



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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
 Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩កញ្ញា២០០៧/អវតក/អជសដ

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

Before: Judge NIL Nonn, President
 Judge Jean-Marc LAVERGNE
 Judge YA Sokhan
 Judge Claudia FENZ
 Judge YOU Ottara

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**DECISION ON DEFENCE PRELIMINARY OBJECTION REGARDING
 A STATUTE OF LIMITATIONS FOR GRAVE BREACHES OF THE GENEVA CONVENTIONS
 OF 12 AUGUST 1949**

Co-Prosecutors
 CHEA Leang
 Nicholas KOUMJIAN

Accused
 NUON Chea
 KHIEU Samphan

Civil Party Lead Co-Lawyers
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1. INTRODUCTION

1. On 14 February 2011, the IENG Sary Defence filed a preliminary objection to the ECCC's jurisdiction to apply grave breaches of the Geneva Conventions, asserting that the statute of limitations in the 1956 Cambodian Penal Code ("1956 Penal Code") bars the application of Article 6 of the ECCC Law (concerning grave breaches).¹ On 17 November 2011, the Trial Chamber deferred consideration of this preliminary objection.² IENG Sary's death on 14 March 2013 extinguished all criminal and civil actions against him.³ On 25 April 2014, after the inclusion of grave breaches charges within the scope of Case 002/02,⁴ the Chamber invited the remaining Parties to Case 002 to indicate whether they adhered to the objections raised by the IENG Sary Defence.⁵ Both the NUON Chea and KHIEU Samphan Defence Teams filed submissions on 20 May 2014 adhering to the IENG Sary objection.⁶ The Office of the Co-Prosecutors ("Co-Prosecutors") filed a response on 30 May 2014.⁷

2. SUBMISSIONS

2. The NUON Chea and KHIEU Samphan Defence Teams both adhere to and endorse the reasoning of the IENG Sary Defence preliminary objection to the ECCC's jurisdiction over grave breaches of the Geneva Conventions.⁸ Pursuant to this objection, the grave breaches

¹ IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), E43, 14 February 2011.

² On this date the Trial Chamber announced that it had prioritised all preliminary objections with implications for trial management and that the disposition of the remaining objections did not constitute a barrier to the commencement of evidentiary hearings in Case 002. See Trial Chamber Memorandum "Response to Issues Raised by Parties in Advance of Trial and Scheduling of Informal Meeting with Senior Legal Officer on 18 November 2011", E141, p. 6.

³ Termination of the Proceedings against the Accused IENG Sary, E270/1, 14 March 2013.

⁴ Annex to Decision on Additional Severance of Case 002 and Scope of Case 002/02: List of Paragraphs and Portions of the Closing Order Relevant to Case 002/02, E301/9/1.1, 4 April 2014, p. 4.

⁵ Trial Chamber Memorandum "Further Information Regarding Remaining Preliminary Objections", E306, 25 April 2014.

⁶ NUON Chea's Position on Remaining Preliminary Objections Raised by the IENG Sary Defence Team, E306/1, 20 May 2014; *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué*, E306/2, 20 May 2014.

⁷ Co-Prosecutors' Joint Response to NUON Chea and KHIEU Samphan's Submissions Concerning Preliminary Objections, E306/4, 30 May 2014.

⁸ NUON Chea's Position on Remaining Preliminary Objections Raised by the IENG Sary Defence Team, E306/1, 20 May 2014, paras 1, 3; *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué*, E306/2, 20 May 2014, paras 9-13.

provisions of the ECCC Law are subject to the statute of limitations of ten years contained in Article 109 of the 1956 Penal Code.⁹

3. Four specific arguments are advanced in favour of this position in the original IENG Sary Defence preliminary objection. First, it is submitted that as Articles 4 (genocide) and 5 (crimes against humanity) of the ECCC Law specifically exclude the application of a statute of limitations while Article 6 does not, a statute of limitations must be applicable to Article 6.¹⁰ In support of this argument, it is submitted that the ECCC is a Cambodian court and that the ECCC Law effectively incorporates grave breaches into Cambodian law, to which the statute of limitations applies unless expressly stated otherwise.¹¹ Second, under the 1956 Penal Code, a felony is a crime which carries a sentence of a minimum of five years. As the crime of grave breaches under Article 6 of the ECCC Law also carries a minimum sentence of five years, it is submitted that grave breaches must be considered to be a felony, to which the statute of limitations applies.¹² Third, the Defence submitted that the limitation period for the grave breaches provision cannot be extended because this would violate the principle of non-retroactivity. Further, the ECCC Law makes express provision for such extension only in respect of national crimes in Article 3.¹³ Finally, it is submitted that the Cambodian legal system is modelled after the French legal system, which expressly applies a statute of limitations to grave breaches but not to crimes against humanity, and that the ECCC Law was drafted to mirror the French approach in this regard.¹⁴

4. The KHIEU Samphan Defence further develops the argument relating to the French legal system. It submits that in 2010 the distinction between war crimes and crimes against humanity was reaffirmed in French law and that, while augmented, the statute of limitations for war crimes has been maintained.¹⁵ The KHIEU Samphan Defence also maintains that

⁹ IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), E43, 14 February 2011, para. 1; Article 109 of the 1956 Penal Code.

¹⁰ IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), E43, 14 February 2011, paras 1-2, 9. *See also* T. 28 June 2011, p. 86.

¹¹ T. 28 June 2011, pp. 86-87.

¹² IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), E43, 14 February 2011, para. 2.

¹³ IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), E43, 14 February 2011, paras 1-7.

¹⁴ IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), E43, 14 February 2011, para. 8.

¹⁵ *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué*, E306/2, 20 May 2014, paras 9-12, referring to Loi n. 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'insitution de la CPI, article 7.

there is no provision on limitations in the Geneva Conventions,¹⁶ and that a prohibition on limitation periods did not exist as a matter of customary international law between 1975 and 1979.¹⁷

5. The Co-Prosecutors respond that neither the Geneva Conventions nor the ECCC Law establish a statute of limitations for the prosecution of grave breaches, and accordingly submit that no statute of limitations bars the application of the grave breaches provisions to the Accused.¹⁸ They further submit that: (i) Article 109 of the 1956 Penal Code applies only to ordinary serious crimes (felonies) and not to international crimes over which the ECCC has been granted jurisdiction; (ii) customary international law in 1975 mandated that statutes of limitations do not apply to grave breaches; and (iii) to permit a statute of limitations for grave breaches would impinge upon Cambodia's obligation to prosecute grave breaches.¹⁹

6. The Civil Party Lead Co-Lawyers did not file updated submissions clarifying their position on this issue and, accordingly, the Chamber relies on their previous arguments. The Civil Party Lead Co-Lawyers support the submissions of the Co-Prosecutors²⁰ and assert that grave breaches of the Geneva Conventions are not subject to statutory limitations.²¹ They submit that the *jus cogens* nature of grave breaches and corresponding duty to prosecute these crimes mean that the statute of limitations provision in the 1956 Cambodian Code cannot apply to grave breaches.²²

3. FINDINGS

7. Pursuant to Article 6 of the ECCC Law, the Trial Chamber has jurisdiction over grave breaches of the Geneva Conventions of 1949, which has not been contested by the parties.

¹⁶ *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué*, E306/2, 20 May 2014, para. 13.

¹⁷ *Conclusions de la Défense de M. KHIEU Samphân sur les exceptions préliminaires sur lesquelles la Chambre n'a pas encore statué*, E306/2, 20 May 2014, para. 13.

¹⁸ Co-Prosecutors' Joint Response to NUON Chea and KHIEU Samphan's Submissions Concerning Preliminary Objections, E306/4, 2 June 2014, para. 2; T. 28 June 2011, pp. 97-114; Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/3/1, 21 March 2011, para. 19.

¹⁹ Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals Against the Closing Order, D427/1/17, 19 November 2010, paras 202-205; Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, E51/5/3/1, 21 March 2011, paras 18-21; Co-Prosecutors' Joint Response to NUON Chea and KHIEU Samphan's Submissions Concerning Preliminary Objections, E306/4, 30 May 2014, paras 3-6; T. 28 June 2011, pp. 97-115.

²⁰ T. 29 June 2011, p. 4.

²¹ Civil Parties's Joint Response to Defence Rule 89 Preliminary Objections, E51/5/4, 7 March 2011, para. 53.

²² T. 29 June 2011, p. 13.

Grave breaches were crimes under international law during the period 1975 to 1979.²³ Article 6 does not establish a new crime but simply confers jurisdiction over this existing international crime upon the ECCC.²⁴

8. The Trial Chamber recalls that the ECCC can only apply those provisions of the 1956 Penal Code that are specifically enumerated in the ECCC Law. The sole reference in the ECCC Law to the 1956 Penal Code is contained in Article 3.²⁵ Article 3 does not provide for the direct application of the entire 1956 Penal Code but incorporates certain specified national crimes into the ECCC framework. Article 3 does not impose temporal limitations upon the prosecution of international crimes extraneous to the 1956 Penal Code or in any way address that issue. The 1956 Penal Code does not limit or purport to limit the prosecution of war crimes sourced under international law and specifically referred to by the ECCC Law as grave breaches of the Geneva Conventions of 1949. Therefore, prosecutions for war crimes committed during the period over which the ECCC has temporal jurisdiction are exclusively based on international law, not only as regards the definition of such crimes, but also as

²³ *KAING Guek Eav* Trial Judgment, E188, 26 July 2010, paras 406 and 408, where the Trial Chamber also found that it was foreseeable to the Accused in that case that he could be held criminally liable for acts listed as grave breaches of the Geneva Conventions.

²⁴ Article 6 provides as follows:

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

²⁵ Article 3 of the ECCC Law provides:

The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)

The 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.

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

regards the determination of any applicable limitation period.²⁶ Neither the Geneva Conventions nor customary international law places any temporal limitation on the prosecution of grave breaches.²⁷ In the absence of an express jurisdictional limit in the ECCC Law or in international law, this argument is unfounded.

9. The Defence Teams submit that a distinction in legal drafting in the ECCC Law supports the view that a statute of limitations must apply to grave breaches. Considering the above, while it is the case that Articles 4 (genocide) and 5 (crimes against humanity) respectively and expressly state that those crimes “have no statute of limitations”, the Chamber is not persuaded that the absence of such reference in Article 6 alone necessitates the opposite conclusion.

10. It is further submitted that grave breaches must be equated to a domestic felony, to which the domestic statute of limitations applies. This submission is based on the definition under the 1956 Penal Code of a felony as a crime which carries a sentence of a minimum of five years, and the fact that the crime of grave breaches under Article 6 of the ECCC Law carries a minimum sentence of five years. This argument is unpersuasive. The Chamber recalls that Article 6 functions to confer jurisdiction over the already-existing international

²⁶ See *Kononov v. Latvia*, ECtHR (Application No. 36376/04), Judgement, 17 May 2010, paras 228-233, which deals with a comparable situation.

²⁷ While Article II (5) of Control Council Law No. 10 addressed the issue as regards war crimes committed on German territory prior to and during the Second World War (“the accused shall not be entitled to the benefits of any statute of limitation”), there is no reference to any limitation period for the prosecution of war crimes in the Charters of the IMT Nuremberg/Tokyo, the Geneva Conventions of 1949 or the Nuremberg Principles. On the contrary, in response to fears expressed that alleged war criminals might escape prosecution with the passage of time the United Nations General Assembly adopted in November 1968 the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. This Convention came into force on 11 November 1970 and efforts to ensure effective prosecution of war criminals were also supported through the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes. In *Kononov v. Latvia*, the European Court of Human Rights engaged in an analysis of customary international law and found that international law in 1944 was silent on the subject of limitation periods for war crimes. Based on its review, the Court concluded that “no limitation period was fixed by international law as regards the prosecution of war crimes” and that developments in international law since 1944 have not imposed any limitation period on the war crimes charges in that case: *Kononov v. Latvia*, ECtHR (Application No. 36376/04), Judgement, 17 May 2010, paras 231-233. This position is also reflected in the ICRC Study on customary international humanitarian law, which finds that it is a norm of customary international law that statutes of limitations may not apply to war crimes: ICRC, *Customary International Humanitarian Law: Volume I: Rules*, Rule 160 and supporting practice in ICRC, *Customary International Humanitarian Law: Volume II: Practice*, Practice Relating to Rule 160: Statutes of Limitation. The Chamber finds the position taken by the ECHR and the ICRC to be persuasive and an accurate reflection of the customary international law in existence between 1944 and today. Accordingly, the Trial Chamber finds that customary international law did not contain a limitation period for the prosecution of war crimes during 1975-1979. Incidentally it may be noted that various domestic laws, including in Cambodia, have since further expressly foreseen that war crimes are ‘imprescriptible’, see Article 9 of the 2007 Cambodian Code of Criminal Procedure. The adoption of this last provision indicates that while there may be some relationship between French and Cambodian law, this law has developed in a different way to the French approach.

crime of grave breaches. International crimes exist outside of the domestic framework classifying acts as, for example, felonies or misdemeanours. Coincidental similarities in minimum sentence do not serve to equate grave breaches with national felonies.

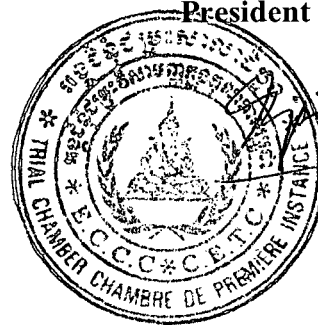
11. The Chamber considers the Defence Teams' submission that the ECCC Law was drafted to follow the French legal system, which has a statute of limitations for grave breaches, similarly unconvincing. The ECCC's unique legal framework prescribes its jurisdiction. The Defence Teams fail to substantiate how aspects of a foreign legal model apply without express incorporation into the ECCC legal framework.

12. The Chamber accordingly finds that there is no statute of limitations applicable to the grave breaches provision in the ECCC Law.²⁸ As a result, the Chamber finds it unnecessary to address whether any extension of a limitation period would be permissible.

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DISMISSES the NUON Chea and KHIEU Samphan Defence Teams' preliminary objection regarding a statute of limitations on grave breaches of the Geneva Conventions of 12 August 1949.

Phnom Penh, 31 October 2014
President of the Trial Chamber



Nil Nonn

²⁸ This is consistent with the conclusion of the Pre-Trial Chamber that “[t]he Geneva Conventions, which are the applicable law under Article 6 of the ECCC Law, provide that war crimes are not subject to any statute of limitations, which indicates that there is no statute of limitations applicable”: Decision on IENG Sary’s Appeal against the Closing Order, D427/1/30, 11 April 2011, para. 73.