

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES OF THE  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**JOINT DEFENCE RESPONSE TO CIVIL PARTIES' INVESTIGATIVE REQUEST  
CONCERNING THE ALLEGED CRIME OF ENFORCED DISAPPEARANCE**

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**I INTRODUCTION AND PETITION**

1. On 30 June 2009, co-lawyers for the Civil Parties filed a 'Co-Lawyers of Civil Parties' Investigative Request Concerning the Crimes of Enforced Disappearance' ("Request").<sup>1</sup>
2. The defence teams for Ieng Thirith and Nuon Chea herewith object to the Request and submit the 'Joint Defence Response to Civil Parties' Investigative Request Concerning the Alleged Crimes of Enforced Disappearance'.

**III ARGUMENT I – CIVIL PARTIES CANNOT REQUEST ADDITION OF NEW CRIME****3.1 Relevant Legal Standards**

3. Rule 55 of the Internal Rules states, insofar relevant:
  - (2) The Co-Investigating Judges shall only investigate the facts set out in an Introductory Submission or a Supplementary Submission.
  - (3) If, during an investigation, new facts come to the knowledge of the Co-Investigating Judges, they shall inform the Co-Prosecutors, unless the new facts are limited to aggravating circumstances relating to an existing submission. Where such new facts have been referred to the Co-Prosecutors, the Co-Investigating Judges shall not investigate them unless they receive a Supplementary Submission.
  - (5) In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth. In all cases, they shall conduct their investigation impartially, whether the evidence is inculpatory or exculpatory. [...].
4. Internal Rule 49(1) specifies that "[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.



<sup>1</sup> Co-Lawyers of Civil Parties' Investigative Request Concerning the Crimes of Enforced Disappearance, 30 June 2009, Document No. D180. The defence was notified of this document on 8 July 2009.

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### 3.2 Submissions

5. The facts of the Introductory Submission are the basis for the OCIJ's investigation, and the parties can request the OCIJ to investigate facts through investigative requests. The OCIJ's investigative powers are limited to the facts set out in the Introductory Submission, as reflected in Rule 55 of the Internal Rules. Rule 49 specifies that it is the OCP who determines the crimes for which the Charged Persons are prosecuted and that such prosecution "may be initiated only by the Co-Prosecutors". Thus, the Civil Parties cannot request the OCIJ to investigate facts that do not constitute crimes in the Introductory Submission.
6. If the OCIJ, or for that matter, the Civil Parties, wishes that the Charged Persons be prosecuted for more crimes than currently enumerated in the Introductory Submission, the appropriate way would be to inform the OCP of such a request, and for it to decide whether to file a Supplementary Submission pursuant to Rule 55(3) or not.
7. Unless and until the OCP files such a Supplementary Submission, the OCIJ has no jurisdiction to investigate the additional crime suggested by the Request.

## IV ARGUMENT II – NO JURISDICTION TO PROSECUTE ENFORCED DISAPPEARANCE

### 4.1 Relevant Legal Standards

8. Article 5 of the ECCC Establishment Law:<sup>2</sup>

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:



<sup>2</sup> The 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 ("Establishment Law"), adopted on 10 August 2001, and amended on 27 October 2004.

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- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.

9. Article 1 of the ECCC Establishment Law reads as follows:

The purpose of this law is to bring 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.

And Article 1 of the Agreement:<sup>3</sup>

The purpose of the present Agreement is to regulate 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. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

10. Article 2(1) of the Agreement reads:

The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in 'the 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' [...].

11. Article 12(1) of the Agreement provides, insofar relevant:

The procedure shall be in accordance with Cambodian law. [...]

12. The Agreement provides in Article 13 reads, insofar relevant:

The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; [...].

<sup>3</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("Agreement"), adopted on 6 June 2003.



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13. Article 7(1) of the Rome Statute provides insofar relevant:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

[...]

(i) Enforced disappearance of persons;

[...].

14. The International Covenant for Civil and Political Rights ("ICCPR") provides in

Article 15(1) thereof:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

## 4.2 Submissions

### 4.2.1 Requested Crime Falls Outside of the Scope of ECCC Jurisdiction

15. The defence submits that the crime of enforced disappearance falls outside scope of the ECCC's jurisdiction, as a result of which the Request should be dismissed.

16. The Request makes the following assertion:

In summary: the enforced disappearance of persons constitutes a crime against humanity when committed in a widespread or consistent manner and the prohibition against crimes against humanity constitutes a *jus cogens* norm from which an obligation *erga omnes* to prosecute is derived. Therefore, this Court, through its Office of the Co-Investigating Judges, has the duty under international law to investigate the occurrence of enforced disappearances during Democratic Kampuchea.<sup>4</sup>

17. The Civil Parties here forget that there is a difference between the law today, and the law at the time of the temporal jurisdiction of this Court, i.e. 1975-1979. Whilst providing arguments that today the crime falls under the category of crime against humanity, or even *jus cogens*, it fails to make such argument in respect to the time of Democratic Kampuchea, and neither can such argument be proven.

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<sup>4</sup> Request, para. 7.

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18. The principle of legality requires prosecution of a crime to be based upon a legal norm that (1) existed at the time of the offence (*nullum crimen sine lege*), (2) is accessible to the individuals it addresses, and (3) is so clear as to make the possibility of prosecution and punishment foreseeable (*lex certa*).<sup>5</sup> Article 15(1) of the ICCPR—directly applicable to the ECCC proceedings through Article 13 of the Agreement—provides, insofar relevant:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.

19. In order to be applicable before the ECCC the crime:<sup>6</sup>

- a. Is specified in the ECCC Establishment Law;
- b. Is criminalised in the 1956 Penal Code;
- c. Forms part of customary international law during the temporal jurisdiction of the Court;
- d. Is criminalised in an international convention which is directly applicable to the ECCC.

#### 4.2.2 Crime Is Not Specified in the ECCC Establishment Law

##### *4.2.2.1 Enforced Disappearance Not Specified in the ECCC Establishment Law*

20. The crime of enforced disappearance was not included in the ECCC Establishment Law; not in the enumeration of crimes against humanity in Article 5 thereof, nor in any other section of that Law. For this reason, the Request falls outside the scope of the ECCC jurisdiction, and should be denied.

##### *4.2.2.2 ECCC Establishment Law Prevails over Agreement*

21. The Request asserts that the Agreement prevails over the ECCC Establishment Law.<sup>7</sup> The argument for that assertion is that the Agreement is older, and thus

<sup>5</sup> W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (2006), p. 223.

<sup>6</sup> See Article 1 ECCC Establishment Law and Article 1 Agreement.

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deserves preference over the Establishment Law, which was drafted at a later date. The Request asserts this on the basis of the 'principle of *lex prior*'.<sup>8</sup> Interestingly, the source used in the Request clearly sets out the prevailing principle is not the *lex prior* but the principle of *lex posterior derogat legi priori*, which implies exactly the opposite of the Civil Parties' argument, namely that a later law prevails over an earlier law.<sup>9</sup> Moreover, whilst amendments were adopted to the ECCC Establishment Law in 2004, no changes were made to the provision on crimes against humanity. As far as the defence is aware, no mention was made at that stage to include the crime of enforced disappearance. The argument can therefore not be upheld that the Agreement prevails over the Agreement on this basis. And if the OCIJ would take the argument of the applicability of *lex prior* serious, it can be said that the initial ECCC Establishment Law was already concluded in 2001, prior to adoption of the Agreement, and as such, the provisions of the initial ECCC Establishment Law should prevail, which exclude the provision of enforced disappearance. Also, the Civil Parties' assertion<sup>10</sup> that the ECCC Establishment Law would not be in accordance with the object and purpose of the Agreement is unsubstantiated and cannot be maintained, as inclusion of enforced disappearances cannot be considered to form part of the Agreement's object and purpose, and secondly,

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<sup>7</sup> Request, paras. 11-14. The Request also sets out that the Agreement prevails over the ECCC Establishment Law with regard to the absence of the discriminatory element in Article 7(1) of the Rome Statute, which discriminatory element is present in the ECCC Establishment Law. The same arguments mentioned here in relation to the crime of enforced disappearance and which of the legal instruments, the ECCC Law or the Agreement prevail, are applicable to the discussion of the discriminatory element. In addition thereto, the fact that the ICTR Statute, Article 3, requires such element, implies that the absence of such element was not part of customary international law in 1975-1979. para. 462. See K. Khan & R. Dixon, *Archbold International Criminal Courts* (2005), p. 630, who state that the States delegates disagreed whether or not to include the discriminatory element in Article 7 of the Rome Statute. The statement in paragraph 17 of the Request that the discriminatory element would defeat the object and purpose of the Agreement is also unsubstantiated, incorrect and irrelevant. The object and purpose of the Agreement does not extend to the discriminatory element, nor is that argument made, and moreover, the application of the ECCC Establishment Law is not dependent on the Agreement's object and purpose. In interpreting the lack of this element, the principle of *in dubio pro reo* should be taken into account, see *infra*.

<sup>8</sup> Civil Parties' Request, para. 11.

<sup>9</sup> UN General Assembly, ILC 58<sup>th</sup> Session, A/CN.4/L.682, Martti Koskeniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 4 April 2006, paras. 225 and 243. See also Malcolm Shaw, *Public International Law* (2006), p. 116.

<sup>10</sup> Request, para. 12, footnote 34.



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application of the ECCC Establishment Law is not dependent on the Agreement's object and purpose.

22. As the OCIJ itself explicitly considered in the 'Order on Request for Investigative Action', it derives its jurisdiction from the ECCC Establishment Law.<sup>11</sup> In determining the limits of its jurisdiction in the said Order, the OCIJ exclusively refers to the ECCC Establishment Law, and not to the Agreement. This also suggests that the ECCC Establishment Law prevails over the Agreement.

23. Further, the defence submits that "where there is a succession of criminal laws, it is always the law most favourable to the accused that is applied",<sup>12</sup> in accordance with the principle of *in dubio pro reo* which provides that where a statute or rule may be fairly interpreted in two or more ways, the version favourable to the accused should be selected.<sup>13</sup> This principle also requires application of the ECCC Establishment Law over the Agreement.

24. In addition to that, the principle of *lex specialis* entails that a special law prevails over a general law (*lex generalis*).<sup>14</sup> As stated by the Civil Parties themselves, "[t]he ECCC Law was created to implement the provisions set forth in the Agreement".<sup>15</sup> Application of the *lex specialis* principle means that the ECCC Establishment Law prevails over application of the Agreement.

25. Finally, the Agreement itself provides that the ECCC Establishment Law has priority over the Agreement. Article 2(1) reads:

<sup>1111</sup> OCIJ Order on Request for Investigative Action, 3 April 2009, Document No. D158/5, para. 8.

<sup>12</sup> ILC Report, 28<sup>th</sup> Session, Doc. No. A/31/10 (1976), p. 89.

<sup>13</sup> See K. Khan & R. Dixon, *Archbold International Criminal Courts* (2005), p. 165. This principle was accepted in for example *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para. 319 where the ICTR Trial Chamber held that "because the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected".

<sup>14</sup> UN General Assembly, ILC 58<sup>th</sup> Session, A/CN.4/L.682, Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', 4 April 2006, para. 56. See also Malcolm Shaw, *Public International Law* (2006), p. 116; K. Khan & R. Dixon, *Archbold International Criminal Courts* (2005), p. 168.

<sup>15</sup> Request, para. 11.





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The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in 'the 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' [...].

26. And Article 12(1) of the Agreement provides that "[t]he procedure shall be in accordance with Cambodian law", i.e. in accordance with the ECCC Establishment Law.

#### 4.2.2.3 *Introductory Submission Refers Solely to the ECCC Establishment Law*

27. The Introductory Submission specifies that it is based on the ECCC Establishment Law, and not on the Agreement.<sup>16</sup> It is the Prosecution who decides for which crimes the Charged Persons are to be prosecuted.<sup>17</sup> The OCIJ's investigations are limited to the facts set out in the Introductory Submission. The latter document is thus limited by the crimes enumerated in the ECCC Establishment Law. Application of a crime which is not part of the ECCC Establishment Law would thus fall outside of the jurisdiction of the OCIJ.

#### 4.2.3 Enforced Disappearance Is Not Part of 1956 Penal Code

28. In order to be able to charge accused persons before the ECCC with a crime that is not part of the ECCC Establishment Law or customary international law, a crime needs to be embedded in the Cambodian penal code that was applicable during the temporal jurisdiction of the ECCC, that is the 1956 Penal Code. This Code does not make any reference to such crime, nor do the Civil Parties allege so.

<sup>16</sup> Introductory Submission, page 1, which mentions:

"We, the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia:

- having seen the 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, dated 27 October 2004,
- having seen the Internal Rules of the ECCC which entered into force on 22 June 2007,
- having seen the Criminal Case File No. 002 dated 14 August 2006
- [...]."

<sup>17</sup> Internal Rule 49.



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4.2.4 Enforced Disappearance Not Part of Customary International Law in '75-'79

29. The Request relies on the Rome Statute to prove that enforced disappearance forms a crime against humanity. The Request states:

Consequently, 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.<sup>18</sup>

30. Enforced disappearance was not part of customary international law during the temporal jurisdiction of this Court, nor do the Civil Parties argue this in paragraph 8 of their Request. During 1975-1979, the definition of crimes against humanity did not include enforced disappearances.

31. The Request confuses the fact that enforced disappearance has been previously recognised as a crime against humanity, and the necessary requirement that it has to be part of customary international law during 1975-1979 in order to be applicable before the ECCC. The sources mentioned in footnote 26 may attest that enforced disappearance has been recognised as a crime against humanity, but fail to establish that this was part of customary international law—what Professor Cassese explicitly denies<sup>19</sup>—and that this was already the case in 1975-1979.

32. The Request relies on the Rome Statute for this statement. However, the basis for the ECCC is the ECCC Establishment Law and not the Rome Statute, and the Request fails to specify why the OCIJ should rely on the statutory document of another tribunal instead of the ECCC Law. This category of crimes against humanity laid down in Article 7(1)(i)<sup>20</sup> of the Rome Statute does not reflect customary international law either, at least not during the temporal jurisdiction of the ECCC, as indeed confirmed by Antonio Cassese, where he explains that



<sup>18</sup> Request, para. 5.

<sup>19</sup> Antonio Cassese, *International Criminal Law* (2003), p. 80 & 94.

<sup>20</sup> Footnote 9 of the Request mistakenly refers to Article 7(1)(h) of the Rome Statute.

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Article 7(1)(i), 'enforced disappearance of persons', is not part of customary international law.<sup>21</sup>

33. A second source in support of their allegation that enforced disappearance forms a crime against humanity at the ECCC is the Declaration on the Protection of All Persons from Enforced Disappearance.<sup>22</sup> A declaration is not a binding instrument under international law, and does not form a source of customary international law which could broaden the applicability of the Rome Statute to the ECCC.

34. Whilst the Civil Parties in footnote 23 argue that "[a]lthough international recognition of the laws of humanity emerged during the turn of the twentieth century, the codification of crimes against humanity first occurred in the Charter of the International Military Tribunal of Nuremberg [...]." Also footnote 24 refers to Nuremberg judgments. However, forced disappearances did not form part of the definition of crimes against humanity before the Nuremberg Tribunal, which is shown by the case of German Field Marshall Wilhelm Keitel, from which case it can be derived that at the time of the Nuremberg trials enforced disappearances were not yet part of the concept of crimes against humanity. Instead, Keitel was convicted for war crimes.<sup>23</sup>

35. In footnote 24 the Request confuses the concepts of international criminal law and human rights. Whilst the ICCPR and other international instruments may have long guaranteed the right to life and other relevant human rights, this does not entail that criminal prosecution can take place on the basis of such human rights instruments.



<sup>21</sup> Antonio Cassese, *International Criminal Law* (2003), p. 80 & 94.

<sup>22</sup> Request, footnote 10.

<sup>23</sup> See Commission on Human Rights, 58<sup>th</sup> Session, Doc. No. E/CN.4/2002/71 of 8 January 2002, para. 65.

#### 4.2.5 No Enforced Disappearance in International Convention

36. The Request furthermore relies on an international convention to show that the crime of enforced disappearance forms part of the ECCC's subject matter jurisdiction.<sup>24</sup> They refer to a convention which was created in 2006, i.e. a long time after the facts which fall within the ECCC's jurisdiction were allegedly committed. Application of an *ex post facto* law is not allowed, and would lead to violation of the principle of *nullum crimen sine lege*. Moreover, Cambodia is not a party to this Convention, and the Convention has not (yet) entered into force.<sup>25</sup>

37. The other sources the Request relies on in support of its theory that this specific crime falls within the jurisdiction of the ECCC is the Inter-American Convention on Forced Disappearance of Persons and the *Velasquez Rodriguez* case from the Inter-American Court of Human Rights.<sup>26</sup> Besides the fact that this does not show that there is a rule of customary international law criminalizing enforced disappearances, these documents postdate 1979, and therefore do not support the argument that enforced disappearance was a crime during the temporal jurisdiction of the Court. The article by Bakker<sup>27</sup> explains that the finding of a customary norm on enforced disappearance by some of the judges in the Argentinian Supreme Court is not an adequate reflection of existing customary international law, let alone a *jus cogens* norm.<sup>28</sup>

<sup>24</sup> See Request, footnote 12, referring to the International Convention for the Protection of All Persons from Enforced Disappearances, adopted on 20 December 2006, Doc A/61/488.

<sup>25</sup> See "International Convention for the Protection of All Persons from Enforced Disappearance, Status as at 8 July 2009, URL address: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-16&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-16&chapter=4&lang=en).

<sup>26</sup> Request, para. 5, footnote 10.

<sup>27</sup> Request, footnote 10.

<sup>28</sup> C.A.E. Bakker, *The Simon Case. A Full Stop to Amnesty in Argentina*, JICJ 3 (2005), p. 1110. The opinions of the judges themselves are not authoritative, because they all reflect personal opinions, and not opinions of the court as such, see page 1107. The author herself even disputes the existence of a peremptory norm to prosecute *all* crimes against humanity to form part of customary international law, because of lack of state practice, see pages 1114 and 1116. Bakker, in referring to Judge Maqueda's reasoning, which is relied upon by the Civil Parties, states that "it clearly clashes with more traditional approaches to international law", also on page 1114. Bakker states that for the Argentinian court, state practice was not a decisive factor in finding a norm of *jus cogens*, see page 1116. Bakker herself indicates that the existence of *opinio juris* and state practice in 1978 for this crime is arguable, see pages 1116-1117. At most, a regional norm of customary international law to this extent could be discerned.



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## V ARGUMENT III – ATTEMPT TO RE-QUALIFY: NO ‘OTHER INHUMANE ACTS’

38. Lastly, the Request suggests that ‘enforced disappearance’ could fall under the category of ‘other inhumane acts’. Again, the arguments mentioned above relating to customary international law apply equally here: enforced disappearance of persons is not part of the ECCC Establishment Law, was not a crime under customary international law at the relevant time, was not part of the 1956 Penal Code and is not laid down in an international convention applicable to these proceedings. The ICTY Appeals Chamber held that the crime of forcible transfer could fall under the category of other inhumane act because it was criminalized at the time of the commission of the crime, and hence did not violate the principle of *nullum crimen sine lege*.<sup>29</sup> *A contrario*, one can conclude that if a specific act was *not* criminalized at the relevant time, it may not fall under the category of other inhumane act.

39. The ICTY Trial Chamber Judgment in the case against Zoran Kupreskic,<sup>30</sup> found that enforced disappearances can fall under the category of other inhumane acts. The Trial Chamber held that “parameters for the interpretation of ‘other inhumane acts’ can instead be identified in international standards on human rights”. It then states:

Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.<sup>31</sup>

In concluding that enforced disappearance of persons can fall under the residual category of other inhumane acts, the ICTY Trial Chamber refers to General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American

<sup>29</sup> See *Prosecutor v. Stakic*, Judgement, Case No. IT-97-24-A, 22 March 2006, para. 317, where the Appeals Chamber held: “The Appeals Chamber notes that Article 2(g) of the Statute, Articles 49 and 147 of Geneva Convention IV, Article 85(4)(a) of Additional Protocol I, and Article 18 of the 1996 ILC Draft Code all condemn forcible transfer. The notion of forcible transfer had therefore clearly been accepted as conduct criminalised at the time relevant to this case, such that it does not violate the principle of *nullum crimen sine lege*.”

<sup>30</sup> *Prosecutor v. Zoran Kupreskic*, Judgement, 14 January 2000, Case No. IT-95-16-T, para. 566.

<sup>31</sup> *Prosecutor v. Zoran Kupreskic*, Judgement, 14 January 2000, Case No. IT-95-16-T, para. 566.



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Convention of 9 June 1994, both documents which *postdate* the temporal jurisdiction of this Court. Hence, the criterion of foreseeability<sup>32</sup> has not been fulfilled, and the *lex certa* principle would be violated by prosecuting the Charged Persons for the crime of enforced disappearance.<sup>33</sup>

40. In any case, the fact that the ECCC Establishment Law in its amended form was drafted *after* the Rome Statute, and the category of enforced disappearances was left out, needs to be interpreted as an intentional exclusion. Especially now that the Agreement refers to the Rome Statute, and the ECCC Establishment Law, formulated after that, fails to include that crime, this legal principle should be adhered to. The later provision which omits enforced disappearances must be interpreted as a deliberate omission that should not be circumvented through inclusion in the residual category of other inhumane acts. The principle of *expressio unis est exclusio alterius* provides that the explicit inclusion of the categories in the ECCC Establishment Law can be interpreted as the implicit exclusion of the category of enforced disappearances. This interpretation is furthermore reinforced by the principle of *in dubio pro reo*, which holds that the interpretation most favourable to the accused must be used.<sup>34</sup>

41. The crime of enforced disappearance can thus not be included in the residual category of other inhumane act.

<sup>32</sup> The sources on which the Civil Parties rely in footnote 25 of their Request do not reflect the crime of enforced disappearance of persons.

<sup>33</sup> In this sense, the crime of forced marriage as a crime against humanity, as ruled on before the Special Court for Sierra Leone, is distinct from the crime of enforced disappearance as a crime against humanity. The several elements of the crime of forced marriage, such as rape, sexual slavery and forced labour, could already amount to separate crimes against humanity. As such, that decision did not violate the principle of *lex certa*. See M. Frulli, 'Advancing International Criminal Law: the Special Court for Sierra Leone Recognizes Forced Marriage as a 'New' Crime against Humanity', J.I.C.J. (2008), p. 1040.

<sup>34</sup> See K. Khan & R. Dixon, *Archbold International Criminal Courts* (2005), p. 165. This principle was accepted in for example *Prosecutor v. Akayesu*, Judgment, 2 September 1998, para. 319 where the ICTR Trial Chamber held that "because the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected".



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**VI ARGUMENT IV – STATUS OF THIS CRIME IS IRRELEVANT**

42. The Request then extensively argues that the crime of enforced disappearance has risen to the level of *jus cogens*, as a result of which these crimes need to be investigated and prosecuted at the ECCC.

43. The defence submits that the legal qualification of the status of this crime is irrelevant. It falls outside of the ECCC's jurisdiction, as argued above, and thus cannot be prosecuted. The crime was not part of customary international law during the period of the temporal jurisdiction of this court, let alone part of *jus cogens*.<sup>35</sup>

**VII CONCLUSION**

44. The Civil Parties do not have the power to request the addition of a new crime to the crimes for which the Charged Persons are being prosecuted. Apart from the Civil Parties' absence of power to do so, the ECCC does not have jurisdiction to try the Charged Persons for the crime of enforced disappearance of persons: the crime does not fall under the ECCC Establishment Law, which sets out the perimeters of the jurisdiction of the ECCC; the crime is not listed in the 1956 Penal Code; at the relevant time, it did not form part of customary international law, and lastly, the crime of enforced disappearance is not provided for in an international treaty that has direct applicability to the ECCC.

45. For these reasons, the ECCC does not have jurisdiction to prosecute the Charged Persons for the crime of enforced disappearance of persons, for doing so would violate the international legal principle of *nullum crimen sine legem*. Any attempt to re-qualify these facts would amount to a violation of that principle.

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<sup>35</sup> Nor does the Request argue that it was part of *jus cogens* in 1975-1979; it does not specify any time period. See Request, para. 6.



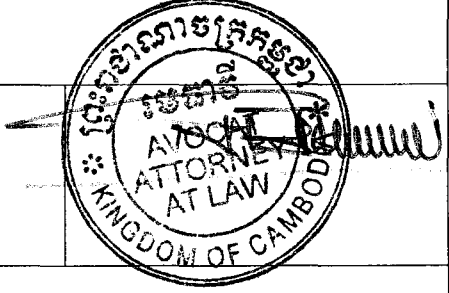
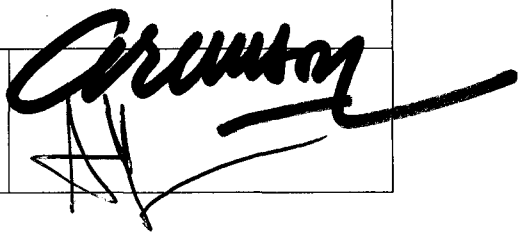
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46. The Civil Parties have not established that the crime of enforced disappearance of persons falls within the jurisdiction of the ECCC, as a result of which the Request to “conduct a full investigation concerning the existence of crimes of forced disappearance”<sup>36</sup> must be denied.

### VIII PRAYER

47. For the above reasons, the defence submits that the Request be denied in its entirety.

Date	Name	Place	Signature
<b>Co-Lawyers for Ieng Thirith</b>			
24 July 2009	PHAT Pouv Seang Diana ELLIS, QC	Phnom Penh	
<b>Co-Lawyers for Nuon Chea</b>			
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<sup>36</sup> Request, para. 27.