



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia

Nation Religion King

Royaume du Cambodge

Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber

Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007-ECCC/TC

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):	
22 / 09 / 2011	
ម៉ោង (Time/Heure) : 11:00	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer/L'agent chargé du dossier: Ratanak	

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

Date: 22 September 2011
Original language(s): Khmer/English/French
Classification: PUBLIC

DECISION ON DEFENCE PRELIMINARY OBJECTIONS
(STATUTE OF LIMITATIONS ON DOMESTIC CRIMES)

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1. INTRODUCTION

1. The Trial Chamber is seised of preliminary objections by the Defence for IENG Sary, IENG Thirith, KHIEU Samphan and NUON Chea, filed on 14 and 25 February 2011 respectively, concerning the limitation period applicable to offences contained in the Criminal Code of the Kingdom of Cambodia (1956) (“1956 Penal Code”) with which each are charged.¹ All Accused submit that the jurisdiction of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) over these offences is debarred by the expiry of the limitation period contained in the 1956 Penal Code, and that this period was not extended by Article 3 (new) of the ECCC Law.² The Office of the Co-Prosecutors (“OCP”) and Lead Co-Lawyers for the Civil Parties filed responses on 7 March and 21 March 2011 respectively.³

2. The Chamber is additionally seised of a motion by the IENG Sary Defence of 24 February 2011 requesting that portions of the Closing Order be struck out due to defects.⁴ The Co-Prosecutors responded to this motion on 16 March 2011.⁵ The Chamber in this decision rules also on this motion insofar as it pertains to the IENG Sary Defence’s application in relation to offences contained in the 1956 Penal Code (“domestic crimes”).⁶

¹ “IENG Thirith Defence’s Preliminary Objections”, E44, 14 February 2011 (“IENG Thirith Preliminary Objections”), paras. 9, 20-24; “Preliminary Objections Concerning Termination of Prosecution (Domestic Crimes)”, E47, 14 February 2011 (“KHIEU Samphan Preliminary Objections”); “Consolidated Preliminary Objections”, E51/3, 25 February 2011 (“NUON Chea Preliminary Objections”), para. 41; “Summary of IENG Sary’s Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions subject to Appellate Review”, E51/4, 25 February 2011 (“IENG Sary Preliminary Objections”), para. 28 (collectively “Defence Preliminary Objections on domestic crimes”).

² Article 3 (new) of the ECCC Law confers upon the ECCC the power to bring to trial all suspects who committed the crimes of homicide, torture and religious persecution set out in the 1956 Penal Code between 17 April 1975 and 6 January 1979. This provision initially extended the statutory limitation period for the prosecution of these crimes by 20 years and subsequently by a further 10 years (“Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea”, 10 August 2001 with inclusion of amendments promulgated on 27 October 2004 (NS/RKM/1004/006) (“ECCC Law”).

³ “Civil Parties’ Joint Response to Defence Rule 89 Preliminary Objections”, E51/5/4, 7 March 2011; “Co-Prosecutors’ Joint Response to Defence Rule 89 Preliminary Objections”, E51/5/3/1, 21 March 2011 (“OCP Response”).

⁴ “IENG Sary’s Motion to Strike Portions of the Closing Order due to Defects”, E58, 24 February 2011, paras. 3-6 (“IENG Sary Motion to Strike”).

⁵ “Co-Prosecutor’s Response to IENG Sary’s Motion to Strike Portions of the Closing Order due to Defects”, E58/1, 16 March 2011, paras. 1-7, 18-19 (“OCP Response to IENG Sary Motion to Strike”).

⁶ See further Trial Chamber Response to various Motions following Trial Management Meeting, E74, 8 April 2011 (“[t]he Chamber is seised of various Motions concerning alleged deficiencies in the Indictment or in the Investigation, [... including requests that] parts of the Indictment should be struck out [...]. It is clear from the Rules that the Chamber is bound by the scope of the Indictment. [...] Should any ambiguity in the Indictment arise at trial, the Chamber will, on a case-by-case basis state its interpretation of the scope of the Indictment and will consider itself bound by this interpretation”).

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2. PROCEDURAL HISTORY

3. In response to a similar preliminary objection in Case 001, the Trial Chamber declared that in the absence of an affirmative majority, the Chamber was unable to consider the guilt or innocence of the Accused with respect to domestic crimes.⁷ The absence of a required majority consequently created a barrier to the continuation of the prosecution against the Accused for domestic crimes before the Trial Chamber in that case.⁸

4. In the present case, the Closing Order issued by the Co-Investigating Judges (“CIJs”) charged the four Accused with the domestic crimes of murder, torture and religious persecution.⁹ The Trial Chamber was seised of the case file in Case 002 on 13 January 2011 following resolution by the Pre-Trial Chamber of appeals against the Closing Order.¹⁰ Following the filing of preliminary objections before the Trial Chamber in February 2011, the Chamber invited the OCP to file supplementary submissions to substantiate their claim that the statute of limitations on domestic crimes had not expired before the 2001 extension of the limitation period by the ECCC Law.¹¹ The OCP filed their submissions on 27 May 2011.¹² Responses were filed by the KHIEU Samphan Defence, and jointly by the IENG Sary, IENG Thirith and NUON Chea Defence teams, on 17 June 2011.¹³ Opportunity was provided to the parties to make oral submissions on this issue during the Initial Hearing.¹⁴

⁷ Article 14 (new) of the ECCC Law provides that “a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges.”

⁸ Case File 001/18-07-2007-ECCC/TC, *KAING Guek Eav alias Duch*, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, Trial Chamber, E/187, 26 July 2010, para. 56.

⁹ Closing Order, D427, 15 September 2010, para. 1613. The Closing Order without any analysis describes the offences in Articles 209 and 210 of the 1956 Penal Code as “religious persecution”. Rather than any offences of specific intent, Articles 209 and 210 instead criminalize “[a]n attempt on the life (or an attempt on the person in the case of Article 210) of a religious figure practising a religion recognised by the Cambodian Government, in the performance or in connection with the performance of his or her ministry”.

¹⁰ See Decision on IENG Sary’s Appeal against the Closing Order, D427/1/26, 13 January 2011; Decision on IENG Thirith’s and NUON Chea’s Appeals against the Closing Order, D427/2/12, 13 January 2011; Decision on KHIEU Samphan’s Appeal against the Closing Order, D427/4/14, 13 January 2011. The Pre-Trial Chamber subsequently issued reasons in respect of the KHIEU Samphan appeal on 21 January 2011, the NUON Chea and IENG Thirith appeals on 15 February 2011 and in respect of the IENG Sary appeal on 11 April 2011 (“Decision on KHIEU Samphan’s Appeal against the Closing Order”, D427/4/15, 21 January 2011; “Decision on Appeals by NUON Chea and IENG Thirith against the Closing Order” D427/3/15, 15 February 2011 and “Decision on IENG Sary’s Appeal against the Closing Order”, D427/1/30, 11 April 2011).

¹¹ “Direction to Parties Concerning Preliminary Objections and Related Issues”, E51/7, 5 April 2011.

¹² “Co-Prosecutors’ submission on statute of limitations for national crimes”, E51/7/1, 27 May 2011 (“OCP Supplementary Submissions”).

¹³ “Joint response of IENG Sary, IENG Thirith and NUON Chea to Co-Prosecutors’ submission on statute of limitations for national crimes”, E51/7/3, 17 June 2011 (“Joint Defence Reply”); “Response to Co-Prosecutors’ Submission on Statute of Limitations for National Crimes”, E51/7/2, 17 June 2011 (“KHIEU Samphan Reply”).

¹⁴ “Agenda for Initial Hearing”, E86/1, 14 June 2011; T., 29 June 2011 (Initial Hearing), E1/6.1, pp. 18–91.

3. SUBMISSIONS

3.1. Objections based on alleged defects in the portions of the Closing Order concerning domestic crimes

5. The IENG Sary Motion to Strike alleges that the Closing Order does not set out the facts which the CIJs consider to support the charges under Article 3 (new) of the domestic crimes of murder, torture and religious persecution, or the forms of liability through which the Accused could be found responsible for these crimes. Consequently, the portions of the Closing Order referring to crimes under Article 3 (new) fail to sufficiently inform the Accused of the nature of the charges against him and are therefore void for procedural defect.¹⁵

6. The OCP opposes this motion, on grounds that the ECCC legal framework does not envisage motions to amend or strike portions of the Closing Order at the trial stage, and that it misstates both the applicable law concerning indictments and the factual findings in the Closing Order. The Closing Order includes material facts with sufficient particularity given the substantial overlap between the domestic crimes charged and the equivalent underlying offences of crimes against humanity in the Indictment. There is no restriction upon using the same factual allegations to demonstrate alternative or cumulative charges. As domestic modes of liability are similar to the international modes of liability specified elsewhere in the Closing Order, there is no prejudice to the Accused in not setting out in detail their application to the material facts.¹⁶

3.1.1. Defence Preliminary Objections challenging legality of Article 3 (new) of the ECCC Law (domestic crimes)

7. All Accused contend that Article 3 (new) of the ECCC Law violates the principles of legality and non-retroactivity of law.¹⁷ The Defence for IENG Sary, IENG Thirith and KHIEU Samphan further submit that Article 3 (new) of the ECCC Law violates the Accused's right to equality before the law, as the extension of the limitation period applied only to prosecutions before the ECCC and not to proceedings before other Cambodian courts.¹⁸

¹⁵ IENG Sary Motion to Strike, paras. 3-6.

¹⁶ OCP Response to IENG Sary Motion to Strike, paras. 1-7, 13, 18-19.

¹⁷ IENG Thirith Preliminary Objections, paras. 22-23; NUON Chea Preliminary Objections, para. 41; KHIEU Samphan Preliminary Objections, paras. 10, 23 and IENG Sary Preliminary Objections, para. 28d (incorporating by reference "IENG Sary's Reply against Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals against the Closing Order", D427/1/23, 6 December 2010, paras. 42-45).

¹⁸ IENG Sary Preliminary Objections, para. 28 c and d (incorporating by reference IENG Sary Appeal against the Closing Order, D427/1/6, 25 octobre 2010, paras. 154-157 and "IENG Sary's Reply against Co-Prosecutors' 

8. The OCP submit that Article 3 (new) of the ECCC Law does not violate the principle of legality, as Article 15 of the International Covenant on Civil and Political Rights only prohibits conviction for a crime that did not constitute an offence at the time it was committed. The Accused are charged with crimes under the 1956 Penal Code, which were all criminalised between 1975 and 1979. The Cambodian Constitutional Council has previously also held that Article 3 (new) is constitutional and complies with Cambodia's international obligations. Further, the Accused's right to equality before the law is not violated because, as the Human Rights Committee has affirmed, trials before extraordinary courts applying different procedures to ordinary courts do not breach the ICCPR provided that the selection of persons to stand trial before these courts is based on reasonable and objective criteria.¹⁹

3.1.2. OCP supplementary submissions concerning suspension of the limitation period

9. The OCP submit that the statute of limitations was suspended until at least 1993, as established national and international practice demonstrates that a state of war which interrupts judicial functions requires the suspension of a statute of limitations. It was practically impossible to proceed with prosecution against the Accused as a result of the lack of a functioning judicial system in Cambodia and the ongoing armed conflict between 1979 and 1999. Further, as the Accused are alleged to be in part responsible for the incapacity of the judicial system during this period, they cannot be permitted to benefit from the passage of time or the circumstances that prevented their prosecution at an earlier time.²⁰

10. The Defence counter that the limitation period set out in Article 109 of the 1956 Penal Code expired in 1989 – well before its purported extension in 2001 by Article 3 (new) of the ECCC Law. The Cambodian legislature has not passed any legislation declaring the limitation period to have been suspended.²¹ Further, the Cambodian judicial system, though weak after 1979, functioned sufficiently to render prosecution of the Accused possible in the ten years following 1979. Cases involving similar crimes to which the Accused are charged were adjudicated in Cambodia between 1979 and 1993.²²

Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals against the Closing Order", D427/1/23, 6 December 2010, paras. 61–63); KHIEU Samphan Preliminary Objections, para. 9 and IENG Thirith Preliminary Objections, para. 23.

¹⁹ OCP Response, paras. 13, 15; T., 29 June 2011 (Initial Hearing), E1/6.1, pp. 40–41.

²⁰ T., 29 June 2011 (Initial Hearing), E1/6.1, pp. 33–40, 50–57; *see also* OCP Response, paras 13, 16, 27–33.

²¹ IENG Sary's Preliminary Objections, para. 28d (incorporating by reference "IENG Sary's Reply against Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals against the Closing Order", D427/1/23, 6 December 2010, paras 53–54); NUON Chea Preliminary Objections, para. 41.

²² Joint Defence Reply, paras. 3–25; KHIEU Samphan Reply, paras. 5–7.

4. DELIBERATIONS

4.1. Evaluation of domestic crimes as incorporated in the Closing Order

11. The Closing Order indicates that the CIJs were unable to agree on a common text on the question the limitation period for the relevant domestic crimes. To avoid recourse to the disagreement procedure pursuant to Internal Rule 72 and thus delay to the proceedings, the CIJs decided “by mutual agreement to grant the Co-Prosecutors’ requests [that the Accused be remitted for trial on the basis of crimes contained in the 1956 Penal Code], leaving it to the Trial Chamber to decide what procedural action to take regarding [these] crimes ...”.²³

12. In its Decision on IENG Sary’s Appeal against the Closing Order, the Pre-Trial Chamber held that the facts and modes of liability mentioned in other sections of the Closing Order in Case 002 can generally be characterised as applicable also to murder, torture and religious persecution under the 1956 Penal Code. It therefore considered there to be no barrier to remitting the Accused to trial on the basis of domestic crimes.²⁴ The Pre-Trial Chamber noted, however, that the question of whether the facts in the indictment can in fact be characterised as murder, torture or religious persecution under the 1956 Penal Code was a matter for the Trial Chamber to determine.²⁵

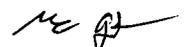
13. The dispositive part of the Closing Order charges all Accused with violations of the 1956 Penal Code, specifically homicide, torture and religious persecution pursuant to Articles 3, 29 and 39 (new) of the ECCC Law and Articles 209, 210, 500, 501, 503 and (or to)²⁶ 508 of the 1956 Penal Code.²⁷

²³ Closing Order, D427, 15 September 2010, para. 1574; *see also* paras. 1568-1572 (noting the failure of the Trial Chamber to reach agreement in Case 001 on whether the limitation period was interrupted or suspended between 1979 and 1993 and, in absence of an affirmative majority, its inability to consider the guilt or innocence of the Accused with respect to domestic crimes); *see further* IENG Sary Preliminary Objections, para. 28c (incorporating by reference IENG Sary’s Appeal against the Closing Order, D427/1/6, 25 October 2010, para. 175, submitting that as the CIJs disagreed in the Closing Order on the application of domestic crimes, prosecution is debarred, and the mechanism provided in Internal Rule 72 should have been utilized). The Pre-Trial Chamber has since determined that the mechanism in Internal Rule 72 is not mandatory. Where the Pre-Trial Chamber is not seised of a dispute, the default position is that the investigation proceeds (Decision on IENG Sary’s Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 274).

²⁴ Decision on IENG Sary’s Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 296 (excepting modes of liability that the CIJs have stated to be relevant to international crimes only).

²⁵ Decision on IENG Sary’s Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 296.

²⁶ The English version of the Closing Order differs from the French and Khmer versions in terms of exactly which crimes are included in the disposition. Paragraph 1613 of the English version charges the Accused with offences described in “... Articles 503 and 508”, whereas the other two language versions refer instead to all offences encapsulated by “... Articles 503 to 508” of the 1956 Penal Code (Closing Order, D427, 15 September 2010, para. 1613); *see also* para. 1575 (noting a similar discrepancy in the Co-Prosecutor’s final submission



14. The relevant portions of the Closing Order do not clearly identify the applicable law or set out the elements of the various domestic crimes contained in the Indictment.²⁸ Nor do they specify the factual basis of these charges or refer directly to other portions of the Closing Order setting out material facts in relation to similar crimes. Far from specifying that these domestic crimes are merely corollaries of similar international crimes (in particular, crimes against humanity of murder, torture and persecution), the Closing Order makes reference to the Pre-Trial Chamber's finding that these domestic crimes "cannot ... be subsumed under the international crimes in this Indictment because each national crime requires a material element that is not present in the international crimes and vice versa."²⁹ Further, the CIJs were themselves undecided as to the most appropriate disposition of these crimes, referring the issue to the Trial Chamber for decision as to what procedural action to take in relation to them.³⁰

15. The Trial Chamber observes that the portions of the Closing Order concerning domestic crimes contain neither a description of the material facts giving rise to these charges nor of the nature of the Accused's criminal responsibility alleged in relation to them. It has in consequence been unable to determine the exact nature of the domestic crimes with which the Accused are charged, or the modes of liability applicable to them. Although apparently concluding that joint criminal enterprise ("JCE") is a mode of responsibility applicable only to international crimes, this form of responsibility is included in the Closing Order's disposition.³¹ Neither the Closing Order nor the Pre-Trial Chamber explains how the Accused could be held responsible for domestic crimes as a member of a JCE or as a superior.³²

concerning charges of religious persecution, but concluding without any explanation that it is "not necessary to distinguish between these three offences [religious persecution, murder and torture]".

²⁷ See Closing Order, D427, 15 September 2010, para. 1613 (Part Five: Dispositive).

²⁸ The various crimes from the 1956 Penal Code referred to in the Closing Order include a variety of offences with differing elements: *see e.g.* Article 503 ("Homicide is said to be homicide without intent to kill, if it is caused by acts willfully committed with intent to assault another person, but without intent to cause death"), Article 504 ("Homicide is said to be murder or attempted murder if it is caused or may be caused by acts committed with sudden attempt to cause death"), Article 505 ("Intent to cause death shall be presumed whenever a deadly weapon is used"), Article 506 ("Homicide is said to be capital murder or attempted capital murder, if it is caused or may be caused by premeditated acts willfully committed or attempted with intent to cause death") and Article 507 ("Homicide is said to be poisoning or attempted poisoning, if it is caused or may be caused by the willful administration of deadly substances").

²⁹ Closing Order, D427, 15 September 2010, para. 1565 (*citing* "Co-Prosecutor's Appeal of the Closing Order against KAING Guek Eav *alias* Duch", D99/3/3, 6 August 2008, para. 35).

³⁰ Closing Order, D427, 15 September 2010, para. 1574.

³¹ Closing Order, D427, 15 September 2010, para. 1613. However, the Closing Order's extended analysis of JCE in paragraphs 1521-1542 make no reference to domestic crimes, presumably accordance with the CIJs' Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, D97/13, 8 December 2009, para. 22 (finding that the "modes of liability for international crimes can only be applied to ... international crimes"). The Pre-Trial Chamber has also concluded that "none of the arguments raised by the parties in the present appeal demonstrate that the Impugned Order is in error in considering that JCE, a form of

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16. The Trial Chamber agrees with the Co-Prosecutors that motions to strike or amend the Closing Order do not generally form part of the ECCC's legal framework.³³ However it also notes that portions of the Closing Order pertaining to domestic crimes do not meet the preconditions for validity contained in Internal Rule 67(2)³⁴: preconditions which are designed to safeguard the Accused's fundamental fair trial right to be informed of the nature of the charges against him and to have adequate opportunity to prepare his defence.³⁵

4.1.1. Applicable international standards regarding form of the Indictment

17. These concerns are reinforced by reference to prevailing standards in the international jurisprudence concerning the specificity of indictments.³⁶

18. As this case law notes, the primary purpose of the indictment, aside from being the basis of the case against the Accused, is to provide the Accused with adequate notice of the case against him and to safeguard his or her fair trial rights (in particular, the right of an Accused to be informed of the nature and cause of the charges against him and to have adequate time

liability recognized in customary international law, shall apply to international crimes rather than domestic crimes" (Decision on the Appeals Against the Co-Investigative Judges Order On Joint Criminal Enterprise, Pre-Trial Chamber, D97/15/9, 20 May 2010, para. 102). The Closing Order's disposition nonetheless charges all Accused on the basis of commission via a joint criminal enterprise and superior responsibility for, *inter alia*, violations of the 1956 Penal Code (Closing Order, D427, 15 September 2010, para. 1613).

³² See e.g. Decision on IENG Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 296 (where, to the contrary, the Pre-Trial Chamber states that the Accused's alleged responsibility is based on various modes of liability "save for the modes of liability that the Co-Investigating Judges have said to be international, namely commission via a joint criminal enterprise, superior responsibility and instigation, which shall not apply to domestic crimes"). It is particularly unclear from both the Closing Order and the above Pre-Trial Chamber decision as to whether superior responsibility is considered to be applicable to domestic crimes (*see e.g.* Closing Order, D427, 15 September 2010, paras 1307 (acknowledging that superior responsibility was not incorporated into the 1956 Penal Code but that it was 'nonetheless sufficiently accessible to the Charged Persons'), 1557-1563 (making reference only to international crimes in relation to the CIJs' extended analysis of superior responsibility) and 1613 (remitting the Accused for trial on the basis of superior responsibility in relation to all offences). The Pre-Trial Chamber cited no authority in support of its above exclusion of superior responsibility from the list of modes of responsibility applicable to domestic crimes (Decision on IENG Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 296).

³³ OCP Response to IENG Sary Motion to Strike, para. 3.

³⁴ Internal Rule 67(2) provides that an Indictment "shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterisation by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility."

³⁵ Within the specific ECCC context, specification of the charges in the Indictment is further relevant to the ultimate determination of Civil Party claims (*see e.g.* Internal Rule 23*quinquies*(1)(a) (specifying that reparations may be awarded only in relation to harm suffered "as a result of the commission of the crimes for which an Accused is convicted"), and serves to inform the Trial Chamber of the scope of the case with which it is seised and the precise crimes to be adjudicated (*see e.g.* Internal Rule 67(4) (noting that the Closing Order "send[s] the case to trial for certain acts or against certain persons [or] dismiss[es] the case for others").

³⁶ See Article 33 (new) of the ECCC Law (permitting recourse to procedural rules established at the international level where existing Cambodian rules of procedure do not deal with a particular matter, where there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards).

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and facilities for the preparation of his defence).³⁷ This right translates into an obligation for the material facts underpinning the charges to be included in the indictment with sufficient particularity to inform an Accused clearly of the nature and cause of the charges against him, enabling him to prepare a defence effectively and efficiently.³⁸

19. A material fact is defined as one upon which the verdict is critically dependant.³⁹ The materiality of a particular fact depends on the nature of the case against the Accused.⁴⁰ Should the Indictment, as the primary accusatory instrument, fail to include with sufficient specificity the material aspects of the case against the Accused, it suffers from a material defect.⁴¹ Further, it is insufficient for an indictment to merely confirm its reliance on each mode of liability charged for all counts alleged in an indictment without providing further details about the acts alleged in respect of the type of responsibility incurred.⁴² An indictment may, however, charge an Accused with all applicable modes of responsibility provided that the material facts relevant to each of these modes are included in the indictment.⁴³

20. The Appeals Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) and International Criminal Tribunal for Yugoslavia (“ICTY”) have recently taken a stricter approach than before to the degree of specification of material facts which should be included in an indictment, and have applied that approach to the averment of the acts and conduct of the Accused which are indicated as being the basis of an Accused’s criminal responsibility.⁴⁴

³⁷ *Prosecutor v. Pavković*, IT-03-70-PT, Decision on Vladimir Lazarević’s Preliminary Motion on the Form of the Indictment, Trial Chamber, 8 July 2005, para. 4.

³⁸ *Prosecutor v. Kupreškić*, Case IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001, para. 88 (further indicating that it is the material facts, and not the evidence through which these facts are to be proven, which must be specified in an indictment).

³⁹ *Prosecutor v. Kupreškić*, Case IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001, para. 88.

⁴⁰ Whether or not a fact is material depends on the proximity of the Accused person to the events for which that person is alleged to be criminally responsible: *see e.g. Prosecutor v. Kvočka*, Case IT-98-30/1-A, Judgement, Appeal Chamber, 28 February 2005, para. 65 (“[a]s the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which ... his responsibility as an accessory or a superior to the persons who personally committed the acts giving rise to the charges against him [is based]”).

⁴¹ *Prosecutor v. Pavković*, IT-03-70-PT, Decision on Vladimir Lazarević’s Preliminary Motion on the Form of the Indictment, Trial Chamber, 8 July 2005, para. 6.

⁴² *See e.g. Prosecutor v. Blaškić*, IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 226.

⁴³ *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, Appeal Chamber, 28 February 2005, para. 29.

⁴⁴ Where an indictment is considered not to clearly inform the Accused of the nature and cause of the specific allegations against him, ICTY and ICTR Chambers has typically ordered the amendment of the indictment, or the provision by the Prosecution of the particulars they seek to rely on in seeking to establish the Accused’s individual criminal responsibility: *see e.g. Prosecutor v. Pavković*, IT-03-70-PT, Decision on Vladimir Lazarević’s Preliminary Motion on the Form of the Indictment, Trial Chamber, 8 July 2005, paras 21, 26 and disposition.

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21. The Chamber notes that no reference whatsoever is provided in the Closing Order to the material facts or forms of responsibility alleged in relation to the domestic crimes charged in the indictment. Although the Chamber agrees with the OCP that alternative or cumulative charging in relation to the same facts has been endorsed both before the ECCC and by other international tribunals, the Closing Order does not specify whether these crimes rely on the same factual basis as other crimes, and if so, which crimes and associated factual allegations are relevant also to the domestic crimes charged. Further, the indictment indicates that domestic crimes do not equate to similar international offences, but provides no clarity as to whether the factual allegations or forms of responsibility in relation to these crimes necessarily differ in consequence of the 'essential elements' which render these offences distinct from international crimes.⁴⁵

22. The Chamber observes that within the ECCC procedural context, these defects cannot be remedied through amendment of the Closing Order by the Trial Chamber.⁴⁶ Nor does the ECCC legal framework envisage remission of a Closing Order, once final, back to the CIJs: an alternative which in any case would both infringe the Accused's right to an expeditious trial and be impracticable in the present circumstances. Whilst it is for the Trial Chamber to determine the scope of the case with which it is seised, the above defects in the Closing Order are such that it is impossible for the Chamber to determine, in relation to the domestic crimes contained in the Indictment, the content of these charges, their factual basis and their legal characterization. The Trial Chamber is consequently unable to determine the scope of the case with which it has been seised, with clear detriment to the defence of the Accused. In the exercise of its duty to ensure that the fundamental rights of the Accused are respected and the proceedings fair, the Chamber has no alternative but to declare itself to have been improperly seised of offences in the 1956 Penal Code as described in the Closing Order in Case 002.

23. The Trial Chamber determines, in consequence, that the charges in the Closing Order pertaining to offences in the 1956 Penal Code cannot form the basis of trial proceedings

⁴⁵ Closing Order, D427, 15 September 2010, para. 1565 (citations omitted) *cf.* para. 1574 (where the CIJs expressed doubt as to whether the Accused can be charged with both domestic and international crimes without infringing their right not to be tried twice for the same facts).

⁴⁶ See Internal Rules 76(7) (issues concerning procedural defects in the Closing Order shall not be raised before the Trial Chamber or Supreme Court Chamber) and 79(1) (indicating that the Trial Chamber is seised by an Indictment from the Co-Investigating Judges or the Pre-Trial Chamber) (*cf.* the corrective modalities utilized before the *ad hoc* Tribunals (*see above*, footnote 44)). In view of the fundamental nature of the defects alleged in the Closing Order, the Chamber also considers that this lack of clarity cannot be remedied through the provision of greater specification by the Co-Prosecutors as to the material facts they seek to rely on in discharging the burden of proof they bear in relation to domestic crimes.



before the ECCC. Having determined that trial in relation to domestic crimes cannot proceed due to the above defects in the Closing Order, it follows that it is unnecessary for the Chamber to otherwise determine the applicability of domestic crimes before the ECCC.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER

DECLARES that the Trial Chamber is not validly seised of the offences in the 1956 Penal Code listed in dispositive paragraph 1613 of the Closing Order in Case 002;

DETERMINES in consequence that the Trial Chamber has no basis to try the Accused for the above domestic crimes and that trial in relation to these crimes cannot proceed;

THEREFORE GRANTS the IENG Sary Motion to Strike insofar as it pertains to the trial of domestic crimes before the ECCC;

DECIDES in consequence that it is unnecessary for the Trial Chamber to otherwise determine the merits of the Defence Preliminary Objections on domestic crimes and related matters. *me at*

