ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to 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.

Case File No: 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146)

Before: **Judge PRAK Kimsan, President**
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: **15 February 2011**

PUBLIC

DECISION ON APPEALS BY NUON CHEA AND IENG THIRITH AGAINST THE CLOSING ORDER

Co-Prosecutors:

CHEA Leang
Andrew T. CAYLEY

Accused:

IENG Sary
IENG Thirith
NUON Chea
KHIEU Samphan

Civil Party Lawyers:

NY Chandy
Lyma Thuy NGUYEN
HONG Kimsuon
Pascal AUBOIN
PICH Ang

Co-Lawyers for the Accused:

ANG Udom
Michael G. KARNAVAS
PHAT Pouv Seang
Diana ELLIS
SON Arun

CHET Vanly
VEN Pov
LOR Chhunthy
Olivier BAHOUGNE
KIM Mengkhy
MOCH Sovannary
Christinne MARTINEAU
Elisabeth RABESANDRATANA
Philippe CANNONE
Martine JACQUIN
Annie DELAHIE
Fabienne TRUSSES-NAPROUS
KONG Pisey
YUNG Phanit
SIN Soworn
Silke STUDZINSKY
Mahdev MOHAN
Patrick BAUDOIN
Marie GUIRAUD
TY Srinna
Ferdinand DJAMMEN-NZEPA
Isabelle DURAND
Emmanuel ALTIT
Emmanuel JACOMY
Barnabe NEKUIE
Daniel LOSQ
Julien RIVET
Francoise GAUTRY
ANG Pich
Laure DESFORGES

Michiel PESTMAN
Victor KOPPE
SA Sovan
Jacques VERGÈS
Philippe GRECIANO

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia is seised of the "Ieng Thirith Defence Appeal from the Closing Order" ("Ieng Thirith Appeal"),[1] filed by the Co-Lawyers for Ieng Thirith on 18 October 2010 and Nuon Chea's "Appeal Against the Closing Order" ("Nuon Chea Appeal"),[2] filed by the Co-Lawyers for Nuon Chea on 18 October 2010.

I. PROCEDURAL HISTORY

1. On 14 January 2010, the Co-Investigating Judges notified the Parties that they considered the investigation in Case File 002/19-09-2007-ECCC/OCIJ ("Case File 002") to be concluded.[3] Case File 002 was forwarded to the Co-Prosecutors pursuant to Internal Rule 66.[4]

2. On 16 August 2010, the Co-Prosecutors issued their Rule 66 Final Submission,[5] which was notified to the Parties on 18 August 2010.

3. On 16 September 2010 the Co-Investigating Judges filed the Closing Order,[6] indicting the Charged Persons Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan with crimes against humanity, genocide, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the 1956 Penal Code.[7] The Closing Order was notified to the parties on the same day.

4. On 20 September 2010, the Co-Lawyers for Ieng Thirith filed a Notice of Appeal against the Closing Order,[8] and on 18 October 2010, they filed an Appeal against the Closing Order ("Ieng Thirith Appeal").[9] The Appeal was notified in English on 19 October 2010 and in Khmer on 21 October 2010.

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[1] Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, D427/2/1 ("Ieng Thirith Appeal").
[2] Appeal Against the Closing Order, 18 October 2010, D427/3/1 ("Nuon Chea Appeal").
[3] Notice of Conclusion of Judicial Investigation, 14 January 2010, D317.
[4] Internal Rules (Rev. 4), 11 September 2009, Internal Rule 66.
[5] Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390.
[6] Closing Order, 16 September 2010, D427 ("Impugned Order").
[7] Impugned Order, para. 1613.
[8] Ieng Thirith Defence Notice of Appeal against the Closing Order, 20 September 2010, D427/2.
[9] Ieng Thirith Appeal.

5. On 21 September 2010, the Co-Lawyers for Nuon Chea filed a Notice of Appeal,[10] and on 18 October 2010, they filed an Appeal against the Closing Order ("Nuon Chea Appeal").[11] The Appeal was notified in English on 19 October 2010 and in Khmer on 21 October 2010.

6. On 6 October 2010, the Co-Prosecutors filed a "Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith Against the Closing Order and Consequent Extension of Page Limit" ("Co-Prosecutors' Request").[12] The Co-Prosecutors' Request was notified to the parties on 18 October 2010.

7. On 22 October 2010, the Civil Party Lawyers enquired whether they would be permitted to file a response or observations on the Appeals against the Closing Order.[13]

8. On 28 October 2010, the Pre-Trial Chamber issued an order permitting the Co-Prosecutors to file a Joint Response to the Appeals from Ieng Sary, Ieng Thirith and Nuon Chea against the Closing Order within 15 days of the notification of the last of those Appeals in English and Khmer.[14] The Pre-Trial Chamber considered that the Appeal from Khieu Samphan raised separate grounds of appeal and that it would be more apposite for the Co-Prosecutors to respond to it separately.[15] The Pre-Trial Chamber also confirmed the Civil Parties' right to file observations in support of the Prosecution's responses to the Appeals against the Closing Order within five days.[16]

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[10] Notice of Appeal against the Closing Order, 21 September 2010, D427/3.
[11] Nuon Chea Appeal.
[12] Co-Prosecutors' Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith Against the Closing Order and Consequent Extension of Page Limit, 6 October 2010, D427/1/5 ("Co-Prosecutor' Request").
[13] Email dated 22 October 2010 from the Case Manager of the Civil Parties Unit to a Greffier of the Pre-Trial Chamber.
[14] Decision on Co-Prosecutors' Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith against the Closing Order and Consequent Extension of Page Limit, 28 October 2010, D427/1/8, p. 6.
[15] Decision on Co-Prosecutors' Request to File a Joint Response to the Appeal Briefs of Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith against the Closing Order and Consequent Extension of Page Limit, 28 October 2010, D427/1/8 ("Decision on Co-Prosecutors' Request"), para. 13.
[16] Decision on Co-Prosecutors' Request, p. 6.

9. On 19 November 2010, the Co-Prosecutors filed their Joint Response to the Appeals ("Co-Prosecutors' Response")[17] which was notified to the Parties in Khmer and English on 24 November 2010.

10. In anticipation of the Co-Prosecutors' Response, the Co-Lawyers for Ieng Thirith filed on 18 November 2010, a request for an extension of time to reply[18] which was notified to the Parties on 19 November 2010 in Khmer and English.

11. By the notification of the Co-Prosecutors' Response on 24 November 2010, the Pre-Trial Chamber issued instructions permitting the Defence Teams to file written replies to the Co-Prosecutors' Response within 10 days of its notification.

12. On 26 November 2010, a first group of Civil Party Lawyers filed their Observations on the Appeals ("Civil Party Lawyers' Observations I"), in Khmer and French only.[19] The Civil Party Lawyers' Observations I were notified to the Parties on 29 November in Khmer and French and on 8 December 2010 in English.

13. On 29 November 2010 a second Group of Civil Party Lawyers filed their Observations ("Civil Party Lawyers' Observations II") in Khmer and French only .[20] These were notified to the Parties 30 November 2010. The Civil Party Lawyers' Observations II were filed and notified in English on 28 December 2010.

14. On 29 November 2010 a third Group of the Civil Party Lawyers filed their Observations on the Appeals ("Civil Party Lawyers' Observations III") in Khmer only .[21] These were notified to the Parties 29 November 2010 in Khmer and the English version was notified on 7 December 2010.

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[17] Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010, D427/2/7, D427/3/6 ("Co-Prosecutors' Response).
[18] Ieng Thirith Defence Request for Extension of Time to Reply to the Co-Prosecutors' Joint Response to the Appeals of Ieng Sary, Ieng Thirith and Nuon Chea against the Closing Order, 18 November 2010, D427/2/5.
[19] Combined Response by *Avocats Sans Frontières* France Co-Lawyers for the Civil Parties to the Appeals by IENG Sary, IENG Thirith and NUON Chea against Co-Invevstigating Judges' Closing Order, 26 November 2010, D427/1/18 ("Civil Party Lawyers' Observations I").
[20] Joint Observations on Mr Nuon Chea, Mr Ieng Sary and Mrs Ieng Thirith's Appeals against the Closing Order, 29 November 2010, D427/1/19 ("Civil Party Lawyers' Observations II").
[21] Observations by Civil Party Co-Lawyers regarding the Appeals by Nuon Chea, Ieng Sary and Ieng Thirith against Closing Order, 29 November 2010, D427/1/20 ("Civil Party Lawyers' Observations III").

15. On 6 December 2010, the Co-Lawyers for Ieng Thirith filed a Reply to the Co-Prosecutors' Response ("Ieng Thirith Reply"),[22] which was notified to the Parties on the same day. They did not file a reply to the Observations filed by the Civil Party Lawyers.

16. On 6 December 2010, the Co-Lawyers for Nuon Chea filed a Reply to the Co-Prosecutors' Response ("Nuon Chea Reply"),[23] which was notified to the Parties on 7 December 2010. They did not file a reply to the Observations filed by the Civil Party Lawyers.

17. On 13 January 2011, the Pre-Trial Chamber announced, in writing, its determination of the final disposition on the Appeals indicating that "the reasons for this decision shall follow in due course."[24]

THE PRE-TRIAL CHAMBER DECIDED UNANIMOUSLY THAT:

1. The Appeal is admissible in its form;
2. Grounds one, two, three, four and five of the Nuon Chea Appeal and grounds one, two, three, four, five (partially) and seven (partially) of the Ieng Thirith Appeal are admissible. The rest of the grounds of these appeals are inadmissible. The inadmissible sub-grounds of grounds five and seven of the Ieng Thirith Appeal are:
   - Ground 5, in so far as it alleges that the Co-Investigating Judges's decision to confirm jurisdiction with respect to domestic crimes charged under the 1956 Penal Code is in violation of the Ieng Thirith's right to equality before the law;
   - Ground 7, in so far as it alleges that the Co-Invesstigating Judges failed to properly plead as a factual matter, the existence of a legal duty to act and its basis in domestic law as an element of superior responsibility.
3. Ground one of Nuon Chea's appeal is dismissed;
4. Ground two of Nuon Chea's appeal is dismissed;
5. Ground three of Nuon Chea's Appeal is dismissed;
6. Ground four of Nuon Chea's Appeal is dismissed;
7. Ground five of Nuon Chea's Appeal is dismissed;
8. Ground one of Ieng Thirith's Appeal is dismissed;
9. Ground two of Ieng Thirith's Appeal is dismissed;
10. Ground three of Ieng Thirith's Appeal is dismissed;
11. Ground four is granted in part as follows and is otherwise dismissed:

[22] Defence Reply to Prosecutions Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, D427/2/11 ("Ieng Thirith Reply").
[23] Reply to Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary, and Ieng Thirith's Appeals against the Closing Order, 6 December 2010, D427/3/13 ("Nuon Chea Reply").
[24] Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 January 2011, D427/2/12 and D427/3/12.

1. This ground of Appeal is granted in so far as the Co-Lawyers assert that the Co-Investigating Judges erred by failing to consider that during the temporal jurisdiction of the ECCC, international customary law required a nexus between the underlying acts of crimes against humanity and an armed conflict. The "existence of a nexus between the underlying acts and the armed conflict" is added to the "Chapeau" requirements in Chapter IV(A) of Part Three of the Closing Order.
2. This ground of Appeal is granted in so far as the Co-Lawyers argue that rape did not exist as a crime against humanity in its own right in 1975-1979. Therefore, the Pre-Trial Chamber decides to strike rape out of paragraph 1613 (Crimes Against Humanity, paragraph (g)) of the Closing Order and to uphold the Co-Investigating Judges finding in paragraph 1433 of the Closing Order that the facts characterized as crimes against humanity in the form of rape can be categorized as crimes against humanity of other inhumane acts."

12. Those parts of ground five of Ieng Thirith's Appeal that are found admissible are dismissed;
13. Those parts of ground seven of Ieng Thirith's Appeal that are found admissible are dismissed;
14. The Appeal is otherwise dismissed;
15. The Accused Persons are indicted and ordered to be sent for trial as provided in the Closing Order being read in conjunction with this decision;
16. The provisional detention of the Accused Persons is ordered to continue until they are brought before the Trial Chamber.

18. On 21 January 2011, the Pre-Trial Chamber notified, in writing, the reasons for its determination in point 16 of the disposition on the Appeal pertaining to the provisional detention of the Appellants.[25] These reasons read:

> Pursuant to sub-rule 68(2), once an appeal is lodged against the Indictment, no matter what the nature of the appeal is, "the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber."
>
> The Accused have not lodged an appeal against the detention order of the Co-Investigating Judges issued within their Closing Order. There is no new circumstance except the confirmation of the indictment by the Pre-Trial Chamber, which reinforces the well founded reasons to believe that the Accused may have committed the crimes charged in the indictment. It also reinforces the necessity to maintain NUON Chea in provisional detention to ensure his presence at trial, protect his security, preserve public order and avert the risk of the Accused exerting pressure on witnesses or victims or

[25] Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order: Reasons for continuation of Provisional Detention, 21 January 2011, D427/2/13 and D427/3/13.

> destroying evidence if released and to maintain IENG Thirith in provisional detention in order to ensure her presence at trial, preserve public order and avert the risk of the Accused exerting pressure on witnesses or victims or destroying evidence if released. The Pre-Trial Chamber considers that the reasons given by the Co-Investigating Judges to order that the Accused remain in provisional detention, which it adopts, justify that it orders that the provisional detention of the Accused pursuant to Internal Rule 68(3) continue until they are brought before the Trial Chamber.[26]

19. Pre-Trial Chamber hereby provides the full reasons for the decision on these Appeals.

REASONS FOR THE DECISION:

II. BRIEF OVERVIEW OF THE APPEAL

The Impugned Order

20. In the Impugned Order, the Co-Investigating Judges reached the following findings relevant to these Appeals:

a) "The question whether the ECCC are Cambodian or international "in nature" has no bearing on the ECCC's jurisdiction" "provided that the principle of *nullum crimen sine lege* is respected."[27]

b) Under the principle of legality, "as set out in Article 33(2)(new) of the ECCC Law, which references Article 15 of the International Covenant on Civil and Political Rights," "in order to be applied before the ECCC, where a crime was not included in the applicable national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly and it must have existed under international law applicable in Cambodia at the relevant time."[28]

c) "As to whether international law is directly applicable in Cambodia, it must be recalled that Articles 1, 2 and 29 (new) of the ECCC Law set out as Cambodian law the violations of international law within its subject matter jurisdiction [...] as well as the applicable modes of criminal responsibility [...]. By virtue of these provisions, the issue whether international law is directly applicable in Cambodian domestic law has no bearing on ECCC jurisdiction."[29]

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[26] Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order: Reasons for continuation of Provisional Detention, 21 January 2011, D427/2/13 and D427/3/13, paras 4 and 5.
[27] Impugned Order, para. 1301.
[28] Impugned Order, para. 1302.
[29] Impugned Order, para. 1304.

d) "Furthermore, the international law provisions prohibiting genocide and grave breaches of the 1949 Geneva Conventions, which expressly provide for criminal liability, were legally binding on Cambodia [...] and thus can be considered to have been sufficiently accessible to the Charged Persons as members of Cambodia's governing authorities."[30]

e) "With respect to crimes against humanity, their prohibition under customary law is considered to have been sufficiently accessible to the Charged Persons, with particular regard to the World War II trials held in Nuremberg and Tokyo."[31]

f) "The remaining modes of liability, namely joint criminal enterprise [...] and superior responsibility, were also set out under international law through sources such as the trials following WWII and as such can be considered sufficiently accessible to the Charged Persons."[32]

g) "With this established, it remains that the principle of *nullum crimen sine lege* does not prevent the Co-Investigating Judges from interpreting the law governing their own jurisdiction and in so doing, taking into account the case law of other international tribunals."[33]

h) "The definition of crimes against humanity under customary international law is the commission of one or more of the following acts, as part of a widespread or systematic attack directed against a civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial or religious grounds; and other inhumane acts, including forced marriage, sexual violence, enforced disappearance and forced transfers of population.[34]

i) "The facts characterized as crimes against humanity in the form of rape can additionally be categorized as crimes against humanity of other inhumane acts in the form of sexual violence.[35]

j) "[T]he Co-Investigating Judges will order the sending of the Charged Persons before the Trial Chamber for charges of murder, torture and religious persecution, crimes defined and punishable by the Penal Code 1956."[36]

The Nuon Chea Appeal

[30] Impugned Order, para. 1305.
[31] Impugned Order, para. 1306.
[32] Impugned Order, para. 1307.
[33] Impugned Order, para. 1308.
[34] Impugned Order, para. 1314.
[35] Impugned Order, para. 1433.
[36] Impugned Order, para. 1576.

21. The Nuon Chea Appeal relies on the following five grounds of appeal in requesting a finding that "the OCIJ erred in law by confirming the ECCC's jurisdiction over genocide, crimes against humanity, war crimes, and any modes of liability not recognized under the Cambodian legal order in 1975-1979"[37] and concluding that this complies with the principle of legality.[38] It requests that the Pre-Trial Chamber "quash and/or amend the Closing Order to the extent that Nuon Chea's alleged liability is expressed with exclusive reference to the substantive crimes and modes of liability recognized in the 1956 Penal Code."[39]

22. Ground 1 alleges that the Co-Investigating Judges erred by concluding in the Impugned Order that "the question whether the ECCC [is] Cambodian or international "in nature" has no bearing on [its] jurisdiction to prosecute such crimes".[40] In contrast, the Nuon Chea Appeal argues that "the ECCC's status as a purely Cambodian court must result in the strict application of municipal law as it existed in 1975-1979; this includes Cambodia's national approach to *nullum crimen sine lege.*"[41]

23. Ground 2 alleges that "the domestic legal regime in force at the time of the events alleged in the Closing Order did not criminalize the offences set out in Articles 4-6 of the ECCC Law."[42]

24. Ground 3 alleges that the Impugned Order erroneously suggests that the ECCC Law provides a substantive basis for the criminalisation of genocide, crimes against humanity, and war crimes in Cambodia.[43]

25. Ground 4 alleges that the international principle of legality found in "Article 33(2) of the ECCC Law – which refers to Article 15 of the ICCPR – does not itself secure

[37] Nuon Chea Appeal, para. 38.
[38] Nuon Chea Appeal, para. 11.
[39] Nuon Chea Appeal, para. 38.
[40] Nuon Chea Appeal, para. 26, ftn. 87.
[41] Nuon Chea Appeal, para. 26.
[42] Nuon Chea Appeal, para. 27.
[43] Nuon Chea Appeal, paras 30-32.

criminalization of genocide, crimes against humanity, or war crimes in Cambodia because these international offences were not *applicable* in 1975-1979."[44]

26. Ground 5 claims that even if "the ECCC Law *has* criminalized the offences referred to in Articles 4-6, such retroactive legislation violates Cambodia's national principle of legality."[45]

The Ieng Thirith Appeal

27. The Ieng Thirith Appeal alleges that the OCIJ erred in seven respects when they determined that the ECCC has jurisdiction to prosecute Ieng Thirith for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions, and domestic crimes, and to prosecute her on the basis of joint criminal enterprise and superior responsibility as forms of liability.[46] Accordingly, the Appeal "requests the PTC to quash the Closing Order with regard to those aspects."[47]

28. Grounds 1-4 raise arguments in support of the allegation that the ECCC lacks jurisdiction to prosecute Ieng Thirith for genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions because "[s]uch prosecution would violate the fundamental principle of *nullem crimen sine lege.*"[48]

29. In particular, Ground 1 alleges that genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions cannot be prosecuted because they were not criminalized under the 1956 Cambodian Penal Code at the time of their alleged commission.[49]

30. Ground 2 argues that with respect of genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions,[50] the OCIJ "have incorrectly interpreted the ECCC Establishment Law in such a manner that it attempts to create new criminal law

[44] Nuon Chea Appeal, para. 33.
[45] Nuon Chea Appeal, para. 35.
[46] Ieng Thirith Appeal, para. 6.
[47] Ieng Thirith Appeal, para. 103.
[48] Ieng Thirith Appeal, para. 14.
[49] Ieng Thirith Appeal, paras 16, 17, 42, 43, 67, 68.
[50] Ieng Thirith Appeal, paras 18-21, 44-45, 70.

and apply such law retroactively to conduct allegedly committed more than 30 years ago."[51]

31. Ground 3 raises several arguments alleging that genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions under international law are not directly applicable before the ECCC and, therefore, Ieng Thirith cannot be prosecuted on these bases.[52]

32. Ground 4 alleges that the Co-Investigating Judges erred in finding that it was foreseeable and accessible to Ieng Thirith that her conduct was punishable as genocide and crimes against humanity from 1975-79.[53]

33. Ground 5 alleges that the Co-Investigating Judges erred in finding that the ECCC has jurisdiction to prosecute domestic crimes under the 1956 Penal Code[54] because the extension of the statute of limitations on these crimes for an additional 30 years under Article 3 (new) of the Establishment Law "amounts to a breach of the general principle of *nullum crimen sine lege*"[55] and "of the general principle of the right to equal treatment for equal cases."[56]

34. Ground 6 contends that the Impugned Order errs in applying joint criminal enterprise as a mode of individual liability; however, because the Pre-Trial Chamber has already ruled on this issue, Ieng Thirith intends "to challenge the application of this doctrine at the Initial Hearing before the Trial Chamber, and not herein."[57]

35. Ground 7 alleges that the Impugned Order errs in applying "superior responsibility as an alternative form of liability in relation to three of the crimes defined as crimes against

[51] Ieng Thirith Appeal, para. 19.
[52] Ieng Thirith Appeal, paras 22-37, 46-57, 71-72.
[53] Ieng Thirith Appeal, paras 35-37, 58-63. Ieng Thirith also makes the same argument, by reference, with respect of grave breaches of the Geneva Conventions (Ieng Thirith Appeal, para. 66). The Pre-Trial Chamber notes that, although these arguments with respect of crimes against humanity were listed under Ground 3 of the Ieng Thirith Appeal, they actually relate to Ground 4 of the appeal raising the same arguments with respect of genocide. As such, the Pre-Trial Chamber will consider them together under Ground 4.
[54] Ieng Thirith Appeal, paras 73-79.
[55] Ieng Thirith Appeal, para. 77.
[56] Ieng Thirith Appeal, para. 78.
[57] Ieng Thirith Appeal, para. 80.

humanity,"[58] because "[t]here is no customary basis in international law for this doctrine's application in 1975-1979," prosecution of command responsibility is in violation of the principle of *nullum crimen sine lege*.[59] Or, alternatively, it "could only be prosecuted in relation to war crimes."[60] Further, "superior responsibility is based on a failure to act" and "[t]he Closing Order fails to establish such duty."[61]

36. Additionally, the Ieng Thirith Appeal raises three grounds in support of its argument that "the Closing Order is in breach of the Appellant's right to a fair trial" and consequently "requests the PTC to quash the Closing Order in that respect."[62]

37. In particular, Ground 8 alleges that the Impugned Order "suffers from arbitrariness" because the Co-Investigating Judges failed to provide sufficient "reasoned evidential basis in support of their decisions".[63]

38. Ground 9 contends that the Co-Investigating Judges "erred in failing to apply the specific facts of the present case [...] to the issues to be determined" and "merely referred to adopted legal findings made by the Trial Chamber in the *Duch* case" without appropriate reasoning.[64]

39. Ground 10 alleges that paragraph 1574 of the Impugned Order, "insofar as it indicts the Appellant with crimes under the 1956 Cambodian Penal Code, is void"[65] because it "fails to set out the legal characterization of the facts"[66] necessary for preparation of the defence "and to avoid prejudicial surprise."[67]

The Responses

[58] Ieng Thirith Appeal, para. 81.
[59] Ieng Thirith Appeal, para. 84.
[60] Ieng Thirith Appeal, para. 90.
[61] Ieng Thirith Appeal, para. 93.
[62] Ieng Thirith Appeal, para. 104.
[63] Ieng Thirith Appeal, para. 97.
[64] Ieng Thirith Appeal, para. 98.
[65] Ieng Thirith Appeal, para. 99.
[66] Ieng Thirith Appeal, para. 100.
[67] Ieng Thirith Appeal, para. 101.

40. In the Joint Response, the Co-Prosecutors request that the Appeals be dismissed because "they are inadmissible as they are procedurally barred and additionally are substantially devoid of merit"[68] for the following reasons: 1) the ECCC has jurisdiction over international crimes and modes of liability under the ECCC Law, which "authorises this Court to apply international law and this is consistent with the principle of legality"[69]; 2) "customary international law criminalized crimes against humanity between 1975 and 1979 to the extent defined in the Closing Order"[70]; 3) "the issue of the validity of the extension of the statute of limitation for domestic crimes [...] conforms with the principle of legality and the right to equality before the law"[71]; 4) "superior responsibility was part of customary international law between 1975 and 1979 to the extent defined in the Closing Order"[72]; and 5) "no violation of rights was established" in the Ieng Thirith Appeal alleging breach of fair trial rights.[73]

41. In addition to the Co-Prosecutors' Response, three groups of Civil Party Co-Lawyers filed responses to the Appeals.

42. First, the Civil Party Lawyers' Observations I, "respond to each of the points raised by the Defence"[74] challenging ECCC jurisdiction over the international crimes of genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions and alleging violation of the principle of legality in charging them in the Closing Order.[75] The Civil Party Lawyers also respond to the following issues: that the statute of limitations for domestic crimes allegedly bars ECCC jurisdiction over those crimes; ECCC jurisdiction over joint criminal enterprise as a mode of liability; ECCC jurisdiction over superior responsibility as a mode of liability; and the alleged violation of fair trial rights in the Closing Order as raised by the Appellants.[76] The Civil Party Co-Lawyers contend that each of the Appellants' arguments with respect of these issues is

[68] Co-Prosecutors' Response, para. 2.
[69] Co-Prosecutors' Response, para. 2(4).
[70] Co-Prosecutors' Response, para. 2(6).
[71] Co-Prosecutors' Response, para. 2(3).
[72] Co-Prosecutors' Response, para. 2(8).
[73] Co-Prosecutors' Response, para. 2(11).
[74] Civil Party Lawyers' Observations I, para. 7.
[75] Civil Party Lawyers' Observations I, paras 8-36.
[76] Civil Party Lawyers' Observations I, paras 37-62.

without merit and "join the prosecution in requesting that" the Appellants stand trial before the Trial Chamber to answer the charges contained in the Closing Order.[77]

43. Second, in the Civil Party Lawyers' Observations II, the Civil Party Lawyers submit that "all arguments presented in the Appellants' Appeals [. . .] are not acceptable, and we wish to declare that we support all arguments presented by the Co-Prosecutors in their joint Response to NUON Chea [...] and IENG Thirith's Appeals against the Closing Order, dated 19 November 2010."[78] As such, the "Civil Party Co-Lawyers would like to request the PTC to: 1. Declare the appeals inadmissible, and 2. Expeditiously send the Closing Order to the Trial Chamber."[79]

44. Third, in the Civil Party Lawyers Observations III, the Civil Party Lawyers present arguments in support of their contentions that the Appellants: 1) "are incorrect in arguing that international law relating to the international crimes with which they are charged is not applicable before the ECCC";[80] 2) err when they claim that "pursuant to the ECCC Law, the applicability by the Court of international crimes having regard to the facts" violates the principle of legality;[81] and 3) "are wrong in assessing the facts by considering that they were not aware of the international crimes for which they are being prosecuted" because they were aware of the crimes "by virtue of the particularly appalling nature of these crimes"[82] and "by virtue of their positions as leaders of Democratic Kampuchea."[83] As such, they request that the Pre-Trial Chamber: 1) "find that the Charged Persons were aware of the particularly atrocious nature of the crimes committed";[84] 2) "find that the Charged Persons were in a position to foresee that they could be held criminally liable";[85] 3) "find that the Charged Persons had knowledge of the national and international laws at the relevant time";[86] 4) "find that each of the crimes was established under international conventional and/or customary law at the

[77] Civil Party Lawyers' Observations I, para. 67.
[78] Civil Party Lawyers' Observations II, para. 8 (footnotes omitted).
[79] Civil Party Lawyers' Observations II, para. 11.
[80] Civil Party Lawyers' Observations III, p. 4.
[81] Civil Party Lawyers' Observations III, para. 25.
[82] Civil Party Lawyers' Observations III, p. 12.
[83] Civil Party Lawyers' Observations III, p. 13.
[84] Civil Party Lawyers' Observations III, para. 42.
[85] Civil Party Lawyers' Observations III, para. 43.
[86] Civil Party Lawyers' Observations III, para. 44.

relevant time";[87] and "therefore, reject all of the Charged Persons' requests" with respect of the charges against them for international crimes.[88]

The Replies

45. In reply to the Co-Prosecutors' Joint Response, Nuon Chea asserts, in addition to the arguments made in the Nuon Chea Appeal, that: "(i) the Appeal is timely and admissible; (ii) the extension of the statute of limitation for the crimes contained in the 1956 Penal Code violates the principle of legality; and (iii) the Office of the Co-Prosecutors [...] has failed to rebut the Defence position that, 'in confirming the jurisdiction of the tribunal, the Co-Investigating Judges [...] erred in law by concluding that the application of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 [...], and the various modes of liability recognized in the Closing Order complies with the principle of legality.'"[89] "For these reasons, as well as those contained in the Appeal, the Defence requests the PTC to vacate the Closing Order, declare the ECCC Law to be in violation of Cambodia's principle of legality, and immediately release Nuon Chea from the custody of the tribunal."[90]

46. Similarly, Ieng Thirith replies that "the arguments advanced by the Co-Prosecutors in their OCP Response should be dismissed, and the Defence Appeal should be allowed."[91] The Ieng Thirith Reply submits that, contrary to arguments made in the Co-Prosecutors' Joint Response, "the Defence Appeal is admissible in all its aspects."[92] Furthermore, the Ieng Thirith Reply challenges the form of the Co-Prosecutors' Joint Response, alleging that it is unclear, misrepresents the Appellant's arguments, makes insufficient reference to previous jurisprudence, inappropriately makes assertion of fact and violates the presumption of innocence standard.[93] Finally, the Ieng Thirith Reply rebuts some of the Co-Prosecutor's arguments on the merits with respect of prosecution of domestic

[87] Civil Party Lawyers' Observations III, para. 45.
[88] Civil Party Lawyers' Observations III, para. 46.
[89] Nuon Chea Reply, para. 1 (footnotes omitted).
[90] Nuon Chea Reply, para. 16.
[91] Ieng Thirith Reply, para. 86.
[92] Ieng Thirith Reply, para. 7.
[93] Ieng Thirith Reply, paras 8-22.

crimes;[94] ECCC jurisdiction over international crimes;[95] the nature of the ECCC;[96] the principle of legality;[97] and superior responsibility.[98] In conclusion, the Ieng Thirith Reply requests the Pre-Trial Chamber to: "Hold that the ECCC have no jurisdiction to prosecute the Appellant for the several crimes and forms of liability set out in the Defence Appeal and herein; and Quash the Closing Order due to lack of jurisdiction, and as a result of a breach of the Appellant's fair trial rights as set out in the Defence Appeal."[99]

III. ADMISSIBILITY OF THE APPEAL

47. Before addressing the merits of these Appeals, the Pre-Trial Chamber must determine whether, as a preliminary matter, they are admissible. The Chamber first notes that, with respect of Ground 6 of the Ieng Thirith Appeal alleging lack of jurisdiction over joint criminal enterprise as a mode of liability, as acknowledged by the Appellant, it has "already ruled on this issue".[100] In light of this fact and that the Appellant indicates that she plans "to challenge the application of this doctrine at the Initial Hearing before the Trial Chamber and not herein", the Pre-Trial Chamber will not consider Ground 6 of the Ieng Thirith Appeal any further.[101]

48. As for Grounds 1-5 of the Nuon Chea Appeal and Grounds 1-4, 5 and 7 of the Ieng Thirith Appeal, the Appellants submit that because they raise jurisdictional grounds under Internal Rules 67(5), 74 and 75, they are admissible.[102] Furthermore, the Ieng

[94] Ieng Thirith Reply, paras 23-31.
[95] Ieng Thirith Reply, paras 32-37.
[96] Ieng Thirith Reply, paras 38-39.
[97] Ieng Thirith Reply, paras 40-69.
[98] Ieng Thirith Reply, paras 70-85.
[99] Ieng Thirith Reply, para. 86.
[100] Ieng Thirith Appeal, para. 80.
[101] Ieng Thirith Appeal, para. 80.
[102] Nuon Chea Appeal, para. 5; Ieng Thirith Appeal, paras 2-3, 5.

Thirith Appeal claims that its Grounds 8-10 raising breach of fair trial rights are admissible on the basis of Internal Rule 21.[103]

49. The Co-Prosecutors raise several objections to the admissibility of these Appeals, which the Pre-Trial Chamber will now examine in turn.

A. Whether the Appeals constitute jurisdictional challenges pursuant to Internal Rule 74(3)(a)

1. Submissions

50. The Co-Prosecutors allege that certain aspects of the grounds raised in the Ieng Thirith Appeal should be dismissed as inadmissible by the Pre-Trial Chamber because they fail to appeal jurisdictional issues confirmed in the Impugned Order.[104]

51. First, the Co-Prosecutors note that within the context of Grounds 1-3 of the Ieng Thirith Appeal alleging lack of jurisdiction over grave breaches of the 1949 Geneva Conventions, "Ieng Thirith states her disagreement with the Co-Investigating Judges' conclusion on the existence of an international armed conflict and the qualification of Vietnamese soldiers and civilians as protected persons."[105] The Co-Prosecutors argue that "[w]hether an offence alleged in the Closing Order meets the requisite elements of a crime is a factual question that cannot be appealed to the Pre-Trial Chamber"[106] and therefore, paragraphs 64 and 65 of the Ieng Thirith Appeal should be dismissed as inadmissible.

52. Second, the Co-Prosecutors contend that, to the extent that Ground 4 of the Ieng Thirith Appeal in paragraphs 60-63 alleges lack of jurisdiction over crimes against humanity by challenging the Co-Investigating Judges' definition and application of certain elements

[103] Ieng Thirith Appeal, paras 4-5 (citing the Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, 10 August 2010, D264/2/6) ("Decision on Abuse of Process"); Ieng Thirith Reply, para. 5.
[104] Co-Prosecutors' Response, paras 9, 12-31.
[105] Co-Prosecutors' Response, para. 26 and ftns. 74, 77 (citing Ieng Thirith Appeal, paras 64, 65).
[106] Co-Prosecutors' Response, para. 22.

of crimes against humanity, it should be dismissed as inadmissible.[107] This is because "[o]nce a crime or mode of liability relied upon in an indictment is accepted as legally founded, the contours of the offence or liability cannot be challenged on jurisdictional grounds."[108]

53. Third, the Co-Prosecutors contend that Ground 5 of the Ieng Thirith Appeal alleging lack of jurisdiction with respect of domestic crimes under the 1956 Penal Code[109] because the retroactive extension of the statute of limitations on these crimes contravenes the principle of legality and the right to equality before the law, is inadmissible. This is because "the validity of the extension of the statute of limitation for domestic crimes, being a mixed question of law and fact, does not raise a jurisdictional issue."[110]

54. Finally, the Co-Prosecutors submit that paragraph 93 of Ground 7 of the Ieng Thirith Appeal alleging lack of jurisdiction over superior responsibility as a mode of liability should be dismissed as inadmissible on the basis that it alleges "defects in the form of indictment [which] are not jurisdictional and hence not appealable."[111] Paragraph 93 states that "[t]he doctrine of superior responsibility is based on a failure to act. A legal duty to prevent the commission of crimes therefore needs to exist. [...] The CIJ, by failing to establish the existence of such duty and its basis in domestic law, did not succeed in providing a basis for prosecution for superior responsibility of the Appellant [...]."[112]

55. Similarly, the Co-Prosecutors contend that Grounds 8-10 of the Ieng Thirith Appeal alleging breach of fair trial rights[113] as a result of the Co-Investigating Judges' reliance upon insufficient evidentiary sources; failure "to apply the specific facts to the issues to be determined"; and failure "to set out the legal characterization of the facts" for charges

[107] Co-Prosecutors' Response, para. 28.
[108] Co-Prosecutors' Response, para. 27.
[109] Ieng Thirith Appeal, paras 73-79.
[110] Co-Prosecutors' Response, para. 2(3).
[111] Co-Prosecutors' Response, paras 29, 30.
[112] Ieng Thirith Appeal, para. 93.
[113] Ieng Thirith Appeal, paras 95-101.

under the 1956 Cambodia Penal Code, amount to challenges to the form of the indictment rather than to jurisdiction.[114]

56. As for the remaining aspects of Ieng Thirith's Grounds 1-4 and 7 or Grounds 1-5 of the Nuon Chea Appeal challenging the Impugned Order for lack of jurisdiction, the Co-Prosecutors do not contest that they raise jurisdictional challenges.

2. Discussion

57. At the outset, the Pre-Trial Chamber notes that, with respect of paragraphs 64 and 65 of the Ieng Thirith Appeal, as raised by the Co-Prosecutors,[115] they do not constitute formal appeals to ECCC jurisdiction over grave breaches of the 1949 Geneva Conventions. Rather, they express disagreement with respect of certain conclusions reached in the Impugned Order. Indeed, the Ieng Thirith Appeal acknowledges that "this is not the forum to appeal from the CIJ's conclusion that there existed an armed conflict [...] as this relates to the substance of the evidence, the defence reserves the right to challenge that conclusion at trial."[116] As such, the Pre-Trial Chamber will not consider arguments raised in paragraphs 64 and 65 of the Ieng Thirith Appeal because they do not formally raise grounds of appeal for consideration by the Pre-Trial Chamber.

58. With respect of the remaining objections by the OCP, for the reasons that follow, the Pre-Trial Chamber finds that paragraph 78 in Ground 5, paragraph 93 in Ground 7, and Grounds 8-10 of the Ieng Thirith Appeal are inadmissible. However, the Pre-Trial Chamber finds that paragraphs 60-63 in Ground 4 and paragraphs 73-77 in Ground 5 are admissible.

59. The Pre-Trial Chamber recalls that pursuant to Internal Rule 67(5), upon issuance of a Closing Order by the Co-Investigating Judges, "[t] he order is subject to appeal as

[114] Co-Prosecutors' Response, paras 29, 30.
[115] Co-Prosecutors' Response, fn. 74.
[116] Ieng Thirith Appeal, para. 64.

provided in Rule 74."[117] Internal Rule 74 stipulates the grounds of appeal that may be raised by the parties before the Pre-Trial Chamber and, relevant to the present Appeals, Internal Rule 74(3)(a) states that "[t]he Charged Person or the Accused may appeal against the following orders or decisions of the Co-Investigating Judges [...] confirming the jurisdiction of the ECCC."[118]

60. In interpreting Internal Rule 74(3)(a), the Pre-Trial Chamber has previously held in its "Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE)" of 20 May 2010 ("JCE Decision") that only jurisdictional challenges may be raised under that rule.[119] In determining what constitutes a proper jurisdictional challenge, the Pre-Trial Chamber considered that the ECCC "is in a situation comparable to that of the *ad hoc* tribunals" as opposed to domestic civil law systems, where the terms of the statutes with respect of the crimes and modes of liability that may be charged are very broad, where the applicable law is open-ended, and where "the principle of legality demands that the Tribunal apply the law which was binding at the time of the acts for which an accused is charged. [...] [and] that body of law must be reflected in customary international law."[120] Consequently, the Pre-Trial Chamber adopted the approach of the *ad hoc* tribunals, such that appeals that 1) "challenge [...] the very existence of a form of responsibility or its recognition under customary law at the time relevant to the indictment"; or 2) argue that a mode of responsibility was "not applicable to a specific crime" at the time relevant to the indictment; and 3) demonstrate that its "application would infringe upon the principle of legality" raise acceptable subject matter jurisdiction challenges that may be brought in the pre-trial phase of the

[117] Internal Rule 67(5) of the Extraordinary Chambers in the Courts of Cambodia Internal Rules (Rev. 6), as revised on 17 September 2010 ("Internal Rule 67(5)").
[118] Internal Rule 74(3)(a).
[119] Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise, 20 May 2010, D97/15/9 ("JCE Decision"), para. 21.
[120] JCE Decision, paras 23, 24 (quoting *Prosecutor v. Milutinović et al.*, IT-05-98, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", Appeals Chamber, 21 May 2003, para. 10).

proceedings.[121] However, "challenges relating to the specific contours of [. . .] a form of responsibility, are matters to be addressed at trial."[122]

61. The Pre-Trial Chamber finds that the same approach applies with respect of grounds of appeal at the pre-trial phase contesting the substantive crimes charged under Articles 3 (new) – 8 of the ECCC Law. Such appeals only raise admissible subject matter jurisdiction challenges where there is a challenge to the very existence in law of a crime and its elements at the time relevant to the indictment, and that its application would result in a violation of the principle of legality.[123]

62. However, "challenges relating to the specific contours of a substantive crime [. . .] are matters to be addressed at trial."[124] For example, challenges to the specific definition and application of elements of crimes charged are inadmissible at the pre-trial phase.[125] Furthermore, challenges as to whether the elements of a charged crime actually existed in reality as opposed to legally at the time of the alleged criminal conduct is inadmissible.[126] This is because such challenges often involve factual or mixed

[121] JCE Decision, paras 23-24.
[122] JCE Decision, para. 23 (citing *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, paras 32-42 (ascertaining the contours of the mental element of "ordering" under Article 7(1) of the Statute); *Prosecutor v. Milutinović et al.*, IT-05-87-PT, "Decision on Ojdanić's Motion Challenging Jurisdiction – Indirect Co-Perpetration, Trial Chamber, 22 March 2006, para. 23.
[123] *Prosecutor v. Gotovina et al.*, IT-06-90-AR72.1, "Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction", Appeals Chamber, 6 June 2007 ("*Gotovina et al.* Decision on Jurisdiction"), paras 15, 18.
[124] JCE Decision, para. 23 (citing *Prosecutor v. Delalic et al.*, IT-96-21-AR72.5, "Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment)", Appeals Chamber, 6 December 1996, para. 27 (holding that any dispute as to the substance of the crimes enumerated in Articles 2, 3, 4 and 5 of the Statute "is a matter for trial, not for pre-trial objections"); *Prosecutor v. Furundžija*, IT-05-17/1-T, Judgement, Trial Chamber, 10 December 1998, paras 172-186; *Prosecutor v. Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, "Judgement", ICTY Trial Chamber, 22 February 2001, paras 436-460 (Trial Judgements ascertaining the contours of rape as a crime against humanity under Article 5(g) of the Statute).
[125] *Gotovina et al.* Decision on Jurisdiction, paras 15, 18 (finding inadmissible grounds of appeal challenging the definition of certain elements of deportation and forcible transfer as crimes against humanity and of violations of common Article 3 of the 1949 Geneva Conventions and arguing that they should be interpreted narrowly).
[126] *Gotovina et al.* Decision on Jurisdiction, para. 21 (rejecting as inadmissible a ground of appeal contesting whether a state of armed conflict actually existed with respect of the alleged violations of international humanitarian law as charged). See also *Prosecutor v. Boškoski and Tarčulovsk*, IT-04-82-AR72.1, "Decision on Interlocutory Appeal on Jurisdiction", Appeals Chamber, 22 July 2005, paras. 11-13; *Prosecutor v. Delić*, IT-04-83-AR72, "Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal", Appeals Chamber, 8 December 2005, para. 11 (holding that "[t]o the extent that the Appellant's argument concerns not the sufficiency of the indictment, but the sufficiency of the supporting evidence, the Appeals Chamber agrees with the Trial Chamber that this is an issue to be resolved at trial."); *Prosecutor v. Šešelj*, IT-03-67-AR72.1, "Decision on the Interlocutory Appeal Concerning Jurisdiction", Appeals Chamber, 31 August 2004, para. 14 (holding that

questions of law and fact determinations to be made at trial upon hearing and weighing all of the evidence.[127]

63. Finally, with respect of challenges alleging defects in the form of the indictment, the Pre-Trial Chamber finds that they are clearly non-jurisdictional in nature and are therefore inadmissible at the pre-trial stage of the proceedings in light of the plain meaning of Internal Rule 74(3)(a) and Chapter II of the ECCC Law, which outlines the personal, temporal and subject matter jurisdiction of the ECCC.[128] Nothing in the ECCC Law or Internal Rules suggests that alleged defects in the form of the indictment raise matters of jurisdiction. As such, these arguments may be brought before the Trial Chamber to be considered on the merits at trial; however, they do not demonstrate the ECCC's lack of jurisdiction.

64. On the basis of the foregoing, the Pre-Trial Chamber finds that because paragraph 93 in Ground 7 of the Ieng Thirith Appeal alleges that the Co-Investigating Judges failed to properly plead, as a factual matter, the existence of a legal duty to act and its basis in domestic law as an element of superior responsibility, this raises an alleged defect in the form of the indictment rather than a jurisdictional challenge and is therefore inadmissible. Similarly, the arguments raised under Grounds 8-10 of the Ieng Thirith Appeal with respect of insufficient evidentiary sources; failure to properly apply the facts; and failure to provide the legal characterization of the facts for charges under the 1956 Cambodia Penal Code constitute inadmissible challenges alleging defects in the form of the indictment.

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whether the Prosecution can establish a connection between alleged Article 5 crimes in Vojvodina and an armed conflict in Croatia and/or Bosnia and Herzegovina is a question of fact to be determined at trial).

[127] The Pre-Trial Chamber does not agree with the Ieng Thirith Reply (at para. 6) that ICTY case law on proper jurisdictional challenges should be applied cautiously because it is a "common law based" tribunal and the civil law aspects of the ECCC stipulate "that as many issues as possible are resolved at the pre-trial stage" with respect of clarifying the jurisdiction of the ECCC. In both Tribunals, issues of fact are to be determined at trial and therefore, any alleged jurisdictional challenges such as those listed in this paragraph that raise issues of fact or mixed questions of fact and law are best determined upon weighing and consider the evidence submitted at trial.

[128] *Gotovina et al.* Decision on Jurisdiction, paras 21, 24 (finding that arguments alleging that the Prosecution failed to plead an element of a mode of liability properly; that provisions in the joint indictment were inconsistent; and that the Prosecution failed to plead any facts in support of the existence of an element of a crime constituted inadmissible allegations of defects in the form of the indictment); *Prosecutor v. Prlić et al.*, IT-04-74-AR72.1, "Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction", Appeals Chamber, 16 November 2005, para. 13.

65. With respect of paragraph 78 in Ground 5 of the Ieng Thirith Appeal, the Pre-Trial Chamber notes that the Appellant has raised two sub-grounds within this ground of appeal. First, the Appellant states that: (i) the extension of the statute of limitations in the ECCC Law for crimes in the 1956 Penal Code is a violation of a general principle of law described as the right to equal treatment for equal cases, and (ii) such extension and application in the Appellant's case has resulted in discrimination against her.[129] The Pre-Trial Chamber finds that both of these submissions are inadmissible as these submissions allege violation of fair trial rights. The Pre-Trial Chamber has clarified below that it has limited jurisdiction to hear appeals against the Closing Order at this stage under Internal Rule 74(3) with respect of fair trial issues.[130] Consequently, the Appellant may raise these with the Trial Chamber during the trial stage of the proceedings.

66. However, with respect of paragraphs 60-63 in Ground 4 of the Ieng Thirith Appeal, the Pre-Trial Chamber finds that they raise an admissible subject matter jurisdictional challenge because they contest the very existence in law at the time relevant to the indictment of certain elements of crimes against humanity applied by the Co-Investigating Judges in the Impugned Order when looking to the definition of crimes against humanity under Article 7 of the 1998 Statute of the International Criminal Court. Specifically, they challenge: the OCIJ's omission of the existence of an armed conflict requirement; the inclusion of rape as a constituent act of crimes against humanity; and the inclusion of forced marriage, sexual violence and enforced disappearances as falling within the category of "other inhumane acts" as constituent acts of crimes against humanity.[131] The Appellant contends that, "[t]he CIJ have therefore erred in widening the scope of conduct which could amount to a crime against humanity at the relevant time" in violation of the principle of legality.[132]

67. Similarly, paragraphs 73-77 in Ground 5 of the Ieng Thirith Appeal raise an admissible subject matter jurisdictional challenge. The Appellant submits that the ECCC has no

[129] Ieng Thirith Appeal, para. 78.
[130] See "Discussion" in Section III(B) below.
[131] Ieng Thirith Appeal, paras 60-61.
[132] Ieng Thirith Appeal, para. 62.

jurisdiction to prosecute her for domestic crimes under the 1956 Penal Code. The Pre-Trial Chamber considers, based on the submissions made by the Appellant that this part of Ground 5 of the Ieng Thirith Appeal falls squarely within the requirements of Internal Rule 74(3) whereby the Appellant is entitled to appeal against an order or decision that confirms the jurisdiction of the ECCC.[133] The issue of the ability of the ECCC to prosecute national crimes, which are subject to a statute of limitations, is a jurisdictional matter. The Impugned Order confirms the subject-matter jurisdiction of the ECCC over the Appellant for national crimes. As such, any question concerning the ability of the Trial Chamber to commence proceedings against her for national crimes should be resolved at this stage.

68. Finally, although not challenged by the Co-Prosecutors, the Pre-Trial Chamber finds that, upon review of the remainder of Ieng Thirith's Grounds 1-4 as well as Grounds 1-5 of the Nuon Chea Appeal, they are also admissible. These grounds all raise proper subject matter jurisdiction challenges of the Impugned Order, questioning whether the international crimes charged existed in law as a general matter at the time of the alleged criminal conduct and whether charging them would comply with the principle of legality. Similarly, the remainder of Ground 7 of the Ieng Thirith Appeal is admissible because it challenges the existence of superior responsibility as a mode of responsibility with respect of crimes against humanity at the time relevant to the indictment; argues that superior responsibility only applied with respect of war crimes at the relevant time; and alleges that application of this mode of liability with respect of crimes against humanity would infringe upon the principle of legality. As such, it raises acceptable subject matter jurisdiction challenges that may be brought in the pre-trial phase of the proceedings.

B. Whether the grounds of Ieng Thirith's Appeal based on an alleged breach of fair trial rights are admissible pursuant to either (1) a broad interpretation of Internal Rule 74(3), or (2) Internal Rule 21

[133] Ieng Thirith Appeal, paras 5, 6 and 73.

1. Submissions

69. Ieng Thirith alleges that the Appeal is admissible on the basis of Internal Rules 74(3), 21 and by interpreting Rule 74(3) broadly in light of Rule 21.[134] In contrast, the OCP contends that Grounds 8-10 of the Ieng Thirith Appeal alleging breach of fair trial rights[135] are inadmissible under Internal Rule 21. It argues that "Rule 74(3) exclusively embodies the Appellants' rights of appeal: Rule 21 does not create a new, separate ground of appeal for the Charged Persons."[136] Such an interpretation of Rule 21, the Co-Prosecutors submit, "amounts to a request to the Pre-Trial Chamber to amend the Rules" which action, if undertaken, would represent a unilateral undertaking of the Pre-Trial Chamber outside of the appropriate procedure for amendment by the Plenary of Judges in accordance with the basic documents of the ECCC.[137] Furthermore, the Co-Prosecutors "submit that extension of the scope of the appellate rights of the Appellants pursuant to the Rules is not appropriate at this stage in the proceedings."[138] Therefore, "[f]or this reason, the exhaustive list of pre-trial appeal grounds in Rule 74 should be applied without modification by the Pre-Trial Chamber."[139]

2. Discussion

70. The Pre-Trial Chamber recalls that Internal Rule 67 governs the issuance of a Closing Order by the Office of the Co-Investigating Judges at the conclusion of their investigations. As noted previously, Internal Rule 67(5) explicitly provides that, upon issuance of a Closing Order, "[t]he order is subject to appeal as provided in Rule 74."[140] No other Internal Rule is listed in Rule 67 as providing a basis for an appeal against a Closing Order. Furthermore, unlike Internal Rule 74, Rule 21 does not address grounds

[134] Ieng Thirith Appeal, para. 5 and Ieng Thirith Reply, para. 5.
[135] Ieng Thirith Appeal, paras 95-101.
[136] Co-Prosecutors' Response, para. 18.
[137] Co-Prosecutors' Response, para. 19 (citing Internal Rule 3).
[138] Co-Prosecutors' Response, para. 21.
[139] Co-Prosecutors' Response, para. 21.
[140] Internal Rule 67(5).

for pre-trial appeals; rather it lays out the fundamental principles governing proceedings before the ECCC. Accordingly, under the express terms of the Internal Rules, the Pre-Trial Chamber does not agree with the contention in the Ieng Thirith Appeal that Grounds 8-10 alleging breach of fair trial rights are admissible pursuant to Internal Rule 21.

71. Ieng Thirith Appeal further argues that these grounds are admissible because Internal Rule 21 "provides an additional basis upon which to mount an appeal where it can be shown that the Appellant's fair trial rights have been breached and have thus jeopardized the fairness of the proceedings."[141] The Pre-Trial Chamber has previously held that in light of Article 33 (new) of the ECCC Law, which provides that "trials are fair" and conducted "with full respect for the rights of the accused", and of Article 14 of the International Covenant on Civil and Political Rights ("ICCPR"), which is "applicable at all stages of proceedings before the ECCC, [...] [t]he overriding consideration in all proceedings before the ECCC is the fairness of the proceedings, as provided in Internal Rule 21(1)(a)."[142] Therefore, where the facts and circumstances of an appeal require it, the Pre-Trial Chamber has found that it has competence to consider grounds raised by the Appellants that are not explicitly listed under Internal Rule 74(3) through a liberal interpretation of a charged persons' right to appeal in light of Internal Rule 21.

72. For example, the Pre-Trial Chamber recalls that in its Decision on Abuse of Process, it found that it had competence to consider an appeal against the Co-Investigating Judges' denial of Ieng Thirith's request for a stay of proceedings on the basis of the abuse of process because it "raises a serious issue of fairness".[143] Similarly, in the JCE Decision, the Pre-Trial Chamber found that it had competence to consider appeals raising the issue of whether the Charged Person received sufficient notice of the charges of JCE as a mode of liability in light of the stipulation in Internal Rule 21(1)(d) that "[a]ny [suspected or prosecuted] person has the right to be informed of any charges brought

[141] Ieng Thirith Reply, para. 5.
[142] Decision on Abuse of Process, paras 13-14.
[143] Decision on Abuse of Process, para. 15.

against him/her [...]" and of the fact that "both international standards and Article 35 (new) of the ECCC Law require specificity in the indictment."[144]

73. That being said, the Pre-Trial Chamber emphasizes that in both decisions, it did not hold that as a general rule it will automatically have competence under Internal Rule 74(3) or Internal Rule 21 to consider any grounds of appeal in which an Appellant raises matters implicating the fairness of the proceedings. Rather, the Pre-Trial Chamber carefully considered, in each case, whether, on balance, "the facts and circumstances" of the appeals required a broader interpretation of the right of appeal.[145] For example, in the Decision on Abuse of Process, it considered whether the seriousness and egregiousness of the issues of fairness raised under the abuse of process doctrine and their impact on the proceedings warranted admitting the appeal.[146] Similarly, in the JCE Decision, the Pre-Trial Chamber considered whether, on balance, the "interests in the preservation of judicial resources and acceleration of legal and procedural processes" outweighed the fairness interests that would be met by declaring admissible those grounds of appeal pertaining to the right to specificity in the indictment.[147]

74. Here, the Pre-Trial Chamber does not find that the facts and circumstances require that it should find Grounds 8-10 of the Ieng Thirith Appeal alleging breach of fair trial rights admissible under a broad interpretation of Internal Rule 74(3)(a) or Internal Rule 21. The Pre-Trial Chamber recalls that Article 33 (new) of the ECCC Law states that "[t]he Extraordinary Chambers of the trial court shall ensure that trials are fair *and expeditious*".[148] Furthermore, Internal Rule 21(4) provides that a fundamental principle applied by the ECCC is that "[p]roceedings shall be brought to a conclusion within a reasonable time."[149] Similarly, Article 14(3) of the ICCPR, which is reflected in Internal Rule 21,[150] states that "[i]n the determination of any criminal charge against him,

[144] JCE Decision, paras 30-34.
[145] Decision on Abuse of Process, para. 14; JCE Decision, para. 30.
[146] Decision on Abuse of Process, para. 14.
[147] JCE Decision, paras 34, 35.
[148] ECCC Law, Art. 33 (new) (emphasis added).
[149] Internal Rule 21(4).
[150] Decision on Abuse of Process, para. 13.

everyone shall be entitled to the following minimum guarantees [. . .]: c) To be tried without undue delay."[151]

75. These provisions highlight that one of the rights enjoyed by the Appellants is the right to an expeditious trial. As such, the "duty to ensure the fairness *and* expeditiousness of trial proceedings entails a delicate balancing of interests."[152] While Grounds 8-10 in the Ieng Thirith Appeal raise issues touching upon alleged defects in the form of the indictment[153] similar to those considered in the JCE Decision, that decision was rendered in response to alleged deficiencies in the Introductory Submissions filed by the Co-Prosecutors.[154] Thus, Co-Investigating Judges investigations were ongoing and an indictment had not yet been issued. In light of the charged persons' right to be informed promptly of the charges against them, had the Appellants successfully argued that the Introductory Submissions were defective, the Chamber would have been in a position to require more details about the charges forwarded by the Co-Prosecutors outlining the course of the investigation. Furthermore, it was important at that stage of the proceedings for the Pre-Trial Chamber to clarify that the requirements attaching to the specificity of the indictment are greater than those attaching to the specificity of the Introductory Submissions. Thus, the fact that the grounds of appeal in the JCE Decision were raised prior to the issuance of the indictment by the Co-Investigating Judges was of essence in finding that the grounds were admissible.

76. At this stage, the Co-Investigating Judges have concluded their extensive investigations carried out over the course of three years, issued the Impugned Order indicting the Appellants, and forwarded the case against the accused, as laid out in the indictment, to the Trial Chamber. As such, the "interests in acceleration of legal and procedural processes"[155] are greater and outweigh the interests to be gained by considering these

[151] ICCPR, Art. 14(3).
[152] *The Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73, "Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List", Appeals Chamber, 21 August 2007, para. 24 (emphasis added).
[153] JCE Decision, paras 31-33.
[154] JCE Decision, paras 6, 31.
[155] JCE Decision, para. 35.

grounds of appeal at this stage. Furthermore, allegations of defects in the indictment may be raised by Ieng Thirith at trial.

C. Whether the jurisdictional challenges in the Appeals are time barred because the Impugned Order is not an order "confirming jurisdiction" within the meaning of Internal Rule 74(3)(a)

1. Submissions

77. The final objection raised by the Co-Prosecutors is that the grounds raised in the Ieng Thirith and Nuon Chea Appeals should the Pre-Trial Chamber find that they constitute jurisdictional challenges under Internal Rule 74(3)(a), are time barred because the Impugned Order is not one "confirming jurisdiction".[156] The Co-Prosecutors note that the Co-Investigating Judges initially confirmed jurisdiction through their provisional detention orders in 2007,[157] and they were not appealed within the ten-day time period prescribed under the Internal Rules.[158] As such, "[j]udicial economy and the need for procedural efficiency require that the absence of challenge to the Court's jurisdiction [...] be understood as a forfeiture of the Appellants' right to raise these issues at the pre-trial stage, especially since the Appellants will have another opportunity to challenge the Court's jurisdiction before the Trial Chamber [...]."[159] Furthermore, "[i]t would not be in the interests of justice to waive the time limits in the Rules; these time limits are intended to resolve jurisdictional matters prior to the undertaking of extensive judicial investigation by the Co-Investigating Judges."[160] Finally, "[a]s the Rules do not provide for appeals against orders *re-confirming* the Court's jurisdiction, the Appeals against the Closing Order, to this extent, are inadmissible."[161]

[156] Co-Prosecutors' Response, paras 35, 43-44.
[157] Co-Prosecutors' Response, paras 40, 42.
[158] Co-Prosecutors' Response, paras 35-42.
[159] Co-Prosecutors' Response, para. 36.
[160] Co-Prosecutors' Response, para. 42.
[161] Co-Prosecutors' Response, para. 35.

2. Discussion

78. The Pre-Trial Chamber does not agree with the Co-Prosecutor's submissions on re-confirmation. First, it is not clear that the provisional detention orders for the Appellants *confirm* the ECCC's jurisdiction with respect of the crimes charged against them. The primary purpose of a provisional detention order is to "set out the legal grounds and factual basis for detention".[162] As such, the provisional detention orders at issue noted the crimes and factual allegations submitted by the Co-Prosecutors in their Introductory Submissions; determined that there were well-founded reasons to believe that the Appellants may have committed the alleged crimes; and found that, for various reasons, detention would be necessary in the course of the Office of the Co-Investigating Judges' investigations.[163] While it may be argued that in so doing, the Co-Investigating Judges implicitly confirmed the subject matter jurisdiction of the ECCC with respect of the crimes alleged to have been committed and those challenged on jurisdictional grounds in these Appeals, this argument is unpersuasive and in no way determinative.

79. Furthermore, under Internal Rule 67, at the conclusion of their investigations and issuance of the Closing Order, the Co-Investigating Judges makes their final determinations with respect of the legal characterisation of the acts alleged by the Co-Prosecutors and determine whether they amount to crimes within the jurisdiction of the ECCC.[164] In doing so, "[t]he Co-Investigating Judges are not bound by the Co-Prosecutors' submissions" in the course of the investigations.[165] As such, it was not given at the time of the rendering of the provisional detention orders that the crimes alleged by the Co-Prosecutors would be crimes for which the Appellants would eventually be indicted at the conclusion of the Co-Investigating Judges investigations. Indeed, the Appellant was not charged with genocide until 21 December 2009, way after the issuance of the provisional detention order.[166] Under the terms of Internal Rule 67, it would have been reasonable for the Appellants to assume that the provisional detention

[162] Internal Rule 63(2)(a).
[163] Provisional Detention Order for Nuon Chea, 27 October 2004, paras 5-6; Provisional Detention Order for Ieng Thirith, paras 5-11.
[164] Internal Rule 67(1)-(3).
[165] Internal Rule 67(1).
[166] Written Record of Interview of Charged Person, 21 December 2009, D286.

orders did not confirm jurisdiction, and that it would be efficient to raise any subject matter jurisdiction objections following the final conclusions on jurisdiction by the Co-Investigating Judges in the Closing Order.

80. Second, even if the Pre-Trial Chamber was persuaded that the Co-Investigating Judges did confirm the ECCC's subject matter jurisdiction in the provisional detention orders within the meaning of Rule 74(3)(a), the Pre-Trial Chamber recalls that it may, on its own motion, "recognise the validity of any action executed after the expiration of a time limit prescribed in these Internal Rules on such terms, if any, as they see fit."[167] Here, the Pre-Trial Chamber finds that for the following reasons, it would be in the interests of justice to allow the Appellants' jurisdictional objections to the Impugned Order even though one may argue that they should have appealed the provisional detention orders on these grounds "within 10 (ten) days from the date that notice of the decision or order was received."[168]

81. First, as noted previously, it may not have been clear to the Appellants that the provisional detention orders confirmed jurisdiction under the terms of Internal Rules 63 and 74(3)(a). In addition, it is also not made explicit by the Internal Rules themselves or in any other applicable law at the ECCC that the phrase "confirming the jurisdiction" in Internal Rule 74(3)(a) precludes appealing Co-Investigating Judges' orders or decisions "re-confirming" ECCC jurisdiction as alleged by the Co-Prosecutors.

82. Furthermore, as noted by the Co-Prosecutors, objections to jurisdiction are fundamental.[169] This is reflected in the fact that jurisdictional appeals, unlike appeals alleging the breach of fair trial rights, are expressly singled out as one of the limited grounds of appeal available to the Appellants in pre-trial proceedings pursuant to Internal Rule 74(3)(a). The Pre-Trial Chamber agrees that the ECCC Law and Internal Rules stipulate that proceedings before the ECCC shall be conducted expeditiously and that such a fundamental matter as jurisdiction should be disposed of as early in the proceedings as possible. However, the Pre-Trial Chamber does not find that considering

[167] Internal Rule 39(4)(b).
[168] Internal Rule 75(1).
[169] Co-Prosecutors' Response, para. 37.

the Appellants' jurisdictional objections at the close of the Co-Investigating Judges investigation and prior to the commencement of trial undermines expediency. Rather, consideration at this time supports the expeditious conduct of proceedings by safeguarding against an outcome in which "[s]uch a fundamental matter as [...] jurisdiction [...] [is] kept for decision at the end of a potentially lengthy, emotional and expensive trial".[170]

83. In sum, in light of the lack of any provision in the Internal Rules on the effect of a provisional detention order or pertaining to re-confirmation, the nature of jurisdictional objections, and the early stage of the proceedings, the Pre-Trial Chamber considers that it is in the interests of justice to consider the Appellants' grounds of appeal raising jurisdictional objections against the Impugned Order at this time. Failure to do so based on the argument that the Appellants are time barred from raising appeals that are permitted according to a plain language reading of the Internal Rules, by relying instead on a questionable interpretation of the Internal Rules so as preclude appeals of this type on mere procedural grounds may result in fundamental unfairness to the Appellants.

D. Conclusion

84. On the basis of the foregoing, the Pre-Trial Chamber finds that Grounds 1-5 of the Nuon Chea Appeal, and Grounds 1-5 and 7 (with the exception of paragraph 93) of the Ieng Thirith Appeal are admissible.

IV. MERITS OF THE APPEAL

85. The Pre-Trial Chamber now turns to consider the merits of the remaining grounds in these Appeals, which address the following four jurisdictional issues. First, as a general matter, whether the Co-Investigating Judges finding that international crimes and modes of liability not found in Cambodian national law from 1975-79 nevertheless fall within the scope of the ECCC's subject matter jurisdiction is in error and violates the principle

[170] *Prosecutor v Tadić*, IT-94-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995, para. 6.

of legality.[171] Second, whether the Co-Invesigating Judges specific findings when confirming ECCC jurisdiction over genocide and grave breaches of the 1949 Geneva Conventions are in error and violate the principle of legality.[172] Third, whether the OCIJ erred when confirming ECCC jurisdiction over crimes against humanity.[173] Fourth, whether the Co-Investigating Judges finding that the ECCC has subject matter jurisdiction over domestic crimes under the Criminal Code of the Kingdom of Cambodia (1956) ("1956 Penal Code")[174] is in error and violates the principle of legality.[175] Finally, whether the Co-Investigating Judges erred in applying the doctrine of superior responsibility as a mode of liability to crimes against humanity and thereby violated the principle of legality.[176]

A. Standard of Review

86. The Pre-Trial Chamber recalls that it has previously held that where an order by the Co-Investigating Judges such as the Impugned Order "addresses jurisdictional matters, it involves no discretion for the OCIJ."[177] As such, the Pre-Trial Chamber does not apply the deferential standard of review applicable to discretionary decisions by the Co-Investigating Judges.[178] Rather, the Pre-Trial Chamber will reverse a decision or order confirming jurisdiction where "the [OCIJ] committed a specific error of law or fact invalidating the decision or weighed relevant considerations or irrelevant considerations

[171] Nuon Chea Appeal, paras 23-28; Ieng Thirith Appeal, paras 6-72.
[172] Ieng Thirith Appeal, paras 35-37, 66.
[173] Ieng Thirith Appeal, paras 38-63.
[174] Promulgated on 21 February 1955 by the King (Kram no. 933NS), Kingdom of Cambodia, *Recueil Judiciaire,* Special Edition, 1956, pp. 11-403.
[175] Ieng Thirith Appeal, paras 73-77.
[176] Ieng Thirith Appeal, paras 81-94.
[177] JCE Decision, para. 36.
[178] Discretionary decisions are those that draw upon the organic familiarity of the OCIJ with the case and the day to day conduct and practical demands of the investigations. Examples may include decisions on provisional detention or release, evaluating evidence, or deciding on points of practice and procedure in the course of the investigations. *Cf. Prosecutor v. Tolimir et al.,* IT-04-80-AR73.1, "Decision on Radivoje Miletić's Interlocutory Appeal Against Decision on Joinder of Accused", Appeals Chamber, 27 January 2006, para. 4 (citing *Prosecutor v. Milošević*, IT-99-37-AR73, IT-01-50-AR73 and IT-01-51-AR73, "Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", Appeals Chamber, 18 April 2002, para. 3; *Prosecutor v. Milošević*, IT-02-54-AR73.7, "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel", Appeals Chamber, 1 November 2004, para. 9).

in an unreasonable manner."[179] It is well-established in international jurisprudence that, on appeal, alleged errors of law are reviewed *de novo* to determine whether the legal holdings are correct and alleged errors of fact are reviewed under a standard of reasonableness to determine whether no reasonable trier of fact could have reached the finding of fact at issue.[180]

B. Whether the inclusion within the scope of the ECCC's jurisdiction of international crimes and modes of responsibility not found in Cambodian law from 1975-1979 is in error and violates the principle of legality (Grounds 1-5 Nuon Chea Appeal; Grounds 1-3 Ieng Thirith Appeal)

1. Submissions

87. In these Appeals, the Appellants raise several arguments challenging, as a general matter, the Co-Investigating Judges confirmation of the ECCC's subject matter jurisdiction with respect of the international crimes of genocide, crimes against humanity and grave breaches of the 1949 Geneva Conventions under Articles 4-6 of the ECCC Law and to any modes of responsibility under Article 29 of the ECCC Law not found in Cambodian national law from 1975 to 1979. The Appellants claim that the ECCC lacks jurisdiction to charge these international crimes and modes of liability and doing so fails to comply with the fundamental principle of legality.

88. First, the Appellants contend that, contrary to the Co-Investigating Judges position in the Impugned Order,[181] the nature of the ECCC as either an international or Cambodian tribunal is determinative of its subject matter jurisdiction.[182] Ground 1 of the Nuon Chea Appeal alleges that several factors make it clear that the ECCC is not an international

[179] *Karadžić* Decision on Jurisdiction, para. 10 (citing *Gotovina et al.*, Decision on Jurisdiction, para. 7, citing *Prosecutor v. Prlić et al.*, IT-04-74-AR72.1, "Decision on Petković's Interlocutory Appeal Against the Trial Chamber's Decision on Jurisdiction", Appeals Chamber, 16 November 2005, para. 11 (and cases cited therein)).
[180] *Prosecutor v. Hardinaj et al.*, IT-04-84-A, "Judgement", Appeals Chamber, 19 July 2010, paras 11, 12.
[181] Impugned Order, para. 1301 ("The question whether the ECCC are Cambodian or international "in nature" has no bearing on the ECCC's jurisdiction to prosecute such crimes, provided that the principle of *nullum crimen sine lege* is respected.").
[182] Nuon Chea Appeal, para. 26; Ieng Thirith Appeal, paras 23, 47-48, 71.

tribunal but "a purely Cambodian court".[183] Consequently, the ECCC must employ a "strict application of municipal law as it existed in 1975-1979; this includes Cambodia's national approach to *nullum crimen sine lege.*"[184] Similarly, Ground 3 of the Ieng Thirith Appeal contends that the ECCC "are not 'international' courts, but hybrid forming also part of the domestic court system."[185] As such, "international law and customary international law provide an insufficient basis to prosecute the Appellant before this Court. The ECCC can only prosecute international crimes if the said crimes were properly criminalized under Cambodian domestic law prior to, or at the time of their alleged commission."[186]

89. Second, the Appellants allege that in light of the ECCC's status as a tribunal in the Cambodian judicial system, the Co-Investigating Judges erred in finding that "the issue whether international law is directly applicable in Cambodian domestic law has no bearing on ECCC jurisdiction"[187] with respect of the crimes set out in Articles 4-6 of the ECCC Law. Ground 2 of the Nuon Chea Appeal and Ground 1 of the Ieng Thirith Appeal observe that no domestic law in Cambodia in 1975-1979, including the 1956 Cambodia Penal Code, criminalized or penalized these offences.[188] Consequently, "the only alternative basis would have been the application of international law", which is not available because of Cambodia's dualist legal system and the lack of any implementing legislation in Cambodia of customary or treaty law norms with respect of these international crimes at the time of the alleged unlawful conduct.[189]

90. More specifically, Ground 3 of the Ieng Thirith Appeal argues that "[a]lthough Cambodia acceded to the 1948 Genocide Convention in 1950, it enacted no legislation

[183] Nuon Chea Appeal, paras 24, 26 (pointing to, *inter alia,* the ECCC's establishment under national law; the ECCC's placement within the existing Cambodian court structure; appointment of judicial officers by the Royal Government of Cambodia; and the priority given to Cambodian law on matters of procedure).
[184] Nuon Chea Appeal, para. 26.
[185] Ieng Thirith Appeal, para. 26 (noting that although the ECCC were established by bi-lateral agreement and are "competent to exercise jurisdiction over both international and national crimes", they "are courts within the Cambodian judicial system" and are governed by Cambodian law).
[186] Ieng Thirith Appeal, para. 27.
[187] Impugned Order, para. 1304.
[188] Nuon Chea Appeal, para. 28; Ieng Thirith Appeal, paras 15-17, 41-43, 67-68.
[189] Nuon Chea Appeal, paras 27, 28.

criminalizing genocide" pursuant to Article 5 of the Convention, "without which act genocide is not liable to prosecution in the domestic system."[190] Furthermore, the Ieng Thirith Appeal contends that the Genocide Convention is not directly applicable as domestic law because, under the terms of the treaty including Article 5 of the Convention, it may not be considered self-executing.[191] Similarly, the Ieng Thirith Appeal alleges that although the Co-Investigating Judges found that there was a customary international law prohibition with respect of crimes against humanity in 1975-1979, which is binding on States, they failed to establish a customary international law norm *criminalising* crimes against humanity necessary for entailing individual criminal responsibility.[192] Furthermore, this norm was not adopted in Cambodian implementing legislation at the time of the alleged criminal conduct, which is required for a State to "prosecute an individual alleged to have committed a crime under customary international law".[193] With respect of grave breaches of the 1949 Geneva Conventions, the Ieng Thirith Appeal notes that at the time of the charged offences, Cambodia had no implementing legislation penalizing grave breaches as required under the Conventions.[194] As such, the ECCC lacks jurisdiction over this category of crimes.

91. Third, the Appellants submit that the Co-Investigating Judges erred in the Closing Order by suggesting "that the ECCC Law has somehow criminalized offences recognized under international law" as domestic implementing legislation.[195] Ground 3 of the Nuon Chea Appeal claims that the ECCC Law is drafted in the language of jurisdiction to enforce and merely provides for personal jurisdiction with respect of crimes listed in Articles 3 (new)-6.[196] Ground 2 of the Ieng Thirith Appeal argues that the ECCC Law "only provides for the definition of those crimes over which the ECCC are endowed with jurisdiction."[197]

[190] Ieng Thirith Appeal, paras 28, 30.
[191] Ieng Thirith Appeal, para. 32.
[192] Ieng Thirith Appeal, paras 49-53.
[193] Ieng Thirith Appeal, paras 54, 56.
[194] Ieng Thirith Appeal, paras 69, 71-72.
[195] Nuon Chea Appeal, para. 30.
[196] Nuon Chea Appeal, para. 31.
[197] Ieng Thirith Appeal, para. 20.

92. Furthermore, Ground 4 of the Nuon Chea Appeal alleges that the international principle of legality under "Article 33(2) of the ECCC Law - which refers to Article 15 of the ICCPR - does not itself secure criminalization of genocide, crimes against humanity, or war crimes in Cambodia"[198] where it allows for prosecution of a criminal offence under *international law*. "As evidenced by state practice [...] international *nullum crimen* is complementary to the strictures of national sovereignty (including Cambodia's own principle of legality); its invocation [...] has no normative effect on the domestic plane in the absence of *municipal* criminalization".[199]

93. Thus, in the ECCC Law, "these articles do not convey the substantive basis of criminalization, such as that found in [the] 1956 Penal Code."[200] In addition, inferring criminality from these provisions would be illogical as their retroactive application to acts committed in 1975-1979 would violate the principle of legality.[201]

94. Finally, Ground 5 of the Nuon Chea Appeal contends that, "[a]ssuming, *arguendo*, this Chamber is convinced that the ECCC Law *has* criminalized the offences referred to in Articles 4-6, such retroactive legislation violates Cambodia's *national* principle of legality."[202] This is because "it is difficult to understand how a person operating in a dualist, national system with strong *nullum crimen* protection could (or should) have [...] foreseen *internationally-based* criminality in a Cambodian court" at that time as is allowed for under the international principle of legality found in Art. 33 of the ECCC Law.[203] Consequently, the Nuon Chea Appeal argues that [a]ny tension created by the divergence of the international and national approaches to *nullum crimen* must be alleviated in favor of the Accused pursuant to the principle of *in dubio pro reo*."[204]

2. Discussion

[198] Nuon Chea Appeal, para. 33.
[199] Nuon Chea Appeal, para. 33 (emphasis added).
[200] Nuon Chea Appeal, para. 31.
[201] Nuon Chea Appeal, para. 32; Ieng Thirith Appeal, para. 21.
[202] Nuon Chea Appeal, para. 35 (emphasis added).
[203] Nuon Chea Appeal, para. 36 (emphasis added).
[204] Nuon Chea Appeal, para. 37.

95. The Pre-Trial Chamber recalls that the ECCC Law explicitly grants jurisdiction to the ECCC to prosecute serious violations of "international humanitarian law and custom, and international conventions recognized by Cambodia".[205] Since each Appeal alleges that this would result in violations of the principle of legality, the Pre-Trial Chamber recalls that this principle is set out in Article 33(2) (new) of the ECCC Law, which provides that the ECCC shall exercise its "jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Article [...] 15" of the ICCPR.[206] Article 15(1) of the ICCPR stipulates, in relevant part, that "[n]o 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."[207] Furthermore, under Article 15(2), "[n]othing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[208]

96. The ECCC was established by a joint agreement between the Royal Government of Cambodia and the United Nations and Cambodia accepted the ECCC agreement as the law of the land.[209] The ECCC Law explicitly gives the Chambers jurisdiction to apply treaties recognized by Cambodia and customary international law, as long as it respects the principle of legality.[210] Given its express reference to Article 15 of the ICCPR, there is no doubt that, in so far as international crimes are concerned, the principle of legality envisaged by the ECCC Law is the international principal of legality. The Trial Chamber has also found that the international principle of legality applies.[211] The Appellants invite in substance the Pre-Trial Chamber to disregard the clear provision of the ECCC Law in this respect and to consider that it is bound to apply to the prosecution of international crimes as well as to that of national crimes, a "national" principle of

[205] ECCC Law, Art. 1. See also Art. 4, which refers specifically to the Genocide Convention, and Art. 6, which refers to the Geneva Conventions of 1949.
[206] Art. 33(2) (new) of the ECCC Law.
[207] Art. 15(1) of the ICCPR.
[208] Art. 15(2) of the ICCPR.
[209] Art. 47*bis* (new) of the ECCC Law.
[210] Art. 33(2) (new) of the ECCC Law.
[211] *Duch* Judgement, paras 26-34.

legality that is far stricter than the international principal of legality.[212] They submit, the ECCC is a Cambodian domestic court, it shall apply the principle of legality provided for in Article 6 of the 1956 Penal Code, which provides in its relevant part that "[c]riminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed". Also, as Cambodia applies a dualist system, the ECCC cannot, in their view, apply directly international law which was not incorporated in Cambodian domestic law during the temporal jurisdiction of the ECCC.

97. The Pre-Trial Chamber notes that in requiring, in the ECCC Law, the ECCC to directly apply treaty law and custom criminalizing the core international crimes and to exercise its jurisdiction regarding these crimes in accordance with the international principle of legality, Cambodia has followed the approach adopted by a number of States which, following the language of the ICCPR and the ECHR,[213] have included an exception for international crimes in their formulation of the principal of legality in national law.[214] Also, even if this does not reflect a uniform or constant practice, a number of domestic

[212] Nuon Chea Appeal, paras 17-19; Ieng Thirith Appeal, section 3.3.3 related to genocide and incorporated by reference to crimes against humanity (para. 48) and grave breaches (para. 71).

[213] Article 7 of the *Convention for the Protection of Human Rights and Fundamental Freedoms,* adopted at Rome on 4 November 1950 by the Council of Europe ("ECHR"), contains a similar provision to Article 15 of the ICCPR ("1. No one shall be held guilty of any criminal offence on account of any act or commission 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 the criminal offence was committed. 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.").

[214] See for instance, Article 42 (1) of the Polish Constitution of 1997 according to which the principle of legality "shall not prevent punishment of any act which, at the moment of its commission, constituted and offence within the meaning of international law". Similar provisions are found in Article 11 (g) of the 1982 Canadian Charter of Rights and Freedoms, which has the constitutional rank and determines that "any person charged with an offence has the right not to be found guilty on account of any act or omission, unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations". According to the Report of the Commission of Inquiry on War Criminals (Deschenes Commission), this interpretation of the principle of legality supersedes any inconsistent legislation. See also the Criminal Code of Bosnia and Herzegovina (Article 3 (2)). Along the same lines, the Special Panel for Serious Crimes in East Timor interpreted Sections 9.1 and 31 of the Timor Leste Constitution as allowing a person to be convicted and punished for an act or omission which at the time when it was committed, "was criminal according to general principles of law recognized by the community of nations," as provided for in Article 15(2) of the ICCPR. (*Prosecutor v. Mondonca et al.*, Case No. 18a/2001, "Decision on the Defence (Domingos Mendonca) motion for the Court to order the Public Prosecutor to amend the indictiment", 24 July 2003, para. 18). This decision has reversed the previous finding of the Court of Appeal of East-Timor (*Armando dos Santos*, "Applicable Subsidiary Law decision", 15 July 2003, p. 14).

courts have rendered decisions applying a different standard of the principle of legality for ordinary crimes and international crimes.[215] As such, various States have applied

[215] See for example, in Hungary, the finding by the Constitutional Court in 1993, referring to Article 14(2) of the ICCPR and 7(2) of the ECHR, that prosecutions for crimes against humanity and war crimes are not governed by the national principle of legality (Hungary, Constitutional Court, "Decision No. 53/1993 on War Crimes and Crimes against Humanity", 13 October 1993, English translation in Sólyom and Brunner 2000, p. 273-283, at 279; See also, interpretations by Argentinean courts of the principle of legality in an international manner, Argentina, Federal Court of Buenos Aires, *Videla*, Ruling on Pre-Trial Detention, 9 September 1999, pointing out that the principle of legality as laid down in Article 15 of the ICCPR was binding on Argentina and that it could not disregard laws established by the international legal system which takes precedence over internal laws "even if this implies assigning a significance to the principle of legality distinct from that which has traditionally been accorded it by internal courts and by the Argentine government, whose reserves in the matter can in no way modify the internal regulations and the weight of the obligations arising from the other sources of international legal norms", pp. 39-40; Argentina, Supreme Court, *Arancibia Clavel, Enrique Lautaro s/ homicidio alificado y associación illićita y otros*, 24 August 2004, majority decision refusing to find a violation of the principle of legality since at the time of the acts in question, customary international law regulated both the criminality of the acts in question and the prohibition of statutes of limitations, para. 22, 23, 28 and 33. Both decisions are cited in Ward N. Ferdinadusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Presse, 2006, pp. 74-75. See also the finding of the Colombian Constitutional Court, in its 2002 judgment on the constitutionality of the ICC Statute that the standards of the principle of legality are not identical for international and national criminal law (Colombia, Corte Constitcional, Sala Plena, *Sentencia C-578 (In re Corte Penal Internacional)*, 30 July 2002, 31 Jurisprudencia y Doctrina 2231 at 2292). In *Barbie* (1984), the French Court de Cassation rejected the extraordinary remedy launched by Barbie (*pourvoi*), by reference to Articles 15(2) of the ICCPR and 7(2) of the ECHR, finding that crimes against humanity are exempted from the principle of legality as formulated in French law (France, Cour de Cassation, *Barbie* (No. 2), 26 January 1984, Bull. Crim. no. 34 at p. 92, citing and affirming the Court of Appeal: "qu'en définitive; l'incrimination de crimes contre l'humanité est conforme aux principes généraux de droit reconnus par les nations civilisées; qu'à ce titre ces crimes échappent au principe de la non rétroactivité des lois de répression..."). But see also France, Tribunal de Grande Instance de Paris, Juge d'Instruction, *In re Javor*, "Ordonnance", 6 May 1994, (where the Investigating Judge found that universal principles defining crimes against humanity as an international crime are not sufficient to establish jurisdiction of the French courts) and, more importantly, in Aussaresses (2003), the rejection by the French Court de Cassation of the direct application of custom and the prosecution of a French general for self-confessed acts of torture and summary execution of civilians in the Algerian war, on the basis that "international customary rules cannot make up for the absence if a provision which criminalises the acts denounced by the civil petitioner as crimes against humanity" (France, Court de Cassation, *Aussaresses*, 17 June 2003, 108 RGDIP 754). For more examples of practice to the contrary, see: Oslo District Court, *Public Prosecutor v. Misrad Repak*, Case No 08-018985MED-OTIR/08, 2 December 2008, paras 6-9 (where the Court dismissed the charges involving crimes against humanity because at the time the offences were committed there were no provisions in Norwegian legislation criminalizing the conduct in the same terms as used in the current relevant law and the Constitution of Norway prohibits legislation from having retroactive effect); *Re Habre*, Appeal Decision, Cassation No 14, ILDC 164 (SN 2001), para. 33 (where the Court found that it could not prosecute a foreigner for acts of torture committed abroad at a time when the provisions of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment had not been incorporated into Senegalese domestic law.); Netherlands Supreme Court, *In re Bouterse,* 18 September 2001, English translation in the Netherlands Yearbook of International Law, para. 4.5 (where the Dutch Supreme Court found that the principle of legality as formulated in Dutch law does not make an exception for international crimes); Australia, Federal Court, *Nulyarimma v. Thompson*, [1999] FCA 1192, paras 20-26, 32 (The 2 judges majority found that in the absence of any enabling legislation, the offence of genocide was not cognizable in Australian Courts, notably as it would violate the principle of legality (para. 26). Dissenting Justice Merkel considered that the application of a crime of universal jurisdiction under international law did not entail such violation and emphasized the need for national courts to take into account developments of international law (paras 161 and 178): "It would be anomalous for the Municipal Courts not to continue their longstanding role of recognizing, by adoption, the changes and developments in international law." (para. 181).)

directly international law based on treaty and/or custom without a specific provision in the domestic law criminalizing the conduct or, in some cases, generally incorporating international law.[216] This approach is in line with the jurisprudence of the ECtHR which, like these national courts, makes a clear distinction between international crimes and ordinary crimes.[217] Similarly, the *ad hoc* tribunals conduct prosecution of international crimes on the sole basis of customary law, under the condition that the international principle of legality is respected.[218] This approach recognizes the role of both domestic and international jurisdictions for prosecuting international core crimes which, having gone through a slow process of codification, have traditionally require reliance on international law.[219] None of the arguments developed in Grounds 1-5 of the Nuon Chea Appeal and Grounds 1-3 the of Ieng Thirith Appeal, including their reference to the terms of Cambodia's constitution and to the 1956 Penal Code *nullum crimen* provision, have convinced the Pre-Trial Chamber that it is bound to exercise its jurisdiction regarding international crimes in accordance with the national principle of legality and disregard the clear direction of the ECCC Law in this respect.

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[216] In addition to the references quoted in the preceding footnote, see: Ward N. Ferdinadusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Presse, 2006, p. 85.

[217] ECtHR, *Naletilic v. Croatia*, Application no. 51891/99, Admissibility Decision, 4 May 2000. See also: *Kononov v. Latvia,* Application no. 36376/04, Judgment, Grand Chamber, 10 May 2010 ("*Kononov* Grand Chamber Judgment"), paras 185, 196 (The ECtHR recalls that "the two paragraphs of Article 7 are interlinked and are to be interpreted in a concordant manner" and that "the *travaux préparatoires* to the Convention indicate that the purpose of the second paragraph of Article 7 was to specify that Article 7 did not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish, *inter alia*, war crimes so that Article 7 does not in any way aim to pass legal or moral judgment on those laws". It emphasizes that the Applicant's conviction for war crimes was based on international rather than domestic law and must, in the Court's view, be examined chiefly from that perspective.)

[218] See *Prosecutor v. Hadzihasanovic et al.*, IT-01-47-AR72, "Decision on Interlocutory Appeal challenging Jurisdiction in relation to Command Responsibility", Appeals Chamber, 16 July 2003, paras. 35, 44-46 and 55. Ieng Thirith ackowldges in her appeal that the *ad hoc* tribunals prosecute individuals on the basis of customary law (Ieng Thirith Appeal, para. 24).

[219] *Kononov* Grand Chamber Judgment, para. 208 (The ECtHR recalls that "throughout the period of codification of war crimes, the domestic criminal and military tribunals were the primary mechanism for the enforcement of the laws and customs of war [...] and the International prosecution through the IMTs was the exception." As such, "where national law did not provide for the specific characteristics of a war crime, the domestic court could rely on international law as a basis for its reasoning, without infringing the principles of *nullum crimen* and *nulla poena sine lege*.) See also: Section 13 of the so-called Lieber Code, which, in 1863 provided that "military offenses which do not come within the statute must be tried and punished under the common law of war." (Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863 ("Lieber Code")).

98. The defendants also argue that the ECCC is restricted from prosecuting international crimes on account of Cambodia's alleged nature as a dualist country.[220] The argument by Nuon Chea that there is no principled reason to interpret the references to "law" and "laws" in the current Cambodian Constitution[221] as anything other than established domestic law is misplaced, as it is the ECCC Law that requires the ECCC to exercise its jurisdiction in accordance the international principle of legality, which allows for criminal liability over crimes that were either national or international in nature at the time they were committed.[222] The Pre-Trial Chamber observes that the Appellants do not challenge the constitutionality of the ECCC Law and, in any event, recalls that it has no authority to review the constitutionality of that law.[223] The Pre-Trial Chamber is not satisfied that this argument compels it to disregard the clear direction of the ECCC Law in this respect. As the international principle of legality does not require that international crimes and modes of liability be implemented by domestic statutes in order for violators to be found guilty, the characterisation of the Cambodian legal system as monist or dualist has no bearing on the validity of the law applicable before the ECCC.

99. As a consequence, the Chamber agrees with the Co-Investigating Judges and the Co-Prosecutors[224] that the nature of the ECCC as a court has no bearing either on its jurisdiction in this respect.[225] The ECCC's status as a national court, as claimed by the Appellants, or as an internationalized Court as earlier found by this Chamber[226] and the

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[220] Nuon Chea Appeal, paras. 20-22; Ieng Thirith Appeal, para. 32.
[221] Nuon Chea Appeal, para. 20, referring to the current Cambodian constitution according to which the "prosecution, arrest, or detention of any person shall not be done except *in accordance with the law*" and any subsequent trial "shall be conducted [...] *in accordance with the legal procedures and laws in force.*" (Constitution, Articles 38 and 110 (emphasis added)).
[222] Art. 15(1) of the ICCPR.
[223] See by analogy: Case File No. 001/18-07-2007-ECCC/OCIJ(PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", Pre-Trial Chamber, 3 December 2007, C5/45 (where the Pre-Trial Chamber hold that there is "no right for any of its Chambers to review decisions from courts outside the ECCC"). See also the view of the Cambodian Judges in the (Case File No. 001/18-07-2007/ECCC/TC, "Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes", Trial Chamber, 26 July 2010, ("Decision on Statutes of Limitation for Domestic Crimes"), para. 38.
[224] Co-Prosecutors' Response, para. 137.
[225] Nuon Chea Appeal, para. 26; Ieng Thirith Appeal, paras 23, 47-48, 71.
[226] Decision on Nuon Chea Co-Lawyers Application for the Disqualification of Judge Ney Thol, 4 February 2008, para. 30, where this Chamber found in relation to the appointment of ECCC judges, "[i]n this respect the ECCC is a new internationalized court applying international norms and standards". See also, Appeal Against

Trial Chamber[227] is irrelevant to its jurisdiction in light of the clear terms of the ECCC Law. [228] Since both the United Nations and the Cambodian's Royal Government have unambiguously agreed to grant the ECCC jurisdiction over the crimes charged in the Closing Order, such jurisdiction does not depend on the nature of the ECCC as a national or an internationalized tribunal, for the reasons explained above.[229] Either way, the ECCC has jurisdiction to hear the crimes enumerated in the ECCC Law, and when applying international law, the Chamber is bound by the international principle of legality. In any event, the Appellants do not offer in this Appeal cogent reasons which would compel the Pre-Trial Chamber to reconsider its earlier finding that the ECCC is an internationalized court.

100. Finally, the Pre-Trial Chamber notes that the same reasoning applies to the modes of liability provided for in Article 29 (new) of the ECCC Law. In this respect, it is noted that the Appellants allege that the ECCC can only apply modes of liability that were defined in the 1956 Penal Code, without mentioning which modes of liability contained in the ECCC Law would not be covered therein. While Nuon Chea makes reference in a footnote to the paragraph of the Closing Oder where the OCIJ has mentioned that some modes of liability listed in Article 29 (new) of the ECCC Law are not covered by the 1956 Penal Code,[230] namely instigation, Joint Criminal Enterprise and superior responsibility,[231] no argument has been made by any of the Appellant in the current Appeals as to how these modes of liability differs from the ones listed in the 1956 Penal Code. In any event, the Pre-Trial Chamber recalls its previous decision that it will not entertain the alleged lack of jurisdiction over joint criminal enterprise in the examination of the current appeals and announces that the conformity of the application of superior

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Provisional Detention Order of Kaing Guek Eav alias "Duch", Case File No. 001/1/-07-2007/ECCC/OCIJ (PTC01), 3 December 2007, para. 18-20.

[227] 2007/ECCC/OCIJ (PTC01), Decision on Request for Release, Case File No. 001/1/-07-2007/ECCC/TC, 15 June 2009 ("*Duch* Request for Release Decision"), para. 10.

[228] Art. 1 of the ECCC Law.

[229] Art. 1 of the ECCC Agreement (granting the ECCC competence to exercise jurisdiction over both national and international crimes); Arts 2(new)-8 of the ECCC Agreement (listing the crimes over which the ECCC has been granted jurisdiction).

[230] Nuon Chea Appeal, ftn. 7.

[231] Impugned Order, para. 1307.

responsibility with the international principle of legality in terms of accessibility and foreseeability will by addressed in part IV(F) of the current decision.

101. The Pre-Trial Chamber turns next to the question of whether, as argued by both Appellants, the Co-Investigating Judges relied on the erroneous proposition that the ECCC retroactively criminalised violations of international law.[232] Nuon Chea's assertion that the Closing Order "does suggest erroneously that the ECCC has somehow criminalized offences recognized under international law" is based on paragraphs 1305-1307 of the Closing Order. This assertion is misplaced. An objective reading of these paragraphs of the Closing Order can only lead to one conclusion – that the ECCC Law gives this court jurisdiction to hear crimes and applies form of responsibilities that were already set out under national and/or international law during the years 1975-1979. Paragraph 1304 of the Closing Order, on which Ieng Thirith places her argument, is more ambiguous:

> As to whether international law is directly applicable in Cambodia, it must be recalled that Articles 1, 2 and 29 (new) of the ECCC Law set out as Cambodian law the violations of international law within its subject matter jurisdiction (genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, the destruction of cultural property during armed conflict and crimes against internationally protected persons), as well as the applicable modes of criminal responsibility (supplementing them with a sentencing regime in accordance with the principle of *nulla poena sine lege*). By virtue of these provisions, the issue whether international law is directly applicable in Cambodian domestic law has no bearing on ECCC jurisdiction (footnotes omitted).

102. It does not however lead to the conclusion that the Co-Investigating Judges interpreted the ECCC Law as criminalising the crimes charged. The articles of the ECCC Law cited in that paragraph merely set out the purpose and jurisdiction of the court for the crimes and modes of responsibility enumerated, rather than criminalising the conduct at stake. This paragraph must be read together with the Co-Investigating Judges finding at paragraph 1302 of the Impugned Order that to comply with the principle of legality, in order to be applied before the ECCC, "where a crime was not included in the applicable

[232] Nuon Chea Appeal, paras 30-31; Ieng Thirith Appeal, para. 20.

national criminal legislation, it must be provided for in the ECCC Law, explicitly or implicitly and it must have existed under international law applicable in Cambodia at the relevant time" as well as its finding at paragraph 1303 that this principle also applies to the modes of criminal responsibility. Read in this context, the Pre-Trial Chamber is satisfied that the Co-Investigating Judges did not consider that the ECCC Law criminalized the conduct in question but rather that it granted the ECCC jurisdiction to apply customary international law that existed between 17 April 1975 and 6 January 1979 as well as conventional law binding on Cambodia during the same period.

103. As to Nuon Chea's further argument that in providing the ECCC with jurisdiction over international crimes the ECCC Law would necessarily have a "retroactive penal effect" violating the principle of legality as found in the 1956 Penal Code, it misunderstands the import of the ECCC Law.[233] The ECCC Law did not empower the Royal Government of Cambodia to prosecute senior leaders of the Democratic Kampuchea or those alleged to be mostly responsible for such international crimes. This was not needed.[234] The Cambodian's Royal Government was not only free to prosecute such crimes which occurred within its territorial jurisdiction, as a basic exercise of its jurisdiction, it was its obligation under international law to do so.[235] However, rather than using its pre-

[233] Nuon Chea Reply, para. 14.
[234] See e.g. *Kononov* Grand Chamber Judgment, para. 207 (where the ECtHR recalled that the Charter of the IMT Nuremberg was not *ex post facto* criminal legislation as there was agreement in contemporary doctrine that international law had already defined war crimes and required individuals to be prosecute.)
[235] *Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) 78 U.N.T.S. 277, ratified by Cambodia on 14 October 1950 ("Genocide Convention") Arts I and V; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified by Cambodia on 15 October 1992, Arts 4 and 5; *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S. 287 (opened for signature 12 August 1949, entered into force 21 October 1950) ratified by Cambodia on 8 December 1958 ("Geneva Convention IV"), Art 146. Cambodia, which has ratified the ICCPR, also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy. In this respect, Article 2(3) of the ICCPR provides that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity". (emphasis added) This obligation would generally require the State to prosecute and punish the authors of violations. See IACtHR, *Case Velázquez Rodríguez*, "Decisions and Judgements", 29 July 1988, para. 176 ("The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention." (emphasis added)); *Kononov* Grand Chamber

existing court structure, the Royal Government of Cambodia agreed with the United Nations to establish the ECCC for its international expertise and delegated it jurisdiction to hear these cases. The argument that the ECCC Law improperly criminalized offences already recognized under international law, according to the Co-Investigating Judges or otherwise, is thus without merit.

104. Having decided that the ECCC has jurisdiction to hear cases alleging violations of international law generally, the Chamber must next decide whether the ECCC may properly pass judgement on the specific crimes alleged in the Closing Order.

105. Before undertaking this analysis the Pre-Trial Chamber recalls that the principle of legality applies "both to the offences as well as to the forms of responsibility" charged in a Closing Order issued by the Co-Investigating Judges.[236] Accordingly, in order to fall within the subject matter jurisdiction of the ECCC, offences and modes of participation charged must: 1) "be provided for in the [ECCC Law], explicitly or implicitly";[237] and 2) have been "recognized under Cambodian or international law between 17 April 1975 and 6 January 1979."[238] As found by the ECCC Trial Chamber, "[t]he 1956 Penal Code was the applicable national law governing during the 1975 to 1979 period."[239] Furthermore, "[a]s regards relevant sources of international law applicable at the time, the Chamber may rely on both customary and conventional international law, including general principles of law recognized by the community of nations."[240] The Chamber may rely "on conventional international law where a treaty is (i) unquestionably binding on the parties at the time of the alleged offence and (ii) not in conflict with or derogating from peremptory norms of international law. [...] International tribunals have in practice nevertheless ascertained whether a treaty provision is also declaratory of custom."[241]

Judgment, para. 213 (where the ECtHR found that by May 1944, even before the adoption of the Human Rights instruments, that "States were at least permitted (if not required) to take steps to punish individuals for [war] crimes, including on the basis of command responsibility.")

[236] *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC/TC, "Judgement", 26 July 2010 ("*Duch* Judgement"), para. 28.

[237] JCE Decision, para. 43.

[238] *Duch* Judgement, para. 28.

[239] *Duch* Judgement, para. 29.

[240] *Duch* Judgement, para. 30 (footnotes omitted).

[241] *Duch* Judgement, para. 33.

106. In addition, the principle of legality requires that charged offences or modes of responsibility were "sufficiently foreseeable and that the law providing for such liability was sufficiently accessible to the accused at the relevant time."[242] "As to the requirement of foreseeability, a charged person must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, reliance can be placed on a law which is based on custom" or general principles in addition to statute or treaty law as being sufficiently available to the charged person.[243] "Further, '[a]lthough the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization [...], it may in fact play a role [...] insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.'"[244]

107. The Chamber will first analyse the arguments raised by Ieng Thirith in relation to the crimes of genocide and grave breaches of the Geneva Conventions, which raise similar issues as both these sets of crimes are codified by treaty law. It will address separately the more developed arguments raised by Ieng Thirith under her fourth ground of appeal which specifically concerns crimes against humanity.

C. Whether the OCIJ erred in its confirmation of ECCC jurisdiction over genocide and grave breaches of the Geneva Conventions because they were not foreseeable or accessible to the Appellants at the time of the alleged criminal conduct? (Grounds 3 and 4 of the Ieng Thirith Appeal)

1. Submissions

108. Grounds 3 and 4 of the Ieng Thirith Appeal further allege that the OCIJ erred in confirming the ECCC's subject matter jurisdiction over the specific crimes of genocide because "the law criminalizing such conduct was not accessible to the Appellant in

[242] *Duch* Judgement, para. 28.
[243] JCE Decision, para. 45.
[244] *Duch* Judgement, para. 32 (quoting *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, "Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise", Appeals Chamber, 21 May 2003, para. 42).

1975-79 and the Appellant could not have foreseen that the alleged conduct constituted a crime in 1975-1979" as is required under the principle of legality.[245] With respect of genocide, Ieng Thirith contends that international law provisions prohibiting it are binding on States Parties and the Co-Investigating Judges "wrongly concluded that the prohibition made individuals criminally responsible for acts of genocide committed in Cambodia in 1975-79."[246] These provisions were not legally binding on Cambodians because "no substantive criminal law at the national level criminalized such crime at the time of its alleged commission."[247] Ieng Thirith, by way of reference, raises the same arguments with regards to grave breaches of the Geneva Conventions.[248]

2. Discussion

108. Cambodia acceded to the 1948 Genocide Convention on 14 October 1950[249] and to the 1949 Geneva Conventions on 8 December 1958.[250] It is uncontested that the crimes of genocide and grave breaches of the Geneva Conventions were already part of the international law applicable to Cambodia at the time of the alleged crimes. Yet the Appellants argue that the lack of implementation into domestic law meant that the criminal nature of the alleged crimes was neither foreseeable nor accessible to them individually.[251]

109. In so far as the accessibility requirement is concerned, the Pre-Trial Chamber recalls that a mere lack of knowledge that an act is criminal does not suffice to protect defendants under the *nullum crimen sine lege* principle. For the reasons developed below, the Pre-Trial Chamber considers that even in 1975, the knowledge that the alleged actions indicted under genocide and grave breaches of the Geneva Conventions

[245] Ieng Thirith Appeal, para. 37. See also Nuon Chea Appeal, para. 13.
[246] Ieng Thirith Appeal, para. 36.
[247] Ieng Thirith Appeal, paras 37.
[248] Ieng Thirith Appeal, para. 66.
[249] United Nations Treaty Collection, MTDSG Database, "Status of Treaties".
[250] Impugned Order, para. 1316.
[251] Nuon Chea Appeal, para. 13; Ieng Thirith Appeal, paras 35-37, 66.

III and IV[252] were criminal was accessible to the Appellants, because of the treaties to which Cambodia was a party, the pre-existing customary nature of the law which those treaties codified, and the nature of the individual rights allegedly infringed.

110. The Pre-Trial Chamber considers that the Appellants' argument ignores the fact that although knowledge of the criminal nature of the alleged acts would not have been accessible to the Appellants in their domestic statutes, even in 1975, the knowledge would still have been accessible to them by virtue of the treaties which Cambodia had signed.[253] Neither Appellant has provided this Chamber with a convincing reason, or any at all, as to why there should be a distinction between municipal and treaty-based law, for purposes of accessibility.

111. Although the express language of these treaties would suggest that the prohibitions under the Genocide and Geneva Conventions apply to States rather than individuals, the Genocide Convention clearly states that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."[254] Both the Genocide[255] and the Geneva Conventions[256] contain a specific obligation for States to prosecute authors of acts prohibited therein. Despite the fact that neither treaty was implemented in Cambodian law during the period 1975-1979, they are governed by the principle of

[252] As the Appellants are only charged for grave breaches of the Geneva Conventions III and IV, the Pre-Trial Chamber will limit its analysis to these treaties in so far as the Geneva Conventions of 1949 are concerned.
[253] See *e.g.*, ECtHR, *C.R. v. United Kingdom*, Application no. 20190/92, "Judgement", 27 October 1995, para. 33.
[254] Genocide Convention, Art. IV.
[255] Art. I of the Genocide Convention ("The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."); Art. XV of the Genocide Convention ("The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.").
[256] *Geneva Convention relative to the Treatment of Prisoners of War*, 75 U.N.T.S. 135 (opened for signature 12 August 1949, entered into force 21 October 1950) ("Geneva Convention III"), Art. 129; Geneva Convention IV, Art. 146 (both stating, in relevant part, that "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.").

pacta sunt servanda.[257] As *Avocats Sans Frontières* noted in its civil party brief, Article 27 of the 1969 Vienna Convention on the Law of Treaties prohibits parties to a treaty from invoking internal law as justification for failure to perform their obligations.[258] Hence, these clearly indicate that individuals may incur criminal liability for committing genocide or grave breaches of the Geneva Conventions.

112. Other sources than the treaties indicated in 1975 that individuals may be found responsible for genocide or grave breaches of the Geneva Conventions.

113. As early as 1946, the United Nations General Assembly recognized genocide as an international, individual crime,[259] In 1951, the International Court of Justice ("ICJ") issued an advisory opinion in "The Case on Reservations to the Genocide Convention", where it wrote that:

> [The] origins of the Convention show that *it was the intention of the United Nations to condemn and punish genocide as a 'crime under international law'* involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by the civilized nations as binding on states, even without any conventional obligations.[260]

114. The Pre-Trial Chamber notes that the General Assembly Resolution and ICJ decision, in addition to the Genocide Convention, put individuals on notice that genocide was an international crime, which would expose violators to prosecution regardless of the deficiencies of a government's domestic laws, for more than twenty years preceding the commission of the alleged crimes in this case.

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[257] Art. 26 of the Vienna Convention on the Law of Treaties.
[258] Civil Party Lawyers' Observations I, para. 15.
[259] *The Crime of Genocide*, U.N. G.A. Res. 96(I), adopted on 11 December 1946.
[260] *Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 28 May 1951, ICJ Reports, 1951, 15, at p. 23 (emphasis added).

115. Furthermore, the definition of this crime of genocide has been universal, predictable, and constant, being defined identically in the Genocide Convention[261] and ECCC law.[262] The accessibility of this definition is only reinforced by the fact that the language of the Genocide Convention, in two different parts, calls on states to penalize individual breaches of the Convention.[263]

116. Similarly, by 1975 the language of the Geneva Conventions of 1949 was accessible to the Appellants, and made clear that any violations of the Grave Breaches provisions would be criminally prosecutable. The Geneva Conventions contain a provision enumerating which acts constitute "grave breaches" of the Conventions,[264] as well as a provision explicitly providing that grave breaches of the Conventions merit universal, mandatory criminal jurisdiction among the contracting States.[265] Thus, even if the

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[261] Art. II of the Genocide Convention provides:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Art. III provides that "[t]he following acts shall be punishable:
(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

[262] Art. 4 of the ECCC Law. The same is true of the ICTY Statute (Art. 4) and of the ICTR Statute (Art. 2).

[263] Art. 1 and 15 of the Genocide Convention, quoted above.

[264] Geneva Convention III, Art. 130 ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention; Geneva Convention IV, Art. 147 ("Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.")

[265] Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146 (both stating, in relevant part, that the "High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. Each High Contracting Party shall be under the obligation to search for persons alleged to

Cambodian government would not punish the Appellants, it was always possible and foreseeable that another signatory to the Geneva Conventions could bring criminal charges against the defendants for their alleged violations of the Grave Breaches provisions. The Chamber also recalls that the Grave Breaches provisions explicitly prohibit and identify the offences listed in Article 6 of the ECCC Law and the Impugned Order as criminal offences.[266] Indeed, it is worth noting in this regard that Nuon Chea and Ieng Thirith are being tried for violating the grave breaches provisions, and no other parts of the Geneva Conventions.[267]

117. The Geneva Conventions, furthermore, did not merely signify an evolution in international law, but also codified pre-existing customary international law.[268] As the Trial Chamber has previously noted, the crimes listed in the Geneva Conventions were prosecuted at Nuremberg, even before the Conventions came into existence.[269] For the acts alleged in the Closing Order, individual criminal responsibility would not be barred absent the treaty provisions on the punishment of grave breaches.[270] As with genocide, the appalling nature of the offences constituting grave breaches of the Geneva Conventions helps establish the alleged acts as being *malum in se*, so inherently evil as to refute any claim that their perpetrators were unaware of the criminal nature of their acts.[271]

118. In addition, the *jus cogens* nature of crimes of genocide and grave breaches of the Geneva Conventions alleged in the Closing Order is sufficient to justify prosecution,

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have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.").

[266] Geneva Convention III, Art. 130; Geneva Convention IV, Art. 147, quoted above.

[267] Impugned Order, paras 1316-17.

[268] *E.g.*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, "Merits Judgement", 27 June 1986, ICJ Reports 1986, p. 114, at para. 218 ("the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of" certain fundamental principles of international humanitarian law); *Prosecutor v. Delacic et al.*, IT 96-21-A, "Judgement", Appeals Chamber , 20 February 2001, paras 112-13 (acknowledging the customary nature of the Geneva Conventions).

[269] *Duch* Judgement, 26 July 2010, para. 405.

[270] *See Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg*, 27 August 1946-1 October 1946, (1948), Vol. 22, pp. 463-64.

[271] See, *e.g.*, *Prosecutor v. Milutinovicet et al.*, IT-99-37-AR72, "Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise", Appeals Chamber, 21 May 2003, para. 42.

regardless of the specific provisions of Cambodia's domestic law.[272] As the crimes indicted under genocide and grave breaches in the Closing Order, by their very nature, entail serious violations of fundamental Human Rights of their victims, such as the right to life, to be free from torture, cruel, inhuman or degrading treatment or punishment, to liberty and security, to be treated with humanity and with respect for the inherent dignity of the human person when deprived of liberty and to a fair trial, they incur a State's duty to prosecute as part of an effective to the victims under Article 2(3) of the ICCPR, which Cambodia has signed on 17 October 1980 and ratified on 26 May 1992.

119. Since the 1948 Genocide and 1949 Geneva Conventions all call for the prosecution of individuals who violate their mandates, the offences alleged in the Closing Order are clearly defined in a manner sufficient to be accessible to the Appellants at the time of the alleged crimes.[273] Therefore, the Chamber finds that the accessibility requirement of the international principle of legality is met as to the alleged violations of the Genocide and Geneva Conventions.

120. The international principle of legality not only requires that the source of law criminalizing the alleged acts be accessible to the defendants, but also that the criminal consequences of the alleged acts be foreseeable.[274] For the reasons that follow, the

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[272] See, *e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, (1996) I.C.J. Reports, 1996, p. 226, at para. 79 (holding that the Geneva Conventions "are to observed by all states whether or not they have ratified the conventions [...] because they constitute intransgressible [sic] principles of international customary law."); *Advisory Opinion on the Reservations to the Genocide Convention*, I.C.J. Reports, 1951, p. 15, at p. 23 (advising that the provisions of the Genocide Convention should be seen as binding upon the [other states], even though they have not expressly accepted them: such conventions establish a kind of binding custom, or rather principles which must be observed by all states by reason of their interdependence and of the existence of an international organization.). See also *Prosecutor v. Furundzija*, IT-95-17/1-T, "Judgement", 10 December 1998, para. 156 (where the ICTY Appeals Chamber asserted, in relation to torture, that the *jus cogens* character of a crime entails the consequence that "every State is entitled to investigate, prosecute and punish or extradite individuals accused" of such crimes. The Appeals Chamber notably refers to the general statement of the Supreme Court of Israel in *Eichmann* to the effect that "it is the universal character of the crimes in question [*i.e.* international crimes] which vests in every State the authority to try and punish those who participated in their commission *(Attorney General of the Government of Israel v. Eichmann*, Supreme Court of Israel, 36 I.L.R. 28 (1962) ("*Eichmann* case"), at p. 298).

[273] See ECtHR, *Kokkinakis v. Greece,* Application No. 14307/88, "Judgement", 25 May 1993, para. 52, ("An offence must be clearly defined in the law. This condition is satisfied where the individual can know from the wording of the relevant provision" that the alleged acts were illegal under criminal law).

[274] See, *e.g.*, ECtHR, *G. v. France*, Application No. 15312/89, "Judgement", 27 September 1995, paras 24-25.

Chamber finds that this second prong of the international principle of legality is satisfied in the present case.

121. As explained above, international treaty and customary law made it foreseeable that authors of genocide or grave breaches could be prosecuted and punished. Indeed, after the Nuremberg and Tokyo trials, it would have been foreseeable to any individual that criminal violations of international law would expose them to potential criminal liability. In so far as the "tariff of penalty" is concerned, the Pre-Trial Chamber observes that the principle of legality, as defined in Article 15(1) of the ICCPR, entails that an individual shall not be imposed "a heavier penalty [...] than the one that was applicable at the time when the criminal offence was committed". A similar provision is contained in the Additional Protocols I and II to the Geneva Conventions.[275] As such, so long as the penalty given is within the maximum allowable under applicable law at the time of the crime, there is no violation of the principle of *nulla poena sine lege* as enshrined in Article 15(1) of the ICCPR.

122. The Pre-Trial Chamber observes that neither the Genocide Convention nor the Geneva Conventions provide for penalties, although they require contracting parties to enact the necessary legislation "to provide effective penalties".[276] However, international customary law made it clear in the aftermath of World War II and even before that genocide and grave breaches of the Geneva Convention would entail the more severe penalties, up to and including the death penalty. As is well-known, the International Military Tribunal (IMT) was notably empowered to impose any criminal sentences which it "determined to be just" on German nationals who committed crimes under international law.[277] Indeed, twelve defendants were sentenced to death by the IMT and

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[275] *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, 1125 U.N.T.S. 3 (adopted on 8 June 1977, entered into force on 7 December 1978) ("Additional Protocol I"), Art. 75(4)(c), ratified by Cambodia in 1993; *Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)* 1125 U.N.T.S. 609 (adopted on 8 June 1977, entered into force on 7 December 1978) ("Additional Protocol II"), Art. 6(2)(c).

[276] Genocide Convention, Art. V; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146, reproduced above.

[277] Charter of the International Military Tribunal for the Trial of the Major War Criminals, appended to the London Agreement, 8 August 1945, 82 U.N.T.S. 280 ("IMT Charter"), Art. 7.

seven to periods of imprisonment ranging from 10 years to life.[278] Heavier sentences were pronounced at Tokyo by the IMTFE.[279] By 1950, the Nuremberg Principles, particularly Principle II, had already established "[t]he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."[280] Given the fact that customary international law would allow for punishment that could include life imprisonment and even the death penalty for genocide and grave breaches of the Geneva Convention, the ECCC Law, which provides for a maximum penalty of life imprisonment and the "confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct"[281] does not expose the Appellants to a heavier penalty than the maximum penalty available under international law.

123. Thus, the Appellants' alleged conduct in carrying out genocide and Grave Breaches of the Geneva Conventions was illegal at the time the acts occurred, as required for a trial at international law.[282] Likewise, it would have been foreseeable to the Appellants here, even in 1975, that their "concrete conduct was punishable at the time of commission."[283] It is quite likely that the alleged perpetrators of these acts, committed at the height of the Khmer Rouge's power, did not foresee that they would ever be punished, as a political matter. Lack of foreseeability in this sense provides no defence under international law, however, when the underlying conduct was itself punishable.

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[278] IMT Judgment. See also *e.g.*, *United States v. Ohlendorf*, 3 LRTWC 470 (1948); *United States v. Alsotter*, 6 LRTWC 1, 3 (1948); *United States v. Greifelt*, 13 LRTWC 1 (1948); *Eichmann* case.. See also: U.S. Army, *Rules of Land Warfare,* Field Manual 27-10 357, 1 October 1940 (expressing that a "penalty may be imposed" on enemies who committed war crimes violations).

[279] At Tokyo, most of the defendants convicted for war crimes were sentenced to death or life imprisonment (International Military Tribunal for the Far East, *The United States of America et al. v. Araki et al.* "Majority Judgment", 4-12 November 1948, reproduced in Neil Boister and Robert Cryer (eds), *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments,* Oxford University Press, 2008 ("IMTFE Judgment"), pp. 49,854-49,858).

[280] Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, Report of the International Law Commission covering its Second Session, 5 June - 29 July 1950, Document A/1316 ("Nuremberg Principles"), Principle II .

[281] ECCC Law, Arts. 38 and 39.

[282] See, *e.g.*, *Prosecutor v. Hadzihasanovic et al.*. IT-01-47-PT, "Decision on Joint Challenged to Jurisdiction", Trial Chamber, 12 November 2002, para. 62.

[283] *Ibid.*

124. In conclusion, the Chamber finds that, at all times relevant to the Impugned Order, the crimes of genocide as defined in the 1948 Genocide Convention and grave breaches of the 1949 Geneva Conventions III and IV retained in that order constituted crimes under international law. Thus, the ECCC has jurisdiction to try the Appellants for their alleged violations of these treaties, as detailed in the Closing Order.

D. Whether the OCIJ erred in its confirmation of ECCC jurisdiction over crimes against humanity because they were not foreseeable or accessible to the Appellants at the time of the alleged criminal conduct (Ground 4 of the Ieng Thirith Appeal)

1. Submissions

125. Ground 4 of the Ieng Thirith Appeal alleges that the OCIJ erred in confirming the ECCC's subject matter jurisdiction specifically with respect of crimes against humanity because they "were not sufficiently foreseeable and accessible during the period of the Court's temporal jurisdiction."[284] First, the Ieng Thirith Appeal notes that crimes against humanity have never been the subject of a specialized convention and, before the jurisprudence of the *ad hoc* criminal tribunals, "no firm definition of 'crimes against humanity' was adopted under customary international law."[285] Consequently, the definition of crimes against humanity lacked specification in 1975-1979 and was inaccessible and insufficiently foreseeable at that time.[286]

126. Second, the OCIJ erred in referring to the definition of crimes against humanity as found under the 1998 Statute of the International Criminal Court because that definition departs from customary international law and "substantially enlarges the specific elements and modes of behavior."[287] Specifically, the Ieng Thirith Appeal challenges: the OCIJ's omission of the existence of an armed conflict requirement; the inclusion of rape as a constituent act of crimes against humanity; and the inclusion of forced

[284] Ieng Thirith Appeal, para. 59.
[285] Ieng Thirith Appeal, para. 59.
[286] Ieng Thirith Appeal, paras 58-59.
[287] Ieng Thirith Appeal, para. 60.

marriage, sexual violence and enforced disappearances as falling within the category of "other inhumane acts" as constituent acts of crimes against humanity.[288] The Appellant contends that, "[t]he CIJ have therefore erred in widening the scope of conduct which could amount to a crime against humanity at the relevant time."[289] In sum, "[t]his not only violates the principle of *nullum crimen sine lege* but also means that the specific requirement of foreseeability and accessibility has not been fulfilled."[290]

2. Discussion

127. The Pre-Trial Chamber recalls that under Article 5 of the ECCC Law:

> [c]rimes against humanity [. . .] 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: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; other inhumane acts.

128. In the Closing Order, the OCIJ held that this definition of crimes against humanity existed as an international crime under customary international law from 1975-1979 and, in light of World War II case law, it was sufficiently foreseeable and accessible to the Appellant that she could be prosecuted for such crimes.[291] Also, in finding that the ECCC has jurisdiction over charges of rape and other inhumane acts as crimes against humanity specifically with respect of charges against Ieng Thirith, the OCIJ held that the underlying offence of "other inhumane acts" includes indicted acts of forced marriage, sexual violence and enforced disappearance.[292]

(i) Whether the Definition of Crimes Against Humanity was Sufficiently Foreseeable and Accessible in 1975-1979

[288] Ieng Thirith Appeal, paras 60-61.
[289] Ieng Thirith Appeal, para. 62.
[290] Ieng Thirith Appeal, para. 62.
[291] Impugned Order, para. 1308 (footnotes omitted).
[292] Impugned Order, para. 1314 (footnotes omitted).

129. The Ieng Thirith Appeal posits that because crimes against humanity have never been the subject of a specialized convention as there was disagreement on the definition of crimes against humanity when the International Law Commission ("ILC") was working on a draft code of offences for a future international criminal court from the 1950s until the jurisprudence of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda in the 1990s and as the elements of crimes against humanity were not spelled out prior to that jurisprudence, "no firm definition of 'crimes against humanity' was adopted under customary international law until then."[293]

130. The Pre-Trial Chamber does not agree. Following World War II, the definition and elements of crimes against humanity as an international crime were established under customary international law as articulated and applied in the 1945 Nuremberg International Military Tribunal ("IMT") Charter;[294] the 1946 International Military Tribunal for the Far East ("IMTFE") Charter,[295] Law No. 10 of the Allied Control Council ("Council Control Law"),[296] the jurisprudence from the Nuremberg IMT[297] and from the military commissions in the occupied zones in Germany;[298] and the 1950 Nuremberg Principles.[299] The definition that was codified and adopted by the ILC in the Nuremberg Principles pursuant to UN General Assembly Resolution 177 (II), paragraph (a), and affirmed by General Assembly resolution,[300] reflected the principles of international law on crimes against humanity at the time as follows:

> Crimes against humanity:

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[293] Ieng Thirith Appeal, para. 59.
[294] IMT Charter, Art. 6(c).
[295] Charter of the International Military Tribunal for the Far East ("IMTFE Charter"), Art. 5(c).
[296] *Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 20 1945, 3 Official Gazette Control Council for Germany 50-55 (1946) ("Council Control Law"), Art. II(1)(c).
[297] Trial of the Major War Criminals before the International Military Tribunal, "Judgment", 1 October 1946, reprinted in Trial of the Major War Criminals, Secretariat of the International Military Tribunal, 1947, Vol. I, p. 171 ("IMT Judgment"), at Vol. I, pp. 174, 253, 254-55.
[298] See, *e.g.*, the cases heard and decided under the Council Control Law from October 1946-April 1949 before the Nuremberg Military Tribunals ("NMT") cited in Section IV(F) below.
[299] Nuremberg Principles.
[300] *Affirmation of the Principles of International Law recognized by the Charter of the Nürrnberg Tribunal*, U.N. G.A. Res. 95 (I), 11 December 1946.

> Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.[301]

131. The Pre-Trial Chamber notes that it is true, as stated by the Appellant, that subsequently, starting with the 1954 Draft Code of Offences[302] until the Draft Code of Crimes Against the Peace and Security of Mankind in 1996,[303] the ILC was unable to adopt an agreed definition for crimes against humanity in its quest to codify a criminal code for a future international criminal court. However, the Pre-Trial Chamber does not consider that this indicates that a sufficient definition for crimes against humanity under customary international law was lacking from 1975-1979. The object of the ILC under Article 1 of its Statute is "the promotion of the progressive development of international law and its codification" and, under Article 15 of the Statute, the ILC's codification work involves "the *more precise* formulation and systematization of rules of international law in fields where there *already has been* extensive State practice, precedent and doctrine".[304] The fact that the ILC was unable to agree on a "more precise" formulation for crimes against humanity than that which was articulated from post World War II precedent does not indicate that the definition that already existed under customary international law during the ECCC's temporal jurisdiction lacked sufficient specification and was in violation of the principle of legality. Furthermore, the ILC's disagreement may well have resulted from efforts at seeking progressive development of crimes against humanity beyond its customary international law definition following World War II.

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[301] Nuremberg Principles, Principle VI(c).
[302] *Draft Code of Offences against the Peace and Security of Mankind*, Third Report of J. Spiropoulos, Special Rapporteur, Doc. A/CN.4/85, reproduced in *Yearbook of the International Law Commission,* 1954, Vol. II, pp. 112-121; see also the General Assembly's rejection: Draft Code of Offences against the Peace and Security of Mankind, U.N. G.A. Res. 897 (IX), 4 December 1954.
[303] *Draft Code of Crimes for the Peace and Security of Mankind*, Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, Doc. A/51/10, reproduced in *Yearbook of the International Law Commission*, 1996, Vol. II (Part II), pp. 15-56, esp. Art 18, p. 47
[304] *Yearbook of the International Law Commission*, 1979, vol. II (Part One), Doc. A/CN.4/325, para. 102, and *ibid.* 1996, vol. II (Part Two), paras 156 and 157 (emphasis added).

132. The Pre-Trial Chamber does not agree either that the failure of the international community since the Nuremberg Principles to enact a specialized convention for crimes against humanity indicates that a firm definition of crimes against humanity as a matter of customary international law was lacking prior to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") beginning in the 1990s. There are various reasons, including political reasons, why States fail to enact treaty law. Furthermore, even if treaties are enacted, they do not necessarily reflect the state of customary international law with respect of their subject matter at the time they are adopted.

133. Finally, the Chamber notes that the definition, including the elements of crimes against humanity as articulated in the 1950 Nuremburg Principles, was sufficiently specific such that its elements were adopted nearly verbatim in the statutes of the ICTY and ICTR in 1993 and 1994 pursuant to Security Council resolutions.[305] While there are some differences, specifically with respect of the ICTR Statute's omission of an armed conflict nexus requirement and inclusion in the chapeau of a discriminatory *animus* requirement, these differences were specific to these *ad hoc* tribunals' jurisdiction and do not necessarily reflect customary international law. Indeed, some of the changes to the definition, specifically the omission of the armed conflict nexus requirement and inclusion of more underlying acts,[306] have been interpreted and applied to reflect developments in customary international law since the prosecution of crimes against humanity post-World War II. In addition, while the *ad hoc* tribunals' jurisprudence has certainly played a role in fleshing out the contours of the elements of crimes against humanity as articulated in the Nuremberg Principles, the Pre-Trial Chamber does not consider that this fact indicates that the definition post-World War II was insufficiently clear. Therefore, the Pre-Trial Chamber finds that the definition of crimes against

[305] Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted on 25 May 1993 by U.N. S.C. Res. 827 (1993), as amended on 7 July 2009 ("ICTY Statute"), Art. 5; Statute of the International Criminal Tribunal for Rwanda, adopted by U.N. S.C. Res. 955 (1994), as amended on 31 January 2010 ("ICTR Statute"), Art. 3.

[306] Both Statutes include imprisonment, torture and rape as additional underlying acts (See ICTY Statute, Art. 5(e)-(g); ICTR Statute, Art. 3 (e)-(g)). However, the Pre-Trial Chamber notes that these were also included in Council Control Law, Art. II(1)(a)..

humanity as articulated in the Nuremburg Principles was sufficiently specific in the period 1975-1979 under customary international law such that it was foreseeable and accessible to the Appellant that she could be prosecuted for such crimes.

(ii) Whether the Definition of Crimes Against Humanity under Customary International Law from 1975-1979 Included an "Armed Conflict Nexus" Requirement

134. The Ieng Thirith Appeal further argues that the OCIJ erred in the Closing Order in affirming ECCC jurisdiction over crimes against humanity under Article 5 of the ECCC Law because "although the existence of an armed conflict was an element of the definition as set out in Article 6(c) of the IMT Charter, the OCIJ did not uphold that requirement in the definition of crimes against humanity set out in the Closing Order."[307] Accordingly, this definition of crimes against humanity was not foreseeable and accessible in the relevant period of 1975 to 1979.[308]

135. The Pre-Trial Chamber recalls, as noted previously, that the definition of crimes against humanity was first codified in international law under Article 6(c) of the IMT Charter. Embedded within that definition is the so-called armed conflict nexus requirement, which stipulates that the underlying acts constituting crimes against humanity be perpetrated "in execution of or in connection with any crime within the jurisdiction of the Tribunal."[309] This provision imported into the definition a requirement that there be a connection between crimes against humanity and crimes against peace or war crimes as set out in the preceding two paragraphs of the same article. This requirement was also included in the Nuremberg Principles.[310]

136. The ICTY jurisprudence on point has held that the explicit requirement of an armed conflict nexus in the Nuremberg Charter and Nuremberg Principles was special to the

[307] Ieng Thirith Appeal, para. 61. Although Nuon Chea does not raise this particular issue as a separate ground of appeal, the Nuon Chea Appeal, in its "Relevant Law" section similarly observes that "[a]s late as 1994, Judge Meron noted that it was impossible to find a consistent position on whether the link between crimes against humanity and armed conflict was in tact. And it was only in the following year that the ICTY Appeals Chamber announced that such link had been severed." (Nuon Chea Appeal, para. 11).
[308] Ieng Thirith Appeal, para. 62.
[309] IMT Charter, Art. VI(c).
[310] Nuremberg Principles, Principle VI(c).

jurisdiction of the IMT,[311] as it was established specifically "for the just and prompt trial and punishment of the major war criminals of the European Axis countries."[312] Accordingly, the ICTY Appeals Chamber in *Tadić* held that "there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity."[313]

137. The Pre-Trial Chamber notes that, while this may have been the case under customary international law at the time of the *Tadić* decision in 1995, it must determine whether the armed conflict nexus requirement still existed from 1975-1979. For the reasons that follow, the Chamber considers that it is not clear, as a matter of customary international law, whether the armed conflict nexus requirement was severed prior to, or during, the temporal jurisdiction of the ECCC.

138. The ICTY Trial Chamber in *Tadić* quoted the Nuremberg Military Tribunal ("NMT") *Einsatzgruppen* case in the U.S. occupied zone in support of the proposition that subsequent to the IMT Charter and jurisprudence, the Control Council Law and jurisprudence removed the nexus to an armed conflict requirement "so that the [Nuremberg Military] Tribunal ha[d] jurisdiction to try all crimes against humanity *as long known and understood under the general principles of criminal law.*"[314] Implicit in this passage is the proposition that the definition of crimes against humanity under customary international law predating the definition codified in the IMT Charter did not include an armed conflict nexus requirement.

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[311] *Prosecutor v. Tadić*, IT-94-1-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995, para. 140.
[312] Art. I, IMT Charter; *Prosecutor v. Tadić*, IT-94-1-T, "Decision on the Defence Motion on Jurisdiction", Trial Chamber, 10 August 1995, para. 78.
[313] *Prosecutor v. Tadic*, IT-94-1-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995, para. 140.
[314] *United States v. Otto Ohlendorf et al.*, 8 and 9 April 1948, reproduced in Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, United States Government Printing Office, 1949-1952 ("*NMT Trials*"), Vol. IV, p. 3 (the "*Einsatzgruppen* Case"), at Vol. IV, p. 499(emphasis added); *Prosecutor v. Tadić*, IT-94-1-T, "Decision on the Defence Motion on Jurisdiction", Trial Chamber, 10 August 1995, para. 79.

139. However, the predecessors to crimes against humanity, the preamble of the Declaration of St. Petersburg in 1868[315] and the Martens Clause in the Hague Conventions of 1899[316] and 1907[317] invoking the "laws of humanity"' as residual protection against acts not explicitly prohibited in the text of each convention, were firmly based in the laws and customs of war. The drafters of the IMT Charter accordingly ensured a connection to an armed conflict in order to avoid allegations that the resulting convictions went beyond that provided for under international customary and conventional law.[318] Thus, at the time of its genesis, crimes against humanity required a nexus to armed conflict.

140. In addition, although the Council Control Law omitted it, some of the subsequent cases heard and decided under the Council Control Law from October 1946 – April 1949 before the Nuremberg Military Tribunals ("NMT") jurisprudence continued to apply it.[319] Furthermore, although the 1948 Genocide Convention was unanimously adopted by the United Nations General Assembly,[320] the definition of genocide contained therein, which does not include the armed conflict nexus requirement, unequivocally departs from genocide's crimes against humanity origins by requiring a very specific intent that was not articulated in the IMT Charter.[321] Even if genocide was considered a subset of crimes against humanity in 1948, the Genocide Convention only omitted the armed conflict nexus requirement for genocide specifically and not all other crimes against humanity. Indeed, as noted previously, the 1950 Nuremberg Principles, which reflected principles of international law at the time, included it in the crimes against humanity definition.

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[315] *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (adopted at Saint Petersburg, 29 November / 11 December 1868), reprinted in D. Schindler and J. Toman (eds), *The Laws of Armed Conflicts*, Martinus Nihjoff Publisher,1988, p. 102 (Preamble: "[...] the employment of such arms would, therefore, be *contrary to the laws of humanity*" (emphasis added).)

[316] *Hague Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899 ("1899 Hague Convention II"), Preamble.

[317] *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907 ("1907 Hague Convention IV"), Preamble.

[318] Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, pp. 23-25, 29-30, 43.

[319] *United States v. Friedrich Flick et al.*, 22 December 1947, reproduced in *NMT Trials*, Vol. VI, p. 3 (the "*Flick* Case), at Vol VI, p. 1213; *United States v. Ernst von Weizsaecker et al.*, 14 April 1949, reproduced in *NMT Trials*, Vols XIII – XIV (the "*Ministries* Case"), at Vol XIV p. 558.

[320] Genocide Convention, Art. 1 ("whether committed in time of peace or in time of war").

[321] Genocide Convention, Art. 2 ("committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group").

141. The Pre-Trial Chamber further notes that the ILC's draft definition of crimes against humanity without an armed conflict nexus requirement in the 1954 Draft Code of Offences Against the Peace and Security of Mankind was never accepted by the United Nations General Assembly.[322] The 1968 Statute of Limitations Convention,[323] which fails to make reference to the nexus requirement, was signed, ratified or acceded to, by only 18 United Nations member States out of a total 134 by 17 April 1975, and by only one additional State during the ECCC's temporal jurisdiction.[324] While the Chamber accepts that the practice of States need not be perfectly uniform to amount to general practice, it cannot be said that this convention passed a threshold level of acceptance in order to qualify as general practice. Furthermore, in 1968, the representatives to the Convention on Statutes of Limitation were almost equally divided among those in favor of removing the armed conflict nexus and those who opposed such a step.[325]

142. Similarly, the 1974 Apartheid Convention, which defines the crime against humanity of apartheid without an armed conflict nexus requirement,[326] was signed, ratified or acceded to, by only 25 United Nations Member States out of a total 134 by 17 April 1975, and by 32 further States during the ECCC's temporal jurisdiction by the close of which the total number of Member States had increased to 148.[327] This does not amount to general State practice. Hence, as noted with respect of the 1948 Genocide Convention, the removal of the armed conflict nexus requirement for apartheid did not change the general requirement of a nexus for all other crimes against humanity. In

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[322] See the General Assemby's rejection: *Draft Code of Offences against the Peace and Security of Mankind*, U.N. G.A. Res. 897 (IX), 4 December 1954.
[323] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, U.N. G.A. Res. 2391 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968), 754 U.N.T.S. 73 (opened for signature on 26 November 1968, entered into force on 11 November 1970), Art. 1(b) ("Crimes against humanity whether committed in time of war or in time of peace").
[324] United Nations Treaty Collection, MTDSG Database, "Status of Treaties", Chap. IV.6.
[325] Commission on Human Rights, Report of the Twenty-Third Session, 20 February 1967 - 23 March 1967, paras 144-145, in Economic and Social Council Official Records, 42nd Sess., Supp. No. 6.
[326] *International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. G.A. Res. 3068 (XXVIII)), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243 (entered into force 18 July 1976) ("1974 Apartheid Convention") (Note the Preamble, in paras 6 and 7, where apartheid is expressed as a crime against humanity, and Art. II where the nexus is omitted in the definition of apartheid).
[327] United Nations Treaty Collection, MTDSG Database, "Status of Treaties", Chap. IV.7.

addition, as far as the Pre-Trial Chamber can ascertain, there are few examples of national legislation defining crimes against humanity without this nexus requirement.

143. Finally, after the period of the ECCC's temporal jurisdiction, when the ILC again recommended adopting a definition of crimes against humanity without the nexus requirement in 1984, the debates among State representatives evince that it was likely that the mainstream of State opinion was to remove the nexus requirement.[328] However, that draft definition was not adopted by the UN General Assembly. In addition, as noted previously, although the Security Council omitted the armed conflict nexus in the 1994 ICTR Statute, it included it in the first definition of crimes against humanity codified as a matter of international law since the 1950 Nuremberg Principles in the 1993 ICTY Statute. Finally, disagreement on the requirement of an armed conflict nexus persisted until the conference for establishment of the International Criminal Court, [329] which was ultimately resolved by the text of the resultant 1998 Rome Statute which does not require an armed conflict nexus.[330]

144. In sum, in the absence of clear state practice and *opinio juris* from 1975-1979 evidencing severance of the armed conflict nexus requirement for crimes against humanity under customary international law, the principle of *in dubio pro reo* dictates that any ambiguity must be resolved in the favor of the accused. Thus, the Pre-Trial Chamber finds that from 1975-1979, the definition of crimes against humanity under customary international law included an armed conflict nexus requirement as articulated in the IMT Charter and Nuremberg Principles, such that there needs to be a link to war crimes or crimes against peace., i.e. a link between the underlying acts charged as

[328] See: Comments and observations received from Governments pursuant to General Assembly Resolution 36/106, May 1982, U.N. Doc. A/CN.4/358 and Add. 1-4, pp. 274-275 (Belarus), 275 (Czechoslovakia), 276 (East Germany), 277 (Ukraine), 279 (USSR), 280 (Uruguay); Comments and observations received from Governments pursuant to General Assembly Resolution 37/102, May 1983, U.N. Doc. A/CN.4/369 and Add. 1 and 2, p. 154 (Suriname); Observations of Member States and intergovernmental organizations received pursuant to General Assembly Resolution 39/80, May 1985, A/CN.4/392 and Add.1 & 2, p. 86 (Mongolia).

[329] Herman von Hebel and Darryl Robinson, "Crimes within the Jurisdiction of the Court" in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, p. 79, at p. 92.

[330] *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 3 (opened for signature 17 July 1998, entered into force 1 July 2002), Art. 7 (definition of crimes against humanity omits nexus requirement); 71 nations became signatories immediately in 1998, increasing to 139 in 2010, with 114 States having ratified the treaty).

crimes against humanity and an armed conflict. Furthermore, because grave breaches and serious war crimes as defined under the 1949 Geneva Conventions were prohibited as a matter of customary international law with respect of both international and internal armed conflict at the time, the necessary nexus to an armed conflict includes both international and internal armed conflicts.[331] While the Trial Chamber did not reach this conclusion in the *Duch* Judgment[332] with respect of its application of crimes against humanity in that case, the Pre-Trial Chamber notes that the issue of the existence of an armed conflict requirement was not specifically challenged by the accused and was therefore not before the Chamber. On the basis of the foregoing, the Pre-Trial Chamber grants this part of Ground 4 of the Ieng Thirith Appeal and finds that the OCIJ erred in failing to include the armed conflict nexus requirement as part of its definition of crimes against humanity under customary international law from 1975-1979.

145. Turning on to determine whether it can add this requirement to the indictment and maintain the charges for crimes against humanity set out therein, the Pre-Trial Chamber notes that the Impugned Order does not specifically describe the material facts with respect of the armed conflict nexus requirement because the OCIJ was of the view that it was not required in the definition for crimes against humanity under the ECCC Law. However, it did find, as a factual matter, that:

> [a]lmost immediately following the entry into Phnom Penh of the Cambodian People's National Liberation Armed Forces (CPNLAF) on 17 April 1975, a state of international armed conflict came into existence between the Socialist Republic of Vietnam and Democratic Kampuchea. Protracted armed hostilities continued until the capture of Phnom Penh on 7 January 1979 by Vietnamese forces and beyond.[333]

146. In addition, the OCIJ, in its factual findings on joint criminal enterprise, found that "[t]he common purpose of the CPK leaders was to implement rapid socialist revolution in Cambodia through a 'great leap forward' and defend the Party against internal and

[331] *Prosecutor v. Tadić*, IT-94-1-T, "Decision on the Defence Motion on Jurisdiction", Trial Chamber, 10 August 1995, para. 82.
[332] *Duch* Judgement, paras 291-292.
[333] Impugned Order, para. 150. See also paras 151-155.

external enemies, by whatever means necessary" including through the "killing of 'enemies', both inside and outside the Party ranks."[334]

147. The Co-Prosecutors have also consistently argued that a nexus was not necessary, but added that in any event, such nexus existed.[335]

148. Although further particulars might eventually be required for the accused to be put on sufficient notice of the nature and cause of the charge against them[336], this can be done before the Trial Chamber and shall not prevent the Pre-Trial Chamber, at this stage of the proceedings, to maintain the charges for crimes against humanity, while adding the "existence of a nexus between the underlying acts and the armed conflict" to the "Chapeau" requirements in Chapter IV(A) of Part Three of the Closing Order.

(iii) Whether the Definition of Crimes Against Humanity under Customary International Law from 1975-1979 Included Rape as a Crime Against Humanity

149. In the Impugned Order, the Co-Investigating Judges found that "[t]he legal elements of the crime against humanity of rape have been established in the context of forced marriage."[337] The Ieng Thirith Appeal contends that because rape was not explicitly included in the IMT Charter, the IMTFE Charter or the Nuremberg Principles, rape was not an enumerated crime against humanity under customary international law during the ECCC's temporal jurisdiction.[338] The Ieng Thirith Appeal further avers by way of footnote that rape was only recognised as a crime against humanity in 1998, by the ICTR in *Prosecutor v. Akayesu*.[339] Therefore, between 1975 and 1979, it was neither foreseeable nor accessible to the Appellant that she could be prosecuted for rape as a crime against humanity.[340]

[334] Impugned Order, paras 156, 157.
[335] Co-Prosecutors' Response, para. 186.
[336] ECCC Law, Art. 35 (new) (1)(a).
[337] Impugned Order, para. 1430.
[338] Ieng Thirith Appeal, para. 61.
[339] Ieng Thirith Appeal, ftn. 64.
[340] Ieng Thirith Appeal, paras 61-62.

150. The Pre-Trial Chamber concurs with the ICTY *Kunarac* Trial Chamber that "[r]ape is one of the worst sufferings a human being can inflict upon another."[341] The act of rape is abhorrent and deeply shocking to any reasonable human being. Rape constitutes a gross violation of the victim's physical integrity, in addition to inflicting lifelong and severe consequences upon the victim's mental well-being. However, as Justice Robertson's dissenting opinion in the Special Court for Sierra Leone *Child Soldier Case* points out, "it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime."[342] Accordingly, although rape is explicitly enumerated under Article 5 of the ECCC Law as a crime against humanity, the Pre-Trial Chamber turns to consider whether it was criminalized as a crime against humanity from 1975-1979.

151. The offence of rape has long been prohibited as a war crime, dating back at least to the Lieber Code of 1863.[343] The Oxford Manual, drafted by the Institute of International Law in 1880, states that "family honour and rights", a phrase understood to encompass a prohibition on rape and sexual assault,[344] must be respected as part of the laws and customs of war.[345] The 1899[346] and 1907[347] Hague Conventions repeat the same

[341] *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, "Judgement", Trial Chamber, 22 February 2001, para. 655; Co-Prosecutors' Response, para. 190.
[342] *Prosecutor v. Norman*, SCSL-04-14-AR72(E), "Dissenting Opinion of Justice Robertson on Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)", Appeals Chamber, 31 March 2004, para. 13.
[343] Lieber Code, Art. 44 ("All wanton violence committed against persons in the invaded country [...] all *rape*, wounding, maiming or killing of such inhabitants, are prohibited under the penalty of death, or such severe punishment as may seem adequate for the gravity of the offense" (emphasis added)).
[344] Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, 1999, p. 348.
[345] *The Laws of War on Land*, adopted by the Institute of International Law, Oxford, 9 September 1880 ("Oxford Manual"), Art. 49 ("Family honour and rights, the lives of individuals, as well as their religious convictions and practice, must be respected.")
[346] *Hague Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land*, 29 July 1899 ("1899 Hague Regulations"), Art. 46 ("Family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected.")
[347] *Hague Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land*, 18 October 1907 ("1907 Hague Regulations"), Art. 46 ("Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.")

requirement, reinforced by the general protection afforded by the Martens Clause.[348] Rape was then explicitly prohibited in the Geneva Conventions of 1949,[349] Additional Protocol I of 1977,[350] and Additional Protocol II of 1977.[351] It is thus clear that rape was a war crime before 1975, and was confirmed as such by the Additional Protocols during the ECCC's temporal jurisdiction.

152. Prior to 1975, rape was criminalised as a crime against humanity under Article II(1)(c) of the Control Council Law, although there are no clear examples of convictions for rape pursuant to this law before the NMTs.[352] As noted previously, neither the IMT nor IMTFE Charters included rape as a crime against humanity. Even if evidence of rape was read into the record by the French and Soviet prosecutors before the IMT,[353] nowhere in the IMT Judgement was rape mentioned and no defendants were convicted of rape characterised as any crime, let alone as a crime against humanity.[354] The United Nations General Assembly did not therefore uphold rape as a crime against humanity when it affirmed the Nuremburg Principles. The IMTFE Judgement found General Iwane Matsui and Kōki Hirota guilty of failing to prevent the rape of approximately 20,000 women at Nanking, but rape was characterised as a war crime rather than as a crime against humanity.[355] The OCIJ[356] have not referred this Chamber to any other

[348] Hague Convention (II), Preamble.
[349] Geneva Convention IV, Art. 27(2).
[350] Additional Protocol I, Art. 76(1) (adopted by consensus).
[351] Additional Protocol II, Art. 4(2)(e) (adopted by consensus).
[352] For mention of other sexual crimes see: *United States v. Karl Brandt et al.*, 19 August 1947, reproduced in *NMT Trials*, Vols I-II, p. 3 (the "*Medical* Case"), at Vol. I, pp. 694 - 738, Vol. II p. 177 (forced sterilization and castration); *United States v. Oswald Pohl et al.*, 3 November 1947, reproduced in *NMT Trials*,Vol. V, p. 195 (the "*Pohl* Case"), at Vol. V, pp. 983, 1105, 1108 (evidence of forced abortion and concentration camp "brothels"); *United States v. Ulrich Greifelt et al.*, 10 March 1948, reproduced in *NMT Trials*, Vols. IV – V, p. 599 (the "*RuSHA* Case"),
(forced abortion, gender persecutions and reproductive crimes).
[353] See IMT Judgment , Vol. 6, Transcript 31 January, pp. 404-407; Vol. 7, Transcript 14 February 1946, pp. 456-457 (reading into evidence the "The Molotov Note" dated 6 January 1942).
[354] Kelly Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles" (2003) 21 *Berkeley Journal of International Law* 288 at 301.
[355] For segments on the "Rape of Nanking" and rape more generally, see IMTFE Judgment, pp. 535-541, 546, 548-549, 604, 611-612; see also *Trial of General Tomoyuki Yamashita*, Case No. 21, Judgment of the United States Military Commission, Manila, 8 Oct. 1945-7 Dec. 1945, as reprinted in the *Law Reports of Trials of War Criminals,* selected and prepared by the United Nations War Crimes Commission, London, HMSO, 1948, Vol. IV ("*Yamashita* Judgment"; *In re Yamashita,* US Supreme Court, Judgment of 4 February 1946, 327 US 1, 66 S.Ct. 340, 90 L.Ed. 499 (1946) reprinted, in part, in the Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, London, HMSO, 1948, Vol. IV ("Yamashita US Supreme Court Judgemnt")..

sources evidencing criminalisation of rape as a crime against humanity under customary international law prior to, or during, the period 1975 to 1979, nor have the Co-Prosecutors provided such in their joint response.[357]

153. The Co-Prosecutors argue that because rape was criminalised under the 1956 Penal Code, it was foreseeable to Ieng Thirith from 1975-1979 that rape constituted a crime against humanity.[358] The Pre-Trial Chamber recalls that an alternative source of international law is "the general principles of law recognized by civilized nations."[359] At the relevant time, rape was almost universally criminalised under the domestic laws of States, albeit using varying definitions.[360] However, rape as a crime against humanity is necessarily composed of chapeau elements common to all crimes against humanity, such as the requirement that the act form part of a "widespread or systematic attack."[361] Rape as it is defined under domestic criminal codes does not contain such elements. As such, the facts evidencing rape as a crime against humanity may also support a charge of rape under domestic law, but the same may not be true in reverse, given that an isolated event unconnected to a broader attack does not amount to a crime against humanity. In another context, the Pre-Trial Chamber has previously considered whether domestic crimes and international crimes may be considered synonymous. This Chamber has held that where the constitutive elements are not identical, domestic and international crimes are to be treated as distinct crimes.[362] As such, rape as a domestic crime cannot simply be imported into international law as a crime against humanity by recourse to the

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[356] Impugned Order, ftn. 2570-2571.
[357] Co-Prosecutors' Response, ftn. 485-494.
[358] Co-Prosecutor's Response, para. 190.
[359] Statute of the International Court of Justice, Art. 38(1)(c).
[360] See, *e.g., Code Pénal* (1956), Art. 443 (Cambodia); *Code Pénal* (1810) Arts 331-333 (France); *Penal Code* (Act No. 45 of 1907), Arts 177-178 (Japan); *Penal Code* (Ordinance 4 of 1871; 1970 Ed. Cap. 103), Art. 375 (Singapore); *Indian Penal Code* (Act No. 45 of 1860), Art. 375 (India); *Penal Code* (No. 58 of 1937), Arts 267-268 (Egypt); *The Criminal Code* (Act No. 29 of 1960), Section 98 (Ghana); *Criminal Code of RSFSR* (1960, as amended on 1 March 1972), Art. 117 (Russian Socialist Federal Soviet Republic, USSR); *Código Penal* (Decreto-Lei No. 2.848 de 1940), Arts 213-215 (Brazil); *Crimes Act* (Public Act No. 43 of 1961), Section 128 (New Zealand); *Criminal Code Act 1899*, Section 349 (Queensland, Australia); *California Penal Code* (1873), Sections 261-269 (California, USA).
[361] *Duch* Judgement, para. 300; *Prosecutor v. Tadić*, IT-94-1-T, "Opinion and Judgement", Trial Chamber, 7 May 1997, paras 646-648; *Prosecutor v. Akayesu*, ICTR-96-4-T, "Judgement", Trial Chamber, 2 September 1998, para. 579.
[362] *Case of Kaing Guek Eav alias Duch*, 001/18-07-2007-ECC/OCIJ (PTC 02), "Decision on Appeal Against Closing Order Indicting Kaing Guek Eav Alias 'Duch'", 8 December 2008, D99/3/42, paras 72 and 84.

general principles of law recognised by civilised nations. Rather, such principles may serve to assist in clarifying the *actus reus* and *mens rea* of rape once the existence of the chapeau elements for rape as a crime against humanity have already been established.[363]

154. The Pre-Trial Chamber therefore finds that the OCIJ erred in charging rape as an enumerated crime against humanity from 1975-1979 under customary international law.[364] As such, the Chamber strikes "rape" from paragraph 1613 of the Closing Order (Crimes Against Humanity, paragraph (g)). However, the Pre-Trial Chamber agrees with the OCIJ that "[t]he facts characterized as crimes against humanity in the form of rape can additionally be categorized as crimes against humanity of other inhumane acts"[365] and, therefore, are to be charged as such.

(iv) Whether the Definition of Crimes Against Humanity under Customary International Law from 1975-1979 Included Forced Marriage, Sexual Violence and Enforced Disappearance as Other Inhumane Acts

155. The final question before the Pre-Trial Chamber under this ground of appeal is whether the OCIJ erred in the Closing Order when they found that "other inhumane acts" as crimes against humanity encompasses forced marriage,[366] sexual violence[367] and enforced disappearances.[368] The Ieng Thirith Appeal contends that these constituent acts of "other inhumane acts" did not attain the status of crimes against humanity by 1975.[369] Furthermore, the Appeal argues that the distinct category of "other inhumane acts" may not be treated as a "catch-all" category.[370] Rather, it has been found in ICTY

[363] *Prosecutor v. Furundžija*, IT-95-17/1-T, "Judgement", Trial Chamber, 10 December 1998, para. 177: "[T]o arrive at an accurate definition of rape based on the criminal law principle of specificity [...] it is necessary to look for principles of criminal law common to the major legal systems of the world"; see also *Prosecutor v. Kunarac et al.*, IT-96-23-T and IT-96-23/1-T, "Judgement", Trial Chamber, 22 February 2001, paras 439-460.
[364] The Pre-Trial Chamber notes that the Trial Chamber did not reach this conclusion in the *Duch* Judgement when laying out the applicable law on rape as crime against humanity (see paras 293, 361). However, as with the armed conflict nexus requirement, the issue of the existence of a rape as a crime against humanity under customary international law during the temporal jurisdiction of the ECC was not specifically challenged by the accused and was therefore not before the Chamber.
[365] Impugned Order, para. 1433.
[366] Impugned Order, paras 1314, 1442-47.
[367] Impugned Order, paras 1314, 1430-33.
[368] Impugned Order, paras 1314, 1470-78.
[369] Ieng Thirith Appeal, para. 61.
[370] Ieng Thirith Appeal, para. 61.

jurisprudence that the parameters for the interpretation of what constitutes "other inhumane acts" should be informed by international standards on human rights such as those found in international conventions.[371] As such, the Ieng Thirith Appeal contends that because there were no international conventions outlawing forced marriage, sexual violence or enforced disappearances and because there were no domestic laws criminalizing such conduct from 1975-1979, the OCIJ erred in charging her for such acts and violated the principle of legality.[372]

156. First, at the outset, the Pre-Trial Chamber notes that "other inhumane acts" is *in itself* a crime under international law."[373] Thus, it does not agree with the Appellant that the OCIJ were required in the Closing Order to find that sexual violence, forced marriage and enforced disappearances as "other inhumane acts" were each criminalised as distinct crimes against humanity under customary international law from 1975-1979. To require that each sub-category of "other inhumane acts" entails individual criminal responsibility under international law is to render the category of "other inhumane acts" meaningless. That is, the conduct would have to amount to an international crime in its own right, regardless of whether or not it also amounts to a crime as an "other inhumane act." For this reason, the Pre-Trial Chamber finds that the requirements of criminalisation solely attach to the category of "other inhumane acts" and not the underlying conduct constituting other inhumane acts.

157. As such, the Chamber recalls that it has previously found in this decision that crimes against humanity were criminalised as a matter of customary international law from 1975-1979 as defined under the 1950 Nuremburg Principles.[374] Each of the definition of crimes against humanity articulated and applied prior to the Nuremburg Principles under

[371] Ieng Thirith Appeal, para. 61 (citing *Prosecutor v. Kupreskić*, IT-96-16-T, "Judgement", Trial Chamber, 14 January 2000, para. 566).
[372] Ieng Thirith Appeal, para. 61.
[373] *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, "Judgement", Trial Chamber I, Section A, 17 January 2005, para. 624 (emphasis added); see also *Prosecutor v Brima, Kamara and Kanu* ('AFRC Trial Chamber case'), SCSL-2004-16-T, "Judgement", Trial Chamber II, 20 June 2007, paras. 697-698; *Prosecutor v. Brima, Kamara and Kanu* ('AFRC case'), SCSL-2004-16-A, "Judgement", Appeals Chamber, 22 February 2008, paras. 183, 197-198; *Prosecutor v. Kayeshima and Ruzindana*, ICTR-95-1-T, "Judgement", Trial Chamber, 21 May 1999, para. 583; *Prosecutor v. Stakić*, IT-97-24-A, "Judgement", Appeals Chamber, 22 March 2006, paras. 316-317; cf. *Prosecutor v. Stakić*, IT-97-24-T, "Judgement", Trial Chamber II, 31 July 2003, para. 719.
[374] See Section IV(D)(2)(i).

the IMT Charter, the IMTFE Charter, and the Council Control Law provides a list of underlying acts constituting crimes against humanity, which includes the category of "other inhumane acts".[375] Furthermore, as noted below, "other inhumane acts" as crimes against humanity were prosecuted before the IMT Tribunal and in the NMT cases. Subsequently, "other inhumane acts" was included in the definition codified by the 1950 Nuremburg Principles. Therefore, the Pre-Trial Chamber finds that the category of "other inhumane acts" as crimes against humanity was criminalised as a matter of customary international law by 1975.[376]

158. Second, the Chamber does not agree with the Appellant that "other inhumane acts" is not to be treated as a residual category of offences constituting crimes against humanity under customary international law. The Chamber recalls that, as noted previously,[377] the definition of crimes against humanity codified under Principle VI(c) of the 1950 Nuremburg Principles derives from the preamble of the Declaration of St. Petersburg in 1868 and the Martens Clause in the Hague Conventions of 1899 and 1907 invoking "the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience"[378] as residual protection against acts not specifically prohibited in the text of the Hague Conventions.[379] While Principle VI(c) articulates specific acts that constitute crimes against the laws of humanity, it nevertheless provides a non-exhaustive list and includes "other inhumane acts" as a residual category, in order to, in the spirit of the Martens Clause, avoid creating an opportunity for evasion of the laws of humanity.[380]

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[375] See Section IV(D)(2)(i) and citations therein.
[376] *Duch* Judgement, paras 293, 367.
[377] See Section IV(D)(ii).
[378] 1899 Hague Convention IV, Preamble; see also 1907 Hague Convention II, Preamble.
[379] See also *ICRC Commentary on the IVth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958, reprinted 1994, p. 39 (regarding 'inhumane treatment' in Common Art. 3 of the 1949 Geneva Conventions, it states: "[h]owever great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.")
[380] *Duch* Judgement, para. 367; *Prosecutor v. Kupreškić et al.*, IT-96-16-T, "Judgement", Trial Chamber, 14 January 2000, para. 563.

159. Third, that being said, the Pre-Trial Chamber finds that the principle of legality requires that it must determine whether there was a sufficiently specific definition of "other inhumane acts" that existed under customary international law from 1975-1979 clarifying when certain conduct rises to the level of "other inhumane acts" such that it was both foreseeable and accessible that it could be prosecuted as crimes against humanity.

160. The Pre-Trial Chamber finds that when looking at the plain meaning of "other inhumane acts", the word "other" imports an *ejusdem generis* rule of interpretation, whereby this category can only include acts which are "inhumane" in the sense that they are of a similar nature and gravity to those specifically enumerated: namely, murder, extermination, enslavement and deportation.[381] This interpretation of "other inhumane acts" is reflected in the NMT jurisprudence wherein Judges used the doctrine of *ejusdem generis* to clarify whether the taking of property falls within the definition of crimes against humanity as an unenumerated act. For example, in the *Flick* Case and later in the *I. G. Farben* Case, the Tribunals found that the offenses listed in the Council Control Law's crimes against humanity provision are all offences against the person and, as such, "must be deemed to include only such as affect life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category."[382] In *Eichmann*, the Supreme Court of Israel found that "[c]ausing serious physical and mental harm" can amount to another inhuman act committed against a civilian population as defined by the Nazi and Nazi Collaborators (Punishment) Law, section 1(a), which reproduces the definition of crimes against humanity in the IMT Charter.[383] It further found that the plunder of property may be considered an inhuman act within the meaning of the definition of crime against humanity when, amongst others, "it is linked to any of the other acts of violence defined by the Law as a crime against humanity, or as a result of any of those acts, i.e., murder, extermination,

[381] *Flick* Case, Vol. VI, p. 1215; *Ternek Elsa*, District Court of Tel Aviv, 14 December 1951, 5 *Pesakim Mehoziim* (1951-2) 142-152 (Hebrew); 18 I.L.R. 540 (1951) (English summary; wrongly mentioned as 'Tarnek'); *Enigster Yehezkel Ben Alish*, District Court of Tel Aviv, 4 January 1952, 5 *Pesakim Mehoziim* (1951-2)152-180 (Hebrew); 18 I.L.R. (1951) 541-542 (English summary).
[382] *Flick* Case, Vol. VI, p. 1215; endorsed in *United States v. Carl Krauch et al.*, 30 July 1948, reproduced in *NMT Trials*, Vols VII-VIII, p. 1("*I. G. Farben* Case"), at Vol. VIII, p. 1130.
[383] *Eichmann* case, para. 204.

starvation, or deportation of any civilian population, so that the plunder is only part of a general process".[384] In that case, Eichmann was charged and convicted for the plunder of the Jews' property as part of a procedure of expulsion, which, the Court found, amounted to a crime against humanity on the form or another inhuman act.[385]

161. In finding that the doctrine of *ejusdem generis* is relevant for determining the content of "other inhumane acts", the Pre-Trial Chamber emphasises that this is not in violation of the rule against analogy found in civil law jurisdictions.[386] The Pre-Trial Chamber notes that applying a crime by analogy to unregulated conduct (*analogia lexis*) is distinguishable from – as with "other inhumane acts" – applying a subcategory within a crime by analogy to another subcategory within that crime for purposes of clarifying the definition of that other subcategory. In the latter scenario, if the conduct at issue falls within the definition of the crime, then it is in fact *regulated* conduct, such that the rationale of the rule against analogy does not apply. This distinction is unavoidable when it is further considered that the category of "other inhumane acts" as crimes against humanity was specifically designed as a residual crime to avoid lacunae in the law, and that the term is rendered meaningless without applying an *ejusdem generis* canon of construction. Thus, the rule against analogy is inapplicable to "other inhumane acts."[387]

162. In addition to use of the doctrine of *ejusdem generis* with respect of enumerated acts in the definition of crimes against humanity, the Pre-Trial Chamber notes that it is also clear from Nuremburg jurisprudence that the Tribunals, in routinely dealing with war crimes and crimes against humanity together, relied on the settled scope of war crimes under international law to inform the content of crimes against humanity, including "other inhumane acts", against German nationals or civilian populations in occupied

[384] *Eichmann* case, para. 204.
[385] *Eichmann* Case, paras 204-205. See also the *Ministries* Case, referred to in *Eichmann*, Vol. XIV, pp. 990-991 (where the Minister of Finance, Schwerin von Krosigk, was convicted for war crimes and crimes against humanity as other inhuman acts for the plunder of Jews' property upon expulsion).
[386] See Ieng Thirith Defence Appeal, paras. 49-51 where it is argued that "sexual violence" and "forced marriage" cannot amount to "other inhumane acts" by analogy to recognised crimes against humanity.
[387] Many legal commentators simply list *ejusdem generis* as an exception to the rule against analogy. See for example, Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, pp. 153-156.

territories. For example, in the IMT Judgement under the section on the "Law Relating to War Crimes and Crimes Against Humanity," the Judges found that war crimes under Article 6(b) of the IMT Charter were clearly criminalised under the 1907 Hague Convention and the 1929 Geneva Convention, and that "from the beginning of the war in 1939 War Crimes were committed on a vast scale, *which were also Crimes against Humanity*."[388] In the NMT *Medical* Case, the war crime of conducting "medical experiments" without consent against non-German civilians and armed forces was also charged and found to constitute "other inhumane acts" as crimes against humanity against German nationals.[389] Also, in the NMT *Justice* Case, defendants were charged and convicted for "murder, torture, and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons" as war crimes and also as crimes against humanity.[390] In that case, when addressing the issue of crimes against humanity as violations of international law, the Judges stated that "t]he charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, *in violation of the laws of war* and of humanity."[391] Finally, in the NMT *Ministries* Case, defendants were charged and convicted under Count 5 for:

> war crimes and crimes against humanity in that they participated in atrocities and offenses, including murder, extermination, enslavement, deportation, imprisonment, killing of hostages, torture, persecutions on political, racial, and religious grounds, and other inhumane and criminal acts against German nationals and members of the civilian populations of countries and territories under belligerent occupation of, or otherwise controlled by Germany [. . .].[392]

163. In this respect, by 1975, it was foreseeable that inhumane acts criminalised by the international laws of war could similarly be criminalised under customary international law as crimes against humanity. Thus, the definition of "other inhumane acts" was

[388] IMT Judgement, p. 253 (emphasis added) (citing Arts 46, 50, 52, and 56 of the 1907 Hague Convention and Arts 2, 3, 4, 46, and 51 of the 1929 Geneva Convention). See also pp. 226-27 addressing criminal acts as both war crimes and crimes against humanity.
[389] *Medical* Case, Vol. I, pp. 11, 16, Vol. II, pp. 174-181, 198.
[390] *United States of America v. Josef Altstoetter et al.*, 4 December 1947, reproduced in *NMT Trials*, Vol. III (the "Justice Case"), at Vol. III, pp. 3-4, 19, 23.
[391] *Justice* Case, Vol. III, p. 985.
[392] *Ministries* Case, Vol. XIV, pp. 467-68. See also *Trial of Wilhelm Von Leeb and Thirteen Others*, 28 October 1948, reproduced in *NMT Trials*, Vols X – XI (the "*High Command* Case"), at Vol. X, pp. 29, 36, Vol. XI, pp. 463-465.

likely to encompass acts that would amount to serious violations or grave breaches of, *inter alia,* the 1899 Hague Regulations, the 1907 Hague Regulations, the 1929 Geneva Convention and the 1949 Geneva Conventions provided that they would meet the other requirements specific to these instruments.

164. Accordingly, the Pre-Trial Chamber finds that, from 1975-1979, provided that the requisite chapeau and *mens rea* elements existed, an impugned act or omission constituted an "other inhumane act" as a crime against humanity where it was of a similar nature and gravity to the enumerated crimes against humanity of murder, extermination, enslavement or deportation such that: 1) it seriously affected the life or liberty of persons, including inflicting serious physical or mental harm on persons or 2) was otherwise linked to an enumerated crime against humanity. In determining what constitutes "inhumane" conduct, reference could be made to 1) serious breaches of international law regulating armed conflict from 1975-1979, including the grave breaches provisions of the 1949 Geneva Conventions or 2) serious violations of the fundamental human rights norms protected under international law at the relevant time.

165. The Pre-Trial Chamber finds that this definition of the *actus reus* for "other inhumane acts" under customary international law was sufficiently specific such that it was accessible and foreseeable to the Appellant that certain types of conduct outside of murder, extermination, enslavement or deportation would be criminalised as crimes against humanity.

166. With respect of the final matter of whether the OCIJ erred in charging forced marriage, sexual violence and enforced disappearances under the aforementioned definition of "other inhumane acts", the Pre-Trial Chamber finds that this constitutes a mixed question of law and fact. As such, it is not a jurisdictional issue that may be determined by the Pre-Trial Chamber pursuant to Internal Rule 74(3)(a), but is one for the Trial Chamber to decide at trial.

167. On the basis of the foregoing, Ground 4 of the Ieng Thirith Appeal is granted in part as stated in Section IV, D(ii) pertaining to the nexus requirement and dismissed for the rest.

E. Whether inclusion within the scope of the ECCC's subject matter jurisdiction of domestic crimes under Cambodia's 1956 Penal Code is in error and violates the principle of legality and the right to equality before the law (Ground 5 of the Ieng Thirith Appeal)

1. Submissions

168. Under Ground 5 of the Ieng Thirith Appeal, the Appellant contends that the OCIJ erred in the Impugned Order when they confirmed jurisdiction over charges of domestic crimes under the 1956 Penal Code of Cambodia, without referring to the Trial Chamber's Decision on Statute of Limitations for Domestic Crimes in Case No. 001 before the ECCC.[393] In that case, the Trial Chamber "decided that the 1956 Penal Code was in effect during the temporal jurisdiction of the ECCC."[394] However, because "[t]he 1956 Penal Code contains a limitation period and as a result prohibits the prosecution of the crimes specified therein more than ten years after their commission"[395] and "the Trial Chamber failed to reach a majority decision" on whether the statute of limitations had expired before its extension by the ECCC Law, they "could not prosecute Duch for domestic crimes."[396]

169. The Ieng Thirith Appeal further submits that the OCIJ erred because "the prosecution of domestic crimes is barred by the statutory limitation" and Article 3 (new) of the ECCC Law, which extends that statute of limitations for an additional thirty years, "amounts to a breach of the general principle of criminal law of *nullum crimen sine lege*."[397]

[393] Ieng Thirith Appeal, para. 74.
[394] Ieng Thirith Appeal, para. 75.
[395] Ieng Thirith Appeal, para. 75.
[396] Ieng Thirith Appeal, para. 74.
[397] Ieng Thirith Appeal, paras 76, 77.

2. Discussion

170. The Pre-Trial Chamber recalls that under Article 3 (new) of the ECCC Law, the ECCC has jurisdiction to try accused persons for homicide, torture and religious persecution under the 1956 Penal Code.[398] During the period of the temporal jurisdiction of the ECCC, namely 17 April 1975 to 6 January 1979, the 1956 Penal Code was in effect.[399] "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 the commission and are interrupted by judicially-ordered investigations."[400] "On a plain reading of Articles 109 to 114 of the 1956 Penal Code [....], in the absence of any act of investigation or prosecution which interrupted the limitations period in relation to the domestic crimes",[401] this period expired ten years after the indictment period, namely between 17 April 1985 to 6 January 1989.[402] Finally, "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".[403]

171. In its Decision on the Statute of Limitations for Domestic Crimes in Case No. 001, the Trial Chamber unanimously agreed that "there was no available evidence to satisfy the Chamber that the applicable limitation period was interrupted" because "the crimes with which the Accused is charged were investigated or prosecuted prior to" 6 January 1989.[404] However, they also agreed that "between 1975 and 1979, there was no legal or judicial system in Cambodia, and accordingly [...] no criminal investigations or prosecutions were possible during that period."[405] As such, the ten-year statute of

[398] Art. 3 (new), ECCC Law.
[399] Decision on Statute of Limitations for Domestic Crimes, para. 12.
[400] Decision on Statute of Limitations for Domestic Crimes, para. 10.
[401] Arts 112-114 of the 1956 Penal Code provide "that any act of investigation or of prosecution interrupts the time limit, which resumes after the last such act (in the case of a felon), for a new period of 10 years." Decision on Statute of Limitations for Domestic Crimes, ftn. 13.
[402] Decision on Statute of Limitations for Domestic Crimes, para. 12.
[403] Decision on Statute of Limitations for Domestic Crimes, para. 13; Art. 33(new)(2), ECCC Law.
[404] Decision on Statute of Limitations for Domestic Crimes, para. 12.
[405] Decision on Statute of Limitations for Domestic Crimes, para. 14.

limitations "did not commence between those dates."[406] What they could not agree on was the factual question of "whether the limitation period had already expired by the time the ECCC investigation against the Accused" for national crimes began.[407] In other words, the Chamber "failed to reach agreement on whether or not the applicable limitation period was [...] suspended between 1979 and 1993 and thus whether this period had extinguished by the time Article 3 and Article 3 (new) were promulgated."[408]

172. The three-Judge majority of Judge Nil Nonn, Judge Thou Mony and Judge Ya Sokhan found that "from 1979 until 1982, the judicial system of the People's Republic of Kampuchea did not function at all" and, "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".[409] Consequently, they concluded "that the limitation period with respect to the domestic crimes [...] started to run, at the earliest, on 24 September 1993".[410] Therefore, the extension of the ten-year limitation period by 20 years under Article 3 of the ECCC Law in 2001 prior to its expiry in 2003 allowed for prosecution of national crimes under the 1956 Penal Code.

173. Whereas, the two-Judge minority of Judge Silvia Cartwright and Judge Jean-Marc Lavergne found that "[w]hile the Democratic Kampuchea regime undeniably weakened national judicial capacity" between 1979-1993, they could not conclude "that no prosecution or investigation would have been possible from 1979-1993."[411] Accordingly, they found that "this limitation period had already expired" in 1989 before the adoption of the ECCC Law in 2001 and, under Article 3, "its 'extension' was accordingly impossible."[412] Furthermore, they were 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

[406] Decision on Statute of Limitations for Domestic Crimes, para. 14.
[407] Decision on Statute of Limitations for Domestic Crimes, paras 13-14.
[408] Decision on Statute of Limitations for Domestic Crimes, para. 14.
[409] Decision on Statute of Limitations for Domestic Crimes, paras 19, 20.
[410] Decision on Statute of Limitations for Domestic Crimes, para. 25.
[411] Decision on Statute of Limitations for Domestic Crimes, para. 32.
[412] Decision on Statute of Limitations for Domestic Crimes, para. 44.

its expiry."[413] As such, Judge Cartwright and Judge Lavergne determined that national crimes prohibited by the 1956 Penal Code could not be prosecuted before the ECCC.

174. As a result of this split, although a majority of three Judges had found that the 10-year statute of limitations in the 1956 Penal Code had not expired when it was extended under Article 3 of the ECCC Law and that prosecution would therefore be proper, the Chamber was procedurally barred from "allowing continuation of the prosecution against the Accused for domestic crimes".[414] This is because Article 14 (new)(1)(a) of the ECCC Law requires that if unanimity in a Trial Chamber decision is not achieved, "a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least *four* judges".[415]

175. In the Impugned Order, the OCIJ ordered that the Appellants be sent "before the Trial Chamber for charges of murder, torture and religious persecution, crimes defined and punishable by the Penal Code 1956."[416] Contrary to the assertion in the Ieng Thirith Appeal, it reached this conclusion after careful consideration of the Trial Chamber's Decision on Statute of Limitations for Domestic Crimes in Case No. 001, noting that the "Chamber failed to reach an agreement on whether or not the applicable limitation period was interrupted or suspended between 1979-1993"[417] and, "[i]n the absence of an affirmative majority [...] was unable to consider the guilt or innocence of the Accused with respect to national crimes proscribed in the Penal Code 1956."[418] In view of this decision, the OCIJ found themselves in a "procedural stalemate" over issuing a common text on the question of "the limitation period for the relevant national crimes".[419] Without resolving this stalemate, they nevertheless "decided by mutual agreement to grant the Co-Prosecutors' requests, leaving it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956."[420]

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[413] Decision on Statute of Limitations for Domestic Crimes, para. 45.
[414] Decision on Statute of Limitations for Domestic Crimes, para. 56.
[415] Art. 14 (new)(1)(a) of the Internal Rules (emphasis added).
[416] Impugned Order, para. 1576.
[417] Impugned Order, para. 1568.
[418] Impugned Order, para. 1571.
[419] Impugned Order, para. 1574.
[420] Impugned Order, para. 1575.

176. Based on the reasoning that follows, the Pre-Trial Chamber does not find this confirmation of jurisdiction with respect of national crimes charged under Article 3 (new) and the 1956 Penal Code to be in error. Nor is it in violation of the principle of legality.

(i) The Decision on Statute of Limitations for Domestic Crimes in Case No. 001

177. The Pre-Trial Chamber first considers the Appellant's contention that the OCIJ erred because they failed to refer to the Trial Chamber's Decision on Statute of Limitations for Domestic Crimes in Case No. 001 when confirming charges for national crimes. The Pre-Trial Chamber notes that this statement made in the last sentence of paragraph 74 in Ground 5 of the Ieng Thirith Appeal could be interpreted to mean that the Appellant believes that the OCIJ should have found, similar to the Trial Chamber, that they were procedurally barred from prosecuting national crimes because they could not agree on a common text on the question of the applicable statutory limitation period and the effect of the Constitutional Council Decision of 12 February 2001 on that period. The Pre-Trial Chamber finds that this is most likely the intended meaning of this statement, as the OCIJ cited extensively in the Impugned Order to the Trial Chamber's Decision on Statute of Limitations for Domestic Crimes in Case 001.

178. The Pre-Trial Chamber finds that this argument is misplaced. The OCIJ were not in a situation comparable to the Judges of the Trial Chamber in Case No. 001 who, in the absence of the required majority, had no option procedurally but to discontinue prosecution for such crimes under the Internal Rules.[421] By including domestic charges in the Impugned Order in spite of their disagreement, the OCIJ clearly confirmed jurisdiction over such crimes and the real question before the Chamber in this appeal is whether this confirmation was erroneous on its merits. In that regard, the Appellant

[421] In the case of the OCIJ, another option was available to them. They could have elected to utilize the procedure in Internal Rule 72 for settlement of disagreements between themselves. The OCIJ chose not to utilize the procedure in question. The Pre-Trial Chamber does not need to determine in the present appeal whether it was appropriate for the OCIJ to choose this course of action, or whether they had to bring their disagreement before it. The Appellant does not make this argument in any way before the Pre-Trial Chamber.

submits that the OCIJ erred in confirming jurisdiction against crimes set forth in the 1956 Penal Code because "the prosecution of domestic crimes is barred by the statutory limitation".[422] The four paragraphs constituting the entire argument in support of this assertion are reproduced herein (footnotes omitted):

> 74. In the *Duch* case the Trial Chamber failed to reach a majority decision and thus could not prosecute Duch for domestic crimes. The Prosecutors did not appeal from this decision, and thus acquiesced to this legal finding. The Co-Prosecutors' Rule 66 Submissions fail to make reference to this decision by the Trial Chamber in Case 001 and the fact that the prosecution did not appeal the decision. The CIJ erred in their conclusions on jurisdiction for this category of crimes without referring to the Trial Chamber's decision in the *Duch* case.
>
> 75. The Trial Chamber in the *Duch* case decided that the 1956 Penal Code was in effect during the temporal jurisdiction of the ECCC. The 1956 Penal Code contains a limitation period and as a result prohibits the prosecution of the crimes specified therein more than ten years after their commission.
>
> 76. Article 3(new) of the Establishment Law provides that '[t]he statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.
>
> 77. The defence submits the prosecution of domestic crimes is barred by the statutory limitation, and to extend the period in which the prosecution is permitted amounts to a breach of the general principle of criminal law of *nullum crimen sine lege*. Interestingly, Article 6 of the 1956 Penal Code itself prohibits the retroactive application of law.

179. The Pre-Trial Chamber finds that the brevity and lack of development of the Appellant's jurisdictional challenge to the Impugned Order for charging national crimes prevent it from being able properly to consider the merits of this ground of appeal. While the footnotes have been omitted in the preceding excerpt, no references or jurisprudence found in them are in support of the operative claim in the first sentence of paragraph 77 that "the prosecution of domestic crimes is barred by the statutory limitation". The Pre-Trial Chamber notes that an appeal against the Closing Order is the opportunity for an accused to challenge the legal findings on jurisdiction made by the OCIJ. The Appellant purports to do this without developing any legal argument and without reference to any

[422] Ieng Thirith Appeal, para. 77.

law. To the extent that the Appellant is relying on paragraphs 74-76 to substantiate the relief requested,[423] the Pre-Trial Chamber considers that these notations of a finding in Case No. 001, the fact that another party has not appealed a finding in Case No. 001, and the provision of two quotations from law applicable before the ECCC (the 1956 Penal Code and the ECCC Law) are mere recitations that fail to demonstrate their relevance to the Appellant's claim and how the OCIJ erred.

180. Furthermore, the only argument made in the Ieng Thirith Reply is a repeat of the statement that the OCP has not appealed one finding of the Trial Chamber in Case No. 001. This statement does not, in any way, lead the Pre-Trial Chamber to conclude that the OCIJ erred by confirming jurisdiction over the Appellant.

181. In sum, under this ground of appeal, the Appellant fails to explicitly or implicitly incorporate by reference any legal analysis conducted by the Trial Chamber Judges in the Decision on the Statute of Limitations for Domestic Crimes on the issue of the applicable statutory period. The Pre-Trial Chamber considers that merely stating a fact related to this decision – that the Trial Chamber failed to reach the requisite majority leading to an inability to prosecute – is not an acceptable substitute for any kind of reference to, exploration of or determination concerning the views contained in either the decision or the two separate opinions of the Trial Chamber Judges. The Pre-Trial Chamber therefore finds that it cannot consider further the merits of this ground of appeal as the Appellant has not made appropriate legal submissions on the issue of national crimes and the applicable statutory limitations period.

(ii) The Principle of Legality

182. The Pre-Trial Chamber also finds that the lack of development by the Appellant of her jurisdictional challenge to the Impugned Order for charging national crimes on the basis

[423] See paragraph 79 of the Ieng Thirith Appeal which states in its entirety that "[o]n this basis, application of Article 3(new) of the Establishment Law should be dismissed." A plain reading of this request for relief makes clear that the basis referred to is that found in the preceding paragraphs 74-77. The Pre-Trial Chamber has already determined in Section III(A) above that the arguments made in paragraph 78 are inadmissible at this stage of the proceedings.

that the extension of the statutes of limitation would violate the principle of legality prevents the Chamber from being able to properly consider the merits of this ground of appeal. The Appellant merely states that "to extend the period in which the prosecution is permitted amounts to a breach of the general principle of criminal law of *nullum crimen sine lege*". As stated previously, the principle of legality, in its *strict sense*, requires in order for the ECCC to have subject matter jurisdiction with respect of charged crimes, that they be provided for under the ECCC Law as well as have existed in international or national law at the time of the alleged criminal conduct such that charging them would be in compliance with the principle of legality. Here, there is no question that the charged national crimes are explicitly listed under Article 3 (new) of the ECCC Law and were prohibited under the 1956 Penal Code, which was in effect at the relevant time. Therefore, it was sufficiently foreseeable and accessible to Ieng Thirith that her conduct would be alleged to be criminal and charging her for crimes under the 1956 Penal Code does not violate the principle of legality.

183. The Pre-Trial Chamber further notes that the Appellant does not give any explanation or quote any authority that would justify a departure from the *strict sense* of the principle of legality as defined above. There is no basis either under the plain language of Article 15(1) of the ICCPR for extending the principle of legality to govern conditions of prosecution beyond a retroactive change to the substance of the crimes or penalties between the time a crime is committed and prosecuted.[424] As noted by the international Judges in the Trial Chamber in Case No. 001, the principle of legality under Article 15(1) of the ICCPR does not "refer directly to limitation periods. [It does] not unequivocally interpret the scope of international fair trial principles in relation to the retroactive consideration or repeal of statutes of limitations."[425] In these circumstances, the Pre-Trial Chamber shall not go further than analyzing the argument raised by the Appellant in the light of the principle of legality, understood in its *strict sense*, as it did above. The underlying purposes of the principle of legality in safeguarding fairness and legal certainty require that it is sufficiently foreseeable and accessible to an accused that

[424] Decision on Statute of Limitations for Domestic Crimes, paras 42-43, 50
[425] Decision on Statute of Limitations for Domestic Crimes, para. 42.

his or her conduct is criminal at the time of its commission. As the principle of legality, in its *strict sense*, does not require that it be sufficiently foreseeable or accessible to an accused that he or she may or may not be prosecuted depending on the applicable statute of limitations period and whether it is suspended or lifted in the future, the Pre-Trial Chamber finds the argument raised by the Appellant to be without merit.

184. The Pre-Trial Chamber recalls that it is separately seised of the appeal against the Impugned Order of the accused Ieng Sary who also challenges the ECCC's jurisdiction over national crimes on the basis of the same errors allegedly committed by the OCIJ. Contrary to the Appellant in the current appeal, Ieng Sary elaborates a reasoning to support his arguments that the OCIJ erred in sending the accused for trial despite their disagreement[426] and that the extension of the statute of limitation by Article 3 (new) of the ECCC Law violates the principle of legality.[427] The Pre-Trial Chamber notes that it addresses these arguments further in the Decision on Ieng Sary's Appeal against the Closing Order. As the jurisdictional issues that may be appealed at this stage are fundamental, the Pre-Trial Chamber considers that it must apply its holdings with regard to them to all accused in Case No. 002. As such, the Pre-Trial Chamber finds that the charges for national crimes must also be upheld pursuant to its conclusions on this issue in its Decision on Ieng Sary's Appeal against the Closing Order.

F. Whether inclusion within the scope of the ECCC's subject matter jurisdiction of the doctrine of superior responsibility with respect of charges of crimes against humanity is in error and violates the principle of legality (Ground 7 of the Ieng Thirith Appeal)

185. Under Ground 7 of the Ieng Thirith Appeal, the Appellant submits two arguments in support of her contention that the OCIJ erred in the Closing Order when they confirmed

[426] Ieng Sary Appeal against the Closing Order, 25 October 2010, D427/1/6 ("Ieng Sary Appeal"), paras 174-175.
[427] See in particular Ieng Sary Appeal, para. 159 (where Ieng Sary argues that "the issue is that the possibility of prosecuting these crimes more than thirty years into the future did not exist in Cambodian law at the relevant time" and that the principle of legality enshrined in Article 15(1) of the ICCPR forbids the retroactive application of law and thus encompasses a protection against the extension of a statute of limitation that had expired).

jurisdiction over superior responsibility as "an alternative form of liability in relation to three of the crimes defined as crimes against humanity".[428]

186. First, the Ieng Thirith Appeal submits that "[t]here is no customary basis in international law for this doctrine's application in 1975-1979, nor does the CIJ provide a basis for this in the Closing Order. Prosecution of command responsibility is therefore in contravention of the principle of *nullum crimen sine lege* [...]."[429] Second, "[i]n the alternative, the defence submits that at the relevant time, superior responsibility could only be prosecuted in relation to war crimes" and, because "[t]he Appellant is only charged with superior responsibility for crimes against humanity [...] the Court has no jurisdiction to prosecute her for superior responsibility."[430]

2. Discussion

187. The Pre-Trial Chamber recalls that, in the Closing Order, the OCIJ held that the ECCC has jurisdiction under Article 29 (new) of the ECCC Law over superior responsibility as a mode of criminal responsibility, which it interpreted, in relevant part, as follows:

> [A] superior is responsible for the commission of a crime within ECCC jurisdiction by a subordinate, when he or she knew or had reason to know of the commission of the crime and, having effective control over such subordinates, failed to take necessary and reasonable measures to prevent such acts or to punish them. This mode of responsibility applies to civilian superiors for the crimes committed by their subordinates.[431]
>
> The responsibility of the superior results from the breach of the duty to prevent the commission of, or punish participants of, the commission of a crime [...]. The criminal responsibility of the superior applies at [*sic*] both to military superiors and to civilian superiors, with that [*sic*] a formal hierarchy not being necessary for a person to be considered responsible as a superior.[432]

[428] Ieng Thirith Appeal, para. 81.
[429] Ieng Thirith Appeal, para. 84.
[430] Ieng Thirith Appeal, paras 90, 92.
[431] Impugned Order, para. 1319 (footnotes omitted).
[432] Impugned Order, para 1557.

188. Furthermore, the OCIJ held that "[a]ll of the modes of criminal responsibility set out in Article 29 (new) of the ECCC Law were part of international law applicable in Cambodia at the relevant time."[433] Specifically, with respect of superior responsibility, the OCIJ found that it was "set out under international law through sources such as the trials following World War II and as such can be considered sufficiently accessible to the Charged Persons."[434] Consequently, the OCIJ concluded that its definition of superior responsibility as a mode of responsibility for crimes charged was in compliance with the principle of legality.[435]

189. In addition, when applying this definition of the doctrine of superior responsibility to Ieng Thirith in particular, the OCIJ concluded that "in the alternative to the [direct] modes of responsibility described above [...], she is responsible in her capacity as a superior because of the effective control which she exercised (particularly in the area of public health) over her subordinates at the Ministry of Social Affairs" who committed crimes against humanity.[436] The OCIJ found that "Ieng Thirith knew or had reason to know of the imminent commission of the crimes listed above by her subordinates and she failed to take the necessary steps to prevent the commission of these crimes."[437] Furthermore, she "knew or had reason to know of the actual commission of these crimes by her subordinates and she failed to punish the perpetrators."[438]

(i) Whether There was a Basis in Customary International Law for Superior Responsibility from 1975-1979

190. In disposing of this ground of appeal, the Pre-Trial Chamber must first determine whether the OCIJ erred in the Impugned Order by holding that there was a basis in international law for applying the doctrine of superior responsibility as a mode of criminal liability from 1975-1979, specifically with respect of applying the doctrine as it

[433] Impugned Order, para. 1318.
[434] Impugned Order, para. 1307.
[435] Impugned Order, para. 1299.
[436] Impugned Order, para. 1561.
[437] Impugned Order, para. 1562.
[438] Impugned Order, para. 1562.

is defined under Article 29 (new) of the ECCC Law. Article 29 (new) of the ECCC Law stipulates that superior responsibility is defined as follows:

> The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

191. In other words, in order for an individual accused to be held liable for the criminal conduct of a subordinate under Article 29 (new) pursuant to the doctrine of superior responsibility, three elements must be demonstrated to exist. First, "there must have been a superior-subordinate relationship between the accused and the person who committed the crime" with effective command and control or authority and control; second, "the accused must have known, or had reason to know, that the crime was about to be or had been committed" - referred to as the *mens rea* element of actual or constructive knowledge; and third, "the accused must have failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator" - referred to the *actus reus* by omission element.[439]

192. As a preliminary matter, the Pre-Trial Chamber notes that the Ieng Thirith Appeal only challenges the customary international law basis in 1975-1979 for the doctrine of superior responsibility as a general matter and not whether it also applied to civilian superiors. In her arguments, she repeatedly makes reference to "command responsibility", equating it with "superior responsibility", and does not make a distinction between military as opposed to civilian superior responsibility.[440] Furthermore, she does not argue or provide any case law on the issue of whether the doctrine of superior responsibility post World War II applied with respect of military as opposed to civilian superiors. In addition, in her Reply, the Appellant states that she "did not, as suggested by the OCP Response, deny that the concept of superior

[439] *Duch* Judgment, para. 538.
[440] Ieng Thirith Appeal, paras 84-92; Ieng Thirith Reply, paras 70, 74.

responsibility can also be applied to civilian superiors."[441] While she notes that "it is a concept that derives from military law, which is particularly applicable to the state of affairs which exists within the discipline of the military," she acknowledges that "isolated examples may be found of cases where command responsibility has been applied to non-military individuals".[442] As such, the Pre-Trial Chamber interprets the Ieng Thirith Appeal to challenge the existence of superior responsibility generally in customary international law at the relevant time and not whether it also extended to civilian superiors.

193. The Pre-Trial Chamber notes that the evolution of individual criminal responsibility pursuant to the doctrine of superior responsibility as a customary international law norm was foreshadowed by events in the aftermath of World War I. First, in the 1919 report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, which was created by the Preliminary Peace Conference for purposes of determining responsibilities relating to the war, the Commission gave explicit expression to the doctrine of superior responsibility in recommending that charges be brought before an international tribunal:

> [a]gainst all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered or, *with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war* (it being understood that no such abstention should constitute a defence for the actual perpetrators).[443]

194. While trial by an international tribunal of individuals from Germany and her allies pursuant to the doctrine of superior responsibility never occurred, the German government agreed to try twelve individuals before the Supreme Court of the Reich at

[441] Ieng Thirith Reply, para. 78,
[442] Ieng Thirith Reply, para. 78.
[443] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, "Report Presented to the Preliminary Peace Conference", 29 March 1919, reprinted in 14 *Am. J. Int'l L* 1 (1920) at 121 (emphasis added).

Leipzig for war crimes.[444] In one of these cases with respect of Emil Müller, a Captain in the Reserve of Karlsruhe, the Supreme Court found the accused to be liable for the mistreatment of a prisoner by a subordinate on the basis that he witnessed the mistreatment and failed to take action in the aftermath. The Court concluded that Müller had "at least tolerated and approved this brutal treatment, even if it was not done on his orders".[445] Whereas, with respect of another incident of prisoner mistreatment by a subordinate, the Court did not find that Müller was responsible because it was "not clear whether this ill-treatment had not taken place before the accused either noticed it or could prevent it. Therefore, no case of knowingly permitting this when he could have prevented it [. . .] can be established here."[446]

195. However, it was only in the aftermath of World War II that international prosecutions based on the doctrine of superior responsibility were actually carried out. While the doctrine was not expressly provided for under the IMT Charter , the IMTFE or Law No. 10 of the Allied Control Council ("the Council Control Law") with respect of trials in the German occupied zones, a number of cases of Japanese and German superiors tried before the IMTFE and the Allied military commissions or tribunals articulated and applied the doctrine.

196. First, in the 1945 trial of Japanese General Tomoyuki Yamashita (*"Yamashita"*), "an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army,"[447] before a United States Military Commission in Manila, General Yamashita was charged with:

> [u]nlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes. The essence of the case for the Prosecution was that the accused knew or must have known of, and permitted, the widespread crimes committed in the Philippines by troops under his command (which included

[444] James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War,* Greenwood Publishing Group, 1982, p. 142.
[445] Judgment in the Case of Emil Müller, 30 May 1921 reprinted in 16 *Am. J. Int'l L* 684 (1922) at, 691.
[446] Judgment in the Case of Emil Müller, 30 May 1921 reprinted in 16 *Am. J. Int'l L* 684 (1922) at 691.
[447] *Yamashita* Judgment, Vol. IV, p. 35.

> murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial) [. . .].[448]

197. Although the evidence submitted was conflicting or unclear with respect of General Yamashita's knowledge of crimes committed by his subordinates or effective control over them at the relevant time, there was abundant evidence before the Commission that the offences were "many and widespread both in space and time"[449] and were committed "by Japanese armed forces under [General Yamashita's] command".[450] Consequently, the Commission held that "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."[451] The Commission therefore convicted General Yamashita on the basis that "a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command" and "during the period in question you failed to provide effective control of your troops as was required by the circumstances."[452]

198. In response to a petition for a writ of *habeas corpus* on behalf of General Yamashita, the majority of the judges of the United States Supreme Court endorsed the Military Commission's findings, holding that certain provisions of international law "plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures *as were within his power* and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognised, and its breach penalised by our own military tribunals."[453]

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[448] *Yamashita* Judgment, p. 1.
[449] *Yamashita* Judgment, p. 2
[450] *Yamashita* Judgment, p. 35.
[451] *Yamashita* Judgment, p. 35.
[452] *Yamashita* Judgment, p. 35.
[453] *Yamashita* US Supreme Court Judgment, p. 16 (emphasis added).

199. The Pre-Trial Chamber notes that, while the articulation and application of the specific elements of the doctrine of superior responsibility by Judges in this case has been controversial, specifically with respect of the *mens rea* requirement including negligence or even a strict liability standard, as well as a failure to establish effective control by General Yamashita over his troops, it is without question that *Yamashita* serves as precedent for the notion that a superior may be held criminally responsible under international law with respect of crimes committed by subordinates. Furthermore, the dissenting opinions in the Supreme Court case "have contributed, more than the Judgment of the majority, to moulding this concept into a doctrinally-sound form of criminal liability."[454]

200. Second, several of the twelve cases heard and decided under the Council Control Law from October 1946-April 1949 before the Nuremberg Military Tribunals ("NMT") in the United States occupation zone in Germany applied the doctrine of superior responsibility. Perhaps the most well known is the "*High Command* Case, which involved prosecution of fourteen high ranking officers in the German military for, among other charges, war crimes against enemy belligerents and prisoners of war (Count Two); and crimes against humanity against civilians (Count Three) as alleged in the indictment.[455]

201. Ten of the defendants were found guilty for both war crimes and crimes against humanity while the lead defendant, Field Marshal von Leeb, was only convicted for crimes against humanity.[456] Field Marshal von Leeb was convicted specifically for crimes against humanity as a military superior.[457] When articulating a theory of command responsibility, the Tribunal stated the following, which touches upon the requisite *mens rea* and *actus reus* requirements:

[454] Guénaël Mettraux, *The Law of Command Responsibility,* Oxford University Press, 2009, pp. 7-8.
[455] *High Command* Case, Vol. X, p. 10; Vol. XI, pp. 463-465.
[456] *High Command* Case, Vol. XI, pp. 560-561. The remaining defendant committed suicide before the trial was adjourned.
[457] *High Command* Case, Vol. XI, pp. 560-561.

> [m]ilitary subordination is a [sic] comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as know to civilized nations. [. . .] [T]he occupying commander must have knowledge of these offences [by his troops] and acquiesce or participate or criminally neglect to interfere in their commission and [...] the offences committed must be patently criminal.[458]

202. Furthermore, with respect of the requisite nature of the superior/subordinate relationship, the Tribunal laid out a form of the requirement of effective control, when rejecting the Prosecution's theory that a field commander officially responsible for an occupied territory could be held strictly liable for crimes committed against a civilian population by his subordinates in that territory due to the actions of higher military and Reich authorities.[459] The Tribunal found that where such authority was alleged to have

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[458] *High Command* Case, Vol. XI, pp. 543-545.

[459] *High Command* Case, Vol. XI, pp. 544-545:

> Concerning the responsibility of a field commander for crimes committed within the area of his command, particularly as against the civilian population, it is urged by the prosecution that under the Hague Convention, a military commander of an occupied territory is per se responsible within the area of his occupation, regardless of orders, regulations, and the laws of his superiors limiting his authority and regardless of the fact that the crimes committed therein were due to the action of the state or superior military authorities which he did not initiate or in which he did not participate. [. . .] It is the opinion of this Tribunal that [. . .] [i]t cannot be said that he exercises the power by which a civilian population is subject to his invading army while at the same time the state which he represents may come into the area which he holds and subject the population to murder of its citizens and to other inhuman treatment. [. . .] We are of the opinion, however, as above pointed out in other aspects of this case, that the occupying commander must have knowledge of these offenses and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.

been removed from a commander, it would examine objective and subjective factors in considering the validity of the defence.[460]

203. Third, another NMT case, *United States v. Wilhelm List et al.* (the "*Hostage* Case"),[461] applied the doctrine of superior responsibility. The *Hostage* Case involved high-ranking field marshals and generals who were charged with war crimes and crimes against humanity perpetrated against civilians, enemy troops and prisoners of war[462] "by troops of German armed forces under the command and jurisdiction of, responsible to, and acting pursuant to orders issued, executed, and distributed"[463] by the defendants. The Tribunal held that "[i]n determining the guilt or innocence of each of these defendants, we shall require proof of a causative, overt act or omission from which a guilty intent can be inferred before a verdict of guilty will be pronounced."[464] General List was found guilty for war crimes and crimes against humanity under Counts One and Three of the indictment with respect of murder and ill treatment perpetrated against thousands of civilians, enemy troops and prisoners of war by his subordinates when he was Armed Forces Commander Southeast in the occupied territories of Yugoslavia, Greece and Albania.[465] The Tribunal found that the evidence indicated that with respect of the *mens rea* and *actus reus* requirements of command responsibility:

> [t]he reports made to the defendant List as Armed Forces Commander Southeast charge him with notice of the unlawful killing of thousands of innocent people in reprisal for acts of unknown members of the population who were not lawfully subject to such punishment. Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these un-lawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility. Instead of taking corrective measures, he complacently permitted thousands of innocent people to die before the execution squads of the Wehrmacht and other armed units operating in the territory.[466]

[460] *High Command* Case, Vol. XI, pp. 548-549.
[461] *United States v. Wilhelm List et al.*, 19 February 1948, reproduced in *NMT Trials*, Vol. XI (the "Hostage Case").
[462] *Hostage* Case, Vol. X, pp. 765-776, 1233.
[463] *Hostage* Case, p. 765.
[464] *Hostage* Case, p. 1261.
[465] *Hostage* Case, p. 1274.
[466] *Hostage* Case, pp. 1271-1272.

204. The Tribunal rejected the defence that he lacked knowledge of these reports on the basis that "[r]eports to commanding generals are made for their special benefit. Any failure to acquaint themselves with the contents of such reports, or a failure to require additional reports where inadequacy appears on their face, constitutes a dereliction of duty which he cannot use in his own behalf."[467] Furthermore, with respect of the superior/subordinate requirement for command responsibility, the Tribunal did not accept his argument that many of the killings were carried out by military units not tactically subordinate to him.[468] The Tribunal noted that "[a] commanding general of occupied territory is charged with the duty of maintaining peace and order, punishing crime, and protecting lives and property within the area of his command. His responsibility is coextensive with his area of command."[469] Consequently, the Tribunal found that General List's authority was inherent in that position and "[t]he primary responsibility for the prevention and punishment of crime lies with the commanding general; a responsibility from which he cannot escape by denying his authority over the perpetrators."[470]

205. Similarly, General Walter Kuntze, who assumed the position of Armed Forces Commander Southeast from General List was convicted under Counts One, Three and Four, for war crimes and crimes against humanity committed against thousands of civilians, enemy troops and prisoners of war by his subordinates.[471] The Tribunal held that he was responsible under command responsibility theory for the collection of thousands of Jews and Gypsies into concentrations camps and their killings when it found that:

> [t]he evidence shows the collection of Jews in concentration camps and the killing of one large group of Jews and gypsies shortly after the defendant assumed command in the Southeast by units that were subordinate to him. The record does not show that the defendant Kuntze ordered the shooting of

[467] *Hostage* Case, p. 1271.
[468] *Hostage* Case, p. 1272.
[469] *Hostage* Case, p. 1271.
[470] *Hostage* Case, p. 1272.
[471] *Hostage* Case, p. 1281.

> Jews or their transfer to a collecting camp. The evidence does show that he had notice from the reports that units subordinate to him did carry out the shooting of a large group of Jews and gypsies as hereinbefore mentioned. He did have knowledge that troops subordinate to him were collecting and transporting Jews to collecting camps. Nowhere in the reports is it shown that the defendant Kuntze acted to stop such unlawful practices. It is quite evident that he acquiesced in their performance when his duty was to intervene to prevent their recurrence. We think his responsibility for these unlawful acts is amply established by the record.[472]

206. In addition, as commander of the LXIX Reserve Corps in northern Croatia, General Ernst Dehner was convicted under Count One of the indictment for unlawful killings of thousands of innocent civilian hostages and reprisals taken against civilian prisoners by his direct subordinates, which constituted war crimes and crimes against humanity.[473] The Tribunal found that "[t]he records show that this defendant had full knowledge of these acts. [...] It appears to us from an examination of the evidence that the practice of killing hostages and reprisal prisoners got completely out of hand, legality was ignored, and arbitrary action became the accepted policy. The defendant is criminally responsible for permitting or tolerating such conduct on the part of his subordinate commanders."[474] In response to General Dehner's defense that it was the divisional commanders responsible for ordering the commission of the acts, the Tribunal agreed; however, it found that "the superior commander is also responsible if he orders, permits, or acquiesces in such criminal conduct. His duty and obligation is to prevent such acts, or if they have been already executed, to take steps to prevent their recurrence."[475]

207. Likewise, General Hubert Lanz was convicted for war crimes and crimes against humanity under Count One, for failing to prevent reprisals against innocent civilians committed by subordinates.[476] The Tribunal held that:

> [T[he defendant says that as a tactical commander he was too busy to give attention to the matter of reprisals. This is a very lame excuse. The unlawful killing of innocent people is a matter that demands prompt and efficient

[472] *Hostage* Case, pp. 1279-1280.
[473] *Hostage* Case, pp. 1297, 1299.
[474] *Hostage* Case, p. 1299.
[475] *Hostage* Case, p. 1298.
[476] *Hostage* Case, p. 1313.

> handling by the highest officer of any army. This defendant, with full knowledge of what was going on, did absolutely nothing about it. Nowhere does an order appear which has for its purpose the bringing of the hostage and reprisal practice within the rules of war. The defendant does not even contend that he did. As commander of the XXII Corps it was his duty to act and when he failed to so do and permitted these inhumane and unlawful killings to continue, he is criminally responsible.

208. Finally, General Wilhelm Speidal, as Military Commander Southern Greece, was convicted under Count One for war crimes and crimes against humanity for the carrying out of unlawful hostage and reprisal killings by his subordinates against innocent civilians.[477] The Tribunal found that "the Military Commander Greece could *control* the reprisal and hostage practice through the various subarea headquarters which were subordinate to him cannot be questioned."[478] Furthermore, the Tribunal found that the evidence indicated that General Speidal had knowledge of these acts and permitted them to occur.[479]

209. Fourth, *United States v. Karl Brandt et al.* (the "*Medical* Case")[480] is another NMT case that applied the doctrine of superior responsibility. However, unlike the *High Command* and *Hostage* Cases, the theory was applied to defendant Karl Brandt, who was not a military superior, strictly speaking. In 1934 he was Hitler's personal physician and a member of the Allgemeigne SS. In 1940, he was transferred to the armed wing of the SS, the Waffen SS, in which commissions were equivalent to those of the army although it was not part of the German army.[481] By decree issued by Hitler on 25 August 1944, Brandt became Reich Commissioner for Medical and Health Services, "authoriz[ed] to issue instructions to all the medical services of the State, Party, and Wehrmacht concerning medical problems", both civilian and military.[482] The Tribunal found that in addition to his visits to concentration camps, Brandt became aware of sulfanilamide experiments on human subjects at Ravensbrueck for a period of about a year prior to

[477] *Hostage* Case, p. 1317.
[478] *Hostage* Case, p. 1314.
[479] *Hostage* Case, pp. 1315-1316.
[480] *Medical* Case.
[481] *Medical* Case, Vol. II, p. 190.
[482] *Medical* Case, Vol. II, pp. 191-192.

August 1943 at a meeting held in May 1943 where a complete report on the experiments was made.[483] At the time:

> [i]n the medical field Karl Brandt held a position of the highest rank directly under Hitler. He was in a position to intervene with authority on all medical matters; indeed, it appears that such was his positive duty. It does not appear that at any time he took any steps to check medical experiments upon human subjects. [. . .] Occupying the position he did, and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps.[484]

210. Consequently, the Tribunal concluded that:

> [w]e find that Karl Brandt *was responsible for*, aided and abetted, took a consenting part in, and was connected with plans and enterprises involving medical experiments conducted on non-German nationals against their consent, and in other atrocities, in the course of which murders, brutalities, cruelties, tortures and other inhumane acts were committed. To the extent that these criminal acts did not constitute war crimes they constituted crimes against humanity.[485]

211. Similarly, Brandt's co-defendant, Oskar Schroeder was convicted under superior responsibility as a military superior for war crimes and crimes against humanity against non-German civilians and prisoners of war due to freezing experiments conducted in 1942 at the Dachau concentration camp for the benefit of the Luftwaffe. The Tribunal found that at the time he became Chief of the Medical Service of the Luftwaffe he had actual knowledge of the experiments resulting in suffering and death of the non-German subjects. He also had knowledge that typhus vaccine research was being administered on non-German subjects at Natzweiler and Schirmeck concentration camps in 1942-1943, and he had means of knowledge through reports to him that deaths were resulting, but failed to inquire on this point.[486] The Tribunal convicted him for these experiments committed by his subordinates, finding that "the law of war imposes on a military

[483] *Medical* Case, Vol. II, p. 193.
[484] *Medical* Case, Vol. II, p. 193-194.
[485] *Medical* Case, Vol. II, p. 198 (emphasis added).
[486] *Medical* Case, Vol. II, pp. 211-213.

officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the law of war."[487]

212. Another co-defendant, Sigfried Handloser, was also convicted for war crimes and crimes against humanity committed against non-German and German civilians and prisoners of war in his capacity as a military superior.[488] The Tribunal found that Handloser had actual knowledge of freezing and sulfanilamide experiments being conducted on inmates against their consent and resulting in death; however, he made no attempts to investigate or control his subordinates conducting the experiments.[489] Citing the *Yamashita* precedent, the Judges held that:

> [i]n connection with Handloser's responsibility for unlawful experiments upon human beings, the evidence is conclusive that with knowledge of the frequent use of non-German nationals as human experimental subjects, he failed to exercise any proper degree of control over those subordinated to him who were implicated in medical experiments coming within his official sphere of competence. This was a duty which clearly devolved upon him by virtue of his official position. Had he exercised his responsibility, great numbers of non-German nationals would have been saved from murder. To the extent that the crimes committed by or under his authority were not war crimes they were crimes against humanity.[490]

213. Fifth, in *United States of America v. Ernst von Weizsaecker et al.* (the "*Ministries* Case"),[491] Gottlob Berger, Chief of the Main Office SS from 1940-1945 and Himmler's liaison officer for the Ministry for Eastern Territories, was found guilty for crimes against humanity committed by the Dirlewanger brigade, which were *de facto*

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[487] *Medical* Case, Vol. II, p. 212.
[488] Specifically, the conviction related to his authority "as Chief of the Medical Service of the Wehrmacht occupying the position of superior over the Army Medical Service and the chiefs of the Medical Services of the Navy and Luftwaffe and certain other subordinate agencies pertaining to the Wehrmacht. The chart also indicates his authority over the Chief of the Medical Office [Service] of the Waffen SS and components of the Waffen SS when attached to the Wehrmacht." (*Medical* Case, Vol. II, p. 200).
[489] *Medical* Case, Vol. II, p. 206.
[490] *Medical* Case, Vol. II, p. 206.
[491] *Trial of Ernst von Weizsaecke and Others*, Judgment of 11 April 1949, *Trials of War Criminals Before the Nurernberg Military Tribunals Under Council Control Law No. 10* (1951), Vols. XII-XIV ("*Ministries* Case").

subordinate to him.[492] Like Karl Brandt, he was not a military superior strictly speaking; he was a Lieutenant General in the Waffen SS while also serving in some government ministry posts.[493]

214. Sixth, in *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roechling* ("*Roechling* Case"),[494] German industrialists Hermann Roechling and Hans Lothar von Gemmingen-Hornberg were held responsible for war crimes for the inhumane treatment by the Gestapo of foreign deportees and prisoner of war workers in their plants through a disciplinary system that had been set up by prior agreement with the industrialists.[495] Although the Tribunal states that these two civilian superiors "permitted" and "encouraged" the existence and further development of this system of inhumane treatment in their plants,[496] Hermann Roechling's culpability is also in the language of omission as a superior. The Tribunal found that in view of his position and power, it was his:

> [d]uty to keep himself informed about the treatment of the deportees; the fact that he did no longer concern himself about their fate, could only increase his responsibility. In his dual capacity as chief of the Voelklingen plants and chairman of the Reich Association Iron he had sufficient authority to intervene and to render the abuses less severe, even if he could not stop them. The contested judgment validly establishes that the witnesses declared Hermann Roechling to have had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoners' uniform on those occasions.[497]

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[492] While in the field the unit was not under his tactical direction, it was organized by him, trained by the man whom he selected, the idea was his, he kept it and its commander under his protection, he was repeatedly informed of its savage and uncivilized behavior, which he not only permitted to continue, but attempted to justify; he fought every effort to have it transferred or dispersed, recommended its commander for promotion and covered him with the mantle of his protection. That one of the purposes for which the brigade was organized was to commit crimes against humanity, and that it did so to an extent which horrified and shocked even Nazi commissioners and Rosenberg's Ministry for the Eastern Territories, who can hardly be justly accused of leniency toward the Jews, and people of the eastern territories, is shown beyond a doubt. Berger's responsibility is quite as clear. He is guilty with respect to the matters charged against him regarding the actions of the Dirlewanger unit, and we so find. *Ministries* Case, Vol. XIV, pp. 545-546.
[493] *Ministries* Case, Vol. XII, pp. 17-18.
[494] *Trial of Hermann Roechling and Others*, Judgment of 30 June 1948,, *Trials of War Criminals Before the Nuremberg Military Tribunals under Council Control Law No. 10* (1951), Vol. XIV, app. B ("*Roechling* Case").
[495] *Roechling* Case, pp. 1135, 1140-41.
[496] *Roechling* Case, pp. 1136, 1140-41.
[497] *Roechling* Case, p. 1136.

215. Similarly, with respect of Hans Lothar von Gemmingen-Hornberg, the Tribunal stated that:

> [he] was president of the Directorate of the Stahlwerke Roechling; he furthermore held the position of works manager, that is, as the works representative in negotiations with the authorities specially competent to deal with matters relating to labor. His sphere of competence also included contact with the Gestapo in regard to the works police. Von Gemmingen-Hornberg declares that he was incapable of altering the conditions, of which he was aware, since the deported workers were under the jurisdiction of the Gestapo and the German Labor Front. However, the high position which he held provided him with sufficient authority to intervene and to ensure an improvement in the treatment of the convicted deportees.[498]

216. Seventh, the 1949 IMTFE Judgment[499] articulates the doctrine of superior responsibility under Chapter II entitled "The Law", with respect of individual criminal responsibility for war crimes against prisoners and applies it to members of the government, military or naval officers commanding military formations with prisoners in their possession; officials in departments responsible for the well-being of prisoners; and officials, whether civilian, military or naval, having direct and immediate control of prisoners.[500] Although the Judgment does not explicitly refer to "superior responsibility" when it outlines the applicable law in this regard, the language used tracks the fundamental elements of the doctrine found in the ECCC Law. The Judgment provides that all such officials by virtue of their position have a duty to prevent ill treatment of prisoners by "establishing and securing the continuous and efficient working of a system appropriate for these purposes."[501] Once that system is established, such officials are not responsible for the commission of war crimes against the prisoners unless:

> (1) *They had knowledge* that such crimes were being committed, and having such knowledge *they failed to take such steps* as were *within their power to prevent* the commission of such crimes in the future, or (2) They are at fault in having failed to acquire such knowledge.

[498] *Roechling* Case, p. 1136.
[499] IMTFE Judgement.
[500] IMTFE Judgment, pp. 48, 443-48, 444.
[501] IMTFE Judgment, pp. 48, 444.

> *If such person had, or should,* but for negligence or supineness, *have had such knowledge he is not excused for inaction if his office required or permitted him to take any action to prevent such crimes.*[502]

Furthermore, with respect of army or navy commanders in particular, the IMTFE Judgment provides that:

> If crimes are committed against prisoners under their control, *of the likely occurrence of which they had, or should have had knowledge in advance,* they are responsible for those crimes. If, for example, it be shown that *within the units under his command* conventional war crimes have been committed *of which he knew or should have known,* a commander *who takes no adequate steps to prevent the occurrence of such crimes in the future* will be responsible for such future crimes.[503]

217. In addition, under Chapter X of the IMTFE Judgment, entitled "Findings on Counts of the Indictment", Judges applied the principles laid out under Chapter II to the individual accused who were superiors when determining individual culpability under Count 55 of the Indictment. Count 55 charged the accused "with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war."[504] Subsequently, the Judges convicted General Iwane Matsui, Commander-in-Chief of the Central China Area Army, under Count 55 with respect of atrocities committed by his troops against civilians during the "Rape of Nanking." The Judges found that Matsui had received reports of the atrocities and had made his own observations. Thus, the tribunal was "satisfied that Matsui knew what was happening."[505] Nevertheless, "[h]e did nothing, or nothing effective to abate these horrors [. . .] *He had the power*, as he had the duty, to control his troops and to protect the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge his duty."[506]

218. IMTFE Judges also found Field Marshal Shunroku Hata guilty for war crimes committed by his expeditionary forces in China in 1938 and 1941-1944, stating that:

[502] IMTFE Judgment, pp. 48, 445 (emphasis added).
[503] IMTFE Judgment, pp. 48, 446 (emphasis added).
[504] IMTFE Judgment, pp. 48, 424.
[505] IMTFE Judgment, pp. 49, 815.
[506] IMTFE Judgment, pp. 49, 816 (emphasis added).

> [a]trocities were committed on a large scale by the troops under his command and were spread over a long period of time. Either Hata knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war and civilians were obeyed. In either case, he was in breach of his duty as charged under Count 55.[507]

219. Similarly, with respect of General Heitarō Kimura, commander of the Burma Area Army from August 1944 until surrender to Allied forces, the Judges convicted him under Count 55 because he was found to have had knowledge of mistreatment of prisoners and when he took over command of the Burma Area Army, failed to take effective disciplinary measures to stop the crimes. The Judges found that:

> The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders [. . .] His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus, he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.[508]

220. In addition, in acquitting accused Admiral Takasumi Oka under Count 55 for responsibility for mistreatment of prisoners of war when he was Chief of the Naval Affairs Bureau from October 1940 to July 1944, which had primary responsibility for administration of the system designed to deal with prisoners, the Judges applied elements of superior responsibility. They found that "[there is some evidence tending that Oka knew or ought to have known that war crimes were being committed by naval personnel against prisoners of war with whose welfare his department was concerned, but it falls short of the standard of proof which justifies a conviction in criminal cases."[509]

221. Alongside military officials, several other government officials were convicted as well under Count 55 of the indictment who were civilian officials or had dual civilian and military roles. Kōki Hirota was convicted for war crimes committed during the "Nanjing

[507] IMTFE Judgment, pp. 49, 784.
[508] IMTFE Judgment, pp. 49, 809.
[509] IMTFE Judgment, pp. 49, 822.

Massacre" in the late 1930s, during which time he was Prime Minister and Foreign Minister. The IMTFE Tribunal found that he clearly had knowledge of the event as he received reports on the atrocities from foreign sources, and he brought the international protests with respect of Nanjing before the Cabinet for discussion.[510] However, the Tribunal held that that he should not have simply relied upon assurances from the War Ministry that they would not continue[511] and was "of the opinion that Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[512]

222. In addition, Mamoru Shigemitsu was convicted for war crimes with respect of mistreatment of prisoners and civilian internees during his tenure as Foreign Minister. Similar to Hirota, the IMTFE Tribunal found that he received information from foreign governments on this mistreatment from 1943-1945.[513] The Tribunal held that:

> [he] took no adequate steps to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.[514]

223. Another prime minister, General Kuniaki Koiso, was held responsible under Count 55 for war crimes committed against prisoners of war. The Tribunal noted that when General Koiso was prime minister from 1944-1945, mistreatment of prisoners of war was so widespread that it was "improbable" that he could not have known of it.[515] Furthermore, the Judges found that following a meeting in 1944 in which the foreign minister reported on information from sources about Japan's mistreatment of prisoners, "Koiso remained Prime Minister for six months during which the Japanese treatment of

[510] IMTFE Judgment, pp. 49, 791.
[511] IMTFE Judgment, pp. 49, 791.
[512] IMTFE Judgment, pp. 49, 491.
[513] IMTFE Judgment, pp. 49, 829-49, 830.
[514] IMTFE Judgment, pp. 49, 831.
[515] IMTFE Judgment, pp. 49, 813.

prisoners and internees showed no improvement whatever. This amounted to a deliberate disregard of duty."[516]

224. It is also worth noting that the IMTFE Tribunal considered charges against other high level civilian officials under Count 55 and acquitted them as superiors. For example, Kiichirō Hiranuma, Prime Minister in 1939 and Home Minister thereafter, was charged with war crimes under Count 55. He was acquitted because the Tribunal found that there was no evidence directly connecting him to the crimes.[517] Another example is Kōichi Kido, Lord Keeper of the Privy Seal from 1939-1940, who was acquitted under Count 55 because, although he was found to be a member of the Cabinet during the Nanjing Massacre, "[t]he evidence is not sufficient to attach him with responsibility for failure to prevent war crimes".[518]

225. In sum, similar to the *Yamashita* Judgment, the Pre-Trial Chamber notes that the contours of the elements of the doctrine of superior responsibility laid out by the Judges in Chapter II of the IMTFE Judgment or their application in Chapter X to specific accused are not as developed as the present day definition of the theory found in international jurisprudence. This is true with respect of the requirement of a superior/subordinate relationship with effective control, particularly in the context of non-military superiors, where the Judgment does not make explicit findings demonstrating such a relationship, but seems to assume it by virtue of the accused's high level positions, and only makes reference to "failed to take such steps as were *within their power* to prevent" in Chapter II.[519] As such, the Pre-Trial Chamber considers that the IMTFE is not conclusive with respect of whether the doctrine of superior responsibility extends to non-military superiors as it fails to make findings

[516] IMTFE Judgment, pp. 49, 813.
[517] IMTFE Judgment, pp. 49, 787.
[518] IMTFE Judgment, pp. 49, 805-49, 806.
[519] The assumption that civilian members of the Cabinet would have had the power to prevent or punish crimes committed by members of the military seem hardly compatible with the IMTFE Judgment's section dealing with crimes against peace, wherein there are numerous findings demonstrating that the military were able to "dominate the Japanese polity" and not the other way around. Military action abroad was characterised as without Cabinet sanction or in defiance of Cabinet decisions, there was assassination of opposing leaders, plots to overthrow Cabinets refusing to cooperate with the Army and a military revolt which seised the capital and attempted to overthrow the government (see in particular, IMTFE Judgment, pp. 49, 765) (emphasis added).

relating to the core of the theory, namely whether there was a superior subordinate relationship, either *de jure* or *de facto*, between government officials and the military staff involved in the crimes.

226. For military superiors, the Judgment clearly refers to "units under [...] command", but again, except for General Matsui's case, seems to presume effective control by virtue of that *de jure* relationship. In addition, the "failure to punish" prong of the *actus reus* is not explicitly included in the definition although failure to take "adequate steps to prevent the occurrence of such crimes in the future" could be interpreted to include punishment. Finally, similar to *Yamashita*, the requisite *mens rea* broadly includes a negligence standard in addition to actual and constructive knowledge.

227. Nevertheless, the Chamber finds that the IMTFE Judgment, when read as a whole, sufficiently articulates the doctrine of superior responsibility as a mode of individual liability in its applicable law and verdicts sections.

228. Finally, in the 1948-1949 trial of Admiral Soemu Toyoda, former Commander-in-Chief of the Japanese Combined Fleet, the Combined Naval Forces, and the Naval Escort Command from 3 May 1944-29 May 1945, one of the last major war crimes trials concluded in the aftermath of World War II, the Australian/U.S. military tribunal addressed the issue of superior responsibility after reviewing other international trials preceding it. The tribunal defined the essential elements of the doctrine as follows:

> 1. That atrocities were actually committed; 2. Notice of the commission thereof. This notice may be either: a. Actual [. . .] or b. Constructive. [. . .] 3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders. 4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war. 5. Failure to punish offenders.[520]

[520] War Crimes Tribunal Courthouse, Tokyo, Honshu, Japan, 19 September 1949, *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, 5004, 5006.

229. In acquitting Admiral Toyoda for atrocities committed by navy personnel, the tribunal noted that:

> [h]is guilt cannot [simply] be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrence and punish the offenders, he was derelict in his duties.[521]

230. On the basis of the foregoing, the Pre-Trial Chamber concludes that the doctrine of superior responsibility as articulated under Article 29 (new) of the ECCC Law existed as a matter of customary international law by 1975. Although the articulation of the contours of the fundamental elements of the doctrine was not always clear or complete in accordance with our understanding of them today, and the application of those elements to the specific facts in the post World War II cases was at times inconsistent and incomplete, nevertheless, the principle that a superior may be held criminally responsible with respect of crimes committed by subordinates where there is a superior/subordinate relationship with effective control; the *mens rea* of actual or constructive knowledge; and the *actus reus* of failure to act were established. This overview supports the view that the doctrine was also applied in some cases after the second world war to non-military superiors. However, the Chamber takes no position in the present appeal as to whether, as a matter of customary law by 1975 the doctrine of superior responsibility also applied to civilians.

(ii) Whether there was a Basis in Customary International Law for Superior Responsibility for Crimes Against Humanity from 1975-1979

231. On the question of whether superior responsibility applied as a matter of customary international law only with respect of war crimes, the NMT cases are instructive on this point. As noted above, several accused in the *High Command* Case, the *Hostage* Case,

[521] *Ibid.*

the *Medical* Case and the *Ministries* Case were held responsible under the doctrine not only with respect of war crimes, but also on charges of crimes against humanity.

(iii) Conclusion

232. Therefore, on the basis of the foregoing, the Pre-Trial Chamber finds that the doctrine of superior responsibility as charged in the Closing Order with respect of Ieng Thirith existed as a matter of customary international law from 1975-1979. In light of the post-World War II international case law cited above and the serious nature of crimes against humanity, it was both foreseeable and accessible to Ieng Thirith that she could be prosecuted as a superior, whether military or non-military, for crimes against humanity perpetrated by her subordinates from 1975-1979. Ground 7 of the Ieng Thirith Appeal is hereby dismissed.

Phnom Penh, 15 February 2011

Pre-Trial Chamber **President**

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan