

Determining the Relationship Between International and Domestic Laws Within an Internationalized Court: An Example From the Cambodian Extraordinary Chambers' Jurisdiction Over International and Domestic Crimes

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Abstract

Internationalized criminal tribunals such as the Extraordinary Chambers in the Courts of Cambodia (ECCC) differ from traditional international criminal tribunals by a lesser degree of internationality.

The ECCC emerged through an international agreement but their mixed composition and operating rules are also defined in Cambodian Law. The relationship between the ECCC's Agreement and Law has not been clearly stated, which generates questions since both texts are not always consistent.

This paper proposes, through the study of the provisions of the ECCC Law relating to the ECCC's subject-matter jurisdiction, to determine the impact of such discrepancies on the activity of the Chambers. The decisions of their judicial bodies on the application of Articles 3, 4 and 5 which provide for the ECCC's jurisdiction over crimes against humanity, genocide and certain domestic crimes have allowed to cope with the uncertainty generated by those differences.

However, a bigger issue remains which is due to the ECCC's particular hybrid structure. Composed of national judges in the majority, ECCC's decisions may only be taken if the required qualified majority is reached, which implies the need for an agreement with their international counterparts.

A. Introduction

To remedy the lack of a domestic repressive system, the commission of crimes of exceptional magnitude calls for the alleged perpetrators, to have their trial take place in special courts. The early 2000s saw the emergence of a new generation of such courts¹: the *internationalized* criminal courts which include the ECCC.

These courts were created to meet specific situations where serious crimes were committed on a massive scale. Their particularity appears mainly in their different degrees of internationality and lies in the originality of their methods of creation and operation.² Particularly, these tribunals implement new relationships between national and international laws, but they remain complex. The ECCC is a good example in that matter.

¹ P. Pazartzis, 'Tribunaux pénaux internationalisés: une nouvelle approche de la justice pénale', 49 *Annuaire français de droit international* (2003), 641, 642.

² *Ibid.*, 643.

Between 1975 and 1979, atrocities were perpetrated by the Khmer Rouge in Cambodia, when they were in power. However, the establishment of a competent tribunal to hold trials took almost thirty years.

Lengthy negotiations between the United Nations (UN) and the Royal Government of Cambodia (RGC) led to an innovative solution: the creation by an international agreement in 2003³ (ECCC Agreement) of “Extraordinary Chambers” in the Courts of Cambodia with significant international participation. Erected formally under Cambodian law, these Chambers fall, in reality, under a *hybrid* legal system which explains their unique composition and specific operating rules.⁴ A Cambodian law passed in 2001⁵ defines the peculiar structure of the ECCC and its applicable law.

Although the 2001 ECCC Law was amended in 2004⁶ after the adoption of the *ECCC Agreement* in 2003, these changes appear insufficient.⁷ It turns out that some provisions of the 2004 Amended ECCC Law (ECCC Law) are not in full compliance with the *ECCC Agreement* and international standards, particularly, the provisions regarding the Chambers’ subject-matter jurisdiction over international and domestic crimes.⁸ This affects the nature of the crimes tried before the ECCC since their constitutive elements differ from one text to

³ *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, 6 June 2003, 2329 UNTS 117 [ECCC Agreement].

⁴ D. Boyle, ‘Une juridiction hybride chargée de juger les Khmers rouges’, 1 *Droits fondamentaux* (2001) 1, 213, 215; *Kaing Guek Eav alias Duch*, 001/18-07-2007/ECCC-E39/5 (Trial Chamber), Decision on Request for Release, 15 June 2009, para. 10: “Although its constitutional documents show that the ECCC was established within the Cambodian courts structure, the ECCC is, and operates as, *an independent entity* within this structure.” (emphasis added).

⁵ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea*, NS/RKM/0801/12, adopted in its final version by the National Assembly on 11 July 2001, approved by the Senate on 23 July 2001, pronounced as being fully in accordance with the Constitution by the Constitutional Council in its Decision 043/005/2001 KBThCh (7 August 2001) and signed by the Cambodian king on 10 August 2001, available at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> (unofficial translation) (last visited on 17 November 2014) [2001 ECCC Law].

⁶ *Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea* (2001), as amended by NS/RKM/1004/006 (27 October 2004) [ECCC Law].

⁷ In the 2004 Amended Law, the mention “new” is added to the number of the articles which were changed.

⁸ ECCC Law, *supra* note 6, Arts 3-6.

another. This also may challenge the validity of prosecutions which find their ground in a text whose legality under international law is controversial.

The Law has not been changed since 2004 to conform with the *ECCC Agreement* and international standards. In reality, it is the jurisprudence of the ECCC which has allowed the Chambers to overcome this inconsistency.

Before considering the relevant discrepancies in the provisions of the ECCC founding texts, it is at first necessary to clarify the relationships between the Law and the *ECCC Agreement*. This involves analyzing the choice made by the Cambodian State under a monist or a dualist approach with respect to international law (Sec. B). Indeed, such a preliminary study is necessary in order to understand why a second modification of the ECCC Law should have occurred. However, as this did not happen, it will then be seen how the judicial organs were able to cope with the problems created by the Law's provisions on the ECCC's jurisdiction over international and national crimes (Sec. C).

B. Positioning the *ECCC Agreement* With Regard to Cambodian Law

The 2003 *ECCC Agreement* between the UN and the RGC concerning the prosecution of crimes committed under the Democratic Kampuchea regime⁹ is an international agreement. At the time of its adoption, however, the conditions of its applicability to Cambodia remained unclear. On the question of monism and dualism, the choice of the Cambodian State is ambiguous.

According to the monist approach, domestic and international legal systems form a unity.¹⁰ Consequently, the act of ratifying an international treaty immediately incorporates its provisions into national law. The dualists, on the contrary, emphasize the difference between national and international law, and require the translation of the latter into the former by some act of the relevant national authorities that expressly transforms those norms into domestic law.¹¹

No provision of the 1993 Cambodian Constitution¹² brings precision and even the *ECCC Agreement* contradicts itself in this regard. Art. 2 (2) provides

⁹ Democratic Kampuchea was the name of the Khmer Rouge regime in Cambodia from 17 April 1975 to 6 January 1979.

¹⁰ M. Shaw, *Textbook on International Law* (2002), 82-83.

¹¹ P. M. Dupuy & Y. Kerbrat, *Droit International Public* (2014), 452.

¹² English translation of *Constitution of the Kingdom of Cambodia*, original version adopted by the Constitutional Assembly in Phnom Penh on 21 September 1993 at its Second Plenary Session, and signed by the President on the same date, available at <http://www.refworld.org/docid/3ae6b5428.html> (last visited 16 November 2014).

that “[the] present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers [...]” while Art. 31 states that it “[...] shall apply as law [...]” within Cambodia. Thus, it has to be determined whether the *ECCC Agreement* directly applies in Cambodian law, or whether it had to be incorporated into it through an act of “transformation” which allows its application as a domestic norm.¹³

I. A Domestic Law Adopted Before the International Agreement

Surprisingly, the *ECCC Agreement* was adopted after the Law on the Establishment of the ECCC.¹⁴ The reason is to be found in the history of the negotiations between the UN and the RGC for their creation. The parties agreed on the principle of prosecutions. However, the court, and the modalities of its operation, remained to be defined.

The negotiations began in 1997 when the Co-Prime Ministers at the time, Hun Sen and Prince Norodom Ranariddh, sent a letter to the UN Secretary-General asking for help to conduct the trials of the Khmer Rouge.¹⁵ After three years, the parties agreed on a unique compromise: the Cambodian judges would remain the majority in the Court, but decisions would be taken by a supermajority implying the need for the voice of at least one international judge.¹⁶ In July 2000, the UN laid out the arrangements on the principle on international participation in a draft Memorandum of Understanding.¹⁷ However, contrary to the standard practice in which a government first agrees on the international agreement and then submits the agreement to parliament, the Cambodian Deputy Prime Minister, Sok An, declared that the Government could not formally agree to any arrangement with the UN until the relevant text had been passed by parliament and was adopted as law.¹⁸ This stipulation explains why the ECCC Law was passed in January 2001 by the Cambodian Parliament¹⁹ and

¹³ Dupuy & Kerbrat, *supra* note 11.

¹⁴ 2001 ECCC Law, *supra* note 5.

¹⁵ *Situation of Human Rights in Cambodia*, GA Res. 52/135, UN Doc A/RES/52/135, 12 December 1997.

¹⁶ Boyle, *supra* note 4, 214.

¹⁷ ‘Tribunal Memorandum of Understanding Between the United Nations and the Royal Government of Cambodia’, 9 *Phnom Penh Post* (27 October - 9 November 2000), 22, available at http://www.yale.edu/cgp/mou_v3.html (last visited 22 May 2015).

¹⁸ C. Etcheson, ‘A “Fair and Public Trial”: A Political History of the Extraordinary Chambers’, in Open Society, *Justice Initiatives* (2006), 7, 13.

¹⁹ Boyle, *supra* note 4, 213.

approved by the King in August 2001. However, the UN raised concerns with regard to this text and pulled out of negotiations.²⁰

II. A Peculiar Cambodian Approach Regarding the Law and the *ECCC Agreement*

Following this withdrawal, the RGC expressed its own approach on the relationship between the international agreement and the national law. The Deputy Prime Minister, Sok An, publicly stated that

“[...] ‘the Law, which was adopted by the Cambodian legislature under the Constitution of Cambodia, has determined the jurisdiction and competence of the Extraordinary Chambers as well as their composition, organizational structure and decision-making procedures, while the Articles of Cooperation are to determine the modalities of cooperation between the [RGC] and the [UN] in implementing those provisions of the Law concerning foreign technical and financial support.’”²¹

Thus, “[while] the Articles of Cooperation [...] may clarify certain nuances in the Law, and elaborate certain details, it is not possible for them to modify, let alone prevail over, a law that has just been promulgated.”²² Based on the content of the position held by the RGC, it may be assumed that dualism prevails within Cambodia.²³ Consequently, the *ECCC Agreement* should not directly apply to Cambodia.

²⁰ See *Statement by UN Legal Counsel Hans Corell at a Press Briefing at UN Headquarters in New York*, 8 February 2002: “[...] the United Nations has come to the conclusion that the Extraordinary Chambers, as currently envisaged, would not guarantee the independence, impartiality and objectivity that a court established with the support of the United Nations must have [...]”, available at <http://www.un.org/news/dh/infocus/cambodia/corell-brief.htm> (last visited 22 May 2015) [UN Legal Counsel’s Statement].

²¹ *Statement of the RGC in Response to the Announcement of UN Pullout From the Negotiation on the Khmer Rouge Trial*, 12 February 2002, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/SA_statement_on_UN_pullout.pdf (last visited 22 May 2015).

²² *UN Legal Counsel’s Statement*, *supra* note 20, quoting Minister Sok An’s letter to Mr. Corell of 23 November 2001.

²³ E. Meijer, ‘The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized Tribunal’, in C. P. R. Romano, A. Nollkaemper & J. K. Kleffner,

In 2003, the final *ECCC Agreement* was adopted by the parties. Reflecting the Cambodian position, Art. 1 provides that its purpose

“[...] is to regulate the cooperation between the [UN] and the [RGC] in bringing to trial senior leaders [...] and those who were most responsible for the crimes [...] that were committed during the [Democratic Kampuchea] period [...]”.

However, in accordance with the law of treaties to which the *ECCC Agreement* is subjected,²⁴ the 2001 Law was amended in 2004²⁵ in order to be brought into conformity with the *ECCC Agreement*.²⁶ A closer look at the 2004 Law indicates that some of its provisions, particularly, those concerning the subject-matter jurisdiction, are not in complete accordance with the *ECCC Agreement*: some are less detailed than the provisions in the *ECCC Agreement*, while others even appear to be contrary to international standards.

In this situation, the dualistic approach held by the RGC would normally require that the ECCC Law is amended and that the *ECCC Agreement*'s details are added to the Law (whereas in the monistic tradition, the details would apply directly through the *ECCC Agreement* and no amendment would be necessary).²⁷ Regardless of whether the provisions of the Law are more or less detailed, if the Law is not in conformity with the *ECCC Agreement*, the Law needs to be adapted.²⁸ Nevertheless, the provisions on the ECCC's subject-matter jurisdiction in the 2004 Amended Law have never been changed since.

Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia (2004), 207, 211. However, the author notes that “this is a mere assumption”.

²⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 26, 1155 UNTS 331, 339.

²⁵ *Law to Amend the 2001 Law on the Establishment of the Extraordinary Chambers*, 27 October 2004, available at <http://www.eccc.gov.kh/en/documents/legal/law-amend-2001-law-establishment-extraordinary-chambers> (last visited 22 May 2015).

²⁶ *Report of the Secretary General on Khmer Rouge Trials*, UN Doc A/57/769, 31 March 2003, 10, para. 5.

²⁷ Meijer, *supra* note 23, 210.

²⁸ *Ibid.*, 211.

C. Bringing the Law on the Extraordinary Chambers Into Conformity With the Agreement: The ECCC Law Provisions on the Subject-Matter Jurisdiction

The ECCC have competence to bring Khmer Rouge to trial for international²⁹ (Sec. I) as well as domestic crimes³⁰ (Sec. II). However, for both, the question of the compliance of the ECCC Law's provisions with international standards is raised.

I. An Incomplete Law Concerning the ECCC's Jurisdiction Over International Crimes

Art. 9 of the *ECCC Agreement* states that

“[the] subject-matter of the Extraordinary Chambers shall [...] be the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, [and] crimes against humanity as defined in the 1998 Rome Statute of the International Criminal Court [...]”.

Articles 4 and 5 of the ECCC Law concern the jurisdiction of the Chambers over the crime of genocide (1) and crimes against humanity (2). Both articles were not amended in 2004, despite the fact that they were different from Art. 9 of the *ECCC Agreement*.

Further, the ECCC's temporal jurisdiction over acts committed from 1975 to 1979 raises the question of whether those crimes existed and were criminalized in Cambodia at the relevant time, in compliance with the principle of non-retroactivity of the law as defined in Art. 15 of the *International Covenant for Civil and Political Rights* (ICCPR)³¹ and protected by both the *ECCC Agreement* and Law.³²

²⁹ ECCC Law, *supra* note 6, Arts 4, 5 & 6.

³⁰ *Ibid.*, Art. 3 (new). Homicide, torture and religious persecution as defined in Arts 209, 210, 500, 501, 503-508 of the 1956 Penal Code of Cambodia.

³¹ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Article 15 (1): “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”

³² *ECCC Agreement*, *supra* note 3, Art. 12; ECCC Law, *supra* note 6, Art. 33 (new).

1. The Crime of Genocide

Art. 4 of the ECCC Law provides for the prosecution of persons having committed genocide “[...] as defined in the [1948 Genocide] Convention [...]”.³³ However, the definition of the crime in Art. 4 diverges from its international equivalent.

The first part of Art. 4 is similar to Art. II of the *Genocide Convention* but holds an important difference. Art. II states that “[...] genocide means any of the *following acts* committed with the intent to destroy, [...] a national, ethnical, racial or religious group *as such* [...]”³⁴ while Art. 4 states that “[the] acts of genocide, [...] mean *any acts* committed with the intent to destroy [...] a national, ethnical, racial or religious group *such as* [...]”.³⁵ Thus, the words “as such” in the definition of the *mens rea* are replaced by “such as”.³⁶

First, since these words are followed by the enumeration of acts³⁷ consisting of the *actus reus* of genocide, the list found in the *Genocide Convention* appears to be exhaustive, while the list of acts found in the ECCC Law does not.³⁸ Secondly, the ECCC Law also seems to lower the *mens rea* required. According to its provisions, indeed, a perpetrator would still be held liable for genocide, even if the acts he committed with the intent to destroy the group was perpetrated without intending to destroy the group “as such”.³⁹

The second part of Art. 4 on the incriminated modes of participation in genocide departs from the terms of Art. III of the *Genocide Convention*. The acts of direct and public incitement to commit genocide⁴⁰ and complicity in

³³ *Convention on the Prevention and Punishment of the Crimes of Genocide*, 9 December 1948, I-1021 UNTS 78, 280-286 [Genocide Convention].

³⁴ *Ibid.*, Art. II (emphasis added).

³⁵ ECCC Law, *supra* note 6, Art. 4 (emphasis added).

³⁶ It should be noted that these discrepancies do not appear in the French version of the ECCC Law.

³⁷ ECCC Law, *supra* note 6, Art. 4 and *Genocide Convention*, *supra* note 33, Art. II: “[causing] serious bodily or mental harm to members of the group; [deliberately] inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; [imposing] measures intended to prevent births within the group, forcibly transferring children from one group to another group”.

³⁸ *Prosecutor v. Nuon Chea and Others*, D427 (CIJ), Closing Order, 15 September 2010, para. 1311 [OCIJ Closing Order in Case 002].

³⁹ *Prosecutor v. Nuon Chea and Others*, D240/2 (CIJ), Ieng Sary’s Supplemental Alternative Submission to His Motion Against the Applicability of Genocide at the ECCC, 21 December 2009, para. 12.

⁴⁰ *Genocide Convention*, *supra* note 33, Art. III (c).

genocide⁴¹ do not appear in Art. 4 which provides for attempts to commit acts of genocide,⁴² conspiracy to commit acts of genocide,⁴³ and adds the non-technical term of “[...] participation in acts of genocide”.

The accused in *Case 001*, Kaing Guek Eav *alias* Duch,⁴⁴ has only been convicted for crimes against humanity and grave breaches of the *1949 Geneva Conventions*.⁴⁵ The two remaining⁴⁶ accused in *Case 002*, Nuon Chea⁴⁷ and Khieu Samphan,⁴⁸ are currently indicted for the crime of genocide.⁴⁹ The Co-Investigating Judges (CIJs),⁵⁰ to conform with the principle of non-retroactivity,⁵¹ decided to apply the international definition of genocide⁵² since it was the one that applied to Cambodia during the period of Democratic

⁴¹ *Ibid.*, Art. III (e).

⁴² *Ibid.*, Art. III (d). The word ‘attempt’ is singular in the Convention, while it is in plural in the ECCC Law: ‘attempts to commit genocide’.

⁴³ *Ibid.*, Art. III (b).

⁴⁴ Kaing Guek Eav *alias* “Duch” was the head of Tuol Sleng (S-21) prison and torture center in Phnom Penh under the regime of the Khmer Rouge.

⁴⁵ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Judgement, E188 (TC), 26 July 2010, paras 313 & 568 [ECCC Judgment in Case 001].

⁴⁶ Originally, there were four accused in *Case 002*. Ieng Tirth (the former Minister of Social Affairs) has been found unfit to stand trial and consequently the Trial Chamber has stayed the proceedings against her. Her husband Ieng Sary (former Deputy Prime Minister of Foreign Affairs) died on 14 March 2013. The proceedings against him are terminated.

⁴⁷ Nuon Chea was appointed as Deputy Secretary of the Communist Party of Kampuchea and retained this position throughout the period of Democratic Kampuchea.

⁴⁸ Khieu Samphan was the Democratic Kampuchea’s Head of State.

⁴⁹ *OCIJ Closing Order in Case 002*, *supra* note 38, para. 1335.

⁵⁰ Following the example of Cambodian law which included the French concept of the investigating judge, the investigations before the trial stage are carried out not by the parties (prosecutors and defence), but by two Co-Investigating Judges, a national judge and an international judge. The Co-Investigating Judges investigate facts set out in introductory and supplementary submissions from the Co-Prosecutors. After investigation has been concluded, the Co-Investigating Judges issue a Closing Order containing an indictment with an order to send the case for trial, or a dismissal order, terminating the proceedings.

⁵¹ See *supra* note 31 and *supra* note 32.

⁵² *OCIJ Closing Order in Case 002*, *supra* note 38, paras 1312-1313.

Kampuchea.⁵³ The CIJs' reasoning was upheld on appeal before the Pre-Trial Chamber (PTC).⁵⁴

To date, the CIJs and the PTC's decisions are the sole decisions on genocide by ECCC judicial organs. Prior to the evidentiary phase, in September 2011, the Trial Chamber (TC) decided to sever *Case 002* into smaller trials. The genocide charges were excluded from the scope of the first trial, referred to as *Case 002/01*.⁵⁵ Only in the second part of the *Case 002* trial, i.e. *Case 002/02*, will the two accused stand trial for the genocide charges.⁵⁶

2. Crimes Against Humanity

Art. 5 of the ECCC Law⁵⁷ does not follow Art. 9 of the *ECCC Agreement*, as it differs from Art. 7 of the *Rome Statute*. First, unlike the *Rome Statute*, the definition adopted by the ECCC Law includes a discriminatory requirement which defines crimes against humanity as "[...] any acts committed as part of a widespread or systematic attack directed against any civilian population, *on national, political, ethnical, racial or religious ground*, such as [...]"⁵⁸

In *Case 001*, the TC noted that any discriminatory basis requirement under other international criminal instruments was limited to the underlying offence of persecution and recognized that Art. 5 of the ECCC Law has "[...] added [a] jurisdictional requirement [...]"⁵⁹ which "[...] narrows the scope of the ECCC's jurisdiction over crimes against humanity further than would

⁵³ Cambodia acceded to the *Genocide Convention* upon joining the "French Union" in 1949. The *Genocide Convention* entered into force in 1951 after the reception of the twenty required ratifications, it applied therefore to Cambodia during Democratic Kampuchea period, *ibid.*, para. 1310.

⁵⁴ *Co-Prosecutors v. Nuon Chea and Others*, D427/1/30 (Pre-Trial Chamber), Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, para. 248.

⁵⁵ *Co-Prosecutors v. Nuon Chea and Others*, E124 (Trial Chamber), Severance Order Pursuant to Internal Rule 89ter, 22 September 2011. The scope of *Case 002/01* was limited to two forced movement phases, executions committed against the soldiers of the former regime in the aftermath of the evacuation of Phnom Penh in April 1975 and related crimes against humanity; see *Co-Prosecutors v. Nuon Chea and Others*, E284 (Trial Chamber), Decision on Severance of *Case 002* following the Supreme Court Chamber Decision of 8 February 2013, 4 April 2014, 70.

⁵⁶ The evidentiary hearings of *Case 002/02* began on 17 October 2014.

⁵⁷ In fact, Art. 5 of the ECCC Law reproduces Art. 3 of the *Statute of the International Criminal Tribunal for Rwanda*. See Art. 3, *Statute of the International Criminal Tribunal for Rwanda* (as last amended on 13 October 2006), UN Doc S/Res/955, 8 November 1994.

⁵⁸ ECCC Law, *supra* note 6, Art. 5 (emphasis added).

⁵⁹ *ECCC Judgment in Case 001*, *supra* note 45, para. 313.

otherwise have been necessary under customary international law during the [Democratic Kampuchea] period.”⁶⁰ However, it also stated that the requirement qualifies “[...] the nature of the attack [...]” rather than the individual underlying offences.⁶¹ Consequently, it does “[...] not import a discriminatory intent as a legal ingredient for all underlying crimes against humanity [...]”.⁶² Such findings were upheld on appeal by the Supreme Court Chamber (SCC)⁶³ and by the TC in *Case 002/01*.⁶⁴ Thus, contrary to genocide, the judges decided to apply the provisions of the ECCC Law.

Secondly, the acts enumerated in Art. 5 of the ECCC Law are not as precise and detailed as those enumerated in Art. 7 of the *Rome Statute*.⁶⁵ Art. 5 provides that crimes against humanity are “[...] any acts [...] such as: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious ground; other inhumane acts.” Thus, the following acts of Art. 7 of the *Rome Statute* do not appear in Art. 5 of the ECCC Law: acts of forcible transfer of population;⁶⁶ severe deprivation of physical liberty in violation of fundamental rules of international law;⁶⁷ sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;⁶⁸ enforced disappearance of persons,⁶⁹ and the crime of apartheid.⁷⁰

However, in Art. 5 the use of the words “*such as*”⁷¹ suggests that the list is not exhaustive⁷² and that the characterization of “other inhumane acts” may include acts described in Art. 7 of the *Rome Statute* that do not appear in Art. 5 of the ECCC Law. This interpretation has been followed by the TC in both

⁶⁰ *Ibid.*, para. 314.

⁶¹ *Ibid.*, para. 313.

⁶² *Co-Prosecutors v. Nuon Chea and Others*, E 313, Case 002/01 Judgment, 7 August 2014, para. 188 [ECCC Case 002/01 Judgment].

⁶³ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, F28 (SCC), Appeal Judgement, 3 February 2012, para. 238 [ECCC Appeal Judgment].

⁶⁴ *ECCC Case 002/01 Judgment*, *supra* note 62, para. 188. The TC noted that the ICTY adjudged such a discriminatory element to be a jurisdictional requirement which was not required by international customary law, see *ibid.*, para. 565.

⁶⁵ *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993 [Rome Statute].

⁶⁶ *Ibid.*, Art. 7 (d).

⁶⁷ *Ibid.*, Art. 7 (e).

⁶⁸ *Ibid.*, Art. 7 (g).

⁶⁹ *Ibid.*, Art. 7 (i).

⁷⁰ *Ibid.*, Art. 7 (j).

⁷¹ Emphasis added.

⁷² Meijer, *supra* note 23, 213.

Case 001 and *Case 002/01*. In its judgments, it stated that “[other] inhumane acts comprise a residual offence which is intended to criminalize conduct which meets the criteria of a crime against humanity but does not fit within one of the other specified underlying crimes.”⁷³ It added that “[other] inhumane acts [...]”⁷⁴ constituted *in itself* a crime against humanity under customary international law before 1975, specifying in *Case 002/01*, that it was “[...] unnecessary to establish that each of the sub-categories alleged to fall within the ambit of this offence were criminalised [...]”⁷⁵ under the Democratic Kampuchea period. Consequently, in *Case 002*, the criminal liability of the accused was acknowledged for their participation in the commission of acts which were not expressly included in Art. 5, such as forcible transfer of population and enforced disappearance of persons.⁷⁶

In respect of genocide and crimes against humanity, the ECCC Law lacks clarity since it partly differs from the legal instruments specified in Art. 9 of the *ECCC Agreement*. Particularly, the modes of liability for genocide and the underlying acts of crimes against humanity are less detailed in the ECCC Law.⁷⁷ According to the dualistic approach that Cambodia follows, the *ECCC Agreement*’s details should have been added to the ECCC Law in order ensure their application within the ECCC.⁷⁸ Finally, it is the interpretation of the ECCC Law made by the judges that allowed for these details to be applied, and this in conformity with the principle of non-retroactivity.

Another difficulty is raised by Art. 3 (new) of the ECCC Law on the Chambers’ jurisdiction over national crimes, since part of this provision violates such a principle.

⁷³ *ECCC Judgment in Case 001*, *supra* note 45, para. 367; *ECCC Case 002/01 Judgment*, *supra* note 62, para. 437.

⁷⁴ *ECCC Judgment in Case 001*, *supra* note 45, para. 367; *ECCC Case 002/01 Judgment*, *supra* note 62, para. 435.

⁷⁵ *ECCC Case 002/01 Judgment*, *supra* note 62, para. 436.

⁷⁶ *Ibid.*, paras 940-942 (Nuon Chea) and paras 1053-1054 (Khieu Samphan).

⁷⁷ Meijer, *supra* note 23, 213.

⁷⁸ *Ibid.*, 210.

II. An Invalid Law Concerning the ECCC's Jurisdiction Over National Crimes

Art. 3 (new) of the ECCC Law provides that the Chambers may try the Khmer Rouge for domestic crimes of homicide⁷⁹, torture⁸⁰, and religious persecution⁸¹ as set forth in the 1956 Penal Code. Charging these crimes in addition to the international crimes may prove to be useful when “[...] the [...] thresholds and *mens rea* required for the latter are too difficult to prove beyond a reasonable doubt.”⁸² “National crimes in contrast, do not require proof of [...] additional elements [...]”⁸³ and consequently appear easier to establish.

However, the legal legitimacy of the ECCC to convict an accused for domestic offences has been seriously weakened by challenges to the validity of the second paragraph of Art. 3 (new) on the statute of limitations of those national crimes.

1. A Controversial Provision

Art. 3 (new) states that “the statute of limitations set forth in the 1956 Penal Code shall be extended for an additional thirty years for the crimes enumerated above”. This provision was amended in 2004. Art. 3 of the 2001 ECCC Law provided for a twenty-year extension of the statute of limitations.⁸⁴ The initial limitation period provided by the 1956 Penal Code for felonies (designated as crimes) was of ten years from the date of commission.⁸⁵ Thus, the limitation period for the prosecution of the crimes committed by the

⁷⁹ 1956 Penal Code, Arts 501, 503, 504, 505, 506, 507 & 508 as provided by ECCC Law, *supra* note 6, Art. 3.

⁸⁰ 1956 Penal Code, Art. 500 as provided by ECCC Law, *ibid.*

⁸¹ 1956 Penal Code, Arts 209 & 210 as provided by ECCC Law, *ibid.*

⁸² D. Scheffer, ‘The Extraordinary Chambers in the Courts of Cambodia’, in M. C. Bassiouni (ed), *International Criminal Law: International Enforcement*, Vol. III, 3rd ed. (2008), 219, 243; see also, Boyle, ‘Une juridiction hybride chargée de juger les Khmers rouges’, 1 *Droits fondamentaux* (2001), *supra* note 4, 221.

⁸³ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, ECCC D99/3/3, Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav Duch Dated 8 August 2008, 5 September 2008, para. 40.

⁸⁴ ECCC Law, *supra* note 6, Art. 3.

⁸⁵ 1956 Penal Code, Art. 109. See *Co-Prosecutors v. Kaing Guek Eav alias Duch*, E187, (Trial Chamber), Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, para. 4 [TC’s Decision on the Statute of Limitations of Domestic Crimes in Case 001].

Khmer Rouge between 1975 and 1979 would have normally expired between 1985 and 1989 *before* the 2001 ECCC Law was enacted.

These extensions of the limitation period may be seen as an impermissible *ex post facto* legislation that would violate the principle of non-retroactivity.⁸⁶ Art. 3 of the 2001 ECCC Law and Art. 3 (new) of the 2004 Amended Law appear therefore contrary to the *ECCC Agreement* and to international standards.

The Cambodian Constitutional Council stated in its decision on the constitutionality of the 2001 ECCC Law that “[this] paragraph unquestionably affects a fundamental principle, ‘the non-retroactivity of any new law over offences committed in the past’ [...]”⁸⁷. However, it “[...] made no further ruling on the impact of this principle [...]”⁸⁸ thus concluding that Art. 3 was in conformity with the 1993 Constitution.⁸⁹ In 2007, however, the Constitutional Council issued another decision.⁹⁰ It stated that a “[...] judge shall not only rely on [the law at issue], but also rely on [...] the international laws that [...] Cambodia has recognized [...]”⁹¹. This requirement, which departs from the Cambodian dualistic approach, appears consistent with the 1993 Constitution of Cambodia, since Art. 31 provides that “[...] the Kingdom of Cambodia shall recognize and respect human rights as stipulated in [...] the covenants and conventions related to human rights [...]”⁹². It follows that the international instruments relating to human rights and ratified by Cambodia⁹³ may directly be applied by national courts, including the ECCC.⁹⁴

⁸⁶ See *supra*, notes 31 and 32.

⁸⁷ Constitutional Council, Decision No. 040/002/2001, 12 February 2001, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Const_Council_Res_on_KR_Law_12_Feb_2001.pdf (unofficial translation) (last visited 8 July 2015).

⁸⁸ *TC’s Decision on the Statute of Limitations of Domestic Crimes in Case 001*, *supra* note 85, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, para. 46.

⁸⁹ *Ibid.*, para. 6.

⁹⁰ Constitutional Council, Decision No. 092/003/2007, 10 July 2007, available at http://cambodia.ohchr.org/WebDOCs/DocProgrammes/CC_decision.pdf (last visited 8 July 2015).

⁹¹ *Ibid.*

⁹² *Case of Nuon Chea and Others.*, D427/1/6 (Defence), IENG Sary’s Appeal against the Closing Order, 25 October 2010, para. 153 [IENG Sary’s Appeal against the Closing Order].

⁹³ The *ICCPR* is loosely incorporated by reference into the 1993 Cambodian Constitution, Art 31.

⁹⁴ *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General: Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in Assisting the*

The issue of Art. 3 (new) was raised by the defendants before the ECCC jurisdictional organs, giving them an opportunity to decide on the validity of this article with international standards in *Case 001* and *Case 002*.

2. The Validity of Articles 3 and 3 (new) Raised in *Case 001*

a. An Attempt to Avoid the Issue: The Question of Cumulative Charging

In *Case 001*, the CIJs chose not to indict Duch for domestic crimes on the basis of the civil-law practice⁹⁵ of only indicting for the “[...] *highest available legal classification* [...]”⁹⁶ (crimes against humanity⁹⁷ and grave breaches of the *1949 Geneva Conventions*⁹⁸). They mentioned later in *Case 002*’s Closing Order⁹⁹ that they “[...] draw on French jurisprudence, as Cambodian law shares the same root as French law [...]”¹⁰⁰. This was appealed by the Co-Prosecutors¹⁰¹ who had proposed to indict the accused for domestic crimes¹⁰² in their Introductory Submission.¹⁰³ A commentator has underlined the significance of charging these crimes. This indeed may foster a sense of *ownership* of the ECCC judicial

Government and People of Cambodia in the Promotion and Protection of Human Rights, UN Doc A/HRC/7/56, 11 February 2008, para. 26.

⁹⁵ R. Merle & A. Vitu, *Traité de droit criminel. Problème généraux de la science criminel, Droit pénal général*, Vol. I, 7th ed. (1997), 517: “Les tribunaux français considèrent généralement qu’un acte matériel unique à qualifications légales multiples constitue une seule infraction punissable ‘sous sa plus haute acception pénale’” (“the French courts generally hold that a unique material act with several possible legal characterisations constitute a single offence punishable ‘under its highest available legal classification’”) (unofficial translation).

⁹⁶ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, D99 (OCIJ), Closing Order, 8 August 2008, para. 152 [OCIJ Closing Order in Case 001] (emphasis added).

⁹⁷ *Ibid.*, paras. 131-143.

⁹⁸ *Ibid.*, paras. 144-151.

⁹⁹ *OCIJ Closing Order in Case 002*, *supra* note 39, para. 739.

¹⁰⁰ *Ibid.*, para. 1566.

¹⁰¹ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, Appeal of the Closing Order Against Kaing Guek Eav “Duch”, D99/3/3 (OCP), 8 August 2008.

¹⁰² M. Lemonde & J. Reynaud, *Un juge face aux Khmers rouges* (2013), 146.

¹⁰³ The Introductory Submission refers to the written submission by the Co-Prosecutors requesting the Co-Investigating Judges to open an investigation into a crime and proposing charges, *Internal Rules of the Extraordinary Chambers in Cambodia* (Rev.8 of 3 August 2011), adopted at the Plenary Session of the ECCC on 12 June 2007, and signed into force by the President and Deputy President of the Plenary on 19 June 2007, glossary.

proceedings for the Cambodian judiciary.¹⁰⁴ The former international Co-Investigating Judge stated that it was before all, in the eyes of the Cambodian Co-Prosecutor that the Cambodian law had to be applied.¹⁰⁵

As Cambodian law does not “[...] contain provisions relating to the possibility to set out different legal offences for the same acts in an indictment [...]”,¹⁰⁶ the PTC¹⁰⁷ on appeal applied Art. 12 of the *ECCC Agreement*.

According to this Article, where

“[...] Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, *guidance may also be sought in procedural rules established at the international level.*”¹⁰⁸

Thus, the PTC followed the international jurisprudence and retained the domestic crimes of torture¹⁰⁹ and premeditated murder.¹¹⁰ The PTC relied on the ICTY Appeal Chamber which held that “[...] *cumulative charging* constitutes the usual practice [...]”,¹¹¹ providing that “[...] *multiple criminal convictions* entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.”¹¹² Interestingly, the International Criminal Court also

¹⁰⁴ A. Heindel, ‘Overview of the Extraordinary Chambers’, in J. D. Ciorciari & A. Heindel (eds), *On Trial: The Khmer Rouge Accountability Process* (2009), 103.

¹⁰⁵ Lemonde & Reynaud, *supra* note 102, 145-146.

¹⁰⁶ *Co-Prosecutors v. Kaing Guek Eav alias Duch*, D99/3/42 (Pre-Trial Chamber), Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias Duch, 5 December 2008, para. 86 [PTC Decision on Appeal Against Closing Order in Case 001].

¹⁰⁷ *Ibid.*, paras 41 & 43: The Pre-Trial Chamber decided that it fulfils the role of the Cambodian Investigation Chamber in the ECCC and that it is therefore not bound by the legal characterization given by the Co-Investigating Judges but on the contrary, “[...] empowered to decide on the appropriate legal characterisation of the acts.”

¹⁰⁸ *ECCC Agreement*, *supra* note 3, Art. 12 (1); *ECCC Law*, *supra* note 6, Art. 33 (new) (emphasis added).

¹⁰⁹ *PTC Decision on Appeal Against Closing Order in Case 001*, *supra* note 106, para. 72.

¹¹⁰ *Ibid.*, para. 84.

¹¹¹ *Prosecutor v. Delalic and Others*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 400 (emphasis added).

¹¹² *Ibid.*, para. 412, cited in *PTC Decision on Appeal Against Closing Order in Case 001*, *supra* note 106, para. 59. It seems here that the ECCC Pre-Trial Chamber applied for the charging (pre-trial stage) the test used by the ICTY for the conviction (trial stage), which

held that “[...] as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges.”¹¹³ As the PTC concluded that the domestic offences of torture and premeditated murder were not subsumed by their international equivalent (because they required proof of a materially distinct element),¹¹⁴ it included them in the Amended Closing Order.¹¹⁵

It further stated that

“[the] addition of legal offences at this stage of the proceedings does not affect the right of the Charged Person to be informed of the charges [...] as he will have the opportunity to present his defence on these specific offences during trial.”¹¹⁶

On January 2009, Duch’s Defence filed a Preliminary Objection with the TC alleging that the domestic crimes for which the accused was indicted are time-barred because the applicable limitation period had expired.¹¹⁷

b. The Trial Chamber’s Disagreement on the Suspension of the Limitation Period for Domestic Crimes

In the TC, both national and international judges shared the assumption that any extension of the statute of limitations could only be valid if it was adopted before the expiration of the initial ten-year period.¹¹⁸ They agreed that

results in confusion. ICTY judges indeed, unlike ECCC judges, may not change the characterization of the crime as set out in the Indictment. Cumulative charging appears therefore essential at the ICTY, as “[...] it is not possible to determine to a certainty which of the charges brought against an accused will be proven [...]”, *Prosecutor v. Delalic and Others*, IT-96-21-A, Appeal Judgment, 20 February 2001, para. 400.

¹¹³ *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC, Decision Pursuant to Art. 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424 (Pre-Trial Chamber II, 15 June 2009), para. 202. However, ICC judges, like ECCC judges, may recharacterise the crimes at trial. The ICC Pre-Trial Chamber thus held that “[...] before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber [...]”, *ibid.*, para. 203.

¹¹⁴ *PTC Decision on Appeal Against Closing Order in Case 001*, *supra* note 106, para. 85.

¹¹⁵ *Ibid.*, para. 99 (for the domestic crime of torture) & para. 103 (for premeditated murder).

¹¹⁶ *Ibid.*, para. 106.

¹¹⁷ *TC’s Decision on the Statute of Limitations of Domestic Crimes in Case 001*, *supra* note 85, para. 1.

¹¹⁸ *Ibid.*, para. 8 (conversely).

many national legislatures may have suspended or interrupted the limitation period in the aftermath of national instability.¹¹⁹ For instance, they cited the 12 May 1950 French Law which amended the 29 March 1942 Law Concerning the Lapse of Public Prosecution and Sentences¹²⁰ and suspended the limitations period for the duration of the Second World War.

In their decision, the judges had to determine whether the limitation period of the relevant domestic crimes may have been suspended or interrupted, so that it was not extinguished in 2001, when Art. 3 of the ECCC Law was enacted. But the judges disagreed on the practical application of the conditions of suspension or interruption in the case of Cambodia. Although the judges unanimously decided that there was no legal or judicial system in Cambodia, and no possible criminal investigations or prosecutions between 1975 and 1979,¹²¹ they “[...] failed to reach agreement on whether [...] the applicable limitation period was interrupted or suspended between 1975 and 1993 [...]”.¹²² Cambodian and international judges thus issued separate opinions.

National judges considered particularly that while some trials were conducted during this period, the national judicial capacity was severely impaired before 1993 due to its destruction during the Democratic Kampuchea regime.¹²³ According to them, the limitation period applicable to national crimes therefore started to run on 24 September 1993 with the promulgation of the Constitution of the Kingdom of Cambodia.¹²⁴ On their side, international judges recognized that the Cambodian judicial system was “[...] severely weakened and compromised [...]”¹²⁵ between 1979 and 1993 but they were not convinced that “[...] no prosecution or investigation would have been possible[...]”¹²⁶ They added that it was “[...] not apparent [...] that the promulgation of the Constitution restored to the Cambodian justice system the objective capacity to investigate or prosecute, or eradicate [its] various systemic weaknesses [...]”.¹²⁷ The international

¹¹⁹ *Ibid.*, Opinion of Judges Nil Nonn, Ya Sokhan, Thou Mony, para. 17 & Opinion of Judges Silvia Cartwright & Jean-Marc Lavergne, para. 27.

¹²⁰ *Loi du 29 mars 1942 relative à la prescription de l'action publique et des peines* (unofficial translation in the text).

¹²¹ *TC's Decision on the Statute of Limitations of Domestic Crimes in Case 001*, *supra* note 85, para. 14.

¹²² *Ibid.*, para. 14.

¹²³ *Ibid.*, Opinion of Judges Nil Nonn, Ya Sokhan & Thou Mony, para. 19.

¹²⁴ *Ibid.*, para. 25.

¹²⁵ *Ibid.*, Opinion of Judges Silvia Cartwright & Jean-Marc Lavergne, para. 32.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, para. 34.

judges did not consider themselves in the position “[...] to conclude that the Cambodian legal system was objectively incapable of launching investigations or prosecutions prior to 1993 [...]”.¹²⁸ They concluded that the limitation period had expired before the adoption of Art. 3 in 2001,¹²⁹ adding that there was “[...] no provision of national or international law to support the interpretation of Art. 3 (new) of the ECCC Law as a permissible reinstatement of the right to prosecute the Accused for these crimes.”¹³⁰

The judges were split three to two, and the absence of a supermajority barred the TC from convicting Duch for domestic crimes.¹³¹ According to Art. 14 (new) of the ECCC Law, indeed, “[...] a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges”. In the absence of supermajority, the TC held itself “[...] unable to consider the guilt or innocence of the Accused with respect to domestic crimes [...]”¹³² but its decision left open the possibility of charging the other accused with domestic crimes.¹³³

3. The Validity of Article 3 (new) Raised in *Case 002*

The CIJs decided to charge the accused in *Case 002* with domestic crimes¹³⁴ despite finding themselves in a “procedural stalemate”, as they were unable to agree on the limitation period.¹³⁵ They chose not to make use of the procedure provided by Art. 23 (new) of the ECCC Law. According to this provision, in case of disagreement between them, either judge may bring the disagreement before the PTC to settle.¹³⁶ Instead, they stated that

“[...] taking into account their obligation to make a ruling within a reasonable time [...] they have decided by mutual agreement to

¹²⁸ *Ibid.*, para. 35.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*, para. 54.

¹³¹ *Ibid.*, para. 56.

¹³² *Ibid.*

¹³³ T. Pettay & K. Lampron, ‘A Partial Victory for Fair Trial Rights at the ECCC with the Decision on the Statute of Limitations on Domestic Crimes’, available at <http://www.internationallawbureau.com/blog/wp-content/uploads/2011/11/A-Partial-Victory-for-Fair-Trial-Rights-at-the-ECCC-with-the-Decision-on-the-Statute-of-Limitations-on-Domestic-Crimes.pdf> (last visited 8 July 2015), 7.

¹³⁴ *OCIJ Closing Order in Case 002*, *supra* note 38, para. 1574-1576.

¹³⁵ *Ibid.*, para. 1574.

¹³⁶ ECCC Law, *supra* note 6, Art. 23 (new); *ECCC Agreement*, *supra* note 3, Art. 7.

grant the Co-Prosecutors' requests, leaving it to the Trial Chamber to decide what procedural action to take regarding crimes in the Penal Code 1956.¹³⁷

Two Defence teams appealed their decision, arguing that Art. 3 (new) violates the principle of non-retroactivity.¹³⁸

The PTC decided that the ECCC had subject-matter jurisdiction over domestic crimes,¹³⁹ holding first that the application of Art. 3 (new) does not violate the principle of non-retroactivity.¹⁴⁰ According to its judges, the ten-year statute of limitations had not expired when Art. 3 (new) was enacted as it had been suspended or interrupted due to a poorly functioning judiciary.¹⁴¹ The PTC added that although the CIJs did not explicitly state the facts and modes of liability for the charges of domestic crimes in the Closing Order, this lack of specification did not prevent the accused from being sent to trial for such crimes.¹⁴² It considered that "[whether] the facts stated in the indictment can actually be characterised as [domestic crimes] [...] under the 1956 Penal Code is ultimately a question of legal characterisation that is to be determined by the Trial Chamber [...]".¹⁴³

The Defence teams filed Preliminary Objections with the TC on the validity of Art. 3 (new).¹⁴⁴ The TC, unlike the PTC, decided that the Closing Order's insufficiency in setting out the facts and modes of liability to support

¹³⁷ *OCIJ Closing Order in Case 002*, *supra* note 38, para. 1574.

¹³⁸ *IENG Sary's Appeal against the Closing Order*, *supra* note 92, paras. 158-173; *Case of Nuon Chea and Others*, D427/2/1 (PTC), IENG Thirtieth Defence Appeal from the Closing Order, 18 October 2010, para. 77.

¹³⁹ *Case of Nuon Chea and Others*, D427/1/30 (PTC), Public Decision on IENG Sary's Appeal against the Closing Order, 11 April 2011, para. 76 [PTC Decision on Appeal Against Closing Order in Case 002].

¹⁴⁰ *Ibid.*, para. 285.

¹⁴¹ *Ibid.*, paras. 286-287.

¹⁴² *Ibid.*, para. 294.

¹⁴³ *Ibid.*, para. 296.

¹⁴⁴ *Case of Nuon Chea and Others*, IENG Thirtieth Defence's Preliminary Objections, E44 (TC), 14 February 2011; *Khieu Samphan's Preliminary Objections Concerning Termination of Prosecution (Domestic Crimes)*, E47 (Trial Chamber), 14 February 2011; *Nuon Chea's Consolidated Preliminary Objections*, E51/3 (Trial Chamber), 25 February 2011; *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 (TC), 25 February 2011.

domestic crimes resulted in its inability to try domestic crimes in *Case 002*.¹⁴⁵ It decided further that it was “[...] unnecessary [...] to otherwise determine the applicability of domestic crimes before the ECCC.”¹⁴⁶ The TC has thus ruled out the possibility of taking another decision on the validity of Art. 3 (new), leaving open again the possibility of charging the next accused with domestic crimes at the ECCC. The respective positions held by the national and international TC’s judges in *Case 001* may also have remained unchanged in *Case 002*. The decision of the TC, on that matter, would consequently have stayed the same. However, as long as the judges disagree regarding the suspension of the limitation period, the validity of Art. 3 (new) will remain uncertain.¹⁴⁷

D. Conclusion

Cambodia adopted a moderate dualist approach regarding the application of international law within its domestic legal framework. This means that the *ECCC Agreement* should apply to Cambodia through the ECCC Law. However, although the 2004 Amended ECCC Law is not as detailed as the *ECCC Agreement* and some of its provisions are controversial regarding international standards, the Law has not been changed yet. However, thanks to the decisions of the ECCC judges on the application of the Law, these discrepancies were smoothed out. In deciding how such provisions should apply, the judges have allowed the *ECCC Agreement*’s provisions and international standards to be accurately implemented. Even if they did not explicitly use it, the judges may have been influenced by Art. 12 of the *ECCC Agreement*.¹⁴⁸ Drawing inspiration from the international practice, they managed to solve the problems caused by the litigious provisions of the Law on the ECCC’s subject-matter jurisdiction. The scope of Art. 12 has thus gone beyond the sole procedural rules, applying also to substantive provisions.

¹⁴⁵ *Case of Nuon Chea and Others*, E122 (TC), Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), 22 September 2011, para. 15, 22.

¹⁴⁶ *Ibid.*, para. 23.

¹⁴⁷ On 3 March 2015, the ECCC international CIJ charged two accused in *Case 003* and *Case 004* of homicide as a violation of the 1956 Cambodian Penal Code. To date, however, the arrest warrants issued by the international CIJ have remained without effect, see *Statements of the International Co-Investigating Judge regarding Case 003 and Case 004*, available at <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-meas-muth-absentia-case-003> & <http://www.eccc.gov.kh/en/articles/international-co-investigating-judge-charges-im-chaem-absentia-case-004> (last visited 18 July 2015).

¹⁴⁸ See Sec. B.II.2.a.

However, the judges' power in the interpretation of the rules has significant limitations due to the particular hybrid structure of the Chambers. The application of the Law's provisions is dependent on reaching a consensus among the international and national judges. If the judges' decisions do not get the required supermajority, the fate of these provisions is negated.¹⁴⁹ This not only slows down the process of justice started by the ECCC but may also annihilate it, by preventing any substantial decisions from being taken, thereby creating a significant detriment to the victims of the Khmer Rouge regime.

¹⁴⁹ To date, no decision on the validity of Art. 3 has been taken yet.