

MEMORANDUM

TO: Judges of the Trial Chamber, Extraordinary Chambers in the Courts of Cambodia

FROM: Margarita Clarens, Legal Volunteer, Documentation Center of Cambodia

DATE: February 16, 2009

RE: Extending the Statute of Limitations for Cambodian National Crimes Tried before the Extraordinary Chambers and the Implications of *Ex Post Facto*

I. Introduction

The Extraordinary Chambers in the Courts of Cambodia (ECCC) is mandated with the prosecution of both Cambodian and international crimes. To this end, Article 3 of the Law Establishing the ECCC explicitly brings within the Court's jurisdiction certain conduct criminalized under the Cambodian Penal Law of 1956. Though felonies under the Penal Code are subject to a ten year statute of limitations (SOL), Article 3 extends the limitations period by thirty years. Because the ECCC's jurisdiction applies only to crimes committed between 1975 and 1979, this extension raises questions of retroactive—or *ex post facto*¹—lawmaking.

It is a generally accepted principle of international law that applying a criminal law retroactively is prohibited.² The International Covenant on Civil and Political Rights states,

¹ *Ex post facto* is the Latin expression meaning “after the fact.”

² See, e.g., UNIVERSAL DECLARATION OF HUMAN RIGHTS, art. 11, ¶ 2 (“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”); EUROPEAN CONVENTION ON HUMAN RIGHTS, art. 7, ¶¶ 1-2 (“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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence

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. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.³

A law, therefore, is prohibited if it is “made after the doing of the thing to which [that law] relates, and retroact[s] upon it.”⁴ Various countries have incorporated the prohibition of retroactive lawmaking into their constitutions.⁵ This general acceptance reflects the view that the principle of *ex post facto* ensures fundamental fairness and protects against “improperly motivated or capricious crimes.”⁶

National courts have unequivocally held that the limitations period for a crime may be extended prior to its expiration without implicating retroactive lawmaking. Alternatively, the ability to extend the limitations period once a crime is time-barred is contentious, drawing a split in legal authority. Thus, with respect to Cambodia’s decision to extend the SOL for national crimes, three questions arise. The first question is whether the limitations period for crimes committed during the Khmer Rouge regime had finished running when the ECCC Law was passed. Because the Cambodian court system was inoperable during period following Khmer

was committed. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.”); AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, art. 7, ¶ 2 (“No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”).

³ International Covenant on Civil and Political Rights, Article 15, ¶ 1.

⁴ William Winslow Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 U. CHI. L. REV. 539, 539 (1947).

⁵ See, e.g., U.S. Const. art. 1, § 9, cl. 3.

⁶ Eric Kobrick, *Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1515, 1516 (1987).

Rouge rule, the limitations period, arguably, was suspended and had not finished running when the ECCC Law was passed. Second, if the Court finds that the limitations period had indeed run, the question is whether reviving it would violate *ex post facto*, and thus international law. Finally, assuming that the limitations period expired and that reviving the law would be a violation of *ex post facto*, the third question is whether there are other considerations that would provide a compelling justification, notwithstanding the statute of limitations, to prosecute those most responsible for the Khmer Rouge atrocities for violations of Cambodian law.

II. The Running of the Statute of Limitations for National Crimes

The limitations period for felonies under the 1956 Cambodian Penal Code is ten years, and the crimes within the jurisdiction of the ECCC⁷ were committed between 17 April 1975 and 6 January 1979. Thus, if the statute of limitations began to run on 6 January 1979 for acts in violation of the Penal Code during the Khmer Rouge regime, those crimes would become time-barred on 6 January 1989. However, various factors may serve to suspend, or “toll,” the period of limitations. Tolling refers to an interruption in the running of a statute of limitations. The time during which the SOL is tolled does not count in calculating the date after which a prosecution becomes time-barred. The efforts of national courts to prosecute crimes subject to an SOL indicate that tolling may take place when the court system responsible for prosecution cannot function⁸ or when the acts of the defendant make prosecution impossible.⁹

⁷ The national crimes governed by the Penal Code and falling within the ECCC’s jurisdiction are murder, torture and religious persecution.

⁸ See Robert A. Monson, *The West German Statute of Limitations on Murder: A Political, Legal, and Historical Exposition*, 30 Am. J. Comp. L. 605, 610 (1982).

⁹ See *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006).

In the wake of the Nazi atrocities, for instance, West Germany sought to prosecute various individuals not tried at Nuremberg with murders committed prior to 1945. As a consequence, in 1965, the West German government was faced with a similar problem to that faced currently by the ECCC. The twenty-year statute of limitations for murder, which they determined had begun to run in May of 1945, was set to expire. However, at that time the courts and prosecutors were not prepared to bring charges against any of the potential defendants. In response, therefore, in March 1965 the Parliament decided that because “German courts had been incapacitated from 1945 to 1949,” the limitations period did not begin to run until 31 December 1949.¹⁰ Germany, thus, tolled the statute of limitations for 4.5 years.

Tolling an SOL because of the impossibility of trial is not a novel concept. In the United States, for instance, “case law on equitable tolling in the context of ATCA [Alien Tort Claims Act] and TVPA [Torture Victim Protection Act] cases . . . is very permissive.”¹¹ In particular, U.S. courts have found that statutes of limitations should be tolled “where (1) defendant’s wrongful conduct prevented plaintiff from asserting the claim or (2) extraordinary circumstances outside the plaintiff’s control made it impossible to timely assert the claim.”¹² Further, during the American Civil War, the U.S. Supreme Court upheld a statute tolling all criminal and civil

¹⁰ Monson, *supra* note 6, at 610. Importantly, Germany’s decision to toll the SOL was, in part, due to the fact that Germany was unsure if it could extend the limitations period because of its constitutional prohibition of *ex post facto* laws. *Id.* In 1969, Germany passed a law abolishing the SOL for murder altogether.

¹¹ Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INTL L. 211, 293 (2005).

¹² Nat’l Coalition Gov’t of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 360 (C.D. Cal. 1997). U.S. courts have found equitable tolling appropriate where the plaintiff could not collect evidence due to the civil war in El Salvador, *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006) and during the time that the defendant, a nation, was protected by sovereign immunity, *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68-69 (D.D.C. 1998).

statutes of limitation.¹³ Justice Breyer, in 2003, reflected on this decision, stating that “the Court could have seen the relevant statute as ratifying a pre-existing expectation of tolling due to wartime exigencies, rather than as extending limitations periods that had truly expired.”¹⁴ In short, the SOL only becomes operable when the trials become possible.

Other countries have taken similar measures. In the early 1990s, Romania tolled the statute of limitations for the crime of murder throughout “the duration of Communist rule, thus allowing prosecutions for the murder of dissidents during the 1950s and 1960s.”¹⁵ The Czech Republic did the same. The Czech Constitutional Court reasoned, in an advisory opinion, that the defendants could not benefit from the statute of limitations when they were themselves responsible for failure of the Communist regime to try them for their crimes in a timely manner.¹⁶ The Court stated that the SOL is only applicable “[i]f there has been a long-term interaction of two elements: the intention and the efforts of the state to punish an offender and the on going danger to the offender that he may be punished, both giving real meaning to the institution of the limitation of actions.”¹⁷ Thus the Court held that the limitations period would not begin to run until 1989 when, upon the fall of the Communist regime, the prosecution of Communist officials finally became a possibility, and “the prosecutorial system was [no longer]

¹³ *Stewart v. Kahn*, 11 Wall. 493 (1871).

¹⁴ *Stogner v. California*, 539 U.S. 607, 620 (2003).

¹⁵ NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 64 (1995).

¹⁶ RUTH A. KOK, *STATUTORY LIMITATIONS IN INTERNATIONAL CRIMINAL LAW* 199-200 (2007) (citing Czech Republic, Czech Republic Constitutional Court, Decision on the Act on the illegality of the Communist Regime, 21 December 1993).

¹⁷ *Quoted in* David Robertson, *A Problem of Their Own, Solution of Their Own: CEE Jurisdiction and the Problems of Lustration and Retroactivity*, in *SPREADING DEMOCRACY AND THE RULE OF LAW?* 73, 85-86 (Adam Czarnota et al. eds. 2006). Along with the “intention” and the “effort” on the part of the state, it may be appropriate to add that the state have the “opportunity” and “possibility” to, in fact, punish the offender.

inoperative.”¹⁸ Ultimately, the possibility of prosecution for criminal offenses is an indispensable prerequisite for the running of the limitations period.

This approach, however, is not universal. Hungary, for instance, in a post-Communism situation similar to the Czech Republic, refused to prosecute individuals for crimes whose limitations period had expired. The Hungarian Constitutional Court focused on the principle of legal certainty and the importance of the rule of law in legitimizing the newly democratic government. Scholars also suggest that the difference in the Hungarian and Czech approaches was due largely to the severity of repression felt by the two countries, with Hungary experiencing a less repressive Communist regime than the Czech Republic.¹⁹

Circumstances in Cambodia can similarly be evaluated to determine when the statute of limitations should begin to run for national crimes within the jurisdiction of the ECCC. The ECCC may look to factors such as the destruction of infrastructure in Cambodia, including the Court system, the extermination of all but a handful of lawyers and judges, and the continued civil war that plagued the country for decades after the fall of the DK. Further, the Court must consider that the damage to the country’s judicial infrastructure was of a magnitude that could not and was not foreseen by the drafters of the 1956 Penal Code. By destroying the means of justice, the Khmer Rouge undermined the intent of the statute of limitations, which is, *inter alia*, to limit the amount of time a person must live in trepidation of prosecution.

Ultimately, if the Court finds that the SOL was suspended because the prosecution of the Khmer Rouge was impossible, then issues of *ex post facto* would not threaten the legitimacy of lengthening the SOL by thirty years. Simply, the SOL would not have finished running upon the enactment of the Law Establishing the ECCC.

¹⁸ KOK, *supra* note 13, at 200.

¹⁹ See KOK, *supra* note 13, at 210.

III. Implications of the Prohibition of Retroactive Lawmaking on Extending the Statute of Limitations

Alternatively, the Court may hold that the SOL did, indeed, finish running. Under such a circumstance, the question becomes whether extending the SOL violates the prohibition of retroactive lawmaking.

In 2003, the United States Supreme Court in *Stogner v. California* held by a vote of 5 to 4 that the retroactive extension of a statute of limitations for a time-barred offense violates the *Ex Post Facto* Clause of the U.S. Constitution.²⁰ The analysis drew on a case from 1798, *Calder v. Bull*, in which Justice Chase defined the *ex post facto* prohibition within American jurisprudence. The *Calder* Court found that the prohibition of *ex post facto* invalidates four categories of laws:

- 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2d. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.²¹

The Supreme Court held that a law extending a SOL falls within the second of these four categories, namely a “law that aggravates a crime, or makes it greater than it was, when committed.”²² The Court further suggested that an alternative finding would be antithetical to the principle of fair warning. Quoting Judge Learned Hand, the Court stated that “extending a

²⁰ *Stogner v. California*, 539 U.S. 607 (2003).

²¹ *Calder v. Bull*, 3 Dall. 386, 390-91 (1798) (*quoted in Stogner*, 539 U.S. at 612).

²² *Calder*, 3 Dall. at 390-91.

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.’”²³

Of the nine justices, however, four disagreed. Justice Kennedy reasoned that “[a] law which does not alter the definition of the crime, but only revives prosecution does not make the crime ‘greater than it was, when committed.’”²⁴ The *Ex Post Facto* Clause, the dissent found, should be read narrowly, not unnecessarily expanding the categories.²⁵ Kennedy further looked to the influential commentaries of Joel Prentiss Bishop who “concluded that a law reviving expired prosecution ‘is not within any of the recognized legal definitions of an *ex post facto* law.’”²⁶ Bishop reasoned,

The punishment which it renders possible, by forbidding the defense of lapse of time, is exactly what the law provided when ‘the fact’ transpired. No bending of language, no supplying of implied meanings, can, in natural reason, work out the contrary conclusion. . . . The running of the old statute had taken from the courts the right to proceed against the offender, leaving the violated law without its former remedy; but it had not obliterated the fact that the law forbade the act when it was done, or removed from the doer’s mind his original consciousness of guilt.²⁷

The split in the United States Supreme Court outlines the two lines of reasoning regarding revival of time-barred offences: on the one hand, fair warning dictates against revival, while on the other, plain text analysis reveals that there is no injustice under the principles of *ex post facto* in extending an expired SOL.

Applying this decision in the international context, it is important to note that the four categories outlined in the 1798 *Calder* decision are more expansive than comparable international documents. As noted above, the *ex post facto* provision of the International

²³ *Stogner*, 539 U.S. at 611.

²⁴ *Id.* at 633 (Kennedy, J., dissenting).

²⁵ *Id.* at 635.

²⁶ *Id.* at 639 (citing Joel Prentiss Bishop, COMMENTARIES ON THE LAW OF STATUTORY CRIMES § 266 (rev. 3d ed. 1901)).

²⁷ *Id.*

Covenant on Civil and Political Rights prohibit (1) finding a person “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,” and (2) imposing a heavier penalty “than the one that was applicable at the time when the criminal offence was committed.”²⁸ However, the majority in *Stogner* decision found that retroactive extension of a SOL was prohibited by category two, prohibiting any “law that aggravates a crime, or makes it greater than it was, when committed,” which, interestingly, is not clearly incorporated into international law.

Other countries have also ruled on the validity of extending a limitations period after it has expired. German constitutional law has been found to forbid such extensions.²⁹ Hungary has also refused to extend expired limitations periods on account of the *ex post facto* prohibition.³⁰ In reaching its decision, the Hungarian Constitutional Court focused on the principles of certainty, security, notice and repose.³¹ Though not explicitly ruling on the question, various countries, such as the Netherlands, have recently abolished statutes of limitation for murder and other grave crimes, but have only applied the new laws prospectively so as not to run into *ex post facto* problems.³²

Ultimately, whether the ECCC judges take a textual or principled approach to this question will determine whether the SOL provision in the Establishing Law is valid under international law. In determining which approach to take the Judges should consider the

²⁸ See International Covenant on Civil and Political Rights, Article 15, ¶ 1.

²⁹ Monson, *supra* note 6, 610.

³⁰ Ruti Teitel, *Transnational Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2008, 2022-23 (1997) (citing Constitutional Court of the Hungarian Republic Resolution No. 11/1992 (111.5))
CONST. L. E. & CENT. EUR. 129, 138 (1994)).

³¹ *Id.*

³² See KOK, *supra* note 13, at 289.

appropriateness of adopting the principles cited by other jurisdiction for denying SOL extension, such as certainty and repose, in light of the mandate of the ECCC and the circumstances leading to its establishment.

IV. “The Rule of Law Understood as Predictability Versus the Rule of Law Understood as Substantive Justice”³³

The ECCC may determine that circumstances specific to the Cambodian experience provide compelling reasons to put aside technical legal protections and proceed, regardless, with the prosecution of the time-barred national crimes.

The rationale behind statutes of limitations is two-fold. First, SOLs are enacted to curb state penal power and to provide individuals, after a time, with repose, secure in the knowledge that the state will no longer come after them and that they no longer must horde exculpatory evidence. This also reflects the state’s diminished interest over time in prosecuting the individual.³⁴ Second, SOLs are necessary from a practical evidentiary prospective. Particularly, there comes a time when collecting evidence to prove a case is too difficult. Subsequently, as memories fade and documents are lost, issues of reliability are brought into question.³⁵

However, SOLs are not fundamental human rights, nor are they universally accepted.³⁶ They are criticized as formalized impediments to substantive justice.³⁷ Moreover, many

³³ Teitel, *supra* note 19, at 2023 (describing the Constitutional Court of Hungary’s characterization of the SOL retroactivity dilemma).

³⁴ See J. Anthony Chavez, *Statutes of Limitations and the Right to a Fair Trial*, 10 CRIM. JUST. 2, 2-3 (1995).

³⁵ See *id.* at 3; Martin Clausnitzer, *The Statute of Limitations for Murder in the Federal Republic of Germany*, 29 INT’L & COMP. L.Q. 473, 474 (1980).

³⁶ Indeed, England does not impose statutes of limitations. See KOK, *supra* note 13.

³⁷ *Id.*

countries have abolished limitations periods for murder and other violent crimes, and SOLs do not exist for international crimes.³⁸ Indeed, during the debates in 1964 regarding statutory limitations and crimes against humanity committed by the Nazis in France, reporter Coste-Floret said the following to the French National Assembly:

[T]he justification for the doctrine of prescription, the disappearance of evidence and the principle of “forgive and forget” simply do not apply. First, evidence had become more – not less – abundant in the twenty years since the liberation, as archives were unearthed and witnesses came forward. Second, the crimes committed were of a gravity not to be pardoned or forgotten – *le temps n’a pas de prise sur eux*.³⁹

In this view, the nature and egregiousness of mass crimes, such as those committed by the Nazis, outweigh the protections afforded by a SOL.

The statement by the French reporter in 1964 is very relevant today as Cambodia seeks to prosecute the crimes of Khmer Rouge. In the end, the judges of the ECCC must balance the need to ensure procedural justice with the need to deliver substantive justice to the people of Cambodia. The fundamental values that are critical to Cambodia and that will be reflected by the tribunal will be theirs to debate and determine.

V. Conclusion

The ECCC will be able to exercise its jurisdiction over national crimes committed in violation of the 1956 Penal Code if (1) the statute of limitations is tolled because of the Khmer Rouge’s complete destruction of the Cambodian justice system; (2) the Court finds that the SOL has run but adopts a textual analysis of the prohibition of *ex post facto* lawmaking, finding that

³⁸ *See id.*; ICC Statute, art. 29.

³⁹ KOK, *supra* note 13, at 1 (quoting France, *Journal Officiel de la Republique Francaise Assemblée Nationale*, session of 17 December 1964, p. 66143).

the extending a SOL does not violate the internationally recognized right; and (3) the Court decides that regardless of the SOL, compelling values require that the Khmer Rouge be brought to substantive justice.