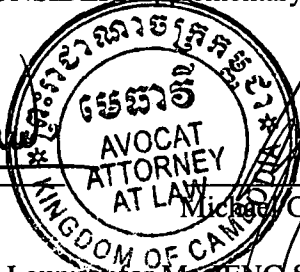
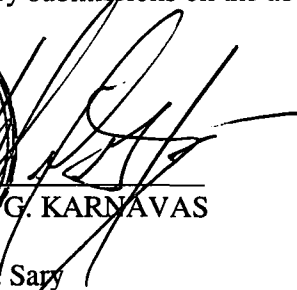
12. The Pre-Trial Chamber erred in determining that command responsibility existed in customary international law in 1975-79²² and that command responsibility as it existed at that time included liability for non-military superiors.²³ The Pre-Trial Chamber relied on an incorrect interpretation of what is required to form customary international law. Supplementary submissions are necessary to set out and analyze the requirements necessary to find that command responsibility exists in customary international law.

ii. Whether the certain issues raised by the Defence related to command responsibility are jurisdictional arguments

13. The Pre-Trial Chamber erred in determining that whether command responsibility may only apply to an international armed conflict was not jurisdictional in nature.²⁴ Supplementary submissions are necessary to explain that this is a jurisdictional challenge, because if the Trial Chamber accepts the Pre-Trial Chamber's erroneous determination that this is not jurisdictional, it will cause the Trial Chamber to reject these issues as proper preliminary objections.²⁵

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **AUTHORIZE** and **CONSIDER** supplementary submissions on the above issues.

Respectfully submitted,




 ANG Udom MICHAEL G. KARNAVAS
 Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 3rd day of May, 2011

²² See, e.g., *id.*, para. 458.

²³ *Id.*, para. 459.

²⁴ *Id.*, para. 102.

²⁵ The Defence has submitted these preliminary objections under Rule 89(a) (the jurisdiction of the Chamber).