



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០១/១៨ កក្កដា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 001/18-07-2007/ECCC/TC

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: 26 July 2010

Classification: PUBLIC

DECISION ON THE DEFENCE PRELIMINARY OBJECTION CONCERNING THE STATUTE OF LIMITATIONS OF DOMESTIC CRIMES

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I. INTRODUCTION

1. On 28 January 2009, the Defence filed a Preliminary Objection concerning termination of prosecution of domestic crimes, requesting the dismissal of the charges brought against the Accused under the Criminal Code of the Kingdom of Cambodia (1956) (“1956 Penal Code”).¹ The Preliminary Objection alleges that the domestic crimes for which the Accused was indicted fall within the ambit of the applicable statute of limitations and are time-barred.² It further contends that as the statute of limitations had expired before the extension of the limitation period by Article 3 (new) of the ECCC Law,³ this provision violates the principle of non-retroactivity.⁴

2. The Trial Chamber declared the Preliminary Objection admissible and on 20 April 2009, directed the Parties to file written submissions in response to the Preliminary Objection, addressing the following questions:⁵

1. Have any legal acts such as prosecution or investigative action or factual circumstances such temporary non-functioning of the judicial system interrupted or suspended the Statute of Limitations governing the domestic crimes contained in the Indictment against the Accused?

2. Had the Statute of Limitations governing the offences mentioned above expired against the accused before the promulgation of the 10th August 2001 and 27th October 2004, Article 3 and 3 (new) of the Laws on the establishment of the ECCC, and if so, do those provisions amount to an express reactivation or reinstatement of the right to prosecute?

3. Is the extension of the Statute of Limitations as described by Article 3 and Article 3 (new) of the Laws on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea (“ECCC Law”) a substantive or procedural provision? What legal consequences follow from the respective qualification?

4. If this provision is considered procedural, does the ECCC Law envisage reference to international standards to effectively invalidate one of its own provisions?; and if so, can you identify any relevant international standard which should apply?

5. What if any are the legal effects on the ECCC of the Constitutional Council decision of 12 February 2001?

3. All Parties except Civil Party Group 4 made submissions, but submitted no further responses.

¹ Promulgated on 21 February 1955 by the King (Kram no. 933NS), Kingdom of Cambodia, *Recueil Judiciaire*, Special Edition, 1956, pp. 11-403.

² “Preliminary Objection Concerning Termination of Prosecution of Domestic Crimes”, E9/1, 4 February 2009 (“Preliminary Objection”); *see also* T., 17 February 2009, pp. 6-8.

³ “Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea”, 10 August 2001 with inclusion of amendments promulgated on 27 October 2004 (NS/RKM/1004/006).

⁴ Preliminary Objection, paras 5-7.

⁵ Direction Requesting Written Submissions on Preliminary Objection, E9/4, 21 April 2009; T., 17 February 2009, p. 8.

II. SUBMISSIONS

4. The Defence submits that Article 109 of the 1956 Penal Code established a prescriptive period of 10 years in relation to domestic crimes, which expired on 6 January 1989. This period was not interrupted or suspended. A trial of persons who committed crimes during the period of Democratic Kampuchea took place in 1979 and numerous laws promulgated from 1979 onwards show a functioning judicial system. Article 33 (new), paragraphs 1 and 2, obligate the ECCC to exercise its jurisdiction in accordance with international standards as expressed in Articles 14 and 15 of the International Covenant on Civil and Political Rights (“ICCPR”). Article 3 (new) cannot reactivate a right to prosecute domestic crimes once the limitation period has already expired without violating the fundamental principle of non-retroactivity. Article 3 (new) of the ECCC Law accordingly contravenes international standards and is therefore invalid.⁶

5. The Defence submissions are contested by the Co-Prosecutors and three Civil Party groups, who submit that the applicable statute of limitations did not start to run before 1993. During the Democratic Kampuchea period and between 1979 and 1993, the Cambodian judicial system was incapacitated and the prosecution of such crimes impossible. The key suspects were in the area controlled by the Khmer Rouge and outside the jurisdiction of the People’s Republic of Kampuchea and subsequently, of the Kingdom of Cambodia. The statute of limitations should therefore be considered suspended or interrupted prior to 1993, and this period not counted when calculating the date beyond which prosecution is barred. Accordingly, the prescriptive period of 10 years was still running when the ECCC Law was promulgated on 10 August 2001 and amended on 27 October 2004 to extend the statute of limitations. The statute of limitations is procedural in nature and its extension by Article 3 (new) of the ECCC Law is not prohibited by the principle of non-retroactivity of criminal law. Further, Article 3 (new) of the ECCC Law does not contravene Articles 14 and 15 of the ICCPR. The fair trial rights embodied in Article 14 of the ICCPR are aimed at preventing undue delays during actual trial proceedings, but do not prescribe the time period between the crime’s actual commission and the filing of an indictment, whereas the purpose of Article 15 of the ICCPR is to prevent prosecution and sentencing for acts not recognized as criminal at the time of commission. The crimes in question (homicide and torture) were in 1975, and remain, universally criminalized. The principle of legality cannot be

⁶ “Conclusions écrites concernant l’exception préliminaire soulevée par la défense”, E9/9, 18 May 2009 (“Defence Submission”), paras 2, 5, 20, 22-25 and 28 (noting also the corollary principles of foreseeability, strict interpretation of criminal law and its interpretation in favour of the accused).

violated by the prosecution of these crimes. Accordingly, an individual should not be able to invoke a statute of limitations to prevent prosecution for their commission.⁷

6. All parties concur that the Decision of the Constitutional Council of 2001 declared Article 3 (new) of the ECCC Law to be in conformity with the 1993 Constitution of the Kingdom of Cambodia.⁸ The Co-Prosecutors submit that this decision provides a strong indication that Article 3 (new) conforms to international standards.⁹ The Defence view is that it affirms only that the principle of non-retroactivity of a criminal law has no constitutional value and consequently that the ECCC Law, in particular Article 3, is not contrary to the 1993 Constitution of the Kingdom of Cambodia.¹⁰ The Defence and the Civil Party Groups argue that the decision has no effect on the resolution of the question of whether Article 3 (new) complies with international standards.¹¹

III. FINDINGS

7. The Accused is charged with the domestic crimes of premeditated murder and torture, violations of Articles 501, 506 and 500, respectively, of the 1956 Penal Code, punishable before the ECCC pursuant to Article 3 (new) of the ECCC Law.¹² Article 3 (new) of the ECCC Law accordingly empowers the ECCC to prosecute, in addition to the listed international crimes, specific offences within domestic law which remained extant, but unenforced, during the Khmer Rouge era.

8. The Pre-Trial Chamber Decision of 5 December 2008, which granted the Co-Prosecutor's request to add these charges to the Closing Order, did not expressly consider the impact of the limitation period on the ECCC's capacity to prosecute these crimes. In evaluating this issue, the Chamber considers it necessary to determine:

⁷ "Co-Prosecutors' written response to the Defence's preliminary objection to the applicability of the 1956 Cambodian Penal Code", E9/7, 18 May 2009 ("OCP Submission"), paras 24-26, 30-32, 35-36; "Group 1 – Civil Parties' Co-Lawyers' Submission on the Preliminary Objection", E9/5, 18 May 2009 ("CPG1 Submission"), paras 3-18, 25-26; "Submission of Co-Lawyers for Civil Parties – Group 2 – on the preliminary objection concerning termination of prosecution of domestic crimes", E9/8, 18 May 2009 ("CPG2 Submission"), paras 6, 10-17; "Response (Group 3) to the preliminary objection concerning expiry of the Statute of limitations for domestic crimes", E9/6, 18 May 2009 ("CPG3 Submission"), paras 8-17, 23-26, 28-29.

⁸ OCP Submission, para. 27; Defence Submission, para. 30; CPG1 Submission, para. 28; CPG2 Submission, paras 21-22.

⁹ OCP Submission, para. 28.

¹⁰ Defence Submission, para. 30 (citing "Decision of the Constitutional Council," 092/003/2007 of 10 July 2007, E9/9.5.)

¹¹ Defence Submission, para. 31, CPG1 Submission, para. 28, CPG2 Submission, para. 22.

¹² "Closing Order indicting Kaing Guek Eav alias Duch", D99, 8 August 2008, as amended by the Pre-Trial Chamber's "Decision on Appeal Against the Closing Order indicting KAING Guek Eav alias 'Duch'", D99/3/42, dated 5 December 2008 ("Amended Closing Order"), para. 152.

- A. Whether in the present case, the applicable limitation period under the 1956 Penal Code, or if necessary under subsequent Cambodian Codes, may be considered to have been interrupted or suspended (and if so, from and until when)?;
- B. Is extension of the limitation period in this manner consistent with national or international standards (notably those expressed in Articles 14 and 15 of the ICCPR)? If finding that the applicable limitation period within domestic law had already expired before its “extension” under Article 3 (new) of the ECCC Law, may the Chamber, consistent with the principle of legality, instead interpret Article 3 (new) of the ECCC Law as re-instating the right to prosecute these domestic crimes?

A. THE APPLICABLE LIMITATION PERIOD AND LEGAL FRAMEWORK

9. In order to determine the relevant Cambodian law concerning the applicable limitation period, the Chamber referred to a number of domestic legislative provisions which have successively addressed this issue.

10. Article 109 of the 1956 Penal Code establishes a ten year limitation period for felonies, five years for misdemeanours and one year for petty offences. These run from the date of commission and are interrupted by judicially-ordered investigations.¹³ This limitation period was referred to subsequently in Article 37 of the 1964 Code of Criminal Procedure, which incorporated by reference the time limits contained in the 1956 Penal Code.¹⁴

11. Article 30 of the “Provisions dated September 10, 1992 Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period” (“1992 UNTAC Law”) provides that “[t]he Statute of Limitations is three years for misdemeanours and ten years for felonies. The Statute of Limitations ceases to run as soon as any legal process has been initiated.” The 2007 Code of Criminal Procedure of the Kingdom of Cambodia (“2007 Code of Criminal Procedure”) contains a prescription period of 15 years for a felony, five years for a misdemeanour and one year for a petty offence, and clarifies that crimes against humanity, genocide and war crimes have no statute of limitations.¹⁵ It also provides rules similar to those

¹³ Article 109 of the 1956 Penal Code reads: “A perpetrator shall not be punishable in respect of a felony committed more than ten years previously, a misdemeanour committed more than five years previously, or a petty offence committed more than twelve months previously” (unofficial translation); *see also* Article 111 of the 1956 Penal Code (indicating that the prescriptive period starts to run at the time the alleged acts were committed) and Articles 112-114 (providing that any act of investigation or of prosecution interrupts the time limit, which resumes after the last such act (in the case of a felony), for a new period of 10 years).

¹⁴ *See* Article 37 of the 1964 Code of Criminal Procedure of the Kingdom of Cambodia: “L’action publique pour l’application de la peine peut s’éteindre seulement par [...] la prescription telle qu’elle est réglée aux articles 109 et 111 du Code Pénal [...]”; *see also* Articles 38 and 21 of the same Code (envisaging that prosecution may be stopped or suspended in order to obtain a civil court decision on a preliminary objection).

¹⁵ Articles 9 and 10 of the 2007 Code of Criminal Procedure.

contained in the 1956 Penal Code concerning the start of the time limit and the interruptive effect of an act of prosecution or investigation.¹⁶

12. On a plain reading of Articles 109 to 114 of the 1956 Penal Code (the law applicable at the time of commission of the alleged crimes), in the absence of any act of investigation or prosecution which interrupted the limitation period in relation to the domestic crimes, this period expired at the latest ten years after the conclusion of the indictment period, namely on 6 January 1989. Despite the express request of the Chamber, neither the Co-Prosecutors nor any other party has provided any evidence to show that the crimes with which the Accused is charged were investigated or prosecuted prior to that date and nor has the Chamber identified any such material.¹⁷ Hence there is no available evidence to satisfy the Chamber that the applicable limitation period was interrupted by the application of Articles 112 to 114 of the 1956 Penal Code.¹⁸

13. Article 3 and Article 3 (new), which were promulgated in 2001 and 2004 respectively, added an initial 20 years and subsequently 30 years to the limitation period, thus extending this total period to 40 years. The Chamber shall first determine whether the limitation period had already expired by the time the ECCC investigation against the Accused commenced.

14. The Chamber has decided that between 1975 and 1979, there was no legal or judicial system in Cambodia, and accordingly that no criminal investigations or prosecutions were possible during that period.¹⁹ The Chamber agrees that the limitation period therefore did not commence between these dates. The Chamber has, however, failed to reach agreement on whether or not the applicable limitation period was interrupted or suspended between 1979 and 1993 and thus whether this period had extinguished by the time Article 3 and Article 3 (new) were promulgated. The separate opinions of Judges NIL Nonn, YA Sokhan and THOU Mony, and of Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE, follow.

¹⁶ Article 11 of the 2007 Code of Criminal Procedure provides: “The duration of the statute of limitation commences at the time the offence was committed. The statute of limitations is interrupted by an act of prosecution or investigation. The end of any such act of prosecution or investigation restarts a new period of limitation pursuant to the provisions of Article 10 of this Code [...]”.

¹⁷ Direction Requesting Written Submissions on Preliminary Objection, E9/4, 23 April 2009.

¹⁸ See Decree Law No. 1 on the Organization of the People’s Revolutionary Tribunals (Provinces and Capital) (15 July 1980), E9/9.3, ERN (English) 00336567-00336569, 15 July 1979 (mentioning the so-called POL Pot – IENG Sary Trial, the only known occasion when crimes committed in S-21 were prosecuted, although not in relation to the Accused). As that trial concluded in 1979, it has negligible impact on the calculation of the applicable limitation period.

¹⁹ Case File 001/18-07-2007/ECCC/TC, *KAING Guek Eav alias Duch*, Judgement, Trial Chamber, E188, 26 July 2010, Section 2.2.3.

1. Opinion of Judges NIL Nonn, YA Sokhan and THOU Mony

15. The Trial Chamber Cambodian judges now consider whether the applicable period of limitation started to run during the period between January 1979 and 1993.

16. The Cambodian judges note that according to the European Court of Human Rights, one of the purposes of statutes of limitations is “ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time.”²⁰ If not considered part of substantive law (in which case it is subject to the principles of strict construction), a legal provision may be interpreted according to its purpose.²¹ In Cambodian law, the statute of limitations figures occasionally in the criminal code but appears more recently in procedural codes.²² A prescriptive period neither provides rights to offenders against the State nor extinguishes the criminality of an act after its expiry. According to Cambodian law, a statute of limitations extinguishes the public action, but not the criminality of the conduct in question.²³ It is not therefore part of substantive criminal law. The Cambodian judges consider that the drafters of the 1956 Penal Code proceeded on the assumption that during any ten-year period of limitation, State institutions capable of commencing an investigation or prosecution against the alleged perpetrators of the crimes in question existed. When circumstances are such that objectively, an investigation of crimes committed by an alleged perpetrator is impossible, the statute of limitations cannot apply. The Cambodian judges note also that the international judges agree that between 1975 and 1979, the statute of limitations did not run because of the absence of a judicial system.²⁴

²⁰ *Coëme a.o. v. Belgium*, Judgement, European Court of Human Rights (“ECtHR”), (nos 32492/96, 32547/96, 32548/96, 33209/96, 33210/96), 22 June 2000, para. 146 (E9/5.2); see also *Stubbings a. o. v. the United Kingdom*, Judgement, ECtHR, Reports 1996-IV, 22 October 1996, pp. 1502-1503, para. 51; *Kononov v. Latvia*, Grand Chamber Judgment, ECtHR, (no. 36376/04), 17 May 2010, overturning (on different grounds) the judgment *Kononov v. Latvia*, Judgment, ECtHR, (no. 36376/04), 24 July 2008.

²¹ See Article 5 of the 2009 Penal Code; Article 22 of the Rome Statute; see further Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (2nd edition, Beck), Article 22, para. 46.

²² Prescriptive periods were regulated in Article 109 of the 1956 Penal Code, Article 30 of the 1992 UNTAC Criminal Code, and Article 10 of the 2007 Code of Criminal Procedure. The placement of such a provision is only indicative. For instance, German jurisprudence clarifies that statutes of limitations in criminal law are a separate category, neither substantive nor only procedural in character (German Constitutional Court, BVerfGE 25, 269 (2 BvL 15, 23/68)).

²³ See Article 110 of the 1956 Penal Code: “On the expiration of the limitation periods specified above, the civil party’s action for reparation shall be barred on the same basis as the criminal prosecution”; see also Articles 7 and 8 of the 2007 Code of Criminal Procedure (providing reasons for extinguishing a charge in a criminal action, including the expiration of the statute of limitations).

²⁴ See *supra*, para. 14.

17. Further, practice from other national systems shows that a functioning judicial system is a prerequisite for the running of a statute of limitations.²⁵

18. The Cambodian judges now consider whether the facts before them lead to the conclusion that the statute of limitations contained in the 1956 Penal Code was inapplicable at least until 1993.

19. First, while some domestic trials were conducted during this period (increasing from 1982 onwards), the Cambodian judges find that national judicial capacity was severely lacking in this period due to the destruction of the judicial system by the Democratic Kampuchea regime. Based upon the evidence and other material before them, they conclude that a lengthy period was needed to re-establish a judicial system and to educate lawyers, prosecutors and judges. For instance, it took until 1980 and 1982 respectively to issue decrees concerning the organisation of the judiciary,²⁶ while in 1985 and 1987, decrees were issued relating to the establishment of the Supreme Court.²⁷ In 1980, a decree relevant to criminal law was issued with retroactive effect to 7 January 1979.²⁸ The Cambodian judges find therefore that from 1979 until 1982, the judicial system of the People's Republic of Kampuchea did not function at all, and operated only to a very limited extent during the years that followed. The weakness of the judicial system alone is

²⁵ For example, the German Legislature decided that the German courts had been incapacitated from 1945 to 1949, i.e. until the occupation ended and the new Constitution entered into force (and during the Nuremberg trial and the post-Nuremberg trials in the occupied areas) (Gesetz ueber die Berechnung strafrechtlicher Verjährungsfristen, BGBI I 1965, 315, 22 April 1965). On 11 June 1864, the United States Congress passed “[a]n act in relation to the limitation of actions in certain cases”, which stated “[t]hat whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or arrest of such person: Or whenever, after such action, civil or criminal, shall have accrued, such person cannot by reason of such resistance of the laws, or such interruption of judicial proceedings, be served with process for the commencement of the action: The time during which such person shall be beyond the reach of judicial process shall not be deemed or taken as any part of the time limited by law for the commencement of such action.” (cited in *Stewart v. Kahn*, 78 U.S. 11 Wall., 493 (1870) E9/8.5; see also the Supreme Court of the United States: *Hanger v. Abbott*, 73 U.S. 532, 1867 WL 11246 (U.S. Ark.) E9/7.14 (finding that the statute of limitations (for a civil claim) did not run while the courts in Arkansas were closed on account of a three-years rebellion)). In France, the 12 May 1950 Law, which amended the 29 March 1942 Law concerning “la prescription de l’action publique et des peines”, provides: «Pour toute infraction non couverte par la prescription lors de la publication de la présente loi, les délais de prescription de l’action publique [...] sont suspendus jusqu’à la date de cessation des hostilités.» (*Journal officiel de la République française*, 13 mai 1950, Loi no. 50-529, p. 5243). This legislation suspended the limitation period for the duration of the war. Upon cessation of hostilities, the time limit resumed and continued to run for the duration that had remained at the outbreak of hostilities.

²⁶ Decree Law No. 1 on the Organization of the People's Revolutionary Tribunals (Provinces and Capital) (15 July 1980), E9/9.3, ERN (English) 00336567-00336569; Decree Law No. 1 on the Organization of the People's Revolutionary Tribunals (Provinces and Capital) (15 May 1982); Decree Law No. 2: Law on the Organization of the Courts and Prosecution (10 February 1982).

²⁷ Decree Law No. 28 on the Creation of the People's Supreme Court and the General Prosecutor at the People's Supreme Court (31 July 1985); Decree Law No. 34 on the Organization of the activities of the People's Supreme Court and of the General Prosecutor attached to the People's Supreme Court (26 August 1987).

²⁸ Decree Law No. 2 on the Penalty for Betraying the Revolution and Various Penalties for Other Betrayals (15 May 1980), E9/9.4.

not, however, sufficient to explain the failure to investigate or prosecute the Accused after 1982 for crimes falling within the jurisdiction of the ECCC.

20. The Cambodian judges consider that until the Kingdom of Cambodia was created by the promulgation of its Constitution on 24 September 1993, a number of historical and contextual considerations significantly impeded domestic prosecutorial and investigative capacity, particularly in relation to crimes allegedly committed by the Accused, a person who falls within the personal jurisdiction of the ECCC:

- a) From 1979 until 1998, Cambodia endured a civil war during which the Khmer Rouge controlled parts of the nation's territory;²⁹
- b) The Khmer Rouge and their Cambodian coalition partners were recognised internationally as Cambodia's government;³⁰ and
- c) The only domestic judicial system, albeit very weak, that existed at any time until 1993 was that of the People's Republic of Kampuchea (between 1979 and 1989) and later, the State of Cambodia (1989 to 1993). From 1985 onwards, efforts to achieve peace predominated.³¹ During that time, the Khmer Rouge were of significance to any peace negotiations. As the weakened judicial system was also not fully independent,³² such considerations are relevant in finding that investigations and prosecutions for crimes falling within the jurisdiction of the ECCC and allegedly committed by the Accused could not objectively be initiated.
- d) Further, the Cambodian judges note that from 1979, the Accused continued to serve the Democratic Kampuchean regime, including for a period in China, until he lost contact with his commanders around 1993. According to his statement to the Co-Investigating Judges, he then distanced himself from the Khmer Rouge.³³ Using a different name (Hang Pin), the Accused worked as a teacher for the Kingdom of Cambodia, returning to

²⁹ *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* (with annexes), concluded at Paris on 23 October 1991 (authentic texts: Chinese, English, French, Khmer and Russian), 1663 UNTS No. 28613 ("1991 Paris Peace Agreement"); Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*, 13 (2005), 4.14, ERN 00078730-00078731, pp. 9-10 (referred to in OCP Submission); Nayan Chanda, *Brother Enemy: the War after the War*, E3/193, ERN00192562, p. 377.

³⁰ The Khmer Rouge represented Cambodia in the United Nations between 1979 and 1982 as "Democratic Kampuchea." From 1983 until 1990, they represented Cambodia at the United Nations together with other Cambodian groups as the "Coalition Government of Democratic Kampuchea." In 1990, the Coalition Government was renamed the "National Government of Cambodia": see Nayan Chanda, *Brother Enemy: the War after the War*, E3/193, ERN 00192562, p. 377; Raoul M. Jennar, *Les clés de Cambodge*, E3/515, ERN (Fr) 00385773, 00385826-00385847, pp. 29, 84-105 (describing the United Nations seat as "de facto vacant" in 1990).

³¹ Raoul M. Jennar, *Les clés de Cambodge*, E3/515, ERN (Fr) 00385773, 00385838, 00385841, pp. 29, 96, 99; United Nations Security Council Resolution 668, SC/RES/668 (1990); United Nations General Assembly Resolution A/RES/45/3, 15 October 1990.

³² See Article 60 of the 1981 Constitution of the People's Republic of Kampuchea; Decree Law No. 4, Law on the Organization of the National Assembly and the Council of State of the People's Republic of Kampuchea (10 February 1992); Koy Neam, *Cambodian Judicial Process*, E9/9.10, ERN 00336591, page 4; *The Cambodian Government in Report to the Human Rights Committee in 1993* (ICCPR/C/81/Add. 12, 23 September 1998), E9/6.8, ERN (Fr) 00333208, para. 212; *United Nations, Report on the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135, A/53/850-S/1999/231*, 18 February 1999, E9/5.13, ERN 00330672, para. 43; *Report of United Nations Secretary-General for Human Rights, Mr. Michael Kirby (Australia) to the Commission on Human Rights, Cambodian Human Rights in 1994*, E/CN.4/1994/73, E9/6.6, ERN (Fr) 00333197, 00333198, paras 137, 155.

³³ "Written Record of Interview of Charged Person of 21 January 2008", E3/11, ERN (English) 00159556, p. 5.

Khmer Rouge-controlled territory where he was arrested by Cambodian authorities in 1999, after the Khmer Rouge finally disbanded.³⁴ While under the protection of the Khmer Rouge, the Accused therefore enjoyed impunity from investigation or prosecution.³⁵

21. The Paris Peace Agreement, which concluded in 1991, emphasised the destabilising effects of the conflict that preceded it:

Concerned by the tragic conflict and continuing bloodshed in Cambodia, the Paris Conference on Cambodia was convened, at the invitation of the Government of the French Republic, in order to achieve an internationally guaranteed comprehensive settlement which would restore peace to that country [...].³⁶

22. The Paris Peace Agreement further noted the extremely unstable situation in Cambodia, referring to the high-level measures that had been employed to “end [...] the bloodshed in Cambodia at the earliest possible date.”³⁷ The Agreement referred also to the need to release prisoners of war and civilian internees, to “restore and maintain peace in Cambodia, to promote national reconciliation [...] [and realize] special measures to assure the protection of [...] human rights and the non-return of the policies and practices of the past.”³⁸ All these statements confirm that Cambodia, until shortly before the convening of the Paris Peace Conference in 1991, had effectively been in a state of war, and that this impacted profoundly upon the ability of its legal system to safeguard fundamental rights.

23. The Paris Peace Agreement ushered in a transitional period during which United Nations Transitional Authority in Cambodia (“UNTAC”) pursued its mission goals of overseeing the disarmament process and the democratic elections that were held in 1993.³⁹ During this transitional period, however, the Khmer Rouge formed part of the Supreme National Council of Cambodia, which was the sole legitimate body and source of authority in Cambodia.

³⁴ See Amended Closing Order, para. 166; T., 27 August 2009 (Accused), pp 98-101; T., 2 September 2009 (Accused), pp 41-46 (describing his continuing allegiance to the Khmer Rouge (albeit with diminishing enthusiasm) until his arrest).

³⁵ The Cambodian judges note that according to the 1956 Penal Code, the suspension or interruption of a statute of limitations is not justified by the flight of a suspect from the jurisdiction of a State, because it remains possible for national authorities to start an investigation. Under some jurisdictions, fleeing the jurisdiction is nonetheless a ground for the suspension of a limitation period: *see e.g.* Section 3290 of Title 18 of the United States Code. The Accused however did not simply flee from the jurisdiction of Cambodia; he continued to serve the Khmer Rouge.

³⁶ 1991 Paris Peace Agreement, para. 1.

³⁷ 1991 Paris Peace Agreement, para. 8.

³⁸ 1991 Paris Peace Agreement, Preamble; *see further* Preamble to the 1992 UNTAC Law, where the Supreme National Council expressly recorded that it was “[c]oncerned that the structures, laws, and judicial institutions [of Cambodia] do not fully comply with the requirements of the Paris Agreement and are sometimes totally or partially lacking in certain areas, and in any case are inadequate to ensure public order and human rights throughout most of the territory,” and “[r]ecognizing that UNTAC has the responsibility to assist in establishing such structures, laws and judicial institutions where they are absent and to help improve them where they already exist in order to bring them to the requirements of the Agreement”.

³⁹ Paris Peace Agreement, Annex I.

24. The Paris Peace Agreement led to the establishment of the 1993 Constitution of the Kingdom of Cambodia, the principle of an independent judiciary and international support for the Royal Government of Cambodia, which was created in 1993 through a fair and free election without the participation of the Khmer Rouge.⁴⁰ The organization of the judiciary was the subject of legislation that year,⁴¹ but the factual situation in which it was to operate could not, realistically, change overnight. From this date, however, the new government was able to enact an increasing number of legislative measures, including the Law on the Outlawing of the “Democratic Kampuchea” Group in 1994, and in 1997, to request the assistance of the United Nations to negotiate and prosecute the crimes committed during the Democratic Kampuchean regime.⁴²

25. For these reasons, the Cambodian judges agree with the Co-Prosecutors and the Civil Parties⁴³ that the limitation period with respect to the domestic crimes allegedly committed by the Accused and falling within the jurisdiction of the ECCC started to run, at the earliest, on 24 September 1993 when the Kingdom of Cambodia was created, and did not run before that date. The Cambodian judges do not need to determine whether the limitation period was interrupted or suspended, given that the legal effects of both alternatives lead to the same result: the limitation period started to run in 1993. The Accused was arrested by the Cambodian authorities in 1999 in connection with crimes committed in S-21.⁴⁴ According to Cambodian law, an arrest interrupts the limitation period.⁴⁵ Upon the conclusion of any act interrupting this period, the ten-year limitation period starts to run anew. The ECCC investigation against the Accused commenced in 2006. The Cambodian judges therefore conclude that the statute of limitations for the domestic crimes allegedly committed by the Accused had not expired in 2006.

26. The Cambodian judges note that this decision relates only to the facts and the Accused before them. Judges do not legislate. They can only adjudicate the individual situation of each individual coming before them in judicial proceedings.

⁴⁰ Article 109 of the 1993 Constitution of the Kingdom of Cambodia.

⁴¹ Council of State/National Assembly, Decree/Law/06 K (On the Organisation and Activities of the Adjudicate Courts of the State of Cambodia).

⁴² See letter dated 21 June 1997 from the Royal Government of Cambodia requesting the assistance of the United Nations to investigate and prosecute the crimes committed during the Democratic Kampuchea regime (UN Doc. A/51/930-S/1997/488 (24 June 1997); UN Doc. A/RES/52/135 (27 February 1998), para. 16); Law on the Outlawing of the “Democratic Kampuchea Group”, promulgated on 15 July 1994 (Law No. 01.NS.94); see also Preamble of the *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*.

⁴³ See OCP Submission, paras 30, 36; CPG1 Submission, para. 12; CPG2 Submission, paras 12-13; CPG3 Submission, paras 8-17.

⁴⁴ See “Decision on Request for Release”, ECCC Trial Chamber, E39/5, 15 June 2009.

⁴⁵ See Article 112 of the 1956 Penal Code; Article 11 of the 2007 Code of Criminal Procedure.

2. Opinion of Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE

27. The Trial Chamber international judges agree with their Cambodian colleagues that many national legislatures have identified factors that have operated to suspend or interrupt the operation of a limitation period in the aftermath of national instability. While the Democratic Kampuchea regime undeniably weakened national judicial capacity in this period, the international judges are nevertheless unable to conclude that the applicable statute of limitations was suspended between 1979 and 1993 (and accordingly, that prosecution of domestic crimes was not extinguished by the time Article 3 and Article 3 (new) of the ECCC Law were promulgated in 2001 and 2004, respectively).

(i). *Criteria for the suspension or interruption of limitation periods.*

28. There are no generally-applicable rules at the international level which establish criteria for the suspension or interruption of statutory limitations. The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, a multilateral treaty promulgated in 1968, declared that international crimes – due to their innate gravity and the imperative of ending impunity for their commission – are not subject to statutes of limitation.⁴⁶ Even if this treaty can be considered to embody norms of general application,⁴⁷ it neither expressly applies to domestic crimes nor addresses the impact of national instability on pre-existing limitation periods in relation to them.

29. Some national practice suggests that limitation periods may not run during periods in which a judicial system was incapacitated due to war, or where the crimes in question were themselves committed by State officials. However, much of this State practice follows from national legislation expressly designed to enable the prosecution of offences that would otherwise be time-barred.⁴⁸ For the reasons described below, the international judges have found

⁴⁶ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 UNTS 73, entered into force on 11 November 1970.

⁴⁷ To date, this treaty has been ratified by only 53 countries. The Kingdom of Cambodia is not a signatory.

⁴⁸ See e.g., in France, the 12 May 1950 Law, which amended the 29 March 1942 Law concerning “la prescription de l’action publique et des peines” and which provides: «Pour toute infraction non couverte par la prescription lors de la publication de la présente loi, les délais de prescription de l’action publique [...] sont suspendus jusqu’à la date de cessation des hostilités.» (*Journal officiel de la République française*, 13 mai 1950, Loi no. 50-529, p. 5243). This legislation suspended the limitation period for the duration of the war; upon cessation of hostilities, the time limit resumed and continued to run for the duration that had remained at the outbreak of hostilities. In other cases, limitation periods were considered to be incapable of running for reasons that were not explicitly laid down in national laws, but which were instead identified by jurisprudence and based on the inability of national systems to prosecute perpetrators of serious crimes where those perpetrators were themselves responsible for the perpetuation of the oppressive regime, and preventing any real judicial investigation or form of redress for victims; see e.g. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1549-1550 (N.D. Cal. 1998) (noting that while the applicable limitation period had long expired, it was impossible for victims of the Argentinian military dictatorship to seek judicial recourse,

that no equivalent measure has been adopted to date by the Cambodian legislature.⁴⁹ Further, no Cambodian jurisprudence declaring the limitation period to have been suspended due to the incapacity of the judicial system prior to 1993 has been provided to, or located by, the Chamber.

30. Although the relevant national legislation does not expressly refer to the incapacity of the Cambodian judicial system and its possible implications for the applicable limitation period, the international judges consider that limited guidance may be sought from the above-mentioned international instrument and national practice.⁵⁰ They now consider whether the debilitating impact of the Khmer Rouge era may enable the international judges to deem this period to have been interrupted or suspended in the Democratic Kampuchea regime's aftermath.

(ii). *Evidence concerning the functioning of the Cambodian judicial system prior to September 1993.*

31. The principles distilled from the relevant national practice regarding the interruption or suspension of statutory limitations require proof, to the required standard, of the objective incapacity of the Cambodian legal system to undertake investigation or prosecution in the aftermath of the Democratic Kampuchea regime. It is undisputed that the judicial system during the Democratic Kampuchea regime was incapacitated and provided no possibility for the investigation or prosecution of crimes between 1975 and 1979.⁵¹ However, the Prosecution has failed to fulfil its evidentiary burden of showing that, as a matter of objective fact, no prosecution or investigation of the crimes committed during this regime would have been possible between 1979 and 1993, even if that system was in practice hampered by resource, security and other constraints.

32. The material available on the case file in relation to the aftermath of the Democratic Kampuchea regime suggests a severely weakened and compromised judicial system due to the impact, *inter alia*, of the destruction of public institutions and qualified personnel during this period, and of ongoing civil war.⁵² This material does not, however, permit the international

requiring the equitable tolling (suspension or interruption) of the statute of limitations, as the pervasiveness of the military regime's reign of terror may have rendered it possible for the plaintiffs to demonstrate that members of the judiciary neglected to apply laws granting relief out of fear of becoming the next victim of the so-called dirty war.)

⁴⁹ See *infra*, paras 46-49 (noting that the 2001 Constitutional Council Decision, which analyses Article 3 (new) of the ECCC Law but does not itself suspend the applicable limitation period, is not akin to such measures).

⁵⁰ Cf. Article 33 (new) of the ECCC Law (providing that where existing procedures do not deal with a particular matter, guidance "may be sought in procedural rules established at the international level.")

⁵¹ Case File 001/18-07-2007/ECCC/TC, *KAING Guek Eav alias Duch*, Judgement, Trial Chamber, 26 July 2010, Section 2.2.3; see *supra* para. 14.

⁵² See Amended Closing Order, para. 166; T., 2 September 2009 (Accused), pp. 42-44; T., 27 August 2009 (Accused), p. 98; see also United Nations, *Report on the Group of Experts for Cambodia Established Pursuant to*

judges to conclude, as a matter of objective fact, that no prosecution or investigation would have been possible from 1979 until 1993. To the contrary, there is evidence to indicate that from 1979 onwards, laws and decrees were progressively enacted.⁵³ For instance, in 1980 and 1982, decrees were issued concerning the organisation of the judiciary,⁵⁴ and in 1985 and 1987, in relation to the establishment of the Supreme Court.⁵⁵ A specific decree relevant to criminal law was also issued by decree in 1980 with retroactive effect as of 7 January 1979.⁵⁶

33. Although civil war and effective control by the Khmer Rouge over certain areas of the country presented genuine constraints in initiating prosecutions or judicial investigations, the international judges conclude that prosecutions or investigations were not precluded in all parts of the country. The international judges note that a large volume of material found at S-21 was collated and held from the period shortly after the Accused left the prison on 6 January 1979, at S-21 itself and later at the Documentation Center of Cambodia.⁵⁷ This material was used by scholars and authors from the early 1980s and was the basis for the expert testimony given at trial by Expert David CHANDLER. It was therefore available as the basis for investigation and trial during this time.

34. Further, the Co-Prosecutors seek the suspension or interruption of the limitation period until 24 September 1993; the date upon which the Kingdom of Cambodia was created by the promulgation of its Constitution.⁵⁸ Whilst undoubtedly a significant turning-point in Cambodia, it is not apparent from the available evidence that the promulgation of the Constitution restored to the Cambodian justice system the objective capacity to investigate or prosecute, or eradicated

General Assembly Resolution 52/135, A/53/850-S/1999/231, E9/5.13 and E9/7.26, para. 43, 18 February 1999; (noting the need to re-establish a judicial system and to educate lawyers, prosecutors and judges).

⁵³ See e.g. Decree Law No. 1 on the Organization of the People's Revolutionary Tribunals (Provinces and Capital) (15 July 1979), E9/9.3, ERN (English) 00336567-00336569 (establishing an extraordinary tribunal to try the "Pol Pot – Ieng Sary clique").

⁵⁴ Decree Law No. 1 on the Organization of the People's Revolutionary Tribunals (Provinces and Capital) (15 July 1980), E9/9.3, ERN (English) 00336567-00336569; Decree Law No. 1 on the Organization of the People's Revolutionary Tribunals (Provinces and Capital) (15 May 1982); Decree Law No. 2: Law on the Organization of the Courts and Prosecution (10 February 1982).

⁵⁵ Decree Law No. 28 on the Creation of the People's Supreme Court and the General Prosecutor at the People's Supreme Court (31 July 1985); Decree Law No. 34 on the Organization of the activities of the People's Supreme Court and of the General Prosecutor attached to the People's Supreme Court (26 August 1987).

⁵⁶ Decree Law No. 2 on the Penalty for Betraying the Revolution and Various Penalties for Other Betrayals (15 May 1980), E9/9.4.

⁵⁷ T., 6 August 2009 (David CHANDLER), p. 4; see also "Voices from S-21" (book) by David Chandler", E3/427, Preface, ERN 00192674.

⁵⁸ OCP Submissions, para. 36. This Constitution incorporates the principles laid down in the 1991 Paris Peace Agreement.

the various systemic weaknesses observed previously, many of which have proved enduring and continued well beyond 1993.⁵⁹

35. Based on the evidence before them, the international judges are unable to conclude that the Cambodian legal system was objectively incapable of launching investigations or prosecutions prior to 1993 and that the applicable limitation period should thus be considered to have been suspended or interrupted until that date. The international judges accordingly find that by 10 August 2001 and 27 October 2004, the dates on which Article 3 (new) of the ECCC Law sought to extend it, this limitation period had already expired.

B. IMPACT OF APPLICABLE INTERNATIONAL AND NATIONAL LEGAL STANDARDS

1. Opinion of Judges NIL Nonn, YA Sokhan and THOU Mony

36. The Trial Chamber Cambodian judges have previously found that the Accused can be prosecuted for the domestic crimes of murder and torture, as the limitation period established by the 1956 Penal Code had not expired by the time the ECCC investigation against the Accused commenced in 2006. Article 3 (new) of the ECCC Law does not prevent consideration of whether or not the limitation period for the domestic crimes allegedly committed by the Accused has expired. The Cambodian judges therefore do not need to consider whether Article 3 (new) of the ECCC Law is (as required by Article 33 (new), paragraph 2, of the ECCC Law) in accordance with Articles 14 and 15 of the ICCPR.

37. The Cambodian judges refer further to the decision of the Constitutional Council of 12 February 2001, the relevant portions of which state:⁶⁰

After hearing comments from its members [and a]fter conducting proper discussion according to legal procedure[, the Constitutional Council ...] is of the opinion that Paragraph 2, Article 3 of this [ECCC] Law extends for an additional 20 years the statute of limitations stipulated at 10 years in Article 109 of the 1956 Penal Code. This Paragraph unquestionably affects a fundamental principle, “the non-retroactivity of any new law over offences committed in the past”, which Cambodia, as other civilized countries, recognized both before 1975 and after 1978, including the transitional period of the Supreme National Council.

However, Cambodia has not ruled that this fundamental principle is of equal value with its Constitution, and therefore the Constitutional Assembly [...] was not bound by this principle in inscribing any article of the Constitution or its Preamble. Furthermore, whatever value this principle may have, and whether or not it has been inscribed, they

⁵⁹ See letter dated 21 June 1997 from the Royal Government of Cambodia requesting the assistance of the United Nations to investigate and prosecute the crimes committed during the Democratic Kampuchea regime, expressly on the basis that Cambodia lacked the resources or expertise to carry out such trials (UN Doc. A/51/930-S/1997/488 (24 June 1997); UN Doc. A/RES/52/135 (27 February 1998), para. 16).

⁶⁰ “Constitutional Council Decision on EC Law”, Decision no. 040/002/2001, 12 February 2001 unofficial (English) translation, E9/7.2.

had also to respect another principle, namely ‘every principle has its counterweight: every rule has its exception’. Whatever value a rule has, its exception will have equal value. Non-retroactivity, which is not mentioned in the Constitution, is found in the 1956 Penal Code. [...]

None of the above is considered to infringe the Constitution.

38. Based on this decision, the Cambodian judges note that the 2001 Constitutional Council decision in substance declared the extension of the limitation period as provided for in Article 3 (new) of the ECCC Law to be compatible with the 1993 Constitution of the Kingdom of Cambodia. They note further that they have no competence to review the correctness of decisions of the Constitutional Council.

2. Opinion of Judges Silvia CARTWRIGHT and Jean-Marc LAVERGNE

39. Article 33 (new) of the ECCC Law states that the ECCC shall exercise its jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the ICCPR. Directly applicable international standards are accordingly the concept of a fair trial as expressed in Articles 14 and 15 of the ICCPR, which Cambodia has ratified and incorporated into domestic law.⁶¹

40. Article 14 of the ICCPR safeguards the proper administration of justice, and upholds a range of individual rights, including the right to a fair, public and expeditious hearing by a competent, independent and impartial tribunal established by law.

41. The principle of legality, which includes the prohibition against the retroactive application of criminal law in Article 15(1) of the ICCPR, prohibits finding a person “guilty of any criminal offense on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed” or the imposition of a heavier penalty than the one applicable at the time the offence was committed.

42. Neither Article 14 nor Article 15 of the ICCPR refer directly to limitation periods. These sources therefore do not unequivocally interpret the scope of international fair trial principles in relation to the retroactive consideration or repeal of statutes of limitation.

43. The international judges accordingly find no express contradiction between the international fair trial standards applicable before the ECCC and retroactive amendment, by a national legislature, of a statutory limitation period. They are, however, unable to share the conclusion of their Cambodian colleagues that the 2001 Constitutional Council Decision

⁶¹ See Article 31, 1993 Constitution of the Kingdom of Cambodia.

amounted to a decision of this type by the Cambodian legislature. They are further concerned by the notion of “extension” of the limitation period as expressed in Article 3 (new) of the ECCC Law.

(i) *Interpretation of the “extension” of the limitation period in Article 3 (new) of the ECCC Law and the 2001 Constitutional Council Decision*

44. Although Article 3 (new) of the ECCC Law provides for the “extension” of the limitation period contained in the 1956 Penal Code, the clear meaning of the notion of “extension” is the lengthening or continuation of an existing period. As the international judges have concluded that this limitation period had already expired before the adoption of Article 3 (new), its “extension” was accordingly impossible. This conclusion accords with the general interpretative principle, reflected in the Cambodian Penal Code of 2009, that the need for interpretation does not arise where the law is clear, and that criminal provisions must be interpreted strictly.⁶²

45. Furthermore, the international judges are unable to conclude that the Cambodian legislature has ever expressly indicated an intention to suspend the applicable limitation period, or to reactivate the right to prosecute domestic crimes after its expiry. For the reasons indicated below, such a construction would also appear to contravene Cambodian law, including Article 7 of the 2007 Code of Criminal Procedure, which instead provides that “when a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated.”⁶³

46. In its 12 February 2001 decision, the Constitutional Council of the Kingdom of Cambodia determined that the notion of “extension” as expressed in Article 3 (new) of the ECCC Law did not infringe the 1993 Constitution of the Kingdom of Cambodia, without indicating that the notion of “extension” was to be interpreted beyond its ordinary meaning. In its reasoning, the Council merely noted that Article 3 (new) of the ECCC Law affects the “fundamental” principle of non-retroactivity of criminal law, but made no further ruling on the impact of this principle.⁶⁴

47. It is undisputed that a limitation period can be either extended before its expiry by an express legislative act, or in some exceptional circumstances declared to have been suspended during periods where it was impossible for objective reasons to prosecute. It is, however, essential that any such extension or suspension be overt if it is not to contravene the principle of non-retroactivity. The international judges consider that the Constitutional Council did not

⁶² See Article 5 of the 2009 Penal Code, promulgated on 30 November 2009, E180/1: “In criminal matters, the law shall be strictly construed. A judge may neither extend its scope of application nor interpret it by analogy.”

⁶³ The same provision lists expiration of a statute of limitation as one of the grounds for extinguishing a criminal charge.

⁶⁴ See *supra*, para. 37.

unambiguously state that the ECCC Law intended to impose either a retroactive suspension of the applicable limitation period, or the reinstatement of the right to prosecute after its expiry.

48. The Report of the Group of Experts for Cambodia,⁶⁵ in taking account of the limitation period in the 1956 Penal Code and the fact that the absence of any acts of investigation or prosecution before 1989 would debar prosecution, indicated that:

[B]ased on precedents in European States that prosecuted Nazi offenders after the apparent expiration of the prior statute of limitations – in particular Germany and France in the 1960s and 1980s – other options remain available to Cambodia. First the National Assembly could repeal the statute of limitations, and do so notwithstanding the fact that the limitation period had already expired. Second, the National Assembly could suspend the application of the statute from 1975 to the present on the ground that the judiciary has not been fully functioning.⁶⁶

49. The international judges acknowledge that the Cambodian legislature may, in 2001, have intended in similar terms to empower the ECCC to try domestic crimes, including by the reactivation of the power to prosecute after the expiry of the limitation period. This would, however, have required at least a clear and deliberate legislative act. Further, such overt reactivation of the right to prosecute would also need to ensure the rights of the Accused to a fair trial consistent with national or international standards, notably those expressed in Articles 14 or 15 of the ICCPR. The international judges will accordingly consider whether any conflict with these standards is entailed if interpreting the 2001 Constitutional Council Decision as reactivating the right to prosecute.

(ii) *Is the “extension” of a limitation period after its expiry consistent with applicable national and international standards?*

a. International and national practice

50. As neither Article 14 nor Article 15 refer directly to statutory limitations, “extension” by law of a limitation period, including reinstatement of the right to prosecute after its expiry, may also be considered permissible according to these sources, as it does not infringe the plain language of Article 15(1) of the ICCPR. Nonetheless, based on notions of foreseeability, legal certainty and fair trial principles, some national laws and jurisprudence of the European Court of

⁶⁵ The Group of Experts was established in 1998 pursuant to General Assembly Resolution 52/135 and recommended that in order to bring the Khmer Rouge leaders to justice, their criminal responsibility should be considered not only under international law, but also under domestic law. *See* UN Doc. A/53/850-S/1999/231, Annex (“Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135”, 18 February 1999), para. 84: “Crimes under domestic law will lack the special elements of many international crimes and thus generally be easier to prove.”

⁶⁶ “Report of the Group of Experts for Cambodia established pursuant to General Assembly Resolution 52/135”, 18 February 1999, para. 90.

Human Rights have considered that extension of a limitation period is only possible where the period in question has not expired.⁶⁷ In a decision in the *Kononov* case, the European Court of Human Rights interpreted Article 7 of the European Convention on Human Rights to prevent the reactivation of criminal action for domestic crimes which had already become subject to limitation.⁶⁸

51. Attempts to reactivate a right to prosecute a crime that is time-barred have also proved contentious before some national courts. In the United States, a law extending a criminal statute of limitations after the existing limitations period had expired was found to violate the United States Constitution when its application revived a previously time-barred prosecution.⁶⁹ Other countries also appear to have been reluctant in practice to extend limitation periods after their expiry.⁷⁰

b. Subsequent Cambodian legislation

52. The international judges have concluded that the domestic crimes of murder and torture, punishable under the 1956 Penal Code, were extinct due to the operation of the limitation period in Article 109 of that Code prior to the enactment of Article 3 (new) of the ECCC Law. They further note that in its most recent legislative amendments concerning limitation periods, the

⁶⁷ See for example the current provisions of Article 112-2 4° of the French Penal Code: “The following are immediately applicable to the repression of offences committed before their coming into force: ... 4° where the limitation period has not expired, laws governing the limitation of the public prosecution [...]” In relation to the principles of the foreseeability and accessibility of criminal provisions, see e.g., *Coëme a.o. v. Belgium*, Judgement, ECtHR, (nos 32492/96, 32547/96, 32548/96, 33209/96, 33210/96), 22 June 2000, E9/5.2, para. 145.

⁶⁸ *Kononov v. Latvia*, Judgment, ECtHR, (no. 36376/04), 24 July 2008, paras 144-146 (noting that while previously finding Article 7 of the Convention (which mirrors Article 15 of the ICCPR) not to prohibit the extension of limitation periods which have yet to expire, this provision does prevent restoring of the possibility of punishing crimes after their extinction. Although acknowledging that it was only from the restoration of Latvian independence in 1991 that the authorities of that State were able to bring criminal proceedings against those suspected of having committed offences between 1940 and 1991, prosecution of offences which were already time-barred was found to be contrary to the principle of foreseeability inherent in Article 7 of the Convention). These findings were undisturbed by the recent decision of *Kononov v. Latvia*, Grand Chamber Judgment, ECtHR (no. 36376/04), 17 May 2010, paras 228-233.

⁶⁹ See *Stogner v. California*, 539 U.S. 607, 620-621 (2003), E9/8.4. A vigorous dissent, however, reasoned that a law which does not alter the definition of the crime, but which only “[... revives an] expired prosecution is not within any of the recognized legal definitions of an *ex post facto* law” (*Stogner v. California*, 539 U.S. 639 (2003), E9/8.4).

⁷⁰ For example, German constitutional law has been found to forbid such extensions (German Constitutional Court, BVerfGE 25, 269 (2 BvL 15, 23/68)); Hungary has also refused to extend expired limitation periods on account of the prohibition against retroactivity (see Hungarian Constitutional Court, Decision on the Statute of Limitations, No. 2086/A/1991/14, 5 March 1992 (English translation and commentary in 1 *Journal of Constitutional Law in Eastern and Central Europe* 129-157 (1994)). Various other countries have recently abolished statutes of limitation for murder and other grave crimes, but have only applied the new laws prospectively in order to avoid allegations of retroactive legislation (see e.g., in The Netherlands, Wet van 16 november 2005 tot wijziging van het Wetboek van Strafrecht in verband met het vervallen de verjaringstermijn voor de vervolging van moord en enkele andere misdrijven alsmede enige aanpassingen van de regeling van de verjaaring en de stuiting van de verjaaring en de regeling van der strafverjaaringstermijn, Artikel III. Stb. 2005, 595, 13 December 2005, entry into force on 1 January 2005 and in Germany, Einfuehrungsgesetz zum StGB (Introduction Code to the Criminal Code), Articles 315 and 315a.)

Cambodian legislature has adopted a cautious and extensive interpretation of the prohibition against the retroactive application of criminal law. For instance, the 2007 Code of Criminal Procedure, which established lengthier limitation periods, provides in Article 610 that “the statute of limitations for a criminal action [...] for offences committed before the entry into force of this Code shall be governed by the provisions of the old law.” Article 7 of this Code further provides that “[w]hen a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated.”⁷¹

53. In general terms, the prohibition against the retroactive application of criminal law protects the values of legal certainty and safeguards the implementation of the principle of impartiality and objectivity by a State in accordance with the rule of law. An interpretation of Article 3 (new) of the ECCC Law as allowing a reinstatement of the right to prosecute domestic crimes in relation to a limited number of individuals and after the expiry of statutory limitations may accordingly be perceived as an infringement of that duty of impartiality and objectivity.⁷²

54. In summary, the international judges consider that the issue which arises in the present context is not the legitimacy of the prosecution of the offences of murder and torture (which are universally penalized as international crimes), but whether jurisdiction exists to try analogous offences as domestic crimes on the basis of the underlying domestic legal framework. This is primarily a question of construction of the relevant national law. For the foregoing reasons, the international judges consider this law to provide an insufficient basis for the prosecution of these crimes before the ECCC. There is, further, no provision of national or international law to

⁷¹ The same provision expressly lists expiration of a statute of limitations as one of the grounds for extinguishing a criminal charge.

⁷² See e.g. the constitutional guarantee of equality in Article 31 § 2 of the 1993 Constitution of the Kingdom of Cambodia, potentially ruling out differential treatment of the Accused in relation to prosecution for domestic crimes: “Les citoyens khmers sont égaux devant la loi. Ils bénéficient des mêmes droits et libertés et ont les mêmes devoirs.” (For different considerations governing the prosecution of international crimes, see Case File 001/18-07-2007/ECCC/TC, *KAING Guek Eav alias Duch*, Judgement, Trial Chamber, E/188, 26 July 2010, Section 1.4.2). As noted, the Cambodian legislature has had several opportunities since 1979 (notably in 1992 and 2007) to clarify the legal consequences of the impact of the DK period on the Cambodian judiciary, but on these occasions neither declared the limitation period in the 1956 Penal Code to have been interrupted or suspended between 1979 and 1993 nor expressly re-instated the right to prosecute domestic crimes for which this period may have since expired; see further Preamble to the 1992 UNTAC Law, where the Supreme National Council expressly recorded that it was “[c]oncerned that the structures, laws and judicial institutions [of Cambodia] do not fully comply with the requirements of the Paris Agreement and sometimes totally or partially lacking in certain areas, and in any case are inadequate to ensure public order and human rights throughout most of the territory,” and “[r]ecognizing that UNTAC has the responsibility to assist in establishing such structures, laws and judicial institutions where they are absent and to help improve them where they already exist in order to bring them up to the requirements of the Agreement”; see also *supra*, para. 13 (noting that Article 3 (new) of the ECCC Law has twice extended the duration of the limitation period, first for an additional period of 20 years, then for a global additional period of 30 years). No official explanation or rationale appears to have been given for such extension.

support the interpretation of Article 3 (new) of the ECCC Law as a permissible reinstatement of the right to prosecute the Accused for these crimes.

55. Due to the substantial overlap between the elements of these domestic crimes and their international corollaries, this finding has had no impact on the Chamber's evaluation of the totality of the Accused's criminal culpability, or on the sentence ultimately imposed.⁷³

IV. DECISION

56. Article 14 (new) of the ECCC Law provides that "a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges." In the absence of an affirmative majority, the Chamber is unable to consider the guilt or innocence of the Accused with respect to domestic crimes. The absence of the required majority consequently creates a barrier to the continuation of the prosecution against the Accused for domestic crimes before the Trial Chamber of the ECCC.

Done in Khmer, English and French.

Dated this twenty-sixth day of July 2010
At Phnom Penh
Cambodia

Judge NIL Nonn
Presiding

Judge Silvia CARTWRIGHT

Judge YA Sokhan

Judge Jean-Marc LAVERGNE

Judge THOU Mony

[Seal of the Tribunal]

⁷³ Case File 001/18-07-2007-ECCC/TC, *KAING Guek Eav alias Duch*, Judgement, Trial Chamber, E/188, 26 July 2010, Section 3 and Disposition.