00373977

ឯកសារ D 180/4

BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/OCIJ

Party Filing: The Defence for IENG Sary

Filed to: Co-Investigating Judges

Original language: ENGLISH

Date of document: 6 August 2009

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 06 / 08 / 2009
ម៉ោង (Time/Heure): 14 : 35
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber: សម្ងាត់ CONFIDENTIAL CONFIDENTIEL

Classification Status:

Review of Interim Classification: 09/09/2009

សាធារណៈ PUBLIC 26/01/2010

Records Officer Name:

Signature:

IENG SARY'S RESPONSE TO THE CO-LAWYERS OF CIVIL PARTIES' INVESTIGATIVE REQUEST CONCERNING THE CRIME OF ENFORCED DISAPPEARANCE

&

REQUEST FOR EXTENTION OF PAGE LIMITATION

Filed by:

The Co-Lawyers:

ANG Udom
Michael G. KARNAVAS

Distribution to:

The Co-Investigating Judges:

YOU Bun Leng
Marcel LEMONDE

ឯកសារបានចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
ថ្ងៃ ខែ ឆ្នាំ នៃការបញ្ជាក់ (Certified Date/Date de certification): 26 / 01 / 2010
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: SANN RADA

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rule 55(10) of the ECCC Internal Rules ("Rules"), this Response to the Co-Lawyers for Civil Parties' Investigative Request Concerning Enforced Disappearances, filed on 30 June 2009 ("Request"). The Request asserts: (1) "it is a well-established principle of international law that the widespread and systematic commission of enforced disappearances of persons constitutes a crime against humanity;"[1] (2) the ECCC "through its Office of Co-Investigating Judges, has the duty under international law to investigate the occurrence of enforced disappearances during Democratic Kampuchea"[2] as crimes against humanity constitute a "*jus cogens* norm;"[3] and that (3) enforced disappearances as a crime against humanity fall within the ECCC's jurisdiction[4] under the Agreement creating the ECCC[5] or as a form of "other inhumane acts"[6] under the Law establishing the Court.[7] It is respectfully submitted that the Request fails to provide sufficient support for any of these assertions. Moreover, the Request singularly and conspicuously fails to explain, let alone convince, why: (1) the Civil Parties should be permitted to request the Co-investigating Judges ("OCIJ") to undertake investigations of facts outside the scope of the crimes alleged in the Introductory Submission in clear violation of the Rules; and why (2) enforced disappearances were part of customary international law, binding in Cambodia, in 1975-79. On both of these grounds the Request must fail.

I. SUMMARY OF ARGUMENT

1. The Defence will show that:
   A. Enforced disappearance as a crime against humanity does not fall within the jurisdiction of the ECCC under the Establishment Law;
   B. There is no conflict of jurisdiction regarding crimes against humanity between the Agreement and Establishment Law. If there is such a conflict, the Establishment Law must prevail;
   C. Enforced disappearance was not a crime against humanity under Cambodian or customary international law in 1975-79;

---

[1] Request, para. 5.
[2] *Id,* para. 7.
[3] *Id.*
[4] *Id.*, para. 10.
[5] Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea 2003 ("Agreement")
[6] Request, paras. 19-22.
[7] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments promulgated 27 Oct 2004 ("Establishment Law").

D. Crimes against humanity are not *jus cogens* and there is no *peremptory norm* to prosecute them;

E. Crimes against humanity under customary international law are not directly applicable in a domestic court;

F. Crimes against humanity under customary international law contain an element of discriminatory intent and thus comport with Article 5 of the Establishment Law; and,

G. Alternatively, any limitation of jurisdiction by the ECCC regarding crimes against humanity is lawful and must be enforced.

II. LAW

A. OCP Preliminary Investigations and Introductory and Supplementary Submissions

2. Under Rule 49(1) "[p]rosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co- Prosecutors, whether at their own discretion or on the basis of a complaint." Rule 49(4) further provides that:

> [s]uch complaints shall not automatically initiate criminal prosecution, and the Co-Prosecutors shall decide, at their discretion, whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges.

3. Under Rule 50 the OCP may "conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed" and if the OCP has "reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges."[8]

4. Under Rule 55(3) the OCP may file a Supplementary Submission even after submitting the IS to the OCIJ, if "new facts come to their knowledge."

B. Requests for investigative action

5. The law concerning the nature and scope of requests for investigative actions is set out in IENG Sary's first request for investigative action[9] which is incorporated by reference.

---

[8] Rule 53(1).

[9] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's First Request for Investigative Action, 20 March 2009, paras. 2-18 ("First Investigative Request"). *See also of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, IENG Sary's Third Request for Investigative Action, 21 May 2009, paras. 9-11.

C. Substantive law applied at the ECCC

6. Article 1 of the Agreement defines its purpose as regulating:

> the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

7. The ECCC's jurisdiction is determined by Articles 1 and 2 of the Establishment Law which provide that the ECCC has been established to "bring to trial ... those who were most responsible for the crimes and serious violations of ... international humanitarian law and custom..."[10]

8. Both the Agreement and Establishment Law provide definitions of crimes against humanity. Article 9 of the Agreement provides that the ECCC shall have jurisdiction over "crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court." By contrast, Article 5 of the Establishment Law defines crimes against humanity as various "acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds."

9. No provision of the Agreement or Rules appears to explicitly regulate any conflict between the two.

III. ADMISSIBILITY OF INVESTIGATIVE REQUEST

10. There is no mention of enforced disappearances in the Introductory Submission ("IS") filed by the Office of the Co-Prosecutors on 18 July 2007 against Nuon Chea, Ieng Sary, Khieu Samphan, Ieng Thirith and Duch.[11] The OCP has *publicly* confirmed that the alleged crimes referenced in the IS were "committed as part of a common criminal plan constituting a systematic and unlawful denial of basic rights of the Cambodian population and the targeted persecution of specific groups."[12] The OCP also confirmed that the IS comprised "twenty-five distinct factual situations of murder, torture, forcible transfer,

---

[10] *Supra*, note 7 (emphasis added).

[11] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007. Duch as separated by a decision of 19 September 2007. *See* Update by the Co-Investigating Judges, 1 November 2007, where the public is informed that "on 19 September 2007, [the OCIJ] decided, in order to ensure good judicial administration, to order the separation of the DUCH case."

[12] *See* Press Release, Statement of the Co-Prosecutors, 18 July 2007, p. 3.

unlawful detention, forced labor and religious, political and ethnic persecution"[13] for whom the OCP had identified and named in the IS five suspects who had allegedly "committed, aided, abetted and/or bore superior responsibility for those crimes."[14] The OCP has not filed a Supplementary Submission pursuant to Rule 55(3) including the alleged crimes of enforced disappearances.[15] Therefore, the alleged crime of enforced disappearances does not form part of the current judicial investigation in Case File 002, which is limited by "the facts set out in an Introductory Submission or a Supplementary Submission."[16] As such, the Request is not "necessary for the conduct of the investigation"[17] as the judicial investigation is currently framed. Thus, it is inadmissible.

11. The Rules specify the procedure for initiating a criminal investigation. The Civil Parties are authorized to submit complaints regarding enforced disappearances to the OCP who "shall decide, at [its] discretion whether to reject the complaint, include the complaint in an ongoing preliminary investigation, conduct a new preliminary investigation or forward the complaint directly to the Co-Investigating Judges."[18] On the basis of this complaint the OCP may file a supplementary submission which would expand the jurisdiction of the OCIJ's investigation. The filing of a complaint does not "automatically initiate criminal prosecution."[19] This is the system of initiating a criminal investigation explicitly chosen by the ECCC through the Rules. The Civil Parties are not entitled to circumvent the Rules by filing requests for additional investigations of crimes and facts outside the scope of the IS or Supplementary Submissions filed by the OCP.

IV. REQUEST FOR EXTENSION OF PAGE LIMIT

12. The page limit for responses to documents filed before the OCIJ is 15 pages.[20] The Request raises complex issues relating to the ECCC's jurisdiction, its investigative procedure and the status of the alleged crime against humanity of enforced disappearances in customary international law over thirty years ago. These constitute

---

[13] *Id.*, p. 4.
[14] *Id.*, p. 5.
[15] The OCP has filed one Supplementary Submission under this provision which does not relate to enforced disappearances. *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Supplementary Submission Regarding the North Zone Security Centre, 26 March 2008.
[16] Rule 55(2) (emphasis added).
[17] Rule 55(10).
[18] Rule 49(4).
[19] *Id.* (emphasis added).
[20] Article 5.1, Practice Direction on the Filing of Documents, Practice Direction ECCC/01/2007/Rev.4, 5 June 2009.

"exceptional circumstances"[21] similar to those leading to the OCIJ granting a previous request for an extension of the page limit.[22] Therefore, the Defence requests a minimal extension of the applicable page limit from 15 to 17 pages.

V. ARGUMENT

A. Enforced disappearance as a crime against humanity does not fall within the jurisdiction of the ECCC under the Establishment Law

13. The Establishment Law does not create forms of liability or substantive crimes. It merely delineates the subject-matter, temporal and personal jurisdiction of the ECCC. As admitted by the Civil Parties, Article 5 of the Establishment Law does not "enumerate the enforced disappearance of persons as a crime against humanity."[23] It lists the acts of "murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial, and religious grounds and other inhumane acts" as constituting crimes against humanity if they are "committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds." Therefore, by deliberately and unequivocally excluding enforced disappearances from its jurisdiction, the ECCC is prohibited from investigating and prosecuting any Charged Persons for this alleged offence in Case File 002.
14. The Civil Parties argue in the alternative that ECCC has subject matter jurisdiction over enforced disappearances as a crime against humanity under the category of "other inhumane acts" as provided in Article 5 of the Establishment Law.[24] The category of inhumane acts was first introduced in the Nuremberg Charter (Article 6(c)), and was then restated in a number of international instruments, including the Statutes of the International Criminal Tribunals for the former Yugoslavia ("ICTY"),[25] Rwanda ("ICTR"),[26] and Special Court for Sierra Leone ("SCSL").[27] Applying this concept, the ICTR Trial Chamber in *Akayesu* held that the list of acts stated in Article 3 is not exhaustive, and that "any act which is inhumane in nature and character may constitute a

---

[21] *Id.*, Article 5.4.
[22] *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Order on Request for Extension of Page Limit, 2 December 2008.
[23] Request, para. 10.
[24] Request, paras. 19-22.
[25] Article 5, ICTY Statute.
[26] Article 3, ICTR Statute.
[27] Article 2, SCSL Staute.

crime against humanity, provided the other elements are met."[28] These acts would include those which are of "comparable seriousness" and "comparable gravity" to the other enumerated acts in Article 3.[29] The phrase "other inhumane acts" appears to fail to conform to the principle of specificity, which provides that "criminal rules must be as specific as possible".[30]

15. In *Kupreskić*, the Trial Chamber held that enforced disappearance falls under this category of crimes against humanity.[31] However, in *Kupreskić,* the Trial Chamber relied upon documents postdating the temporal jurisdiction of the ECCC in support of this finding.[32] There is no support for the contention that enforced disappearance was considered to constitute other inhumane acts before this date.

B. There is no conflict of jurisdiction regarding crimes against humanity between the Agreement and Establishment Law. If there is such a conflict, the Establishment Law must prevail.

16. Recognizing the exclusion of enforced disappearances from the ECCC's jurisdiction under the Establishment Law, the Civil Parties seek to rely on the definition of crimes against humanity in the Agreement which "adopts the definition of crimes against humanity set forth in the Rome Statute."[33] Assuming that the ECCC may rely upon the ICC Statute drafted in 1998 and which entered into force on 1 July 2002, to delineate the jurisdiction of the ECCC for crimes allegedly committed in 1975-79, the Civil Parties argue that the jurisdiction set out in the Agreement must prevail over the jurisdiction set out in the Establishment Law.[34] This is simply incorrect. There is no genuine conflict between the Establishment Law and the Agreement, as the former is the only instrument entitled to delineate subject-matter jurisdiction. Alternatively, if both may delineate jurisdiction and there is indeed a conflict between the two, the definition of crimes against humanity in the Establishment Law must prevail.

---

[28] *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment, 2 September 1998, para. 585. *See also Prosecutor v Rutaganda*, ICTR-96-3-T, Judgment, 6 December 1999, para. 77.
[29] *Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-T, Judgment, 21 May 1999, paras. 149-150. *See also Prosecutor v Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, para. 92.
[30] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (2ed ed. Oxford University Press, 2008), p. 41 ("CASSESE").
[31] *Prosecutor v Kupreskic et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 566.
[32] *Id.*, citing United Nations General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994.
[33] Request, para. 10. The Rome Statute is the Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998.
[34] Request, para. 11.

17. The Agreement was formed in order to regulate the cooperation between the United Nations and the Royal Government of Cambodia ("RCG") in bringing to trial senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia.[35] The Establishment Law was created "to bring to trial senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia."[36] Simply, the role of the Agreement was to establish the cooperation between the UN and the RCG, whereas the role of the Establishment Law was to put into practice exactly how this would be done, including by specifying the subject matter, temporal and personal jurisdiction of the ECCC.
18. Article 2 of the Agreement further specifies that "[t]he present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in the [Establishment Law]." In addition, Article 2(2) of the Agreement provides that the Agreement shall be implemented 'through' the Establishment Law. These provisions seem to establish quite clearly, through use of the word 'consistent', that the ECCC has subject matter jurisdiction, as provided solely by the Establishment law. Contrary to the submissions of the Civil Parties, there is therefore no genuine conflict between the Agreement and the Establishment Law. Both clearly demonstrate that it is only the latter that delineates the jurisdiction of the ECCC.
19. If the OCIJ does consider that there is a conflict between the Agreement and Establishment Law in terms of jurisdiction, the latter must prevail. The RCG passed the original version of the Establishment Law in 2001.[37] The definition of crimes against humanity in Article 5 of the 2001 Establishment Law is identical to the definition in the later version of the Establishment Law. As such, when the Agreement was signed between the RCG and the UN on 6 June 2003, it was done so in full cognizance of this definition. There is simply nothing in the Agreement which suggests that the UN and the Cambodian government intended to supersede the definition of crimes against humanity

[35] Article 1, Agreement.
[36] Article 1, Establishment Law.
[37] Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, which was adopted by the National Assembly on 2 January 2001, 10 August 2001 ("2001 Establishment Law").

contained in Article 5 of the 2001 Establishment Law,[38] and later reaffirmed in the 2004 Establishment Law. Presumably, the reference to the ICC's definition of crimes against humanity is designed to ensure that there is no requirement of a nexus between a crime against humanity and an armed conflict.[39] This relationship between the Agreeement and Establishment Law is further reflected by the publically expressed view of the RCG that "[w]hile the Articles of Cooperation may clarify certain nuances in the Law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated."[40] The RGC has also highlighted that there is:

> a clear distinction between the nature and purpose of the Law and the Articles of Cooperation. In no way do we wish to reduce the Articles of Cooperation 'to the status of a technical and administrative document subordinate to the Law' (to use Excellency Hans Corell's words). Neither is it correct to say (as in the Spokesman for the Secretary-General's words) that the Cambodian government has 'rejected the UN proposal' that the UN assistance 'will be governed by the agreement between the UN and Cambodia'. In fact, this is precisely what we envisage to be the role for our Articles of Cooperation, as a normal basis for cooperation between a Member State and the United Nations.[41]

---

[38] Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELB. J. INT'L L. 462, 473-474 (2004).

[39] *Id.*, at 474. Indeed the same author has argued that the reference in Article 9 of the Agreement to the ICC's definition of Crimes against Humanity could well be a typographical error, particularly in light of the fact that Article 2 recognizes that the ECCC has subject-matter jurisdiction consistent with that set out in the Establishment Law.

[40] Letter from Minister Sok An to Hans Corell, Under Secretary-General for Legal Affairs, The Legal Counsel, United Nations, 23 November 2001 (http://www.camnet.com.kh/ocm/government/government116.htm). It was further stated by Minister Sok An that: 'I believe that the Law establishing the Extraordinary Chambers based within the Courts of Cambodia with international participation and meeting internationally accepted standards embodies all the fundamental principles agreed to between the two sides during the negotiations.' *See also* Statement from the Royal Government of Cambodia in Response to the Announcement of UN Pullout from Negotiations on Khmer Rouge Trial by Minister Sok An, 12 February 2002 (http://www.camnet.com.kh/ocm/government/government116.htm):"The second major point relates to the relationship between the Cambodian Law establishing the Extraordinary Chambers and the proposed Articles of Cooperation to be signed by both parties. In my letter of 2; November I stated that in our view "the Law, which was adopted by the Cambodian legislature under the Constitution of Cambodia, has determined the jurisdiction and competence of the Extraordinary Chambers as well as their composition, organizational structure and decision-making procedures, while the Articles of Cooperation are to determine the modalities of cooperation between the Royal Government of Cambodia and the United Nations in implementing those provisions of the Law concerning foreign technical and financial support'."

[41] Statement from the Royal Government of Cambodia in Response to the Announcement of UN Pullout from Negotiations on Khmer Rouge Trial by Minister Sok An, 12 February 2002 (http://www.camnet.com.kh/ocm/government/government116.htm) It was further stated that "Article 46 of our Law makes perfectly clear that primacy is given to United Nations participation in the process. It is important to understand that the Law adopted by our legislature was itself the outcome of the complex negotiations between Cambodia and the United Nations, and contains within it a number of significant compromises on our part as well as on theirs."

20. In light of these statements outlining the RCG's understanding of the relationship between the Establishment Law and Agreement it is clear that the former must prevail if a conflict exists between the two.

C. Enforced disappearance was not a crime against humanity under Cambodian or customary international law in 1975-79

21. A law may not retroactively create a crime, or a form of liability by which that crime may be committed.[42] This would breach the *nullum crimen sine lege* principle, upheld in a multitude of human rights instruments,[43] Cambodian law[44] and applied at other courts.[45] A law simply grants the court jurisdiction to apply forms of liability already set out in substantive law at the time of the alleged crimes.[46] Article 5 of the Establishment Law merely sets out the definition of crimes against humanity over which the ECCC has jurisdiction; it does not create the substantive offence of a crime against humanity to be retroactively applied. For enforced disappearance to be applied against the Charged Persons in Case File 002 for alleged crimes in 1975-79, it must have been considered to be a crime against humanity under customary international law or Cambodian law in 1975-79. It is not.

22. The Civil Parties do not assert in the Request that enforced disappearance was a crime under Cambodian law in 1975-79. The sole basis for attributing criminal liability for crimes allegedly committed on this basis in 1975-79 is therefore customary international law. Customary international law[47] can only be created through (a) general and consistent state practice and (b) *opinio juris*.[48] The two concepts are inextricably linked[49] and may

---

[42] *Nullum crimen sine lege* applies to forms of liability as well as to substantive crimes. *See Prosecutor v. Hadžihasanović & Kubura*, IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras. 32-35; *Prosecutor v. Stakić*, IT-97-24-A, Judgment, 22 March 2006, para. 62.

[43] International Covenant on Civil and Political Rights, Article 15; European Convention on Human Rights and Fundamental Freedoms, Article 7; Inter-American Convention on Human Rights, Article 9; African Charter of Human and People's Rights, Article 7(2); Rome Statute of the International Criminal Court, Articles 22, 24; Third Geneva Convention of 1949, Article 99; Fourth Geneva Convention of 1949, Article 67. No derogation from the application of this right is permissible under the ICCPR. See *Puhk v Estonia*, European Court of Human Rights, Application no. 55103/00, Judgment of 10 February 2004, para. 24.

[44] 1956 Cambodian Penal Code, Article 6, para. 1.

[45] *See* ICC Statute, Article 22; *Prosecutor v. Vasiljević*, IT-98-32-T, Judgement, 29 November 2002, para. 193; *Prosecutor v Galić*, IT-98-29-T, Judgment, 5 December 2003, para. 92.

[46] *See Prosecutor v. Tadić*, IT-94-01, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 94.

[47] Customary international law is a source of international law. It is elucidated in Article 38(1)(b) of the Statute of the International Court of Justice ("ICJ") as being "international custom, as evidence of a general practice accepted as law."

[48] State practice should be "extensive and virtually uniform in the sense of the provision invoked." *Nicaragua v. United States*, (Merits), ICJ Reports 14 (1986), ("*Nicaragua v. United States*"), para. 74. As for *opinio juris*, the

overlap.[50] Moreover, custom may be said to be based on the "tacit agreement" of States through their practice and expression of what they believe to be legally binding amongst themselves.[51] State practice must not necessarily be absolutely consistent, but a substantial level of uniformity is required.[52] The consistency of state practice required may vary according to the subject matter in question.[53] It is for the party seeking to rely on a rule of customary international law to prove its existence.[54] *Opinio juris* may be considered to be the recognition by States that a certain practice is "required" by law.[55] The ICJ has been reluctant to presume its existence in the absence of evidence to the contrary.[56] Reliance on international agreements and resolutions alone cannot be enough to establish a consistency of *opinio juris* and state practice.[57]

23. The duration over which the customary rule is alleged to have formed is not prescribed by international law.[58] However, the shorter the period of time over which the customary rule is said to be formed, the stricter the requirement of uniformity of practice and *opinio*

ICJ has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." *Nicaragua v. United States*, para 14.

[49] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (6th ed. Oxford University Press, 2004), p. 9. ("BROWNLIE"). *See also* RESTATEMENT OF THE LAW (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987), which also adopts a two-pronged approach to the formation of international custom; *Nicaragua v. United States*, para. 202; *North Sea Continental Shelf Cases* ICJ Reports 3 (1969) ("*Continental Shelf*"), at 44 stating that the "Frequent, or even habitual character" of state practice is not sufficient to establish custom without *opinio juris*"; *Continental Shelf: Libya v. Malta* ICJ Reports 13 (1985), at 29-30: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states;" *See generally,* International Law Association, London Conference, *Statement of Principles Applicable to the Formation of General Customary International Law* (2000).

[50] *See* P. Haggenmacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale*, 5 Rev. Général du Droit Public International 114 (1986).

[51] *The Lotus Case* PCIJ Series. A, no. 10, p. 18 ("*Lotus Case*") here, the Permanent Court of International Justice stated that customary international law is an expression of the free will of States.

[52] *Anglo-Norwegian Fisheries Case* ICJ Reports 116 (1951), para. 131.

[53] *Id.*

[54] *Asylum Case (Columbia v. Peru)* ICJ Reports 266 (1950), paras. 276-77. This case may be considered as the leading pronouncement made by the ICJ on the establishment of customary international law. *See* BROWNLIE, p. 7. *See also* DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW (6th ed. Oxford University Press, 2004), Chapter 2; HUGH THIRLWAY, *The Sources of International Law* in MALCOLM EVANS (ED.) INTERNATIONAL LAW (2nd ed. Oxford University Press, 2006); J. Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems* 15 EUR. J. INT'L L. 523 (2004).

[55] JL BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (6th ed. Oxford University Press, 1963), p. 61.

[56] *Lotus Case,* at 28; *Nicaragua v. United States*, at 14.

[57] *See Advisory Opinion on the Threat or use of Nuclear Weapons* ICJ Reports 226 (1996) ("*Nuclear Weapons Advisory Opinion*"), at 66; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* ICJ Reports 16 (1971) at 50 (discussing the difference between a binding and a non-binding resolution and their relative normative quality).

[58] On the accelerated establishment of customary international law *see e.g.* Dissenting Opinion of Judge Tanaka in the *South West Africa Cases*, ICJ Reports 248 (1966), at 291; R. Jennings, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 INT'L & COMP. L.Q. 385 (1964).

juris.[59] If no "settled practice" has emerged and if States do not show any "feeling" that they were conforming to what they believed to be a legal obligation, the existence of a customary international law norm becomes impossible.[60]

24. The Request relies upon various international instruments in support of the assertion that enforced disappearance is a crime against humanity.[61] All of these agreements post-date Democratic Kampuchea. As such, none of these instruments fulfil the requirements of *opinio juris* or State practice set out above. None may therefore be relied upon to justify the application of individual criminal responsibility for enforced disappearances in 1975-79. Indeed the Request concedes that the "codification of forced disappearance as a crime against humanity occurred in treaties drafted after Democratic Kampuchea."[62] Even Professor Antonio Cassese, hardly an advocate for the strict application of State practice and *opinio juris* to create rules of customary international law,[63] holds that enforced disappearances did not constitute crimes against humanity in 1975-79.[64]
25. The Civil Parties claim that these agreements, which postdate Democratic Kampuchea, "reflected longstanding customary international law."[65] One basis for this claim, namely the provisions of the International Covenant on Civil and Political Rights ("ICCPR") protecting the rights to life and liberty and security of the person,[66] is irrelevant. This assertion confuses human rights law and international criminal law and dramatically overstates the role of the former in creating a rule of customary international law in the latter. The purpose of the ICCPR is to establish rights for citizens vis-à-vis States.[67] The

---

[59] *Continental Shelf,* at 43. According to the ICJ: "Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensible requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; - and should moreover have occurred in such a way as to show a general recognition that a rule of law of legal obligation is involved."

[60] *Id.*

[61] GA Resolution 47/133 Declaration on the Protection of All Persons from Enforced Disappearances, UN Doc. A/47/49, 18 December 1992; Rome Statute 1998; International Convention for the Protection of All Persons from Enforced Disappearances, UN Doc A/61/488, 20 December 2006 and Inter-American Convention on Forced Disappearances, 33 ILM 1429, 1994.

[62] Request, para. 8.

[63] *See generally*: *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary's Motion to Disqualify Professor Antonio Cassese and Selected Members of the Board of Editors and Editorial Committee of the Journal of International Criminal Justice from Submitting a Written *Amicus Curiae* Brief on the Issue of Joint Criminal Enterprise in the Co-Prosecutor's Appeal of the Closing Order against Kaing Guek Eav "Duch', 3 October 2008.

[64] CASSESE, p. 113.

[65] Request, para. 8.

[66] *Id.*, para. 8, fn. 24.

[67] *See* Article 2, ICCPR which provides that "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the

purpose was not to create individual criminal responsibility for alleged violations of these rights.[68] Reliance may not be placed on these provisions of the ICCPR to show that enforced disappearance was a crime against humanity in 1975.[69]

26. The Civil Parties also rely upon the interpretation of the Nuremberg Judgement by Professor M. Cherif Bassuouni in support of their claim that the instruments regarding enforced disappearances reflect longstanding customary international law.[70] In fact this authority does nothing of the sort. Professor Bassiouni merely explains that the Nuremberg Tribunal held that if an agreement fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators, this agreement is not retroactive. He does not claim that there was individual criminal liability for enforced disappearances as a crime against humanity before Democratic Kampuchea, and indeed before it was codified in the agreements postdating this period, as is implied by the Civil Parties. Nor does he support the Civil Parties argument that a later agreement may, on its own, ground individual criminal responsibility without being retroactive, because there must still be criminal liability "established by positive law upon its actual perpetrators" at the time the crimes were allegedly committed.

27. Reliance upon the ICC Statute is also misplaced and belies a further confusion in the Request between substantive law and jurisdiction. The ICC Statute performs a dual function. Firstly, it delineates the subject matter jurisdiction of the ICC, namely the offences that may be prosecuted before the ICC. Secondly, it creates new offences. The ICC Statute may create new offences because under Article 11(1), the "Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute." The application of these offences for member States of the ICC for alleged offences that occurred after 1 July 2002 does not therefore violate the principle of *nullum crimen sine lege.*[71] However, to retroactively apply these criminal provisions to acts allegedly committed in 1975-79 does indeed constitute a violation of *nullum crimen sine lege.*

---

present Covenant." The ICCPR governs relations between States and individuals on its territories not the creation of individual criminal responsibility.

[68] There is no mention of individual criminal responsibility anywhere in the ICCPR.

[69] Kirsten Anderson, *How Effective is the International Convention for the Protection of All Persons From Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?*, 7 MELB. J. INT'L L. 245 (2006).

[70] Request, para. 8, fn. 24.

[71] The purpose of this fundamental principal is argued to "enhance the certainty of the law, provide justice and fairness to the accused, achieve the effective fulfillment of the deterrent function of the criminal sanction, prevent abuse of power and strengthen the application of the Rule of Law." *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW (Transnational Publishers Inc., 2003), p. 180.

28. Appearing to recognise that there was no criminal liability under customary international law in 1975-79 for the crime against humanity of enforced disappearance, the Civil Parties nonetheless put forward an alternative argument: (1) enforced disappearance is now a crime against humanity; (2) crimes against humanity were part of customary international law in 1975-79; and therefore (3) enforced disappearance as a crime against humanity was part of customary international law in 1975-79. The fallacy of this logic is obvious. Taking this argument to its logical conclusion means that any subsequent development of the law expanding the number of criminal acts in a particular category such as crimes against humanity would retroactively apply criminal liability for these acts, as long as they fell within this category. This denudes the protection *of nullum crimen sine lege* of any meaning.

D. Crimes against humanity are not *jus cogens* and there is no *peremptory norm* to prosecute them

29. Even if enforced disappearance was a crime against humanity in 1975-79, there is insufficient evidence to support the Civil Parties' assertion that it has reached the status of *jus cogens*.[72] Indeed other scholars have denied that crimes against humanity are *jus cogens* norms.[73] Even if this is the case, it does not automatically follow that there is a consequent duty to prosecute such crimes. The weight of academic opinion appears to show that there is no duty to prosecute crimes against humanity.[74]
30. Assuming there is a duty to prosecute crimes against humanity under customary international law, this duty does not fall on the OCIJ but on the RCG. In democratic societies "criminal offences are clearly established by the executive. The judiciary cannot itself determine the existence of an offence *de novo* that is not prescribed in the statutes

---

[72] Request, paras. 6-7, fn. 15.

[73] *See* Jill C. Maguire, *Rape under the Alien Tort Statute in the Post-SOSA v. Alvarez-Machain Era*, 13 GEO. MASON L. REV. 935, 968 (2005) who submits that crimes against humanity are not considered *jus cogens* norms.

[74] Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations*, 33 CORNELL INT'L L.J. 297, 314-18 (2000) (no duty); Claudia Angermaier, *The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?*, 1 EYES ON THE ICC 131, 140 (2004)(no duty). Michael Scharf, *From the Exile Files: an Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 364-367 (2006) "Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary." Christine A. E. Bakker, *A Full Stop to Amnesty in Argentina*, 3 J. INT'L CRIM. JUST. 1106, 1114 (2005) "It is true that, with some exceptions, both national and international courts, as well as many legal scholars, still hesitate to accept the existence of *jus cogens* norms, or voice doubts about their concrete content and application. The peremptory nature of the obligation to prosecute all crimes against humanity has not been generally accepted in the legal literature. An important factor explaining this hesitation is the asserted insufficiency of state practice supporting such a peremptory norm."

promulgated by the executive."[75] Therefore any supposed customary international law obligation to prosecute crimes against humanity weighs not on the OCIJ but on the RCG. Furthermore, as may be seen in the jurisprudence of the ICTY regarding the amendment of indictments, the supposed obligation to prosecute crimes against humanity and war crimes may be overridden by other factors. Trial Chambers have denied Prosecution requests to add charges to existing indictments when to do so would "cause unfair prejudice to the accused."[76]

E. Crimes against humanity under customary international law are not directly applicable in a domestic court

31. There is no convention which ascribes individual criminal liability to individuals for crimes against humanity. While the Nuremberg Charter codified this crime,[77] Article 6(c) of this same Charter makes clear that these crimes were unlikely to be found in the domestic laws of the States where these crimes were committed. Therefore, the sole basis for criminal liability for crimes against humanity is customary international law.
32. Whenever customary international law is invoked in a national court, the court is under an obligation to consider if, and under what circumstances, the national legal system is permitted or obliged to apply customary international law. In the absence of specific directives in its Constitution, legislation or national jurisprudence, a national court is under no obligation to apply customary international law.[78] A fundamental difference

---

[75] Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law,* 6 INT'L CRIM. L. REV. 121, 125 (2006).

[76] *Prosecutor v. Delić,* IT-04-83-PT, Decision on the Submission of the Proposed Amended Indictment and Defence Motion Alleging Defects in Amended Indictment, 30 June 2006, paras. 53, 57-74. This unfair prejudice may manifest itself either through (1) the lack of an adequate opportunity to prepare an effective defence; or (2) undue delay to the length of the pre-trial proceedings, the date of commencement of trial and the overall length of trial. *See also Prosecutor. v. Milan Lukić and Sredoje Lukić,* IT-98-32/1-PT, Decision on Prosecution Motion Seeking Leave to Amend the Second Amended Indictment and on Prosecution Motion to Include UN Security Council Resolution 1820 (2008) as Additional Supporting Material to Proposed Third Amended Indictment as well as on Milan Lukic's Request for Reconsideration or Certification of the Pretrial Judge's Order of 19 June 2008, 8 July 2008.

[77] Article 5(c) of the IMT Charter in setting out the jurisdiction of the Tribunal provides that crimes against humanity are "Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

[78] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW (Oxford University Press, 2003), p. 303 "Normally national courts do not undertake proceedings for international crimes only on the basis of international *customary* law, that is, if a crime is only provided for in that body of law. They instead tend to require either a national *statute* defining the crime and granting national courts jurisdiction over it, or, if a treaty has been ratified on the matter by the State, the passing of *implementing legislation* enabling courts to fully apply the relevant treaty provisions."

between the ECCC and the ICTY is that, as an international court, the ICTY considers itself to be able to directly apply customary international law.[79] This is entirely logical. The ICTY is not a domestic Yugoslav court and does not have to choose between forms of liability found in Yugoslav domestic law and customary international law. It is only obliged to take note of the domestic law of the former Yugoslavia with regards to sentencing.[80] By contrast, the ECCC is established within the existing court structure of the national legal system of Cambodia;[81] it may only apply customary international law if permitted or obliged by Cambodian constitutional law.

33. An extensive analysis of the application of customary international law generally in Cambodia and in other countries[82] shows that if the OCIJ holds that enforced disappearance as a crime against humanity was part of customary international law in 1975-79, the ECCC is not permitted, let alone obliged, to directly apply customary international law in the absence of implementing legislation. Customary international law may only be directly applied in Cambodia to the extent it relates to civil law duties and not substantive offences or if it has been explicitly implemented by Cambodian law.

34. The only provisions of the Establishment Law that could be considered by the OCIJ to implement or incorporate customary international law are Articles 1 & 2 new. These provide that the ECCC has been established to "bring to trial ... those who were most responsible for the crimes and serious violations of ... international humanitarian law and custom..."[83] This provision, however, does not implement crimes against humanity through customary international law. First, the Establishment law does not explicitly provide that it is implementing customary international law to be applied directly against persons brought before the ECCC. Second, this implementing legislation may only incorporate customary international law as it existed at that date, for crimes committed

---

[79] *See Prosecutor v. Tadić,* IT-94-01, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 60 where the Trial Chamber held that "unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law."

[80] *See* Rule 101(B)(iii) of the ICTY Rules of Procedure and Evidence, IT/32/Rev. 42, 4 November 2008.

[81] *See Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ(PTC03), Ieng Sary's Submissions Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 7 April 2008, fn. 19.

[82] *See* Annex B to *Case of IENG Sary,* 002/19-09-2007-ECCC/OCIJ, Ieng Sary's Supplementary Observations on the Application of the Theory of Joint Criminal Enterprise at the ECC, 24 November 2008 for a condensed commentary on the application of customary international law in domestic courts.

[83] (Emphasis added).

after its entry into force. The Establishment Law, promulgated in 2001, may therefore only incorporate customary international law for crimes committed after that date.[84]

F. Crimes against humanity under customary international law contain an element of discriminatory intent and are thus reflected by Article 5 of the Establishment Law

35. The Civil Parties rely confusingly upon the definition of enforced disappearances in the ICC Statute and from ICTY jurisprudence to claim that "a discriminatory motive is not an element required for all crimes against humanity."[85] Again, all the sources relied upon post-date 1975-79. The supposed conflict between Article 9 of the Agreement and Article 5 of the Establishment Law with regards to the definition of enforced disappearance as a crime against humanity only affects the jurisdiction of the ECCC over this crime. To the extent that enforced disappearance as a crime against humanity was part of customary international law in 1975-79, no definition of the elements of the crime which post-dates the alleged criminal activity can be applied without clearly violating the principle of *nullum crimen sine lege.* Simply, in 1975-79, all crimes against humanity under customary international law required a discriminatory motive.[86] The Establishment Law does not therefore change the definition of crimes against humanity under customary international law but reflects it.

G. Alternatively, any limitation of jurisdiction by the ECCC regarding crimes against humanity is lawful and must be enforced

36. The Civil Parties claim that the discriminatory intent requirement for crimes against humanity clearly limits the subject matter jurisdiction of the Court.[87] To the extent that this assertion is correct, it is completely lawful and simply reflects the will of the Cambodian Government in setting up the ECCC. The Establishment Law and Agreement have also limited the temporal jurisdiction of the Court to crimes that allegedly were committed during the period from 17 April 1975 to 6 January 1979.[88] Both instruments also limit the personal jurisdiction of the ECCC to "senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international

---

[84] *Bourterse* (Supreme Court of the Netherlands, Chamber of Criminal law, decision of 18 September 2001), paras. 4.4 and 4.7. *See also R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte (No 3)*, 24 March 1999, [2000] 1 AC 147, at 276.
[85] Request, para. 16.
[86] Article 2 of the ICTR Statute requires the discriminatory motive for all crimes against humanity.
[87] Request, para. 15.
[88] Agreement, Article 1; Establishment Law, Article 2.

conventions recognized by Cambodia."[89] This reflects similar personal and temporal jurisdictional limits in place at other *ad hoc* international courts and tribunals.[90]

37. The ECCC "operates as an independent entity within the Cambodian Court Structure."[91] As such, the RCG may, in establishing this Court, lawfully place limits on its jurisdiction, including limits on the types of crimes that it was established to prosecute. It does not violate the object and purpose of the Agreement to limit jurisdiction in this way as claimed by the Civil Parties,[92] but actually better reflects this object and purpose by focusing on prosecutions for crimes against humanity where there is a discriminatory motive.

VI. CONLUSION & RELIEF SOUGHT

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Co-Investigating Judges to:

a. GRANT the request for an extension of the page limit to 17 pages; and
b. DECLARE the Co-Lawyers for Civil Parties' Investigative Request Concerning Enforced Disappearances filed on 30 June 2009 to be INADMISSIBLE; or
c. REJECT the Request for Investigative Action.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **6th** day of **August, 2009**

---

[89] *Id.*
[90] Article 8 of ICTY Statute limits the temporal and geographical of the ICTY to "the territory of the former Socialist Federal Republic of Yugoslavia" and "a period beginning on 1 January 1991." Article 1 of the SCSL Statute limits personal and geographical jurisdiction to "the territory of Sierra Leone since 30 November 1996." Article 1 of the ICTR Statute limits geographical and personal jurisdiction to the "territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States" and temporal jurisdiction to "between 1 January 1994 and 31 December 1994."
[91] *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC(PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav "Duch", 3 December 2007 para. 19.
[92] Request, para. 17.