

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

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**CO-PROSECUTORS' SUBMISSION ON STATUTE OF LIMITATIONS FOR NATIONAL CRIMES**

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## I. INTRODUCTION

1. Pursuant to the Trial Chamber's Directions, the Co-Prosecutors provide the following submission addressing the "basis of its contention that national crimes are not statute-barred in relation to all accused in Case 002."<sup>1</sup>
2. In the Pre-Trial Chamber and Trial Chamber decisions, the determinative issue on this matter has been whether or not the statute of limitations had expired before the National Assembly of Cambodia extended the limitations period from 10 to 30 years in 2001.<sup>2</sup> The Pre-Trial Chamber and the Cambodian Judges of the Trial Chamber concluded that, because of the lack of a functional judicial system and an ongoing civil war against the Khmer Rouge, the statute of limitations was suspended until at least 24 September 1993 (the date the Kingdom of Cambodia was created by the promulgation of its Constitution) and thus had not expired as of 2001.<sup>3</sup> The two International Judges of the Trial Chamber found that there was insufficient evidence before them in Case 001 to prove the objective incapacity of the Cambodian legal system from 1979 to 1993, and hence concluded the statute of limitations had already expired before the 2001 extension.<sup>4</sup>
3. Because it has been the determinative issue in the Court's prior decisions, the Co-Prosecutors will address in this brief the facts and law supporting the conclusion that the statute of limitations on national crimes had not expired before the 2001 extension of the limitations period. Based on the principle *contra non valentem agere nulla currit praescriptio* ("prescription does not run against he who cannot act"), states have universally concluded that conditions which make it practically impossible to proceed with legal action, such as a state of war, impeded court functions or conduct of the defendant, suspend the running of the statute of limitations. In this case, the evidence establishes that: (a) there was no functional judicial system in Cambodia that could conduct a fair trial of the Accused until at least the mid-1990s; (b) the ongoing civil war

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<sup>1</sup> Trial Chamber Memorandum entitled *Directions to parties concerning Preliminary Objections and related issues*, 5 April 2011, E51/7 at ERN 00658621.

<sup>2</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("ECCC Law"), article 3. The ECCC Law was first adopted by the National Assembly on 2 January 2001, approved by the Senate on 15 January 2001 and, after the adoption and approval of an amendment to Article 3, signed by the King and promulgated on 10 August 2001. The limitations period was later extended to 40 years by an amendment to Article 3 of the ECCC Law promulgated on 27 October 2004 (NS/RKM/1004/006).

<sup>3</sup> Pre-Trial Chamber, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, paragraphs 285-287 ("PTC Ieng Sary Decision"); Trial Chamber, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, Case 001/18-07-2007/ECCC/TC, E187, paragraphs 19-25 ("TC Statute of Limitations Decision").

<sup>4</sup> TC Statute of Limitations Decision, paragraphs 31-35.

made it practically impossible to prosecute the Accused until their surrender to the Cambodian government in 1996 and 1998; and (c) the Accused were directly responsible for the conditions that prevented their prosecution during this time period.

4. Although this submission will focus exclusively on the above issues, the Co-Prosecutors do not waive the additional arguments they have previously made that would also be dispositive of this issue,<sup>5</sup> including their assertions that: (i) as concluded by the Czech Constitutional Court, a retroactive change in the statute of limitations is a procedural act that does not violate the principle of legality;<sup>6</sup> and (ii) the Cambodian Constitutional Council's determination that Article 3 of the ECCC Law did not violate any constitutional rights is final, binding and may not be reviewed by this Court, as judges and prosecutors have no right to interpret such laws adopted by the National Assembly.<sup>7</sup>

## II. STATEMENT OF FACTS

### A. HISTORY OF CAMBODIAN LEGAL SYSTEM

#### *DK Regime: April 1975 to January 1979*

5. During the DK period, the existing Cambodian courts (as well as all other parts of the previous government and social structure) were dismantled, and judges and lawyers were targeted by the CPK for execution as class enemies or officials of the prior regime.<sup>8</sup> While Article 9 of the 1976 DK Constitution provided that justice would be "administered by people's courts" and that "judges at all levels" would be appointed by the People's Representative Assembly (of which Nuon Chea was the Chairman),<sup>9</sup> in reality no courts were ever established.<sup>10</sup> Of the 400 to 600 legal professionals who lived in Cambodia in the pre-1975 period, only a small number (between six and twelve)

<sup>5</sup> Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, D427/3/6, para. 83-130 ("Response to Closing Order Appeals"); Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, E51/5/3/1, para. 12-17.

<sup>6</sup> Czech Republic Constitutional Court, Decision on the 1993 Act on the Illegality of the Communist Regime, 21 December 1993, reprinted in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, D288/6.9/7.12 at ERN 00335995-96 [confirming the validity of a 1993 law providing that the statute of limitations for past crimes would not include the period 25 February 1948 to 25 December 1989].

<sup>7</sup> Response to Closing Order Appeals, para. 100-102.

<sup>8</sup> Cambodian Legal Resources Development Center ("CLRDC"), *The Legal System of Cambodia*, January 1998, D288/6.9/8.18 at ERN 00336370-71.

<sup>9</sup> DK Constitution, 6 January 1976, IS Annex C. 9.2 at ERN 00184836; DK People's Representative Assembly Minutes, 11-13 April 1976, IS Annex C 13.13 at ERN 00184073; CPK Central Committee Decision, 30 March 1976, IS Annex C 6.3 at ERN 00182813.

<sup>10</sup> Written Record of Interview of Kaing Guek Eav alias Duch, D86/21 at ERN 00177588, D86/27 at ERN 00204356 [admitting that persons were arrested, detained and executed by the Party at S-21 "without trials" or "the existence of tribunals and procedural safeguards"]; Written Record of Interview of Meas Soeun, D232/88 at ERN 00425890; Written Record of Interview of Norng Sophang, D200/9 at ERN 00483969.

survived and remained in the country when the DK regime ended and the People's Republic of Kampuchea ("PRK") began in January 1979.<sup>11</sup>

*1979-1991*

6. The court system that was established by the PRK, and remained in effect until the process of rebuilding legitimate courts began in 1992 and 1993, was based on the Soviet socialist model that had been implemented in Vietnam.<sup>12</sup> Neither the French civil system nor the procedures of the 1956 Penal Code were followed in the 1979-1991 time period. Rather, the operative criminal code was contained in a 1980 decree entitled "Law on the Penalty for Betraying the Revolution," which was drafted by a non-lawyer in one week and contained 12 short articles primarily focused on political crimes, and a 1982 decree entitled "Law on the Organization of the Court and Prosecution Department."<sup>13</sup> The principal crime during this period was the crime of "Revolutionary Betrayal," which was defined as "protesting against the country, acting against the independence and independent sovereignty of the country, or harming the revolutionary power and the country's defences."<sup>14</sup> Efforts by Minister of Justice Ouk Bunchhoeun to draft a substantive criminal code containing felonies and misdemeanors were unsuccessful.<sup>15</sup>
7. The first court established by the PRK was the People's Revolutionary Tribunal, which was used for the August 1979 trial of Pol Pot and Ieng Sary.<sup>16</sup> The trial lasted only 5 days, and the President of the Tribunal publicly declared the guilt of the accused before the trial began.<sup>17</sup> The Tribunal was a "court of final instance," with a defendant sentenced to death only having "the right to ask for mercy from the People's Revolutionary Council of Kampuchea."<sup>18</sup>

<sup>11</sup> Kathryn Neilson, *They Killed All the Lawyers: Rebuilding the Judicial System in Cambodia*, October 1996, D288/6.9/5.26 at ERN 00333019 (hereafter "*Neilson*"); CLRDC, *The Legal System of Cambodia*, D288/6.9/8.18 at ERN 00336371; Dolores A. Donovan, *Cambodia: Building a Legal System from Scratch*, *The International Lawyer*, Vol. 27, No. 2, 1993, p. 445 (hereafter "*Donovan*").

<sup>12</sup> Basil Fernando, *The System of Trial Under the Vietnamese-Khmer Model (1981-1993)*, D382.1.22 at ERN 00532914 (hereafter "*Fernando*"); *Donovan*, p. 446; Suzannah Linton, *Putting Cambodia's Extraordinary Chambers into Context*, 2007, *Singapore Year Book of International Law*, p. 199 (hereafter "*Linton*").

<sup>13</sup> Decree Law No. 2 on the Penalty for Betraying the Revolution and Various Penalties for Other Betrayals, 15 April 1980, D288/6.9/9.4 ("Decree No. 2"); *Donovan*, p. 448; Evan Gottesman, *Cambodia After the Khmer Rouge: Inside the Politics of National Building* (hereafter "*Gottesman*"), D382.1.20 at ERN 00532910 (pp. 240-241).

<sup>14</sup> Decree Law No. 2, D288/6.9/9.4 at ERN 00336570 (Article 3).

<sup>15</sup> *Gottesman*, D382.1.20 at ERN 00532912 (p. 244).

<sup>16</sup> Decree Law No. 1 on Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, 15 July 1979, D288/6.9/9.3 ("Decree No. 1"); Summary of People's Revolutionary Tribunal, August 1979, D313/1.2.401.

<sup>17</sup> *Linton*, pp. 208-209.

<sup>18</sup> Decree No. 1, D288/6.9/9.3 at ERN 00336568 (Article 7).

8. Other courts that existed in the 1979-1991 period are believed to have been similar to the People's Revolutionary Tribunal.<sup>19</sup> Most judges were former teachers, soldiers or other persons who had no or minimal legal training.<sup>20</sup> Pursuant to a 1989 Law of Criminal Procedure adopted after the formation of the State of Cambodia, cases were decided by a panel consisting of one judge and two "people's assessors."<sup>21</sup> As there were no private lawyers, defense counsel were selected from a group of "social defenders," nonlegal staff hired to work at each court, though an accused only received such representation if his potential sentence exceeded five years.<sup>22</sup> (As discussed below, it was not until 1995 that a Bar Association was created and competent defence lawyers were available for appointment.)
9. There was neither an appellate court nor a right of appeal during the 1979-1991 period.<sup>23</sup> While the Supreme Court was established by a 1985 decree and operational by 1987, it had limited authority and no effective judicial function prior to 1994.<sup>24</sup> In practice, it was the Ministry of Justice who reviewed all court judgments for factual and legal correctness.<sup>25</sup>
10. From January 1979 to September 1992, it does not appear that any law was in effect that required criminal cases to be brought within a ten year period. Nor was there a comprehensive law that would have allowed an effective prosecution of homicide, torture or religious persecution.<sup>26</sup> While a number of former Khmer Rouge cadres were arrested

<sup>19</sup> *Fernando*, D382.1.22 at ERN 00532914-15 (stating that verdicts were determined prior to trial after seeking the advice of the provincial governor or Ministry of Justice).

<sup>20</sup> *Gottesman*, D382.1.20 at ERN 00532912 (p. 244); CLRDC, *The Legal System of Cambodia*, January 1998, p. 150.

<sup>21</sup> *Donovan*, p. 451.

<sup>22</sup> *Donovan*, pp. 450-452.

<sup>23</sup> *Donovan*, p. 451; *Gottesman*, D382.1.20 at ERN 00532912 (p. 245); *Fernando*, D382.1.22 at ERN 00532915; *Neilson*, D288/6.9/5.26 at ERN 00333019.

<sup>24</sup> Law on the Establishment of the People's Supreme Court and the Prosecutor General's Office Attached to the People's Supreme Court, Decree No. 28D, 31 July 1985; Law on the Organization of the People's Supreme Court and the Prosecutor General's Office Attached to the People's Supreme Court, Decree No. 34D, 26 August 1987; *Donovan*, p. 448-451 (noting that the "right of appeal to the Supreme Court is nonexistent"); Cambodian Defenders Project, *Resource Guide to Criminal Law of Cambodia*, D288/6.9/8.16 at ERN 00336395 (§2.17); *Neilson*, D288/6.9/5.26 at ERN 00333021 (referencing 1989 report by Supreme Court that it was "not competent to resolve the suits itself").

<sup>25</sup> *Gottesman*, D382.1.20 at ERN 00532912 (p. 245); *Linton*, p. 200; Cambodian Defenders Project, *Resource Guide to Criminal Law of Cambodia*, D288/6.9/8.16 at ERN 00336395 (§2.17).

<sup>26</sup> The only potential law covering murder or torture was contained in Article 7 of the April 1980 decree, which merely provided that: (a) "[p]ersons who commit killing of any form shall be punished by 10 to 20 years," though a pardon could be granted "[i]f such violation is deemed not to be serious;" and (b) "[p]ersons who intentionally cause injury to a person whose position is considered sensitive shall be sentenced to between 6 months and 5 years in prison." Decree Law No. 2, D288/6.9/9.4 at ERN 00336572. The decree contained no proscription or penalty related to religious persecution.

by the PRK during this period, it appears that they were simply detained in prison without any court trial.<sup>27</sup>

*Post-1991*

11. The process of rebuilding a legitimate court system in Cambodia began in 1992 following the signing of the Paris Peace Agreements<sup>28</sup> and during the period the country was monitored and administered by the United Nations Transitional Authority in Cambodia (“UNTAC”). An analysis of the situation published in 1993 entitled *Cambodia: Building a Legal System from Scratch* described the challenge that was faced as follows:

“Cambodia now has laws, but they are few and far between. The country has established courts, but most of them are barely functioning. Likewise, persons have been appointed judges and prosecutors, but few of them are educated in the law. In one respect, the situation has deteriorated even further; because of attrition due to death, the number of fully trained legal professionals now present in Cambodia has declined to five. Moreover, Cambodia has no private lawyers.”<sup>29</sup>

12. On 10 September 1992, a law drafted by UNTAC representatives entitled “Provisions Relating to the Judiciary, Criminal Law and Procedure Applicable in Cambodia During the Transition Period” was adopted, which provided for the establishment of trial and appellate courts in each region of the country<sup>30</sup> and broadened the authority and functions of the Supreme Court to include “judicial review of the law” and review of appellate judgments on petition by the Attorney General or convicted parties.<sup>31</sup> It assured the right to counsel and right of appeal, and required detainees to be brought before a judge within 48 hours.<sup>32</sup> The 1992 UNTAC Law also expressly referenced a number of the deficiencies in the existing legal system. For example, Article 7(2) provided that “[d]ue to the small number of attorneys in Cambodia, during the transition period, any Cambodian holding a diploma of completion of secondary school education may represent an accused person in court,” and “accused persons may ask a member of their family to represent them, regardless of level of education.” The law also established a statute of limitations of 3 years for misdemeanors and 10 years for “crimes” such as murder, rape and robbery.<sup>33</sup>

<sup>27</sup> Linton, pp. 212-213; Gottesman, D382.1.20 at ERN 00532913 (p. 246).

<sup>28</sup> Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, 23 October 1991, D288/6.9/5.12.

<sup>29</sup> Donovan, p. 445.

<sup>30</sup> Provisions Relating to the Judiciary, Criminal Law and Procedure Applicable in Cambodia During the Transition Period, 10 September 1992, Articles 3 & 4 (hereafter “1992 UNTAC Law”).

<sup>31</sup> 1992 UNTAC Law, Article 5.

<sup>32</sup> 1992 UNTAC Law, Articles 4(4), 10, 13.

<sup>33</sup> 1992 UNTAC Law, Article 30.

13. On 28 January 1993, the National Assembly of the State of Cambodia adopted a detailed Law on Criminal Procedure containing seven chapters and 238 articles, which was promulgated by the Council of State on 8 March 1993. The 1993 Law on Criminal Procedure reintroduced to Cambodia aspects of the French civil system, including the use of investigating judges, “preparatory investigations” and “introductory requisitions” by a prosecutor opening a judicial enquiry, and trial judges who lead the questioning of the accused, civil parties and witnesses.<sup>34</sup> It provided for a single Court of Appeal located in Phnom Penh with jurisdiction throughout Cambodia, and recognized the right of all accused to appeal to that court.<sup>35</sup> That Appeal Court was subsequently established in May 1994.<sup>36</sup> The 1993 Law also adopted a 3 year limitations period for misdemeanors and 10 year period for felonies.<sup>37</sup> The 1993 Law on Criminal Procedure and 1992 UNTAC Law constituted the operative law followed by Cambodian courts until their abrogation and replacement by the 2007 Code of Criminal Procedure.<sup>38</sup>
14. The effort to establish a legitimate legal system in Cambodia is also reflected in the September 1993 Constitution, which contained a commitment to recognize and respect a broad array of human rights established by international law.<sup>39</sup>
15. Significant efforts to create a body of qualified legal professionals also took place in this period. The Bar Association of the Kingdom of Cambodia was created by a National Assembly law passed on 15 June 1995.<sup>40</sup> The Bar began to function on 16 October 1995, at which time 38 lawyers were sworn in before the Court of Appeals.<sup>41</sup> By September 1996, the number of lawyers in the Bar had increased to 54.<sup>42</sup> In the fall of 1992, the Institute of Public Administration and Law began to offer a four-year law program.<sup>43</sup> From 1989 to 1992, the Institute had provided a two-year law program, and prior to 1989 it had only offered a three or five-month law course.<sup>44</sup>

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<sup>34</sup> 1993 Law on Criminal Procedure, Articles 56, 60, 68-95, 132-133.

<sup>35</sup> 1993 Law on Criminal Procedure, Articles 156, 161.

<sup>36</sup> *Neilson*, D288/6.9/5.26 at ERN 00333032.

<sup>37</sup> 1993 Law on Criminal Procedure, Article 117.

<sup>38</sup> Code of Criminal Procedure, 10 August 2007, Article 611; *Fernando*, D382.1.22 at ERN 00532917.

<sup>39</sup> Constitution of the Kingdom of Cambodia, 1993, Articles 31-51, 76, 109-111.

<sup>40</sup> CLRDC, *The Legal System of Cambodia*, January 1998, p. 150.

<sup>41</sup> CLRDC, *The Legal System of Cambodia*, January 1998, p. 151.

<sup>42</sup> CLRDC, *The Legal System of Cambodia*, January 1998, p. 151.

<sup>43</sup> *Donovan*, p. 450 (n. 17).

<sup>44</sup> *Donovan*, p. 450 (n. 17).

## B. POST-1979 CIVIL WAR

16. Cambodia remained in a state of civil war from the end of the DK regime through at least the Paris Peace Agreements signed on 23 October 1991.<sup>45</sup> During that period, the Accused continued to serve as leaders of the Khmer Rouge opposition force actively resisting the jurisdiction of the PRK (and later State of Cambodia) government, based in the mountains near the Thailand border and protected by a guerrilla army of 30,000 to 50,000.<sup>46</sup> Also through 1991, the United Nations continued to recognize the DK leaders as the legitimate heads of state entitled to represent Cambodia at the General Assembly.<sup>47</sup> These conditions made it a physical, political and practical impossibility for the Accused to be arrested and brought for trial during this time period. It was not until 1996, after Khmer Rouge forces were significantly weakened, that the Cambodian government and military was able to develop a plan and provide instructions for the arrest of the remaining DK leaders.<sup>48</sup>
17. Each of the Accused had a significant role leading the Khmer Rouge during the civil war. Ieng Sary began the period as the DK Foreign Minister and UN representative, procured funding for the Khmer Rouge resistance, and over time gained control of his own region (Pailin) and forces.<sup>49</sup> Khieu Samphan was a public leader of the Khmer Rouge forces, and

<sup>45</sup> Ieng Sary Telegram to the UN, 5 February 1979, D248/5.1.7 at ERN S 00015001 (stating that “[s]ince 15<sup>th</sup> January 1979, the revolutionary army and people of Kampuchea have begun launching general counter-attacks against the Vietnamese aggressors in all parts of the country”); Khieu Samphan Press Release, 1 January 1984, D56-Doc. 279 at ERN S 00036209; Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, 23 October 1991, D288/6.9/5.12 at ERN 00330666 (Article 9 of which provided that a “cease-fire shall take effect at the time this Agreement enters into force”).

<sup>46</sup> Nayan Chanda, *Brother Enemy: The War After the War*, D108/50/1.74 at ERN 00192169 (p. 382) (stating that the Khmer Rouge fighting force grew from 20,000 to 40,000 by the end of 1980); Associated Press, *Cambodian Coalition Reports More Aid From China, Asks for US Help*, 10 December 1985, D56-Doc. 341 at ERN 00122417 (statement by Sihanouk that Khmer Rouge had “as many as 50,000 guerrillas”); The Times, *Khmer Rouge Still Casts Shadow Over Cambodia*, 15 December 1988, D56-Doc. 397 at ERN 00137580.

<sup>47</sup> *Linton*, p. 199; UN Secretariat, Provisional List of Delegations to the 39<sup>th</sup> Session of the General Assembly, 9 November 1984, D56-Doc. 290; Associated Press, *Cambodian Coalition Reports More Aid From China, Asks for US Help*, 10 December 1985, D56-Doc. 341 at ERN 00122417. This continued until the Paris Peace Agreements in October 1991, at which time the Supreme National Council was recognized as the entity that would “represent Cambodia externally and occupy the seat of Cambodia at the United Nations” during the transitional period. Agreement on a Comprehensive Political Settlement of the Cambodian Conflict, 23 October 1991, D288/6.9/5.12 at ERN 00330666 (Article 5).

<sup>48</sup> AFP, *Khmer Rouge Top Leadership Moved as Troops Close in on Rebel Stronghold*, 1 March 1996, D56-Doc. 423 at ERN 00107754; The Washington Post, *Cambodia's Prince, Out of Exile*, 31 March 1998, D56-Doc. 472 at ERN 00131235-36; The Australian, *Weak Khmer Rouge Struggles to Disrupt Poll*, 1 April 1998, D56-Doc. 474 at ERN 00131243.

<sup>49</sup> Ieng Sary Telegram to the UN, 5 February 1979, D248/5.1.7 at ERN S 00015001; Philip Short, *Pol Pot: The History of a Nightmare*, D22211.15 at ERN 00396618-20, 00396653; Kyodo News Service, *Ieng Sary Voices Support for CPP in Polls*, 25 July 1998, D56-Doc. 475 at ERN 00118381; Craig Etcheson, *After the Killing Fields*, IS Annex C 4.14 at ERN 00078846; Nayan Chanda, *Fall of the High Flyer*, 22 August 1996,



Vice-President in charge of Foreign Affairs in the CGDK (Coalition Government of Democratic Kampuchea).<sup>50</sup> Ieng Thirith was one of the delegation leaders who negotiated the CGDK, and was appointed Secretary General of the CGDK Ministry of Foreign Affairs.<sup>51</sup> Nuon Chea also served as a public leader, controlled the region from Samlaut to Koh Kong, and provided instructions to the guerrilla forces.<sup>52</sup>

18. The state of war with Khmer Rouge forces continued after the October 1991 Paris Peace Agreements and the formation of the Kingdom of Cambodia in 1993.<sup>53</sup> It was not until September 1996 that Ieng Sary and Ieng Thirith surrendered to the national government.<sup>54</sup> On multiple occasions in October and November 1996, Nuon Chea and other DK leaders

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D56-Doc. 432 at ERN 00115409; Interview of Ieng Sary by ABC, 28 August 1996, IS Annex C 20.8 at ERN 00078607-08.

- <sup>50</sup> New York Times, *Vietnamese troops continue to meet serious resistance*, 2 February 1979, D56-Doc. 161 at ERN 00122171; Reuters, *Cambodians are Cornered by Vietnamese, Thais say*, 17 April 1979, D56-Doc. 163 at ERN 00122173; Khieu Samphan Press Release, Permanent Mission of Democratic Kampuchea to the United Nations, 1 January 1984, D56-Doc. 279 at ERN S 00036209-11 (stating that “[f]or the past five years of struggle and sacrifices, our people, our National Army and our guerrillas have won successive victories in all fields against the Vietnamese aggressors”); BBC, *Khieu Samphan Comments on Cambodia’s Future*, 19 June 1984, D56-Doc. 283 at ERN 00122319; UN Secretariat, Provisional List of Delegations to the 39<sup>th</sup> Session of the General Assembly, 9 November 1984, D56-Doc. 290 at ERN S 00022416; Associated Press, *Khmer Rouge Chief Claims Vietnamese Pushed Back*, 21 February 1985, D56-Doc. 304 at ERN 00122370 (statement by Khieu Samphan that the resistance would maintain enough strength to “cut (the) enemy’s throat”); Statement of Khieu Samphan to 2<sup>nd</sup> Ministerial Session of the Paris International Conference on Cambodia, 28 August 1989, D366/7.1.660 at ERN 00442676.
- <sup>51</sup> DK Delegation to UNESCO, News Bulletin 17/81, 5 October 1981, *Meeting of the Tripartite Ad Hoc Committee*, D56-Doc. 233 at ERN S 00028022; DK Mission to the UN, Press Release 069/82, 15 September 1982, *Vice-President of Democratic Kampuchea Khieu Samphan is in New York*, D56-Doc. 259 at ERN S 00031853; DK Mission to the UN, Press Release 077/82, 26 November 1982, *Democratic Kampuchea at the Colombo Plan Meeting*, D56-Doc. 262 at ERN S 00031886-87; DK Mission to the UN, Press Release 035/85, 10 April 1985, *DK Delegation meets with Japanese Ruling Party Leader*, D56-Doc. 311 at ERN S 00039016; BBC, *DK Official Says Pol Pot In Good Health*, 10 April 1985, D56-Doc. 310 at ERN 00137579 (reporting statement of Ieng Thirith that “Pol Pot was still the supreme military commander of the anti-Vietnamese forces in Cambodia”).
- <sup>52</sup> Hsinhua Agency, *Democratic Kampuchean Leaders Inspect Battlefields*, 5 August 1981, D56-Doc. 224 at ERN S 00029054; DK Circular Letter by Khieu Samphan and Nuon Chea, 30 November 1981, D56-Doc. 236 at ERN S 00020383; DK Mission to the UN Press Release 011/82, 4 February 1982, D56-Doc. 241 at ERN S 00031489 (Nuon Chea Visits Southern Battambang); DK Mission to the UN Press Release 064/82, 18 August 1982, D56-Doc. 256 at ERN S 00031835 (Khieu Samphan and Nuon Chea Surveyed the Battambang Front); Statement of Democratic National Union Movement, 8 September 1996, D56-Doc. 444 at ERN 00000959.
- <sup>53</sup> David Chandler, *Brother Number One*, D222/1.3 at ERN 00393087 (stating that in late May 1992, Pol Pot, Nuon Chea and Ta Mok refused UN inspectors access to the areas they controlled, expressed their unwillingness to disarm their forces and refused to negotiate with the “Vietnamese puppets” in Phnom Penh); BBC, *Locals Fear Outbreak of War with Khmer Rouge on Route 10*, 29 December 1995, D56-Doc. 422 at ERN 00107753; Bangkok Post, *Cambodia – Pol Pot is Found Near Stronghold*, 6 January 1998, D56-Doc. 466 at ERN 00131101 (reporting heavy fighting between Khmer Rouge and government forces at the Chong Chom pass).
- <sup>54</sup> Jiji Press English News Service, *Ieng Sary Announces Formal Negotiations with Govt.*, 9 September 1996, D56-Doc. 445 at ERN 00115846; Royal decree by Norodom Sihanouk, Pardon of Ieng Sary, 14 September 1996, D366/7.1.191 at ERN 00523598.

fled into Thailand to escape pursuing government troops.<sup>55</sup> In January 1998, Nuon Chea refused to hand Pol Pot over to an international court or military trial, publicly stating that he would fend off any attempts to seize him.<sup>56</sup> Nuon Chea and Khieu Samphan continued their resistance and did not surrender until December 1998.<sup>57</sup>

### III. ARGUMENT

#### A. GENERAL PRINCIPLES REGARDING SUSPENSION OF LIMITATIONS PERIOD

19. The Roman maxim *contra non valentem agere nulla currit praescriptio*<sup>58</sup> is a principle that has frequently been applied in both national practice<sup>59</sup> and international law.<sup>60</sup> It is a natural law principle<sup>61</sup> that has been incorporated into the jurisprudence and statutes of France and other French-based civil law systems in the principle of *empêchement d'agir* (“impossibility of action”).<sup>62</sup>
20. Moreover, as noted by the Pre-Trial Chamber, the underlying principle of statutes of limitation “presupposes that judicial institutions operate effectively, so proceedings can

<sup>55</sup> AFP, *Senior Hardline Khmer Rouge Believed to be in Thailand*, 2 October 1996, D56-Doc. 449 at ERN 00107559; Associated Press, *Khmer Rouge Hardliners Reject Exile Deal*, 14 November 1996, D56 at ERN 00107916.

<sup>56</sup> Bangkok Post, *Cambodia – Pol Pot is Found Near Stronghold*, 6 January 1998, D56-Doc. 466 at ERN 00131101; Dow Jones Newswire, *We Have to be Moral – Captors*, 6 January 1998, D56-Doc. 467 at ERN 00108206 (reporting statement by Nuon Chea that Pol Pot would “never be handed over to the government or to the international community for trial”); The Age, *No Escape for Ailing Pol Pot Under House Arrest in Jungle*, 7 January 1998, D56-Doc. 468 at ERN 00108207; New York Times, *On its Last Legs, the Saddest Cambodian Army*, 20 October 1997, D56-Doc. 463 at ERN 00108168.

<sup>57</sup> Statement by Nuon Chea to Samdech Hun Sen, 25 December 1998, ERN 00531218; Alexander Hinton, *Why did they Kill?*, D313/1.2.7 at ERN 00431457; Nic Dunlop, *The Lost Executioner*, D222/1.4 at ERN 00370203; David Chandler, *Voices from S-21*, D108/50/1.4.6 at ERN 00192858; AP, *Top Khmer Rouge Leaders to Defect*, 25 December 1998, D56-Doc. 477 at ERN 00132427; AFP, *Top Khmer Rouge Leaders Defect to Government*, 26 December 1998, D56-Doc. 478 at ERN 00132425.

<sup>58</sup> “Prescription does not run against he who cannot act.”

<sup>59</sup> **United States:** *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir.1995) (“Equitable tolling is appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence”); **Canada:** Civil Code of Quebec, Article 2904. **France:** Code Civil, Article 2234; Code de Procédure Pénale, Article 6 (absolute or insurmountable, rendering proceedings impossible). **Germany:** German Civil Code, section 206 (“prevented by force majeure from prosecuting his rights”). **Spain:** *Morgan v. Robinson*, 12 Mart. (O. S.) 77, 13 Am. Dec. 366 (on Spanish law). **Hong Kong:** Chapter 347: Limitation Ordinance 1997 (HK), §30. **Botswana:** Chapter 13:01 (Prescriptions) §§ 8(1)(c), 11. **New Zealand:** *Limitation Act* 2010 §§ 45, 46.

<sup>60</sup> Article 10.8 UNIDROIT Principles 2004; U.N. Limitation Convention, Article 15; 2002 UNCITRAL Model Law on International Commercial Conciliation, Article X (“Suspension of limitation period”).

<sup>61</sup> See *Morgan v. Robinson*, 12 Mart. (O. S.) 77, 13 Am. Dec. 366.

<sup>62</sup> Cass.crim. 28 mars 2000 (Gaz.Pal. 2000 II Chr.crim. 2160); Cass.crim. 1<sup>er</sup> août 1919 (Gaz.Pal. 1919 II 176, Dames G...d); Cameroon Criminal Procedure Code, Article 68; Civil Code of Quebec, Article 2904; *Public Services Committee v Maynard* (1996) JLR 343 at 352; *Robertson v Lazard Trustee Co Ltd* (1994) JLR 103 at 112 [Jersey and Guernsey].

be instituted.”<sup>63</sup> A functioning court system is thus a necessary precondition to the running of a limitations period.<sup>64</sup>

21. These principles are applicable to the determination of whether the ten-year limitations period contained in the 1956 Penal Code bars the prosecution of the Accused for national crimes. In French-derived jurisprudence, *contra non valentum* may be applied where it is not provided for in statute, so long as it is “done with caution, and only where the manifest spirit and intention of the express law is not violated.”<sup>65</sup> In this case, both the national and international judges of the Trial Chamber have already recognized that the limitations period can be suspended, pursuant to the above principles, by their unanimous holding that the period was suspended between 1975 and 1979 because there was no functional legal or judicial system in Cambodia and hence no prosecutions were possible.<sup>66</sup> As set forth below, the same principles should also be applied to suspend the limitations period from 1979 to at least 1991, such that the 10 year statute of limitations did not start to run until 23 October 1991 or later.

#### B. SUSPENSION OF LIMITATIONS PERIOD DUE TO LACK OF FUNCTIONAL LEGAL SYSTEM

22. Both the Pre-Trial and Trial Chambers have concluded that statutes of limitation are suspended during periods that courts are not functioning and incapable of hearing a case.<sup>67</sup>
23. Limitation periods must be suspended during periods the courts are closed, as this creates an impossibility of action.<sup>68</sup> In this situation, the limitations period only recommences when there is “effective access” to the courts.<sup>69</sup> In addition to a court being open, the legal system must be able to effectively hear the case, meaning, *inter alia*, that it must be able to gather evidence, hear witnesses without fear of reprisals, learn of all facts, and be free

<sup>63</sup> See PTC Ieng Sary Decision, para. 285 and authorities cited in footnotes 521 and 522.

<sup>64</sup> TC Statute of Limitations Decision, para. 17 and authorities cited in footnote 25.

<sup>65</sup> *Hatch v. Gilmore*, 3 La. Ann. 508.

<sup>66</sup> TC Statute of Limitations Decision, para. 14.

<sup>67</sup> PTC Ieng Sary Decision, para. 285; TC Statute of Limitations Decision, para. 14, 16-17, 29 (fn. 48).

<sup>68</sup> *Hangar v. Abbott*, 73 U.S. 532 (1867) (holding that the statute of limitations for a civil claim did not run while the Arkansas courts were closed on account of the Civil War); *Brown v. Hiatts*, 82 U.S. 177 (1872) (“Statutes of Limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor”). See also German Civil Code, §203(old): “Prescription is suspended so long as the obligee is prevented from enforcing his right if the administration of justice ceased to function;” Austrian Civil Code, §1496: “Absence in the civil or military service, or the complete cessation of the administration of justice in time of war or pest, suspends not only the beginning but also the running of prescription for the duration of the impediment.”

<sup>69</sup> *Forti v. Suarez-Mason*, 672 F.Supp 1531, 1550 (1987) (suspending statute of limitations for claims against an Argentine military officer until such time as a democratically-elected government was in place).

from interference.<sup>70</sup> Accordingly, even in countries where court systems are functioning, where other factors exist that impede “the fair administration of justice,” the running of the statute of limitations will be suspended.<sup>71</sup> This is particularly the case where the Accused is in some way responsible for the difficulties in administering justice.<sup>72</sup>

24. The European Court of Human Rights has defined a “tribunal” as a body that exercises judicial function “on the basis of rules of law” and guarantees basic legal rights.<sup>73</sup> The capacity to prepare a defence, gather evidence and hear and examine witnesses is an essential element of a fair trial.<sup>74</sup> The accused must have the rights and the resources available to mount a sufficient defence, including access to counsel of their choice.<sup>75</sup> Without meeting such minimal requirements, a body cannot be considered a functional court capable of hearing a matter, and a practical impossibility of bringing a case exists which warrants the suspension of the limitations period.
25. In this case, as demonstrated above in section II.A, there was no functional court in Cambodia during the 1979 to 1991 time period at which it was possible for the Accused to be prosecuted in accordance with basic principles of justice and the rule of law.<sup>76</sup> The country did not have a court with qualified judicial officers that operated pursuant to comprehensive procedural and substantive laws establishing a legitimate process to prosecute the Accused for homicide, torture and religious persecution. Specifically, the only courts that existed during this period were used primarily for political offences such as “Revolutionary Betrayal.” Those former Khmer Rouge cadres who were arrested were not brought to trial in a court. There was an absence of trained legal professionals capable

<sup>70</sup> *Arce v. Garcia*, 434 F.3d 1254 (11<sup>th</sup> Cir. 2006); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9<sup>th</sup> Cir.1996); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11<sup>th</sup> Cir. 2005).

<sup>71</sup> In *Arce v. Garcia*, 434 F.3d 1254, both the Plaintiff and Defendant lived in the United States; nevertheless, the court suspended the limitations period under the *Torture Victims Protection Act* during the period the situation in their home country El Salvador would not have allowed the proper gathering of information. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148, the court suspended the limitations period because the political situation in Chile made it impossible for victims to investigate crimes (at 1153).

<sup>72</sup> See section III.D below regarding the fault or fraud of the defendant.

<sup>73</sup> *Belilos v. Switzerland*, Application No. 10328/83, ECtHR, 29 April 1988, para. 64; *Case of Le Compte, Van Leuven and De Meyere v. Belgium*, Application No. 6878/75, 7238/75, ECtHR, 23 June 1981, para. 55.

<sup>74</sup> Geneva Convention III, article 96(4); ICCPR, articles 14(3)(b) & 14(3)(e) (adequate time and facilities to prepare defence); American Convention, article 8(2)(c); European Convention, article 6(3)(b); ICTY Statute, Article 21(4)(b); ICC Statute, Article 67(1)(d).

<sup>75</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609, article 6(2)(a); Charter of the IMT (Nuremberg), article 16(d); ICCPR, article 14(3)(d).

<sup>76</sup> For purposes of this argument, the Co-Prosecutors will focus on whether the facts warrant the suspension of the limitation period until at least 23 October 1991 (the time of the Paris Peace Agreement), because if the statute of limitations did not start running until that time, the August 2001 extension of the limitation period in Article 3 of the ECCC Law occurred before the expiry of the statute of limitations and thus could not violate the principle of legality.

of competently representing the Accused. Trial before an impartial tribunal, the presumption of innocence,<sup>77</sup> a proper defence and the presence of the Accused at trial were all impossibilities, given the ongoing civil war between the Khmer Rouge and PRK. There was no appellate court, and no right of appeal for any persons who were convicted.

26. The process of establishing a legitimate legal system and courts in Cambodia did not begin until after the October 1991 Paris Peace Agreements, with the adoption of the September 1992 UNTAC Law, the January 1993 Law on Criminal Prosecution and the September 1993 Constitution. Accordingly, as there was no functional court in which the Accused could have been prosecuted in Cambodia prior to that time, the statute of limitations should be suspended from at least April 1975 to October 1991.

### C. SUSPENSION OF LIMITATIONS PERIOD DURING TIMES OF WAR

27. It is well established under national and international practice that a state of war which interrupts judicial functions, whether external or internal, necessitates the suspension of the statute of limitations.<sup>78</sup> In post-war Germany, it was determined by the Control Council that in any trial or prosecution, “the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945.”<sup>79</sup> In the United States, courts have consistently suspended the statute of limitations during periods of war, regardless of whether such suspension was provided for by statute.<sup>80</sup> French courts, and courts of other civil law systems, have also suspended limitation periods based on the existence of a state of war.<sup>81</sup>

<sup>77</sup> The public vilification of the “Pol Pot-Ieng Sary clique” by the PRK would have made any presumption of innocence impossible, especially given that the decree establishing the People’s Revolutionary Tribunal expressly proclaimed their guilt. *See* Decree No. 1, D288/6.9/9.3 at ERN 00336567 (“Considering that the Pol Pot-Ieng Sary clique have massacred millions of innocent persons, forced the entire Kampuchean people to live in genocidal conditions, physically and morally; destroyed all economic, cultural and social structures, thus bringing them into danger of extermination”).

<sup>78</sup> *War as Suspending Running of Limitations in Absence of Specific Statutory Provision to that Effect*, 137 A.L.R. 1454 (West 1942); Limitation (Enemies and War Prisoners) Act 1945 (UK) §1; Ch 15 Cypriot Code; H. St. John-Mildmay, *The Italian Law on Prescription* (1916) 1 Int’l L. Notes 59; Limitation Act 2010 (NZ) §46(c) (construing war as an impediment akin to a disability); Hall, *Treatise on International Law* (8<sup>th</sup> ed, 1924), p. 459; Oppenheim, *International Law* (2nd ed. 1912), Vol 2, p. 135.

<sup>79</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, article II(5).

<sup>80</sup> *Hangar v. Abbott*, 73 U.S. 532 (1867); *Colorado Fuel & Iron Co. v. Industrial Com’n*, 73 Colo. 579, 216 P. 706 (1923); *Inland Steel Co. v. Jelenovic*, 84 Ind. App. 373, 150 N.E. 391 (1926); *Maryland Cas. Co. v. Vidigoj*, 207 Ky. 841, 270 S.W. 472 (1925); *Lipmanowich v. Crookston Lumber Co.*, 168 Minn. 332, 210 N.W. 47 (1926); *Peters v. McKay*, 195 Or. 412, 238 P.2d 225 (1951), reh’g denied, 195 Or. 412, 246 P.2d 585 (1952).

<sup>81</sup> Cass.crim. 1<sup>er</sup> août 1919 (Gaz.Pal. 1919 II 176, Dames G...d) (public action prescription suspended when in an occupied territory, an enemy prohibits the course of justice); Cass.-civ, 17 décembre 1872, D.78. 1. 227; Cass.-civ., 19 novembre 1873, D. 74. 1. 200, S. 74. 1. 430; Wahl, *La Guerre Considérée Comme Force*

28. The same principle has been extended to repressive authoritarian regimes in which access to courts may be impeded.<sup>82</sup> For example, in the Czech Republic following the collapse of the Communist regime, the statute of limitations was suspended for the entire 40 year period of the regime.<sup>83</sup> In *Arce v. Garcia*, a suit by Salvadoran refugees against Salvadoran military officials, the court suspended the statute of limitations until the end of the civil war in El Salvador, when Peace Accords were negotiated and an independent judiciary restored.<sup>84</sup> In *Chavez v. Carranza*, that statute of limitations was suspended an additional two years because of pervasive violence in El Salvador that continued following the 1992 Peace Accord until the first national elections held in 1994.<sup>85</sup>
29. The international principle that the statute of limitations is suspended as between two “powers at war”<sup>86</sup> is also applicable here, as in Cambodia a state of civil war existed as between the PRK (and subsequently the State of Cambodia), on the one hand, and the State of Democratic Kampuchea (and subsequently the CGDK), on the other hand, from January 1979 until at least 23 October 1991. The fact the United Nations continued to recognize the DK and CGDK leaders as the representatives of Cambodia during this period confirms that this was a civil war between two competing powers for the control of this state.<sup>87</sup> Any court proceedings involving representatives of two forces at war would

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*Majeure*, Revue Trimestrielle de Droit Civil 383-418 (1915); James B. Thayer, Magdalene Schoch & Gordon Ireland, *The Effect of A State of War Upon Statutes of Limitation or Prescription*, 17 Tulane Law Review 416 at 420-22 (1943); *Public Services Committee v Maynard* (1996) JLR 343 at 352; *Robertson v Lazard Trustee Co Ltd* (1994) JLR 103 at 112.

<sup>82</sup> See *Jean v. Dorelien*, US 11<sup>th</sup> Circuit, Case No. 04-15666, 1 December 2005 (“We note that every court that has considered the question of whether a civil war and a repressive authoritarian regime constitute ‘extraordinary circumstances’ which toll the statutes of limitations of the [Alien Tort Claim Act] and the [Torture Victim Protection Act] has answered in the affirmative”), cited with approval in PTC Ieng Sary Decision, fn. 522.

<sup>83</sup> Czech Republic Constitutional Court, Decision on the 1993 Act on the Illegality of the Communist Regime, 21 December 1993, D288/6.9/7.12 at ERN 00335995-96 [confirming the validity of a 1993 law providing that the statute of limitations for past crimes would not include the period from 25 February 1948 to 25 December 1989].

<sup>84</sup> *Arce v. Garcia*, 434 F.3d 1254, 1258 (11<sup>th</sup> Cir. 2006). See also *Forti v. Suarez-Mason*, 672 F.Supp 1531, 1549-50 (1987); *Hilao v. Estate of Marcos*, 103 F.3d 767, 773 (9<sup>th</sup> Cir.1996) (suspending the statute for claims against former Philippine dictator Ferdinand Marcos until his regime was overthrown); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153-54 (11<sup>th</sup> Cir. 2005) (suspending statute until Chilean military junta was out of power).

<sup>85</sup> *Chavez v. Carranza*, US 6<sup>th</sup> Circuit, Case No. 06-6234, 17 March 2009.

<sup>86</sup> *War as Suspending Running of Limitations in Absence of Specific Statutory Provision to that Effect*, 137 A.L.R. 1454 (“it is now a firmly established principle of international law that the existence of a state of war between two countries or powers is effective to suspend the running of statutes of limitation as between the citizens of such countries or powers at war”); Hall, *Treatise on International Law* (8<sup>th</sup> ed, 1924), p. 459; Oppenheim, *International Law* (2nd ed. 1912), Vol 2, p. 135.

<sup>87</sup> The PRK National Assembly recognised the situation as constituting a “war or other exceptional circumstance,” and on that basis extended the assembly’s term for an additional five years in 1986. See *Constitution of the People’s Republic of Kampuchea*, article 47.

have been both impractical and unlikely to be resolved in a fair or judicial manner, as evidenced by the trial that was conducted of Pol Pot and Ieng Sary in 1979.

30. Accordingly, the inability of the PRK to arrest DK leaders and bring them to trial while those forces were at war, as well as the inability to develop a functional legal and court system during the 1979-1991 civil war, provide sufficient grounds for the suspension of the statute of limitations.

#### D. SUSPENSION OF LIMITATIONS PERIOD DUE TO FAULT OR FRAUD OF DEFENDANT

31. In deciding to suspend the statute of limitations until September 1993, the Pre-Trial Chamber noted that an Accused “cannot benefit from the passage of time ... where he is alleged to be in part responsible for the incapacity of the judicial system to conduct investigation and prosecution” during that period.<sup>88</sup> This conclusion is supported by jurisprudence suspending the statute of limitations where a practical impossibility was caused by fault or fraud of the Accused.<sup>89</sup>
32. In this case, the Accused are directly responsible both for the lack of a functional judicial system in Cambodia following the end of the DK regime and the civil war that effectively prevented their prosecution from 1979 until the mid-1990s. The Accused were the senior leaders of the DK Regime who implemented the revolutionary policy seeking the eradication of judges, lawyers and other professionals or intellectuals considered to be class enemies. It was the Accused who dismantled the courts and other institutions of Cambodia upon assuming power in April 1975. And it was the Accused who led a civil war for over 15 years from the Cambodia-Thailand border, and did not surrender to the Cambodian government until 1996 and 1998.
33. In these circumstances, the Accused should not be allowed to benefit from misconduct and crimes that interfered with and prevented their prosecution at an earlier time.

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<sup>88</sup> PTC Ieng Sary Decision, para. 286.


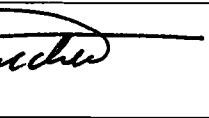
<sup>89</sup> See, e.g., *Corsey v. Louisiana*, 375 So. 2d 1319 (1979); Cass. 1e civ., 28 October 1991, Bull. Civ. I, No. 282 (Fr.); Saul Litvinoff, *Good Faith*, 71 *Tulane Law Review* 1645, 1660-61 (1997).

E51/7/1

#### IV. CONCLUSION

34. For the reasons set forth above, the Co-Prosecutors respectfully submit that the preliminary objections of the Accused based on the statute of limitations for national crimes should be dismissed.

Respectfully submitted,

Date	Name	Place Signature
27 May 2011	CHEA Leang Co-Prosecutor	 
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