

**OBSERVING THE EXTRAORDINARY CHAMBERS IN THE
COURTS OF CAMBODIA (ECCC)¹**

**Initial Hearing in the Case against
Nuon Chea, Ieng Sary, Ieng Thirith, and
Khieu Samphan (Case 002)**

June 27-30, 2011

I. Background to the Initial Hearing

ECCC Internal Rule 80*bis* provides that each trial begins with an initial hearing. On June 27th, the Court's Trial Chamber (TC) began the initial hearing for Case 002, involving accused Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan, marking the official start of trial. The agenda set by the TC included an opportunity for parties to object to the Chamber's tentative list of witnesses, as well as some of the preliminary objections previously briefed by the parties, in particular several objections raised by the Ieng Sary team. Many of the issues discussed have already been addressed during the investigative phase of proceedings by the ECCC Pre-Trial Chamber (PTC). However, the PTC's decisions are not binding on the TC. No decisions were made by the TC during the hearing, and it is likely that an additional management hearing will be scheduled for August, ahead of the substantive proceedings, expected to begin in September 2011.

II. Presence of the Accused²

During the initial hearing, a reoccurring issue was the presence of the accused, all of whom are elderly and some of whom have various medical ailments that making sitting for long periods difficult. During the opening morning of the hearing Ieng Sary, Ieng Thirith and Nuon Chea all requested to be excused, the Iengs on health grounds and Nuon Chea due to his "unhappiness" with the Chamber for failing to schedule time for issues raised by his counsel. TC Judge Nil Non summarily granted the requests, without any discussion among the parties. As the afternoon session began, only Khieu Samphan, who had not yet requested leave, and Ieng Sary, who had returned, were in the courtroom. When Khieu Samphan requested leave to be excused in order to conserve his energy for a later stage of the proceedings, the Chamber held an almost two-hour long impromptu discussion on: (1) whether defendants may be required to be in the courtroom; (2) whether they may be excused; and (3) if they may be excused, under what circumstances and conditions.

¹ The Observation Team is headed by Terith Chy with the assistance of Maryan Kim, Socheata Cy, Cheytoath Lim, and Pronh Chan. This report was compiled and edited by Anne Heindel, Legal Advisor.

² Reported by Kimberly Ang and Valerie Stranieri.

Ieng Sary's lawyer, Michael Karnavas, also sought leave to be excused and attempted to clarify Judge Non's position on voluntary waivers of an accused's right to be present. Karnavas contended that an accused must always be permitted to waive his right to attend the proceedings against him and that to do otherwise may constitute a violation of human rights. ECCC International Co-Prosecutor Andrew Cayley asserted that it is a basic requirement for defendants to attend the proceedings but that if a defendant is physically incapable of attending the proceedings, a court must obtain expert medical testimony and evidence to that effect before granting waiver. Moreover, Cayley further asserted that if an accused is not attending the proceedings, it must be clearly noted why the defendant is not attending, so as to avoid any suggestion on appeal that the defendant was denied his right to be present at trial.

The judges conferred and announced that the accused could leave at any time, without permission from the Court, in order to go to the bathroom. Judge Cartwright noted that Rule 81(3) permits the accused to waive the right to be present and Rule 81(4) permits the accused to participate from the holding cells in the basement under the main courtroom—which are equipped with audio and video equipment allowing two way communication between the parties inside the courtroom and the defendant in the holding cell—but only if he/she has a legitimate basis for not being present in the courtroom that is communicated to the court. After Karnavas provided some information about Ieng Sary's health, Ieng was granted permission to leave the courtroom and watch the proceedings from the basement holding cells.

Judge Non informed the Defense that all parties should attend the morning session at least preliminarily because the issue of their attendance would be addressed on a case-by-case, day-by-day basis. Judge Non then resumed with the scheduled agenda. Ultimately, Judge Non did not rule on Khieu Samphan's request to be excused, and his lawyers did not press the issue.

For the rest of the week, there were only slight disruptions to the proceedings for discussions of the health and presence of the accused. The TC ruled on all requests to be excused from the proceedings based on Internal Rule 81(4), requiring that the basis for each request be communicated to the Court. Khieu Samphan remained present for the whole of the proceedings and said he was in good health. Ieng Thirith again requested to be excused after the last recess on the second day due to poor health, and her request was summarily granted.

In the morning of the second day, there was a small debate amongst the judges when Karnavas requested that Ieng Sary be allowed to leave the proceedings for the rest of the day and whenever his health required. President Nonn lectured the attorney on the need to provide reasoned explanations for all requests to be excused. President Nonn denied the general request for leave, and the proceedings continued without debate. Between the morning recess and adjournment for lunch, however, Karnavas requested his client be excused from the proceedings due to pain in his back. The Chamber president granted the request explaining that a specific and reasoned request in accordance with the Internal Rules allowed the judges to grant leave.

Nuon Chea, speaking on his own behalf, requested at the start of both Tuesday and Wednesday to be excused entirely from the proceedings, which were only related to Ieng Sary. He assured the court he would return when issues relating to his own case were discussed. President Nonn granted the request, reiterating that the accused may be excused with a reasonable and elucidated request. Nuon Chea fulfilled his promise to return and remained in the courtroom on Thursday during discussion of the witness list.

III. Topics of Discussion

1. *Ne Bis in Idem*: the Finality of the 1979 Trial³

a. The principle of *Ne Bis in Idem*

The principle of *ne bis in idem* prohibits a person from being tried twice for the same crime and aims to protect the individual from repeated prosecutions at the hands of a politically motivated court. *Ne bis in idem* is intended to make the law more certain, increase public confidence in the law, and encourage prosecutorial diligence. International law recognizes two basic exceptions to *ne bis in idem*: (1) sham trials where a verdict is foreordained and (2) trials that are not independent and impartial in keeping with fair trial standards.

b. Defense arguments

In 1979 Ieng Sary was convicted by the People's Revolutionary Tribunal (PRT) of numerous crimes under the heading of "genocide" and sentenced to death and confiscation of all his property *in absentia*. Ieng's current argument is that because he was already tried and convicted for the same underlying acts as those now being adjudicated by the ECCC, the current proceedings against him are barred by the principle of *ne bis in idem* as enshrined in domestic Cambodian law, the International Covenant on Civil and Political Rights (ICCPR), and procedural rules established at the international level and should be dismissed.

i. Domestic Cambodian law

First, the Defense argued that the ECCC is a national court within the Cambodian judicial system and its proceedings must therefore comply with Cambodian Code of Criminal Procedure (CPC) article 7, which provides in part, "The reasons for extinguishing a charge in a criminal action are as follows: . . . (5) The *res judicata*. When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated." Because of this rule, Ieng Sary argues that the current prosecution must be terminated.

The Defense argued that Article 7 should be construed as requiring the extinguishment of a case whenever a final judicial decision has been reached, whether there has been an acquittal or a conviction. They argued that CPC article 12 does not define *res judicata* or limit its application. That article provides, "In applying the principle of *res judicata*, any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification." In their view, this article in fact ensures that the principle will be read broadly to apply to acquittals as well as to convictions. The Defense concluded that this interpretation preserves the underlying purposes of *ne bis in idem*: to spare individuals emotional and financial stress and to ensure respect for judicial proceedings by ensuring the finality of final judgments. Counsel

³ Reported by Tatiana Sainati.

emphasized that as a model court, the ECCC must enforce this principle to increase respect for the Cambodian judiciary.

ii. The International Covenant on Civil and Political Rights (ICCPR)

Next, the Defense considered the application of the *ne bis in idem* provision in article 14 of the ICCPR, to which Cambodia is a state party and which is specifically referenced in both the ECCC Law and Agreement.⁴

ICCPR article 14(7) provides, “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.” The Defense argued that the principle of *ne bis in idem* articulated in Article 14(7) also bars his prosecution by the ECCC. In an earlier and non-binding decision, the PTC found that the ICCPR is inapplicable, because it does not govern international proceedings, and the ECCC is a transnational court. The Defense countered that the PTC’s interpretation was erroneous, as the ECCC is in fact a national court by both design and agreement, and therefore the Court’s proceedings fall squarely within the intended scope of Article 14(7). The Defense concluded by arguing that according to this interpretation of the ECCC, the current prosecution of Ieng Sary is a clear violation of the *ne bis in idem* protections enshrined in the ICCPR.

iii. International Procedural Rules

The next point argued by the Defense was that because the CPC and ICCPR were unambiguous, the ECCC should not consult international procedural rules. Nonetheless, if the Court does decide to consult international procedure, the Defense argued that it should look primarily to the International Criminal Court (ICC) for guidance, as it is most representative of international consensus. The provisions of Article 23 of the ICC statute create two exceptions to the *ne bis in idem* doctrine. First, *ne bis in idem* does not apply if the previous trial was a sham, designed to shield the accused from criminal liability. Second, *ne bis in idem* is inapplicable if the prior trial was not independent or impartial, and was not conducted with the intent to bring the accused to justice.

According to the Defense, because the 1979 PRT sentenced Ieng Sary to death and ordered the confiscation of his property, the trial was neither intended to shield him from liability, nor carried out in a manner inconsistent with an intention to bring him to justice. The Defense argued that in determining that the 1979 trial was not a sham, the fact that the sentence would have been carried out by the Cambodian government had Ieng Sary been arrested was dispositive, and attested to the intended finality of the judgment.

The Defense went on to address arguments briefed by the Prosecution, alleging that the 1979 judgment could not be considered final since there was no opportunity for appellate review. The Defense countered that by logical extension, this would imply that all Cambodian convictions from 1979 onward were “gross miscarriages of justice,” as the Cambodian system did not include provisions for appellate review at the time. The Defense

⁴ For example, Article 33new of the ECCC Law states “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 15 and 15 of the [ICCPR].”

alleged that a more logical interpretation was that the PRT did not provide for appellate review precisely because the judgment meted out was meant to be final.

c. Prosecution arguments

The Prosecution countered the Defense's *ne bis in idem* arguments point-by-point, alleging that (1) the CPC clearly applies only in cases where an accused person was acquitted; (2) the PTC correctly found that the ICCPR is inapplicable to the proceedings against Ieng Sary; and (3) international procedural rules articulated by the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively), the ICC, the Special Court for Sierra Leone (SCSL), and the Special Panels for Serious Crimes in East Timor (SPSC) clearly indicate that the principle of *ne bis in idem* is inapplicable to unfair trials such as the 1979 PRT. Therefore, the prosecution against Ieng Sary is not barred by *ne bis in idem*.

i. Cambodian Code of Criminal Procedure (CPC)

First, the Prosecution argued that the principle of *res judicata*, as articulated in Article 12 of the CPC, clearly bars prosecution only in cases where an accused has been finally acquitted. The Prosecution emphasized that this interpretation comports with additional provisions in the CPC, which provide for the reopening of proceedings that resulted in convictions in certain cases, such as when a person convicted *in absentia* requests a retrial. According to the Prosecution, because Ieng Sary was convicted by the 1979 PRT, the *res judicata* provisions of the CPC are no barrier to the current proceedings before the ECCC.

ii. ICCPR

Next, the Prosecution addressed the applicability of the ICCPR to current charges Ieng Sary faces. The Prosecution argued that the ICCPR *ne bis in idem* provisions extend only to domestic proceedings, and as the ECCC is an internationalized court, the ICCPR does not apply to ECCC proceedings. Therefore, according to the Prosecution, the provisions of the ICCPR do not prohibit Ieng Sary's prosecution.

iii. Guidance from international procedure

Finally, the Prosecution argued that international jurisprudence at the ICTY, ICTR, ICC, SCSL and SPSC requires that to trigger *ne bis in idem*, previous proceedings against the accused must have been conducted independently and in keeping with due process norms. Specifically, the Prosecution addressed Article 23 of the ICC Statute, which contains an additional requirement that the previous proceedings were conducted in a manner inconsistent with an intent to bring the person concerned to justice. The Prosecution emphasized that, contrary to the Defense's position, there is no express requirement that the previous proceedings be designed to make it more difficult to prosecute the accused. Rather, the Prosecution argued that anytime the previous proceedings were not impartial or independent, *ne bis in idem* will not apply.

To support this argument, the Prosecution next emphasized the procedural defects of the 1979 PRT proceedings: the presiding judge of the PRT was the propaganda minister of the new Cambodian government; one of the attorneys defending Ieng Sary lost 38 family members to the Khmer Rouge (KR) and agreed he was guilty; and the verdict was drafted in advance. The Prosecution concluded that these proceedings fell far short of fair trial standards. Moreover, although one of the fundamental purposes of *ne bis in idem* is to

spare the accused from the mental, physical and financial hardships of multiple trials, Ieng Sary did not attend the 1979 trial and never suffered any repercussions flowing from the judgment. For these reasons, the Prosecution argued that *ne bis in idem* does bar the prosecution of Ieng Sary at the ECCC.

d. Civil Party arguments

The Civil Parties expressed their support for the arguments made by the Prosecution and added that the TC must consider the requirements and rights of the victims in ruling on the issue. The Civil Parties emphasized the importance of ending impunity for those who commit grievous violations of human rights and humanitarian law, stressing that *ne bis in idem* should not be used as a shield to protect the accused from prosecution. Although the Civil Parties did not cite the Set of Principles to Combat Impunity, their arguments find traction with the ideals enshrined therein. Under the Principles, the State's duty to combat impunity has resulted in a reinterpretation of the *ne bis in idem* doctrine to "allow retrial of defendants in respect of acts for which they have already been prosecuted in a national court, if the earlier proceedings were not impartial or independent, or were designed to shield the accused from international criminal responsibility, or if the case were not diligently prosecuted." This flexible approach to *ne bis in idem* exists to ensure that rules designed to promote justice are not used to "benefit impunity," and guarantees that victims' right to know the truth, right to justice, and right to redress are safeguarded.

The Civil Parties concluded by reminding the Court that, while justice cannot restore the physical and emotional harms endured by victims and survivors, it can establish truth, acknowledge facts and enable the civil parties to request reparations for their suffering, and entreated the Court to consider these factors in ruling on the *ne bis in idem* issue.

2. Pardon and Amnesty⁵

On July 28, the second day of the initial hearing for Case 002, the ECCC TC heard arguments on whether the pardon and amnesty provided to Ieng Sary by former King Sihanouk bar his current prosecution. ECCC Law Article 40new provides: "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."

In 1979, Ieng Sary and Pol Pot were convicted by the PRT, *in absentia*, of committing a number of crimes under the heading of "genocide." The PRT sentenced both to death and ordered the confiscation of their property. Neither sentence was enforced. In an effort to end the nation's violent civil war, the Cambodian government outlawed membership in the KR in 1994. The decree allowed any KR member, other than senior leaders, a six-month grace period to abandon the regime, or to be thereafter found in violation of the law. In 1996, in exchange for Ieng Sary's defection from the KR, the King granted him a royal pardon and amnesty (RPA) on the condition that it was approved by 2/3 of the National Assembly.

The Royal Decree grants (in one English translation) "a pardon to Mr. Ieng Sary . . . for the sentence of death and confiscation of all his property imposed by order of the [PRT] of Phnom Penh . . . ; and an amnesty for prosecution under the [1994] Law to Outlaw the [KR]"

⁵ Reported by Sam Yemington.

a. Defense arguments

The Defense argued: (1) the ECCC only has competence to determine the scope of the RPA, not its validity; (2) even if the ECCC were to find that the determination of the RPA's validity was within the court's jurisdiction, the RPA and the amnesty are valid; and (3) the scope of the RPA and the amnesty granted to Ieng Sary prevents his prosecution before the ECCC.

The Defense first argued that the TC lacked the jurisdiction to determine the validity of the RPA. Defense co-counsel submitted that under Cambodian law, only the Cambodian Constitutional Chamber may review of the validity of laws and consequently, the ability to determine the validity of the RPA falls outside the jurisdiction of the ECCC.

The Defense next addressed the validity of the RPA, in the event that it is found justiciable. Citing Article 27 and Article 90 of the Cambodian Constitution, the Defense submitted that the RPA and the amnesty were validly granted. Article 27 places no limits on the King's power to grant full or partial amnesties and pardons. Article 90 requires that the State recognize any such actions by the King. The Defense submitted that domestic Cambodian law binds the ECCC, and the court must therefore find that the RPA was valid and applicable. Moreover, counsel argued that Ieng Sary's amnesty had been a non-negotiable condition of his reintegration with the government and that the civil war would have continued if he had not defected. They highlighted that the pardon was not intended to encourage impunity, but to stop bloodshed, which it did. Moreover, it was narrowly designed only for one man, and was overwhelmingly approved by the National Assembly. The Defense argued that nations are not legally prohibited from granting amnesties, even when dealing with serious crimes, and argued that law mandates the prosecution of serious crimes by national courts, only prohibits their commission. The Defense argued that this distinction allows for the existence of an amnesty option when dealing with conflict resolution.

Concerning the scope of the RPA, the Defense argued that all the charges against Ieng Sary in the ECCC indictment fall within the scope of the RPA, and that therefore the amnesty prevents prosecution. Although the text is somewhat ambiguous, any ambiguity should be interpreted in favor of Ieng Sary. Moreover, the parties involved in the negotiation process should be examined to provide evidence about the actual intent and scope of the agreement.

b. Prosecution arguments

The Prosecution argued that the RPA has a limited scope and does not prevent the trial of crimes committed by Ieng Sary during the KR era. Second, even if the scope of the RPA is determined to include the crimes charged by the ECCC, the Court has independent obligations under national and international law to prosecute him.

The Cambodian co-prosecutor addressed the first issue, noting that the word used in the RPA regarding both the PRT judgment and 1994 Law was the same in the Khmer language and translates to "lifting the guilt," which could be interpreted as either pardon or amnesty, depending on the context. The co-prosecutor also submitted that the wording of the pardon suggests an intention only to reduce the sentence and nothing more. The Prosecution requested that the TC compare a separate 1988 Cambodian decree and adopt its translation

of the same Khmer word for “lifting the guilt” as meaning “reduction of sentence” and nothing more.

The Prosecution further noted that the 1994 Law Outlawing the KR provides for prospective criminality and does not address acts committed during the temporal jurisdiction of the ECCC (1975-79). Moreover, Article 4 of the 1994 Law criminalizes only the acts of succession, destruction of government property, and taking up arms against the government. The 1994 Law specifically states that other criminal acts shall continue to be prosecuted under existing law. Therefore, according to the Prosecution, the amnesty provides protection only from prosecution for crimes of insurrection, not for the crimes in the indictment. Indeed, the Prime Minister has said that the agreement was carefully worded to leave open the possibility that Ieng Sary could be prosecuted in the future. Because of these reasons, the Prosecution asserted that the intention of the legislature in regard to the scope of the RPA is clear and therefore there is no need to call witnesses who took part in the drafting of the agreement.

The international co-prosecutor next argued that Cambodia has an obligation and duty to prosecute Ieng Sary, regardless of any decision concerning the validity and the scope of the RPA. First, the prosecutor reminded the TC that the ECCC is an “internationalized” court, with an independent mandate to prosecute Ieng Sary, even if the court finds that the scope of the RPA includes the crimes charged by the ECCC. Moreover, the Prosecution further argued that even if the ECCC cannot apply international law directly, it can nonetheless invalidate the RPA. Citing Article 31, the co-prosecutor argued that the Cambodian Constitution requires the court to recognize international standards and obligations, including the inapplicability of amnesties to crimes which violate *jus cogens*⁶ principles under international law.

a. Civil Party arguments

The civil parties argued that the Cambodian government has an obligation to investigate and prosecute serious crimes and recognition of the RPA would violate victims’ right to a remedy.

3. Statute of Limitations – “Grave Breaches”⁷

The four accused in Case 002 are charged with various international crimes, including “Grave Breaches of the Geneva Conventions of 12 August 1949.” The Geneva Conventions are treaties that criminalize certain transgressions against prisoners of war and civilians during periods of inter-state armed conflict. These “Grave Breaches” of the Geneva Conventions are commonly referred to as “war crimes.” At the ECCC, war crimes charges in Case 002 relate solely to Vietnamese victims of the war between Cambodia and Vietnam. Ieng Sary argued that the ECCC cannot charge him with war crimes, because doing so would violate Cambodia’s 1956 Penal Code’s 10-year statute of limitations (SOL)⁸ for felony crimes. The Co-Prosecutors responded by arguing that the Penal Code’s 10-year limit does not apply to international crimes.

⁶ *Just cogens* refers to fundamental rules of international law from which no deviation is permitted, regardless of the proffered justification.

⁷ Reported by Sharita Gruberg and Tessa Bialek.

⁸ A statute of limitations dictates how many years a state has to indict someone for a crime.

b. Background

Ieng Sary's defense team argues that the Co-Investigating Judges (CIJs) incorrectly held that the ECCC has jurisdiction over grave breaches of the Geneva Conventions.⁹ The Defense argued that since grave breaches carry a minimum sentence of fifteen years, and felonies under the 1956 Penal Code are crimes that carry at least a five year sentence, grave breaches ought to be considered a felony under the 1956 Penal Code. Furthermore, since the 1956 Penal Code contains a ten-year SOL, Ieng Sary cannot be prosecuted for alleged grave breaches committed during the KR period.

Previously, the PTC found that Ieng Sary's submission is without merit on two grounds. First, the fact that the Office of the CIJs indicted Ieng Sary for grave breaches confirms that the crime is within the jurisdiction of the ECCC. Second, the PTC noted that the text of the Geneva Conventions provides that there is no SOL for grave breaches. However, under ECCC Law, no PTC decision is binding on the TC.

c. Defense arguments

On Tuesday, June 28, 2011, the ECCC TC for the first time addressed Ieng Sary's claim that a ten-year SOL applies to the crime of grave breaches of the Geneva Conventions described in Article 6 of the Establishment Law.

The Defense noted that although the Establishment Law explicitly states that no SOL applies to Article 4 (genocide) or Article 5 (crimes against humanity), Article 6, which outlines grave breach liability, does not include the same language that the crime has "no [SOL]." According to the Defense, as the ECCC is a Cambodian court, a law must be domestically incorporated before being applied. Thus, crimes in the ECCC Law are subject to the domestic SOL unless it is expressly stated otherwise. The Defense then referenced Article 9 of the Cambodian Penal Code of 1956 and argued that because grave breaches are felony crimes, a ten-year SOL applies.

Additionally, the Ieng Sary Defense claimed that a SOL was envisaged and permissible in customary international law between 1975 and 1979. The Defense suggested that the Geneva Conventions of 1949 set customary international law for that period, and that nothing in the Conventions prohibits statutes of limitations for such crimes. Rather, the Conventions suggest that state parties *will* apply statutes of limitations. The Defense also noted that by 1975, only 17 nations had ratified the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes, and thus customary international law did not prohibit Cambodia from applying a SOL to such crimes at the time. In fact, even as of 2011, only 54 states have ratified the Convention and Cambodia is not among them. The Defense also cited limited support for the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, which only seven states had ratified by 1974. Finally, the Defense explained that although a majority of states have, since 1979, enacted laws prohibiting statutes of limitations, statutory limitations still exist in many places, even for war crimes. For example, France — a model for the Cambodian justice system — still has a twenty-year SOL for war crimes (but not for crimes

⁹See, e.g., the matter put before the PTC at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/D427_1_6_EN.PDF.

against humanity). Thus, the Defense argued, statutes of limitations for grave breaches were envisaged between 1975 and 1979 and were not prohibited by customary international law.

In conclusion, the Defense reminded the Court that between 1975 and 1979, it was not foreseeable to Ieng Sary that statutes of limitations did not apply to crimes of grave breaches of the Geneva Conventions. The Defense reminded the Court that, per Article 35 of the Establishment Law, when doubt exists, an issue must be decided in the defendant's benefit.

d. Prosecution arguments

First, the Prosecution argued that statutory limitations were not permissible under customary international law as of April 19, 1975. The Prosecution claimed that the Geneva Conventions reflected customary international law at that time, and their grave breach provisions had obtained the status of *jus cogens*. To support their claim, the Prosecution referenced: consistent state practice and accompanying *opinio juris*; a 1993 report by the ICTY, which described the Geneva Conventions as constituting the core of international criminal law; and International Court of Justice (ICJ) practice as early as 1950 recognizing the Geneva Conventions as universally binding.

The Prosecution argued that the Geneva Conventions oblige states to prosecute persons who commit grave breaches. Specifically, states must investigate, try, and provide penal sanctions for such crimes. Moreover, this is an absolute obligation and nothing suggests that unilateral limits by states are permissible. Further, the Prosecution argued that the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity demonstrates that statutes of limitations are inapplicable for grave breaches. Despite limited ratifications, the Convention's non-applicability principle was still universally applicable after the Convention came into force in 1970. Thus, according to the Prosecution, even if Cambodia did not ratify the Convention, statutory limitations for grave breaches of the Geneva Conventions would be inconsistent with the principles of international law of 1975.

Additionally, the Prosecution addressed Article 6 of the Establishment Law in more detail. First, the Prosecution suggested that Article 6 of the Establishment Law—like Articles 4 and 5—does not criminalize conduct. Rather, it creates a judicial forum and confers jurisdiction to the ECCC to prosecute crimes including grave breaches; crimes that the PTC has stated that Cambodia has an obligation to prosecute.

The Prosecution also argued that statutory limitations would be inconsistent with the obligation to prosecute grave breaches of the Geneva Conventions. The International Committee of the Red Cross has stated that states have a duty to prosecute grave breaches and domestic law cannot serve as an excuse not to do so. According to the Prosecution, statutory limitations would enable states to avoid their duty to prosecute by "waiting out" the situation until the SOL barred prosecution. Statutory limitations would be similarly inconsistent with Cambodia's obligation under the ICCPR to provide access to effective legal remedies. Finally, the Prosecution claimed that because international law does not recognize a hierarchy between crimes against humanity and grave breaches, applying statutory limitations for one and not the other would be inappropriate. Thus, the Prosecution argued

that no SOL should apply for grave breaches of the Geneva Conventions as described in Article 6 of the Establishment Law.

e. Civil Party arguments

The lawyers for the civil parties argued that interpreting Article 6 of the Establishment Law to apply the 1956 Penal Code's ten-year SOL would lead to an "absurd outcome." The Establishment Law's framers were fully aware of the Penal Code's SOL, and would not have included the crime of grave breaches if prosecution was already precluded by the SOL at the time of the Law's drafting. The civil party representatives also contended that the Geneva Conventions had obtained *jus cogens* status by the time period in question. Therefore, the duty to prosecute grave breaches superseded any domestic statutes of limitation.

2. Statute of Limitations – Crimes under the 1956 Penal Code¹⁰

In addition to international crimes, ECCC Law confers the Court with jurisdiction over domestic crimes as formulated in Cambodia's 1956 Cambodian Penal Code (Code). The Code includes a SOL for felony crimes of ten years. In 2001, the National Assembly extended the SOL from ten to thirty years, which was affirmed by the Constitutional Council and codified in the ECCC Law.

a. Arguments by Defense

The Defense argued that the SOL expired on January 6, 1989—ten years after the fall of the KR government—and could not be legally extended in 2001. Therefore the Defense argued that all national crimes currently charged should be dismissed. During oral arguments, the Defense contended that prosecution of these crimes would be contrary to (1) the principle of non-retroactivity and the (2) principle of fairness and equality before the law.

i. Principle of Non-Retroactivity

In accordance with Article 6 of the 1956 Cambodian Penal Code, Article 11(2) of the Universal Declaration of Human Rights, and Article 15 of the ICCPR (ICCPR), the Defense argued that the Chambers are obligated to comply with the fundamental principle prohibiting the application of retroactive laws against an accused.¹¹ Rejecting the Prosecution's suggestions that this principle is not applicable to procedural matters, the Defense argued that extending the SOL bears on substantive issues, including prosecution and sentencing. Moreover, the Defense stressed that regardless of whether the SOL is found to have an effect on the crimes charged or the sentence, an accused is "just as much entitled to procedural justice" as substantive matters.

The Defense reasoned that domestic crimes could have been charged if the SOL had been extended before the 10-year limitation lapsed. However, according to the Defense, the SOL could not be extended retroactively, especially when there was a functioning, albeit weak, judicial system in place after January 6, 1979, which could have investigated and prosecuted the domestic charges alleged against the Accused, as exemplified by the creation of the 1979 PRT and subsequent criminal prosecutions of domestic crimes and enactment of laws.

¹⁰ Reported by Valerie Stranieri, Lise Reuss Muff, and Anna Mumford.

¹¹ Internationally, this defense is called *nullum crimen sine lege*, or "no crime without law."

Furthermore, even if there was no “political will” to prosecute during this time, the Defense argued that the Court cannot use political difficulties to end-run the SOL.

ii. Principle of Fairness and Equality Before the Law

During oral arguments, the Defense highlighted the fair trial rights identified in the ICCPR, and specifically referenced in the ECCC Law and Internal Rules. The Defense argued that application of national crimes would violate the fair trial right of equality under the law as any charges arising under the 1956 Code are barred against defendants in Cambodian domestic court proceedings due to the running of the SOL.

The Defense attacked the Prosecution’s submission that the Cambodian judges, who were members of the judiciary during the 1980s, were in the best position to determine the court system’s competency and functionality to investigate and prosecute the national crimes contained within Article 3new. The Defense found it “inappropriate” and against fair trial norms for a judge to rule on the basis of their experience, rather than on the evidence or documents put before the court. If allowed, this process would transform judges into witnesses. To illustrate, Ieng Sary’s international defense counsel stated the introduction of his experiences training attorneys and judges in Cambodia during 1993–1996 would change him into a witness and jeopardize the fair trial rights of his client.

b. Prosecution Arguments

The Prosecution argued that the Cambodian judiciary was incapable of prosecuting KR leaders from 1979 until 1993, and that the ten-year limitation was “tolled”—meaning suspended or interrupted—until that year. Moreover, if the SOL expired in 2003, its extension in 2001 would not be illegal and therefore the accused can be prosecuted for crimes under the 1956 Code without violating fair trial standards.

As the Co-Prosecutors noted in their Submission on Statute of Limitations for National Crimes, dated May 27, 2011, the determinative issue to be adjudicated is whether or not the SOL as set out in the 1956 Penal Code had expired before the National Assembly of Cambodia extended the limitations period from ten to twenty years in 2001 and thirty years in 2004. The Prosecution argued that if the facts show reasonable grounds, the expiry period may be extended.¹²

The Prosecution set forth three arguments to support its contention that the SOL period was suspended until at least September 24, 1993 when the Kingdom of Cambodia was created by the promulgation of its Constitution: (1) the judiciary was dysfunctional between 1979 and 1993; (2) civil war and instability was perpetuated by acts of the accused; and (3) the extension from ten to twenty years by the National Assembly of Cambodia was deemed constitutionally valid by the Constitutional Council in 2001. Should the Court accept the Prosecution’s interpretation of the facts, the SOL would have been suspended until 1993 an

¹² The Prosecution argues that based on the principle of *contra non valentem agere nulla currit praescriptio* (“prescription does not run against he who cannot act”), the ECCC should find that suspension of a statute of limitations should be granted in cases of *force majeure* or in conditions which make legal action impossible. In French civil law, a *force majeure* must be external, unpredictable, and irresistible. Under international law, *force majeure* is an irresistible or unforeseen event that makes international obligations impossible to fulfill.

thus, still running in 2001 when the National Assembly granted a twenty year extension codified in Article 3new of ECCC Law.

i. Judiciary Was Dysfunctional

The Prosecution argued that between 1979 and 1993, the judiciary was so dysfunctional as to make prosecution under the 1956 Cambodian Penal Code impossible. Although the 1956 Penal Code was officially in force during the period in question, the 1980 decree “Law on the Penalty for Betraying the Revolution” and the 1982 decree “Law on the Organization of the Court and Prosecution Department” were applied in place of the 1956 Penal Code. Former teachers with no legal training drafted the rules and provisions focusing almost exclusively on political crimes and revolutionary betrayal and allowing accused persons no choice for legal representation or a right to appeal. Attempts by Ouk Bunchhoeun, the Minister of Justice, to establish a criminal code for felonies and misdemeanors were unavailing. Although there were some prosecutions for criminal conduct, arrests were made without evidence, judgments were reviewed by the Ministry of Justice, and bias against the accused was palpable. The Prosecution painted a picture of total bedlam to warrant a suspension of the SOL. In response to the Defense’s argument that the 1979 tribunal exemplified the possibility of prosecution for the crimes committed by the leaders of Democratic Kampuchea, the Prosecution argued the tribunal was a kangaroo (illegitimate) court with no elements of impartiality or competence.

According to prosecutors, the Cambodian judiciary did not truly begin to develop into a viable institution until 1994 when the National Assembly passed the “Law on the Outlawing of the Democratic Kampuchea Group.” At this time Cambodian courts began to conform to international law for the purpose of prosecuting crimes committed by members of the KR and the legal and executive body began to work together to create new laws and train legal professionals. In 1995, the Bar Association of the Kingdom of Cambodia was established, swearing in 54 attorneys by September of 1996. At that point, the Prosecution maintained, the judiciary was competent enough to hold fair trials, and the SOL for crimes committed during the period of Democratic Kampuchea started to run. Even if a Cambodian judiciary existed prior to 1993, the Prosecution concluded, it did not meet the minimum guarantees for a proper and functional system.

In Case 001, there was a strict divide between the national and international judges of the TC on this issue; the national judges opined that the Cambodian judiciary continued to be dysfunctional until the establishment of the Kingdom of Cambodia in 1993.¹³ The Prosecution employed this opinion as persuasive authority in its Case 002 arguments. The international Co-Prosecutor argued that the national judges are in the best position to assess the quality of the Cambodian judicial system. The national judges, he argued, made their determination with confidence and objectivity in criticism of their own country.

¹³ TC, Case No. 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187 at ¶ 14, 20.

ii. Acts of the Accused Contributed to the Dysfunction of the Court System

The Prosecution also contended the accused were at fault for the decimation of the judicial system by implementing a policy that led to the execution of legal professionals and by waging a civil war into the late 1990s. The commanding forces of the Coalition Government of Democratic Kampuchea (CGDK), still under the leadership of the accused, controlled large areas of land near the Thai border during this period and stood in opposition to the government of the Kingdom of Cambodia. The United Nations continued to recognize delegates from the CGDK in the General Assembly until July 1991, and the accused continued to act as political leaders in full capacity. The seditious acts of the accused continued long after the six month grace period allocated in the “Law on the Outlawing of the Democratic Kampuchea Group” of 1994. It was not until September of 1996 that Ieng Sary and Ieng Thirith defected to the national government and December of 1998 when Nuon Chea and Khieu Samphan surrendered. The Prosecution called the TC’s attention to the April 11, 2011, Decision by the PTC which notes “the accused cannot benefit from the passage of time for such period where he is alleged to be in part responsible for the incapacity of the judicial system to conduct investigation and prosecution.”¹⁴ Since the accused openly and aggressively perpetuated a civil war preventing domestic investigation and prosecution of the crimes committed during the Democratic Kampuchea regime, they should not benefit from a SOL that was made impossible to adhere to by their own misconduct and crimes.

iii. Constitutional Council Decision of 2001 Reviewing the Twenty-Year Extension by the National Assembly

The Constitutional Council deemed the twenty-year extension by the National Assembly constitutionally valid. The extension was incorporated into Article 3new of the ECCC law, promulgated on August 10, 2001. The prosecution argued that since the Constitutional Council is the only body that can make such a determination in Cambodia, and the ECCC is a separate institution without the authority to review decisions by other bodies and is bound by Cambodian law, that therefore the Court must abide by the Council’s decision. Furthermore, in response to an argument by Defense, the Prosecution contended the extension in Article 3new of the ECCC Law is not prohibited by the principle of non-retroactivity because it is procedural in nature rather than substantive. Therefore, according to the Prosecution, the revision does not affect the crime itself or any sentence issued by the TC, and thus, as long as the charges are within the boundaries of temporal, personal, and subject matter jurisdiction, they are not a violation of fair trial rights.

c. Civil Party Arguments

Following the presentation of the Co-Prosecutors, four Civil Party lawyers took the floor in order to elaborate on the arguments already put forth. The first lawyer described in detail the collapse of Cambodian society in the aftermath of the KR era. She emphasized that the entire society had to be rebuilt completely and the protracted civil war overshadowed other present needs. Not until 1993, it was argued, could the presence of a functional judiciary be considered to exist. The KR destruction of all societal infrastructure, including all human

¹⁴ PTC, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 75), Decision on Ieng Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30 at ¶ 286.

resources, had made the judiciary unstable in the following decades, and the Civil Party lawyer argued that therefore the SOL should be considered suspended until 1998. This historical account was followed by an objection from Defense Lawyer Michael Karnavas, wherein, he called attention to the lack of legal argumentation. The speech of the Civil Party Lawyer, he reasoned, was testimonial, rather than legal and he argued that the discussion must focus exclusively on law, rather than individual experiences.

In response, the second Civil Party lawyer argued that facts cannot be separated from pure legal discussion, since the facts directly applied to the legal issues. He argued that due to the bad conditions in the aftermath of the KR regime, victims had effectively been deprived of any reparations or justice. Therefore, an extension of the limitation period was necessary in order to seek justice for the victims, as well as to bring the responsible leaders to trial. In addition, the lawyer reiterated the arguments by the Co-Prosecutor that the judiciary was ineffective and dysfunctional well into the 1990s and the extension was not in violation of international principles or the Cambodian Constitution, as determined by the Constitutional Council in 2001.

After the lunch break the TC president, Nonn, reminded the two remaining Civil Party lawyers of the need for efficiency and strongly emphasized that lawyers arguing for the same party must avoid repetition during oral arguments and in written submissions. Despite this admonition, during the final two presentations, Civil Party lawyers offered similar reasoning why the extension of the statutory limitation period was constitutional, appropriate and justifiable.

3. Reparations¹⁵

The ECCC gives victims who participate in proceedings as civil parties the opportunity to file claims for reparations. The Court is limited to awarding civil parties “collective and moral” reparations, which are intended to acknowledge and address their harm. Reparations may not include monetary payments. In the *Duch* verdict, reparations only included naming the Civil Parties and their relatives in the final judgment, and compiling/publishing statements of apology by the Accused. However, at that time, the cost of all reparations could only be paid by a convicted accused, and Duch was found to have no money. Subsequently, the rule has changed and the Court may also recognize that “a specific project appropriately [that] gives effect to an award sought” by the Civil Parties—if the Victim Support Section supports the project and external funding has been secured.

The TC addressed the role of reparations at Case 002 initial hearing on Wednesday, June 29, 2011. National and international lead Civil Party lawyers, Pich Ang and Elisabeth Simmoneau Fort, shared the one-hour period allotted to discussing the importance of awarding reparations and the specific reparations sought.

Ang began by discussing the importance of reparations, describing how reparations benefit victims, as well as Cambodian society as a whole, by helping heal psychological wounds. Simmoneau Fort continued by emphasizing the international prevalence of using reparations

¹⁵ Reported by Mary Orsini and Barbara Wolfe.

to remedy gross human rights abuses by referring to the Universal Declaration of Human Rights (“UDHR”) and the ICCPR. Simmoneau Fort also discussed the unique role that Civil Parties play in ECCC proceedings, stressing how trials would not exist without Civil Parties. Ang then addressed the specific reparations sought by the Civil Parties in Case 002, listing four different types:

1.) Memorials: The Civil Parties request a national day of remembrance, preservation of the killing fields and a memorial site.

2.) Rehabilitative Reparations: The Civil Parties request a framework for building an institution that provides psychological treatment for victims, including a mechanism whereby victims can support/consult one another to help relieve trauma suffered.

3.) Compilation of Documents and Education: The Civil Parties request the establishment of an educational program on Democratic Kampuchea, an archive or library to transmit and preserve the history of the Democratic Kampuchea, a museum in Phnom Penh involving the history of the Democratic Kampuchea and a compilation of the victim’s names.

4.) Other Awards: The Civil Parties seek redress for Vietnamese victims and request an educational project that addresses forced marriages, establishment of a trust fund to pay for reparations and, lastly, the dissemination of the Case 002 judgments in a manner that will be accessible to the public.

Simmoneau Fort concluded the Civil Party presentation by emphasizing that reparations are a fundamental right and arguing that the ECCC should focus on assuring such reparations are properly implemented, as reparations will remain the only lasting tribute to the victims of the Democratic Kampuchea period.

4. Tentative List of Witnesses¹⁶

At the start and conclusion of the initial hearing, the parties discussed the tentative list of witnesses and experts who they plan to call before the TC during the initial phase of the trial, which will address four topics:

- (1) the structure of the Democratic Kampuchea (DK) government;
- (2) the roles of the accused prior to the DK period;
- (3) the roles of the accused during the DK period; and
- (4) the alleged common plan of the DK leadership to implement a “rapid socialist revolution in Cambodia through a ‘great leap forward’ and defend the Party against internal and external enemies, by whatever means necessary,” as implemented through five policies:
 - a. The repeated movement of the population from towns and cities to rural areas, as well as from one rural area to another;
 - b. The establishment and operation of cooperatives and worksites;
 - c. The reeducation of “bad-elements” and killing of “enemies,” both inside and outside Party ranks;

¹⁶ Reported by Amanda Banik Ortiz.

- d. The targeting of specific groups, in particular the Cham, Vietnamese, Buddhists and former officials of the Khmer Republic, including both civil servants and former military personnel and their families; and
- e. The regulation of marriage (i.e. forced marriage).

The TC selected a tentative list of witnesses from submissions made by the parties prior to the hearing. The Chamber highlighted that in choosing these witnesses, it had endeavored to ensure that the trial would be fair — allowing each party adequate opportunity to present its case — and expeditious, with no time wasted on irrelevant or repetitive matters.

On the final day of the hearing, the Chamber heard objections to specific witnesses included in the tentative list and requested that the parties provide written submissions by July 5th regarding any witnesses each party believes should be added to the list. Throughout the discussion, the Chamber mandated that all parties refer to the witnesses using pre-selected pseudonyms rather than by name, as no decision has yet been made regarding protective measures for witnesses.

Specific concerns over particular witnesses were held for closed session discussions at the conclusion of the public session.

During both occasions when the witness list was discussed, defense counsel for Nuon Chea argued that the CIJs' investigation had been unfair due to bias and governmental obstruction. They emphasized that the CIJs had ignored most of their 26 requests for investigation into contextual issues that formed the basis of Nuon Chea's planned defense. They noted that many of the over 300 witnesses they had requested be called regarding the issues planned for the first phase of trial had not yet been accepted by the Court. In particular, Nuon Chea seeks to add witnesses who will address:

- (1) The role of Vietnam, both before and after the DK period;
- (2) The pre-existing conditions in the country, for example with regard to food shortages resulting from the US bombing;
- (3) The role of rogue commanders in the Eastern Zone and the lack of control of the Kr central command over these officials;
- (4) Kaing Guek Eav *alias* "Duch's lack of reliability in testifying as to Nuon Chea's role vis-a-vis the S-21 detention center.

Nuon Chea's counsel were both stopped during the course of their remarks for discussing matters outside the scope of the hearing and for highlighting information about potential witnesses that could lead to their public identification. International Deputy Co-Prosecutor William Smith reminded the Chamber of its role as "managers of th[e] case." During his objection, Smith warned that the Chamber "will lose control of this trial if you don't confine [remarks] to the agenda [the TC] set."

Due to the Court's willingness to contain the hearing to its planned scope, counsel for Ieng Sary confined his remarks to objecting to one witness, and offered to provide his reasoning in closed session. Ieng Thirith's lawyer did not comment on the list.

Khieu Samphan spoke for himself. Addressing his “fellow Cambodian citizens,” Khieu professed his desire to learn the truth of what happened during the DK period. He pledged his contribution to smooth proceedings, finding the truth, and making his own honesty known. Indicating frustration at the large number of prosecution witnesses on the tentative list, he emphatically requested the TC call his requested witnesses, saying “they *shall* be heard.”

Civil Parties noted that some of the listed witnesses had, due to a recent PTC decision, been accepted as Civil Parties and their names would therefore have to be moved to the Civil Party list. The Civil Parties also asked for time to contact the nearly 2000 Civil Parties added to case before they submit a list of proposed Civil Party witnesses. Civil Party Counsel Ms. Silke Studzinski argued that three unnamed witnesses who were tentatively listed to speak about forced marriage practices under the KR could not address the entire DK period and that additional witnesses should be added. However, she began by discussing the DK policy of forced marriage and her intent was not entirely clear to the judges. As a consequence, she received three objections, multiple rebukes, and ultimately was requested to stand down by the Chamber. Judge Cartwright then asked Studzinski to answer in one word whether she accepted or rejected the three witnesses she specifically mentioned. Studzinski indicated that she accepted these witnesses. Noting that the lead co-lawyers for the Civil Parties’ role, in part, of supporting the Prosecution, Judge Cartwright commented, “[g]iven that all three witnesses were proposed by the Prosecution, this is a very appropriate indication.” The judges reminded Studzinski that all parties would have the opportunity the following week to submit written requests to supplement the witness lists.