BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/TC

Party Filing: The Case 003 Defence

Filed to: The Trial Chamber

Original language: ENGLISH

Date of document: 14 May 2014

CLASSIFICATION

Classification of the document suggested by the filing party: **PUBLIC**

Classification by OCIJ or Chamber:

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

CASE 003 DEFENCE REQUEST FOR LEAVE TO FILE AMICUS CURIE BRIEF & AMICUS CURIAE BRIEF CONCERNING THE STATUTE OF LIMITATIONS FOR GRAVE BREACHES OF THE GENEVA CONVENTIONS

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REQUEST FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Case 003 Defence, pursuant to Rule 33 of the ECCC Internal Rules ("Rules"), hereby seeks leave to file an *amicus curiae* brief on the issue of *whether a statute of limitations bars the prosecution of grave breaches of the Geneva Conventions at the ECCC*. The Case 003 Defence, as *amicus curiae*, submits the attached *amicus curiae* brief in response to the Trial Chamber's 25 April 2014 memorandum E306, wherein the Chamber invited the Parties to make submissions on the "the statute of limitations for grave breaches of the Geneva Conventions," because "the Chamber would benefit from further information from the parties on [this issue]…." The Case 003 Defence is well-placed to assist the Trial Chamber as *amicus curiae*, having researched and prepared a submission on this issue in Case 003, and having filed the initial preliminary objection in Case 002[1] as well as having made oral arguments on this issue before the Trial Chamber at the Initial Hearing.[2] There is no prejudice to any party by the filing of this *amicus curiae* brief; it refers to no facts or allegations but relates only to the discrete legal issue of whether grave breaches of the Geneva Conventions are subject to a statute of limitations. *Amicus curiae* briefs have been submitted by Defence Counsel before international tribunals such as the ICTY. For example, the Association of Defence Counsel Practising Before the International Criminal Tribunal for the former Yugoslavia ("ADC-ICTY") was requested to file an *amicus curiae* brief by the Appeals Chamber in the *Brdjanin* case, on the issue of *whether the membership of a joint criminal enterprise must include the physical perpetrators of the crime*.[3] While ADC-ICTY

[1] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Braches), 14 February 2011, E43.
[2] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 28 June 2011, E1/5.1; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 29 June 2011, E1/6.1.
[3] *See Prosecutor v. Brdjanin*, IT-99-36-A, Decision on Motion to Dismiss Ground 1 of the Prosecutor's Appeal, 5 May 2005, p.5; *Prosecutor v. Brdjanin*, IT-99-36-A, Amicus Brief of Association of Defence Counsel – ICTY, 5 July 2005. The ADC-ICTY was also invited to participate during the appeal oral arguments, with Michael G. Karnavas, as President of the ADC-ICTY, appearing to argue the *amicus curiae* brief on 8 December 2006. *See Prosecutor v. Brdjanin*, IT-99-36-A, Decision on Association of Defence Counsel Request to Participate in Oral Argument, 7 November 2005. *See also Prosecutor v. Brdjanin*, IT-99-36-A, Appeal Judgement, 3 April 2007, paras. 24-27. Mr. Karnavas is a current member of the ADC-ICTY *amicus* committee, as well as a member of the ADC-ICTY Rules Committee and Training Committee, and the former ADC-ICTY President, from October 2006 to March 2009. The ADC-ICTY has also appeared as an *amicus curiae* in the *Prlić* case, regarding whether conduct of counsel constituted contempt of court, violation of the Rules of Procedure and Evidence or misconduct, and the *Hadžihasanović* case, regarding the impact of the allocation of resources to the Accused on his right to a fair trial. *See Prosecutor v. Prlić et al*, IT-04-74-T, Order Appointing an Amicus Curiae, 3 July 2009; *Prosecutor v. Prlić et al*, IT-04-74-T, Advisory Opinion of Amicus Curiae Disciplinary Council of the Association of Defence Counsel of the ICTY, 13 August 2009; *Prosecutor v. Hadžihasanović*, IT-01-47-PT, Amicus Brief of the Association of Defence Counsel Practicing Before the International Criminal Tribunal for the Former Yugoslavia in Support of Joint Defence Oral Motion for

represents all ICTY Defence Counsel as an association, at the ECCC, there is no such association. ECCC Defence Counsel have no common representation on legal issues. The ECCC Defence Support Section is an administrative section of the Administration of ECCC (much like the ICTY Office for Legal Aid and Defence), and as such does not have a mandate or the capabilities to research, draft and file *amicus curiae* briefs to assist the ECCC Chambers on issues that are of general interest and importance to the Suspects and Accused. This *amicus curiae* brief has been prepared based on a submission the Defence filed in Case 003 on 12 December 2013. The translation is still unavailable. Therefore, the Case 003 Defence submits this *amicus curiae* brief in English only, with the Khmer translation to follow.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS

Co-Lawyers for a Suspect in Case 003

Signed in Phnom Penh, Kingdom of Cambodia on this **14th** day of **May, 2014**

Reconsideration of Decision on Urgent Motion for Ex Parte Oral Hearing on Allocation of Resources to the Defence and Consequences Thereof for the Rights of the Accused to a Fair Trial, 14 July 2003.

CASE 003 DEFENCE *AMICUS CURIAE* BRIEF CONCERNING THE STATUTE OF LIMITATIONS FOR GRAVE BREACHES OF THE GENEVA CONVENTIONS

The Case 003 Defence, pursuant to Rule 33 of the ECCC Internal Rules ("Rules"), hereby submits an *amicus curiae* brief addressing the issue of whether a statute of limitations bars the prosecution of grave breaches of the Geneva Conventions at the ECCC. This brief concludes that grave breaches of the Geneva Conventions are subject to a 10-year statute of limitation, which has expired for crimes committed from 1975-79, leaving the ECCC unable to exercise subject matter jurisdiction over grave breaches of the Geneva Conventions.

I. LAW AND ARGUMENT

1. The ECCC must apply the law that existed in 1975-79. To do otherwise violates the principle of non-retroactivity. The law applicable in 1975-79 imposed a ten-year statute of limitations for all crimes with a sentence of at least five years. Grave breaches have a sentence of at least five years, and are therefore subject to this statute of limitations. There is no domestic law, applicable treaty-based law, or customary international law that abrogates or supersedes this statute of limitations. A duty to prosecute grave breaches or the *jus cogens* nature of the crime does not alter this analysis. Therefore, prosecution of grave breaches is barred at the ECCC.

A. The ECCC must apply the law that existed in 1975-79

2. The principle of non-retroactivity prohibits the retroactive application of a law to the detriment of a Suspect / Charged Person / Accused. New laws may only have retroactive application when they are more favorable to the Suspect than a prior otherwise-applicable law. This provides a guarantee against arbitrary and capricious retroactive legislation that would deprive a Suspect of the fair warning that might have led him to preserve exculpatory evidence, as well as to provide stability and certainty in the law.[4] "Basic

[4] *See Stogner v. California*, 539 U.S. 607, 611 (2003). There is also a concern as to the reliability of evidence gathered many years after the alleged crimes have occurred. "The proceeding against John Demjanjuk provides a cautionary tale. Alleged to be the infamous 'Ivan the Terrible,' a sadistic guard at Treblinka, Demjanjuk became the target of extradition proceedings in the early 1980s. The proceedings resulted in the revocation of his U.S. citizenship and his extradition to Israel. In Israel, Demjanjuk was convicted after a long public trial in the Jerusalem District Court rivaling that of Adolf Eichmann, at least in terms of public outrage and media attention. Dozens of Holocaust survivors gave eyewitness testimony, based on events that took place fifty years earlier, that Demjanjuk and Ivan the Terrible were the same person. In 1993, the Israeli Supreme Court reversed the conviction, observing that eyewitness testimony was inherently suspect after the passage of a great length of time. Based in part on newly discovered documents from the former Soviet Union, the Court concluded that the documents established a reasonable doubt that the testimony of even dozens of witnesses corroborating one another could not overcome." Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, n. 448 (2005). *See also* YASMIN Q. NAQVI, IMPEDIMENTS TO

human rights of accused persons are eroded by … endorsement of retroactivity, a concept hostile to most legal systems."[5]

3. The principle of non-retroactivity is established in Cambodian law. Article 31 of the Cambodian Constitution requires courts to respect the human rights principles set out in the Universal Declaration of Human Rights ("UDHR") and other human rights instruments such as the International Covenant on Civil and Political Rights ("ICCPR").[6] Article 11(2) of the UDHR and Article 15(1) of the ICCPR each prohibit the retroactive application of law to the detriment of the accused.[7] The Cambodian Constitutional Council has referred to the principle of non-retroactivity as a "fundamental principle."[8]
4. In accordance with the principle of non-retroactivity, the ECCC must apply the law that existed in 1975-79. This is true even for statutes of limitation: the issue is not whether the crime itself existed at the time of its alleged commission, but whether the possibility of punishment at a certain point in the future was foreseen at the time of the alleged commission.[9] The issue here is *not* whether grave breaches were criminalized in 1975-79, but whether the possibility of prosecuting these crimes more than thirty five years into the future existed in Cambodian law at the relevant time.
5. Many States have enacted laws removing statutes of limitations for certain crimes. They have not, however, applied these new laws retroactively, finding that this would violate the principle of non-retroactivity. In France, for example, the criminal code explicitly states that changes to rules regarding a statute of limitations on prosecution or sentences have immediate application *only where the limitation period has not expired*.[10] Thus, any act which has been time-barred from prosecution by virtue of a pre-existing statute of limitations is not affected by a new rule extending that statute.

EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 183 (T.M.C. Asser Press 2010) stating that statutes of limitation are designed to protect individuals from having to defend themselves from trials based upon stale evidence and to create stability and certainty in the law.

[5] Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 501 (1971).

[6] Constitution of the Kingdom of Cambodia dated 24 September 1993 Modified by Kram dated 8 March 1999 promulgating the amendments to Articles 11, 12, 13, 18, 22, 24, 26, 28, 30, 34, 51, 90, 91, 93 and other Articles from Chapter 8 through Chapter 14 of the Constitution of the Kingdom of Cambodia which was adopted by the National Assembly on the 4th of March 1999 ("Cambodian Constitution").

[7] *See also* 1956 Penal Code, Art. 6 and New 2009 Penal Code, Art. 10, which also prohibit the retroactive application of law in Cambodia.

[8] Constitutional Council Decision No. 040/002/2001 KBTh Ch., 12 February 2001.

[9] "[I]f a person has committed a crime which is subject to a statute of limitation that has run, it would constitute a violation of the general principle of non-retroactivity for that person to then have to face charges for a crime committed at a time when charges could only be brought for a set period of time." YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 218 (T.M.C. Asser Press 2010).

[10] *See* French Criminal Code, C PÉN., Art. 112-2, para. 4.

6. Some Civil Law countries, such as the former West Germany,[11] Hungary,[12] and Switzerland[13] have held that prosecutions based on retroactive extensions or removals of statutes of limitations are unconstitutional where the original statutes of limitations had expired. In other jurisdictions, such as the Netherlands[14] and Japan,[15] legislatures have abolished statutes of limitations for serious crimes, but have taken care not to apply the change retroactively to time-barred offenses.
7. In the United States, where the Constitution prohibits the retroactive application of law, the Supreme Court was confronted with a similar issue in *Stogner v. California*.[16] Stogner was indicted in 1998 for child sexual abuse that allegedly occurred between 1955 and 1973. At the time the crimes were allegedly committed, the statute of limitations was only three years. A new statute of limitations enacted in 1993 permitted prosecution where the prior statute of limitations had expired if prosecution is begun within a year from when the victim submits a report to the police. The Court found that the new statute of limitations could not be applied to Stogner. It explained that the issue was *not* whether child sexual abuse was criminalized at the relevant time, but:

[11] *See* Martin Clausnitzer, *The Statute of Limitations for Murder in the Federal Republic of Germany*, 29 INT'L & COMP. L.Q. 473, 478-79 (1980).
[12] "Hungarian courts have rejected attempts to extend statutes of limitation or to apply post-1989 laws to offenses committed during the Communist period. When in 1991 the democratically elected Hungarian Parliament enacted a law purporting to toll the statute of limitations for certain offenses that had been committed during the Communist period, the Hungarian Constitutional Court struck it down. In a landmark ruling, the Court openly wrestled with what had motivated the political branches - widely voiced demands by ordinary citizens that the sins of the old order be exposed and punished. The Court nonetheless rejected these demands. Popular calls for substantive justice could not trump something more fundamental to the Hungarian legal order: procedural fairness. The latter, according to the Court, was 'an indispensable component of the rule of law' and a constitutional principle in Hungary. Citizens were entitled to know in advance their potential liability. They were entitled to rely on a statute of limitations and to rest secure once the statute had run, no matter what the alleged offense." Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 292-93 (2005). *See also* RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 289 (2007).
[13] "The Swiss Federal Court has … refused to apply Article 75(1)*bis* of the Swiss Penal Law and Article 56*bis* of the Military Criminal Code invalidating prescription to genocide and grave breaches to crimes that had already been time barred by the time the provisions entered into force." YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 198 (T.M.C. Asser Press 2010).
[14] RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 299-301 (2007).
[15] In Japan, in 2010, the Diet abolished the statute of limitations for murder and extended it for a number of other crimes; the new law *only* applied to cases in which the previous statute of limitations had not expired. *See* Shinichi Kawarada, *Japan Abolishes Statute of Limitations on Murder, Extends Others*, ASAHI SHIMBUN, 28 April 2010. "Rules such as the non-applicability of a statute of limitations (Article 29 of the Rome Statute) … are … unknown in the Japanese criminal system…. Article 250 provides for a statute of limitations that would also apply to the domestic prosecution of international crimes in Japan." Jens Meierhenrich, *The Implementation of the Rome Statute in Japan: How Do States Join the International Criminal Court?*, 7(2) J. INT'L CRIM. JUST. 233 (2009).
[16] *Stogner v. California*, 539 U.S. 607 (2003).

> [a]fter (but not before) the original statute of limitations had expired, a party such as Stogner was not 'liable to any punishment.' California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past conduct that (when the new law was enacted) did not trigger any such liability.[17]

8. In accordance with the principle of non-retroactivity of law, the ECCC must apply the statute of limitations applicable to grave breaches in 1975-79. Applying a more recent law removing the statute of limitations is unconstitutional. It is also to the detriment of the Accused: when the statute of limitations expired, they were no longer liable to any punishment should they be found guilty. Furthermore, if there is any doubt regarding retroactivity, Article 38 of the Cambodian Constitution provides that any such doubt shall be resolved in favor of the accused.

B. There is no domestic law, applicable treaty-based law, or customary international law that would allow grave breaches to be applied today at the ECCC

9. There must be a legal basis for all law applied at the ECCC. There is no domestic law, treaty-based law,[18] or customary international law allowing for grave breaches to be applied at the ECCC.

1. Domestic Cambodian Law

10. Domestic Cambodian law provides for a ten-year statute of limitations for felonies committed in Cambodia.[19] A felony is described by the 1956 Penal Code as a crime which carries a minimum five year sentence.[20] The crime of grave breaches carries a

[17] *Id.*, at 613. The Court found: "First, the new statute threatens the kinds of harm that, in this Court's view, the *Ex Post Facto* Clause seeks to avoid…. [T]he Clause protects liberty by preventing governments from enacting statutes with 'manifestly *unjust and oppressive*' retroactive effects. Judge Learned Hand later wrote that extending a limitations period after the State has assured 'a man that he has become safe from its pursuit … seems to most of us unfair and dishonest.' In such a case, the government has refused 'to play by its own rules.' It has deprived the defendant of the 'fair warning,' that might have led him to preserve exculpatory evidence." *Id.*, at 611 (internal citations omitted).

[18] The Defence submits, as argued in Case 002 by the IENG Sary Defence, that treaties that are not considered by Cambodia to be self-executing are not directly applicable in Cambodian courts, such as the ECCC. *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 75), IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 103-20.

[19] *See* 1956 Penal Code, Art. 109. Article 37 of the 1964 Code of Criminal Procedure incorporated by reference the time limits contained in the 1956 Penal Code. Article 30 of the UNTAC Law also provides for a ten-year statute of limitations. In 1975-79, the 1956 Penal Code was the Code in effect. *See Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Information about the 1956 Penal Code of Cambodia and Request Authentication of an Authoritative Code, 17 August 2009, E91/5.

[20] 1956 Penal Code, Arts. 21, 32, 33.

minimum five-year sentence at the ECCC.[21] This limitation period has expired and was not extended prior to its expiry. Regardless of whether the statute of limitations was tolled due to the situation in Cambodia after 1979,[22] the limitation period expired prior to the filing of the Case 002 Introductory Submission.

11. Article 143 of Cambodia's new 2009 Penal Code abolishes the statute of limitations for war crimes.[23] However, Article 10 of the new 2009 Penal Code provides that "[t]he new provisions which provide for more severe sentences can be applicable only to the acts committed after the effective date of these provisions." Article 143, therefore, is not intended to apply retroactively. This would subject the Accused to a more severe sentence than they would otherwise be subject to, and thus would be unconstitutional.
12. The Establishment Law is domestic Cambodian legislation. However, as it was enacted after the alleged crimes occurred, it only provides the ECCC with jurisdiction over crimes; it does not criminalize any conduct.[24] It also does not remove or alter the applicable statute of limitations for grave breaches (as it attempts to do for national crimes through Article 3 new). In fact, the Establishment Law implicitly recognizes that statutes of limitations may apply to grave breaches. It refers, in Articles 4 and 5, to genocide and crimes against humanity as crimes "which have no statute of limitations." Concerning grave breaches (in Article 6), it does not make the same proclamation.

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[21] *See* Establishment Law, Art. 39. The Establishment Law is not creating new punishment by providing for a minimum five-year sentence for grave breaches. Grave breaches would have been punished like other national crimes in 1975-79, and would have been subject to a similar sentence. In February 1966, the United Nations ("UN") Office of Legal Affairs prepared a study titled "Questions of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity." Concerning Cambodia, the Office of Legal Affairs stated: "There are no special texts dealing with punishment of war crimes and crimes against humanity. Any such crimes would be punished under the provisions of the Penal Code covering gang murder, looting, and arson, et cetera. They would be subject to the normal statutory limitations, i.e.: ten years in respect of criminal proceedings and 20 years in respect of the execution of the penalty." Study submitted by the Secretary-General to Commission on Human Rights, "Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity," UN Doc. E/CN.4/906, 15 February 1966, p. 56, para. 69.

[22] According to the Cambodian Judges of the Trial Chamber, the statute of limitations set out in the 1956 Penal Code was tolled until 23 September 1993 at the earliest. According to the International Trial Chamber Judges, the statute of limitations was not tolled and began to run from January 1979. *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, *26 July 2010*, E187, paras. 25, 35.

[23] "The penalties pronounced for genocide and for crimes against humanity and war crimes are inextinguishable" (unofficial translation).

[24] The OCP has previously taken this same position. During the Initial Hearing, Mr. Abdulhak stated: "We say that Article 6, just like Articles 4 and 5 of the ECCC Law, does not criminalise conduct. It's a law, the ECCC Law, and this article included, is a law which creates a judicial forum and gives it jurisdiction in respect of international crimes which were in existence and which were punishable as at 1975…. It is clear, therefore, that this is a statute giving jurisdiction in respect of international crimes, as opposed to a domestic law criminalising conduct." *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 28 June 2011, E1/5.1, p. 104.

2. Treaty-Based Law

13. There is no treaty to which Cambodia is a party that supersedes the applicable ten-year statute of limitations. The Geneva Conventions are silent as to statutes of limitation. Cambodia is not a party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[25]

14. If the drafters of the Geneva Conventions intended for no statutes of limitations to be applicable to grave breaches, they would have explicitly stated this in the Conventions. Instead, the Geneva Conventions leave it to State parties "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches."[26] Thus, Courts must look to domestic law to punish grave breaches. Cambodia did not enact any legislation implementing the grave breaches provisions of the Geneva Conventions. Evidently, Cambodia considered that its domestic provisions in force were adequate (and such provisions included a statute of limitations).[27] The United States similarly considered its own domestic provisions adequate for punishing grave breaches when it signed the Geneva Conventions.[28]

3. Customary International Law

15. There is no customary international law which abrogates or supersedes the applicable 10 year statute of limitations. Customary international law can only be created through (a) general and consistent State practice which is an expression of (b) *opinio juris*.[29] State

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[25] Even if Cambodia were a party to the Convention, it would still need to amend its existing law for prosecutions to occur after the expiry of the statute of limitations. According to the International Committee of the Red Cross ("ICRC"): "The United Nations and Council of Europe conventions [on the non-applicability of statutes of limitations] do not directly make the absence of statutory limitations effective in the legal systems of the States party to them. The States have to take the appropriate legislative measures within their domestic legal systems." ICRC, National Enforcement of International Humanitarian Law Information Kit, January 2004, *available at* http://www.icrc.org/eng/assets/files/other/kit_national_enforcement.pdf.

[26] Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146.

[27] *See supra* note 28.

[28] Similarly, in the United States, similarly, upon ratifying the Geneva Conventions in 1955, the Senate Foreign Relations Committee expressed the view that US obligations under the grave breaches provisions in the Geneva Conventions were satisfied by existing law and no implementing legislation was necessary. *See* CURTIS BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 285 n. 14 (Oxford University Press, 2013), *citing* S. Exec. Rep. No. 84-89 (1955), *reprinted in* 84 Cong. Rec. 9958, 9970 (1955).

[29] According to the Pre-Trial Chamber: "a court shall assess existence of 'common, consistent and concordant' state practice, or *opinio juris*, meaning that what States do and say represents the law. A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists; '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it." *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC 35), Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, para. 53. Professors Fletcher and Ohlin explain that "[i]t is notoriously difficult to establish sufficient consensus to validate a rule as customary international law."

practice should be "extensive and virtually uniform in the sense of the provision invoked."[30] As for *opinio juris*, the International Court of Justice has held that States "must have behaved so that their conduct is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."[31]

16. In April 1965, the UN Commission on Human Rights adopted a Resolution stating that "[t]he United Nations must … study possible ways and means of *establishing the principle* that there is no period of limitation for [war crimes and crimes against humanity] in international law."[32] This shows that in 1965 there was no customary international law prohibiting statutes of limitations for such crimes.
17. In April 1966, UN Economic and Social Council adopted Resolution 1158. This Resolution referred to "the desirability of affirming, in international law, the principle that there is no period of limitation for war crimes and crimes against humanity." It stated "that the United Nations should take all possible action to affirm and implement such a principle of international law and to secure its universal application."[33] This language similarly indicates that the non-applicability of statutes of limitation to war crimes was not an established principle of customary international law, but was rather something that would be "desirable." Such resolutions are, in any event, not authoritative as to the status of customary international law.[34]

George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 556 (2005).

[30] *North Sea Continental Shelf Cases*, ICJ Reports (1969), para. 74.

[31] *Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986, ICJ Reports (1986), para. 207.

[32] UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965 (Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity), preamble (emphasis added).

[33] Economic and Social Council Resolution 1158 (XLI), 4 April 1966 (Question of Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity), preamble.

[34] Concerning UN General Assembly Resolutions, (and the same can be said of Economic and Social Council resolutions) Professor Morris explains: "The General Assembly only has the authority to make recommendations to the international community. Its resolutions lack any binding authority in and of themselves. For this reason, some are cynical of the precedential value of a General Assembly Resolution. The members of the General Assembly typically vote in response to political not legal considerations. They do not conceive of themselves as creating or changing international law. It normally is not their intention to affect international law but to make the point which the resolution makes. The issue often is one of image rather than international law: states will vote a given way repeatedly not because they consider that their reiterated votes are evidence of a practice accepted as law but because it is politically unpopular to vote otherwise. The U.N. General Assembly is a forum in which states can express their views; the expressed views of states undeniably may be elements of that state practice which can give rise to customary international law; but what states do is more important than what they say. It is especially more important than what they may say in General Assembly context. General Assembly resolutions are neither legislative nor sufficient to create custom, not only because the General Assembly is not authorized to legislate but also because its members, as Professor Arangio-Ruiz tellingly sums it up, don't 'mean it.' That is to say, in fact, states often don't meaningfully support what a resolution says and they almost always do not mean that the resolution is law. This may be as true or truer in the

18. During a 1967 debate in the Third Committee of the UN General Assembly concerning a proposed convention to eliminate statutes of limitation for war crimes and crimes against humanity, opinion was sharply divided on the issue of whether statutes of limitation may be applied to war crimes.[35] States including Austria, France, The Netherlands, The Philippines, and Sweden considered non-applicability a new principle not yet established in international law.[36] The representative of Austria noted that limitations on State sovereignty could not be presumed, but should be expressly stated in international law. "On that basis, the international agreements on war criminals, which did not refer to the question of prescription for such offenses, should be regarded as leaving each state free to adopt any law or develop any policy which it deemed equitable in the matter. In the absence of any stipulation to the contrary, the question of the applicability of prescription to war crimes … was a matter of domestic jurisdiction in conformity with Article 2, paragraph 7, of the United Nations Charter."[37] The representative of Honduras stated: "War criminals should have the benefit of statutory limitation for humanitarian reasons."[38] The representative of Greece stated that it was "inadvisable to exclude war crimes from statutory limitation."[39] The representative of Brazil stated that "[t]he principle of non-applicability of statutory limitation to war crimes and crimes against humanity was a new principle for many countries, including his own, where the law recognized statutory limitations in criminal matters."[40]
19. The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity[41] entered into force on 11 November 1970 after ten States had ratified or acceded to it. Less than half of the UN Member States voted for the

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case of unanimously adopted resolutions as in the case of majority-adopted resolutions." Scott R. Morris, *Killing Egyptian Prisoners of War: Does the Phrase "Lest We Forget" Apply to Israeli War Criminals?*, 29 VAND. J. TRANSNAT'L L. 903, 936-37 (1996).

[35] Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 481 (1971).

[36] *Id.*, at 482.

[37] *Id.*, at 483.

[38] *See* YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 196 (T.M.C. Asser Press 2010), *quoting* Honduras, Statement Before the Third Committee of the UN General Assembly, UN Doc. A/CN.4.SR.1547, 12 December 1967, para. 7.

[39] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME II: PRACTICE, PART I 4061, para. 845 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge University Press, 2005), *quoting* Greece, Statement Before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1515, 15 November 1967, paras. 12-19.

[40] *Id.*, at 4057, para. 836, *quoting* Brazil, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, para. 28.

[41] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968).

Convention. No Western State and only three Latin American States cast votes in favor.[42] More votes were cast *against* the adoption of this Convention than were voted in opposition to *any* prior international human rights instrument.[43] Many States considered that the Convention violates the principle of non-retroactivity, as it was meant to apply to crimes "irrespective of the date of their commission."[44] The Netherlands, for example, would not ratify the Convention for that particular reason.[45] Mexico and Peru ratified only after attaching reservations stating that the Convention would not apply to crimes committed prior to its entry onto force.[46] By 1979, the Convention had only 22 State parties.[47] Even today, it has only 54 State parties – only one of which is a permanent member of the UN Security Council.

20. According to Professor Dubinsky, "The U.N. Convention went too far for much of Western Europe, which voiced domestic constitutional objections. Allowing extinguished actions to be revived was viewed as inconsistent with fundamental principles of procedural law such as legal certainty, justified reliance, and protection against stale claims and unreliable evidence. The Convention never bridged this gap between accountability and procedural fairness."[48] Because of this, on 25 January 1974, the Council of Europe prepared the European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. However, this Convention has been referred to as "an almost complete failure."[49] It did not enter into force until 2003 and currently only has seven ratifications / accessions.[50] As of 7 January 1979, no State had ratified it or acceded to it.

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[42] Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 AM. J. INT'L L. 476, 500 (1971).
[43] *Id.*, at 477-78.
[44] One example is Norway, which introduced an amendment to delete this wording from Article 1. *Id.*, at 488.
[45] *See* Alper Cinar & Sander van Niekerk, *Implementation of the Rome Statute in the Netherlands*, p. 6, *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=996521.
[46] *See* RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 299 (2007).
[47] *See* United Nations Treaty Collection website, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en#2. The parties as of 1979 were: Albania, Belarus, Bulgaria, Cameroon, Cuba, Czechoslovakia, Gambia, the German Democratic Republic, Guinea, Hungary, India, Kenya, Mongolia, Nigeria, Philippines, Poland, Romania, Russian Federation, Rwanda, Tunisia, Ukraine, and Yugoslavia.
[48] Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 290-91 (2005).
[49] Claus Kreß, *Reflections on the* Iudicare *Limb of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 789, 806 (2009).
[50] *See* Council of Europe Treaty Office website, *available at* http://conventions.coe.int/Treaty/Commun/print/ChercheSig.asp?NT=082&CM=1&DF=&CL=ENG.

21. In light of these Conventions' limited success and the range of divergent national approaches to the issue of statutes of limitations for war crimes, many scholars have concluded that there is no customary international law prohibiting the application of statutes of limitations to such crimes.[51] For example, Professor Ratner and Jason Abrams have found that "in light of the [1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity]'s limited acceptance and the extensive range of domestic legal approaches on the issue, it is difficult to conclude that *mandatory* non-applicability of statutes of limitations has yet entered the realm of custom."[52] According to Yasmin Naqvi, "The question of whether statutes of limitation may apply to international crimes has generated considerable controversy due to the fact that no overriding consensus on the matter can be found in State practice, despite the existence of one international convention and one regional convention (neither of which are widely ratified)…."[53]
22. One example of national practice applying a statute of limitations to war crimes is the *Barbie* case in France. France has stringently defended its statute of limitations for war crimes prosecutions, so long as these do not amount to crimes against humanity.[54] In the *Barbie* case, the *Cour de Cassation* stated:

[51] "Despite a 1968 General Assembly resolution declaring statutes of limitations inapplicable with respect to war crimes, the U.S., while it has expressed support for expansive jurisdiction over war crimes in theory, has never recognized any obligations under international law with respect to the waiver of otherwise applicable statutes of limitations or other impediments to jurisdiction…, nor are commentators inclined to suggest that such non-applicability has ripened into customary international law." William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, n. 283 (2004). "While there is clearly a move towards an acceptance that statutory limitations shall not apply, the fact remains that many States still apply such limitations to international crimes and that the two Conventions have a modest number of States Parties. For example, both German and Dutch law retain statutory limitations for the least serious war crimes, even against the general non-applicability of the ICC Statute. The assertion of a customary norm may thus be premature." ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 65 (Cambridge University Press, 2007). "It would … seem that the better view is that *no customary rule endowed with a far-reaching content has yet evolved on the matter*. In other words, no rule has come into being prohibiting the application of statutes of limitations to all international crimes. It appears to be a sounder view that specific customary rules render statutes of limitation inapplicable with regard to some crimes: genocide, crimes against humanity, torture." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319 (Oxford University Press, 2003) (emphasis in original).

[52] STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 143 (Oxford University Press, 2001).

[53] YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 183 (T.M.C. Asser Press 2010). (Naqvi also states on p. 192-93: "The argument that there is a customary rule providing that statutes of limitation may not apply to international crimes is largely the product of judicial activity, rather than any overwhelming State practice and *opinio juris* on the matter…. State practice regarding statutes of limitation in regard to international crimes is by no means uniform or consistent." On page 217, she notes that applicability of statutes of limitations to war crimes is opposed by "a significant vocal minority").

[54] *Id.*, at 195.

> Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur the acts of brutality which may have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity. There is no principle of law with an authority superior to that of French law which would allow war crimes … to be declared not subject to statutory limitation.[55]

23. Ruth Kok, who has studied State practice and *opinio juris* on statutes of limitation for international crimes, has concluded that a customary rule of international law prohibiting statutes of limitations for international crimes did not exist prior to the entry into force of the International Criminal Court ("ICC") Statute in 2002 (Article 29 of the ICC Statute provides that crimes within the jurisdiction of the Court shall not be subject to any statute of limitations).[56] "Kok, in her detailed study of State practice and *opinio juris* on statutes of limitations and international crimes concluded that … there is insufficient evidence to show that a customary rule prohibiting statutes of limitations over international crimes already existed before the end of the 1990s…. In her view, 1 July 2002, the date of entering into force of the ICC Statute, constitutes a decisive moment for determining the start date of a possible customary rule on statutes of limitation over international

[55] *Barbie*, France, *Cour de cassation*, decision of 20 December 1985, JCP 1986, II, no. 20655; *Bull. Crim.* 1985, 1038-55 (unofficial English translation). "[W]ithout a specific legal provision, [war] crimes are governed by the ordinary **statute of limitations.** This question was raised in the course of the *Barbie* trial, where the private petitioners (*parties civiles*) failed to convince the court that there was no need to distinguish where international law itself did not. The Court of Cassation rejected this argument on the following ground: '... there is no legal principle overriding French law which lifts the **statute of limitations** for war crimes.'" William Bourdon, *Prosecuting the Perpetrators of International Crimes*, 3(2) J. INT'L CRIM. JUST. 434 (2005). According to Judge Cassese, France's statute of limitation, which applies to war crimes but not crimes against humanity, resulted in French courts in *Barbie* and *Touvier* going to great lengths to prove that the crimes with which the defendants were charged were crimes against humanity and not war crimes. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 319 (Oxford University Press, 2003). "[S]tatutes of limitation have been obstacles in national prosecutions. In the *Barbie* case, for example, the French law on non-application of such limitations was strictly interpreted to apply only to crimes against humanity, thus barring prosecution for war crimes. Similarly, prescription concerning war crimes also led to the acquittal by Italian courts in the *Hass and Priebke* case where the accused had admitted to a massacre of many hundred civilians during the Second World War. But war crimes carrying life imprisonment under Italian law were considered exempt from statutory limitations. In 1976, Swiss authorities had to refuse extradition to the Netherlands of Second World War criminal Pieter Menten due to statutory limitation (and were also prevented from prosecuting the case), as did the lower Argentine courts when considering the extradition of Priebke to Italy." ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 65 (Cambridge University Press, 2007).

[56] RUTH A. KOK, STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW 380 (2007).

crimes…."[57] Other scholars are reticent to conclude that such a rule of customary international law exists even today.[58]

24. In 2005, the ICRC prepared a study on customary international law. It found that as a rule of customary international law, statutory limitations may not apply to war crimes.[59] Professor Kreß, noting that the ICRC study failed to consider the limited success of the 1968 Convention or the European Convention, stated: "It is respectfully submitted that this conclusion is at best premature."[60] Naqvi similarly noted that "The ICRC Customary Law Study, on the basis of [State] practice, found as a rule of customary international law that '[s]tatutes of limitation may not apply to war crimes.' However, despite the high number of States which have legislation to this effect, there is arguably no clear consensus that war crimes must not be subject to a statute of limitations."[61]
25. Irrespective of whether such a rule of customary international law existed upon entry into force of the ICC Statute or by 2005, the law that must be applied at the ECCC is the customary international law that existed in 1975-79. At that time, there was no rule of customary international law invalidating statutes of limitations for grave breaches. There simply was no general and consistent State practice, let alone *opinio juris*, that statutes of limitation are inapplicable to grave breaches.

C. There is no absolute "duty to prosecute" grave breaches which would overcome the statute of limitations

26. Each of the Geneva Conventions contain a provision stating that:

> [t]he High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, … grave breaches…. Each High Contracting Party shall be under the

[57] YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 208 (T.M.C. Asser Press 2010).
[58] According to Professor Kreß, Article 29 "only binds the ICC and does not imply a parallel obligation of state parties. Quite a few states parties have recently enacted special war crimes statutes and have adopted a provision that mirrors Article 29 of the ICC Statute, but it would be wrong to interpret this recent legislative trend as recognition of a corresponding duty flowing from the grave breaches regime." Claus Kreß, *Reflections on the* Iudicare *Limb of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 789, 806 (2009). "[I]t remains unclear whether [Article 29 of the ICC Statute] reflects a customary rule of international criminal law given the lack of unanimity on the subject. It does not necessarily follow that States parties must also abrogate national legislation providing for time limitations on prosecutions involving international crimes, though some States have chosen to do so." YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 200 (T.M.C. Asser Press 2010).
[59] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOLUME I: RULES 614 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Cambridge University Press, 2005).
[60] Claus Kreß, *Reflections on the* Iudicare *Limb of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 789, 806 (2009).
[61] YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 195 (T.M.C. Asser Press 2010).

> 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. [62]

27. The OCP has argued that these provisions impose an "absolute duty" to prosecute grave breaches.[63] However, according to Professor Kreß "[i]t would … be far too simplistic to claim that statutes of limitation are inapplicable to grave breaches based only on the seemingly absolute wording of the obligation to search for and prosecute grave breaches contained in the Geneva Conventions. Treaty-based *aut dedere aut iudicare* ["extradite or prosecute"] regimes are simply not interpreted this way in state practice."[64]
28. Professor Kreß explains that there is no absolute duty to punish or to prosecute. "What the *iudicare* limb entails is a duty to investigate, and, where so warranted, to prosecute and convict."[65] Professor Kreß has examined possible legal bars to prosecution and determined that in certain situations, statutes of limitation may absolve a State of the obligation to investigate and prosecute.[66] In the present situation, Cambodia has fulfilled its duty to investigate grave breaches through the current investigations at the ECCC. Whether it may now prosecute is a different matter. In the present situation, prosecution is not warranted, as it would not be possible without violating Cambodian law.

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[62] Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146.
[63] *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 28 June 2011, E1/5.1, p. 107: "[Grave breaches are] the only category, as my colleague explained, to which an absolute duty to prosecute applies under the Geneva Conventions."
[64] Claus Kreß, *Reflections on the* Iudicare *Limb of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 789, 806 (2009). *See also* p. 790: "Although this new legal regime for international armed conflicts [the grave breaches regime established by the Geneva Conventions] was confirmed and expanded through the 1977 First Additional Protocol to the Geneva Conventions (Additional Protocol I), it hardly occupied a prominent place in the international practice. In fact, Antonio Cassese even described it as 'a dead letter' in 1986. The interest that international legal scholarship took into the matter was also relatively limited." *See also* p. 793: "Until the 1990s, the limited amount of 'hard' state practice weakened the claim that the grave breaches regime had grown into customary international law." *See also* p. 795: "The fact remains thus remains that states do not violate their obligation to adjudicate grave breaches of the Geneva Conventions and Additional Protocol I if they apply their general criminal law to them." *See also* Nina Larsaeus, *The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection: The Unresolved Issue of Excluded Asylum Seekers*, 73 Nordic J. Int'l L. 69, 85-86 (2004), *citing* BASSIOUNI & WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 45 (Nijhoff, 1995): "as far as state practice goes, even in regard to the most well-established of the international crimes, namely war crimes, 'the obligation to prosecute or extradite imposed by the Geneva Conventions is widely acknowledged to be a 'dead letter.'"
[65] Claus Kreß, *Reflections on the* Iudicare *Limb of the Grave Breaches Regime*, 7 J. INT'L CRIM. JUST. 789, 801 (2009).
[66] *Id.*, at 806-07.

29. In democratic societies, "criminal offences are clearly established by the executive. The judiciary cannot itself determine the existence of an offence *de novo* that is not prescribed in the statutes promulgated by the executive."[67] This holds true for statutes of limitation.
30. The judiciary is bound to apply the law made by the executive body; it cannot legislate. The judiciary cannot decide to ignore this law (the statute of limitations) because it considers that the executive body should have abolished the statute of limitations to fulfill an obligation under the Geneva Conventions. Similarly, the judiciary cannot ignore the applicable statute of limitations out of concern for Cambodia's obligation to provide victims with an effective remedy under the ICCPR.[68] The judiciary is tasked with applying the law, not amending or repealing it; it has no executive or legislative authority.
31. The Civil Parties have previously argued: "Grave breaches of the Geneva Conventions are *jus cogens* norms of international law. This means that these particular war crimes are not subject to a statutory limitation, and particularly not one imposed by a domestic penal code that does not even refer to such crimes."[69] *Jus cogens* norms have been defined as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of the contrary."[70] According to Naqvi, "[T]he claim that the *jus cogens* nature of international crimes entails an equally non-derogable obligation to prosecute is highly doubtful…. [S]imply because the *jus cogens* norm itself has a non-derogable character does not immediately entail that the method of enforcement of such a norm (*erga omnes* obligations) are also absolute."[71] Other scholars agree.[72] Referring to grave breaches as *jus cogens* simply does not allow the ECCC to ignore applicable Cambodian law.

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[67] Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT'L CRIM. L. REV. 121, 125 (2006).
[68] Article 2(3)(a) of the ICCPR states: "3. Each 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."
[69] *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC, Transcript, 29 June 2011, E1/6.1, p. 10.
[70] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 510 (Oxford University Press, 7th ed, 2008).
[71] YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 208 (T.M.C. Asser Press 2010).
[72] "[N]ational and international practice regarding the domestic legal consequences of peremptory norms of international law is divided at best, and often unclear and poorly reasoned. The lack of analysis and obvious mistakes in many judgments, especially of national courts, notably undercut their authoritative value. A cautious tendency can be discerned to accept a privileged position for *jus cogens* norms in the national legal order, but in the absence of firm State practice, a corresponding rule of customary international law currently appears to be only in the (early) formative stages." WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 169 (T.M.C. Asser Press 2006) (*See also* p. 182-85). "Besides there being no customary rule with a general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the

II. CONCLUSION

32. Cambodia has a ten-year statute of limitations for crimes with a minimum five-year sentence, such as grave breaches, committed in 1975-79. There is no domestic legislation that applies to crimes committed during that period which removes or alters this statute of limitations. There is no treaty-based provision that overrides this statute of limitations. No rule of customary international law applicable in 1975-79 prohibits statutes of limitations for grave breaches. Therefore, the ECCC must apply the statute of limitations to bar prosecutions of grave breaches that allegedly occurred in 1975-79.

33. As Steven Ratner and Jason Abrams have explained:

> Because many states have not legislated the non-applicability of statutory limitations for [war] crimes, it is possible to imagine situations where the slow pace of investigations or other circumstances will result in the actual or predicted expiry of the statute of limitations period before prosecutions begin. Those concerned with accountability might be able to overcome this obstacle through at least two strategies. First, the legislature might pass new legislation lengthening or eliminating the statute of limitations…. Secondly, a court or the legislature could determine that the application of the normal statute of limitations has been suspended during the period in which accountability was impossible.[73]

34. Neither of those possibilities has happened in the present situation. The present legislation eliminating the statute of limitations is not intended to apply retroactively (nor can it, without violating the principle of non-retroactivity). The application of the statute of limitations, even if suspended, has already expired. Grave breaches therefore cannot be applied at the ECCC.

Respectfully submitted,

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Co-Lawyers for a Suspect in Case 003

Signed in Phnom Penh, Kingdom of Cambodia on this **14th** day of **May, 2014**

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international community." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 302 (Oxford University Press, 2003). "Though there is no question that the international community has accepted that the prohibition against committing crimes against humanity qualifies as a *jus cogens* norm, this does not mean that the associated duty to prosecute has simultaneously attained an equivalent status. In fact, all evidence is to the contrary." Michael Scharf, *From the Exile Files: an Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 364-67 (2006), discussing the *jus cogens* nature of crimes against humanity and a State's duty.

[73] STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 144 (Oxford University Press, 2001).