C221/1/35

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE PRE-TRIAL CHAMBER

Criminal Case File No.: 002/19-09-2007-ECCC/OCIJ (PTC 03)

Filed to : The Pre-Trial Chamber

Submitting Date : 19 May 2008

Party Filing : Co-Lawyers for the Civil Parties

Language : Original in Khmer and English

Type of Document : Public

Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order

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I. Procedural Background

1. On the 14th of November 2007 the Office of the Co-Investigating Judges *("OCIJ")* issued the Provisional Detention Order *("PDO")*.[1]
2. On the 15th of January 2008 the Co-Lawyers of the Charged Person filed the appeal[2] against the PDO and discussed therein only the OCIJ's findings under Rule 63 (3) (a) and (b).
3. On the 3rd of March 2008[3] the Pre-Trial Chamber *("PTC")* instructed the Charged Person through his Co-Lawyers to file submissions to Jurisdictional Issues raised by the OCIJ in paragraphs 5-14 of the PDO.[4]
4. On the 7th of April 2008 the Defence filed "Ieng Sary's limited submissions on Jurisdiction"[5] *("Submission")*.
5. The PTC ordered[6] the Civil Parties to file their response within 15 days after notification of the order. The Co-Lawyers for the Civil Parties received the order on the 30th of April 2008. The Civil Parties' Co-Lawyers herewith submit a joint response to the Appeal.

II. Summary of the Arguments

6. The principle of *ne bis in idem* does not apply on the conviction by the People's Revolutionary Tribunal. Proceedings were not conducted (a) independently, (b) impartially and (c) not in accordance with international standards. As the submission will show it is already sufficient to meet only one of these factors in order to form an exception from the *ne bis in idem*

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[1] *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 14 November 2007, ERN 00153253-00153259, Court Document No. C22

[2] *Case of Ieng Sary* , Case No. 002/19-09-2007-ECCC-OCIJ(PTC 03), Ieng Sary's Appeal Against Provisional Detention Order, 15 January 2008, ERN 00159025, Court Document No. C 22/I/5

[3] *Case of Ieng Sary* , Case No. 002/19-09-2007-ECCC-OCIJ(PTC 03) , Decision on Expedited request of Co-Lawyers of Ieng Sary for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 3 March 2008, ERN 00165305-00165307

[4] See supra note 1

[5] *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ(PTC 03), Ieng Sary's submissions pursuant to the decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues; ERN 00177265-00177280

[6] *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ(PTC03), Directions to Civil Parties on Written Submissions, 30 April 2008, ERN 00184974-00184975, Document No. C 22/I/30

principle. To comply with international standards is a proper value and a safeguard for the accused/convicted person even if it is not proved that the sentence of 1979 was designed to shield the accused from criminal responsibility.

7. Either the Royal Pardon *("RP")* or the Royal Amnesty *("RA")* of 1996 is legal and they do not bind the ECCC. Pursuant to the Constitution of Cambodia, Article 27, merely provides the King the right to grant a pardon. The King exceeded his authority by issuing an amnesty for future prosecution under the Outlawing Law from 1994. He has (only) the power to grant a pardon for convicted persons as an act of mercy. Thus, the pardon in 1996 violates international standards and is therefore likewise unlawful and non-binding before the ECCC.

8. The discretion of the OCIJ has been properly exercised and shows no unreasonable and unsustainable grounds. The Appeal of the Defence shows no error in the detention order.

Pursuant to Rule 63 (3) (a), there are well-founded reasons to believe that the Charged Person is strongly suspected of having committed the crimes detailed in the Introductory Submission. Furthermore, the order of provisional detention is a necessary measure to prevent the Charged Person from interfering with victims and witnesses, to preserve the Public Order, to secure his safety and to ensure his presence in the upcoming trial. The order fulfils the requirements of Rule 63 (3) (b)(i-v).

III. Relevant Facts

9. On the 19th of August 1979 after five days of trial, the Charged Person was convicted and sentenced to death for having committed genocide, by the People's Revolutionary Tribunal[7] *("1979 Trial")*. His property was confiscated, but he was never arrested in connection with these proceedings. The trial was *in absentia.* It was based on the

[7] Judgement of the People's Revolutionary Tribunal, 19 August 1979, U.N. A/34/491, Reproduced in *Letter dated 17 September 1979 from the Permanent Representative of Vietnam to the United Nations addressed to the Secretary-General*, UN Doc **A/34/491** (20 September 1979).

Decree Law No. 1, 15 July 1979[8]. The indictment was dated 1st of August 1979.[9]

10. On the 7th of July 1994 the National Assembly of the Kingdom of Cambodia adopted the "Law outlawing the Democratic Kampuchea Group"[10]. This law granted six months amnesty to those who reintegrated, under the administration of the Royal Government, into the Kingdom of Cambodia in order to end the ongoing war.[11] In its article 6 the leaders of the "Democratic Kampuchea Group" are explicitly excluded from this amnesty.

11. On the 14th of September 1996, the King granted the Charged Person, a *pardon* for the 1979 sentence of death and confiscation of all his properties and an *amnesty* for future prosecution under the "Law outlawing the Democratic Kampuchea Group". [12]

12. On the 6th of June 2003 the United Nations and the Royal Government of Cambodia signed an Agreement[13] with the purpose "[to bring] to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal Law, international humanitarian law and custom and international conventions recognized by Cambodia that were committed during the period from the 17th of April 1975 to the 6th of January 1979." The later implementation of the Agreement in the ECCC Law[14] refers likewise to the same purpose. Thus, the investigations of committed crimes were opened. The Agreement and the ECCC Law determined that the scope of the pardon, dated 14 September

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[8] Howard J. De Nike, John Quigley and Kenneth J.Robinson, Genocide in Cambodia, Documents from the Trial of Pol Pot and Ieng Sary, Philadelphia Pennsylvania 2000, page 45-47
The Decree Law contained an idiosyncratic definition of genocide to fit the particular fact situation, defining genocide as

> the planned mass killing of innocent people, the forced evacuation of the inhabitants of towns and villages, the rounding up of the population and forcing them to labour in physically exhausting conditions, the banning of religious practices, the destruction of economic and cultural institutions and social relations.

[9] See supra 8, page 524
[10] Selection of Laws Currently in Force in the Kingdom of Cambodia, Unofficial Translation, United Nations, January 2002, page 836-839
[11] Art. 5 of the aforementioned Law, supra note 10
[12] Royal Decree, NS/RKT/0966/72, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994 (unofficial translation)
[13] 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 , Article 1, Purpose
[14] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12, amended on 27 October 2004, General Provisions, Chapter I, Article 1

1996, or prior to the enactment of the ECCC Law, "is a matter to be decided by the Extraordinary Chambers".[15]

IV. Ne bis in idem principle

A. Legal basis

13. Article 12 of the Criminal Procedure Code in Cambodia *("CPC")*,[16] states:

> "Res judicata
> In applying the principle of *res judicata,* any person who has been finally acquitted by a court judgement cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification."

The CPC shows in so far a *lacuna* because the *ne bis in idem principle* is not absolute and in the CPC are no exceptions of this principle foreseen. Thus, the guidance has to be found in international law where the scope of the principle is designed.

14. The International Covenant on Civil and Political Rights[17] *("ICCPR")* provides in its Article 14 (7):

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."

15. The Statute of the International Criminal Tribunal for the Former Yugoslavia[18] *("ICTY")*states:

> Article 10 - Non-bis-in-idem
>
> 1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
>
> 2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

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[15] Article 11 of the Agreement, supra note 13 and Article 40 of the ECCC Law, supra note 14
[16] Criminal Procedure Code of the Kingdom of Cambodia, 10 August 2007, Art. 12
[17] International Covenant on Civil and Political Rights, 16 December 1966, Art. 14 (7)
[18] In article 9 of the Statute of the International Criminal Court for Ruanda *("ICTR")* and likewise in the Statute of the Special Court for Sierra Leone *("SCSL"), Art. 9* provides the *ne bis in idem* principle in the same terms as the Statute of the ICTY.

(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.[19]

3. [...]

16. Article 20 of the Rome Statute for the International Criminal Court *("ICC")* provides:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[20]

B. Discussion

17. The principle of *ne bis in idem* is widely[21] recognized internationally, but mainly

[19] Emphasis added
[20] Emphasis added
[21] Treaties with "global" (i.e., not only European) validity are, for instance, the American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 Art, 8, para 4 , the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 30 (1))
Furthermore, the principle appears in the most national Codes or Constitutions
The European Schengen Convention states in Article 54: "A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party."
The European Court of Justice (*"ECJ"*)mentioned in the Hüseyin Gözütök and Klaus Brügge Decision, 11 February 2003, Joined cases C-187/01 a. C-385/01 that there is *necessary implication* that the Member States *have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even if the outcome would be different* if its own national law were applied. (para 33 of the decision)

limited to the national level. With the establishment of the Ad Hoc International Tribunals and the International Criminal Court the traditional non-application on the international level was being questioned.

However, the 1979 sentence is not a foreign conviction but a national Cambodian decision. For the interpretation of the principle *ne bis in idem* and its internationally recognised exceptions, the Statutes of International Tribunals should be taken into consideration.

18. The main legal consequence of the application of *ne bis in idem* in most systems is, according to the principle of recognition, the prohibition (and inadmissibility) of subsequent prosecutions based on the *same facts*.[22]

19. With regard to the meaning of *idem,* most countries define it as the *actual historical event* which was part of the former trial.[23]

Others focus on the identifiable criminal offence(s)[24]. But according to the CPC, which is the applicable law and very clear on this point, it is inadmissible to try somebody for the same facts, only under a different legal qualification. This provision is consistent with other domestic legislation and not in contradiction to international standards.

20. The assertion of the OCIJ[25] that cumulative convictions were possible in relation to the same acts if the concerned person is already finally convicted finds no reference in International Law or Case Law.[26] Cumulative charges are possible in the *same* trial where an act may be summarized under different legal qualifications.

21. The Statutes of ICTY, ICTR and SCSL (Article 10 (2), 9 (2) and 9 (2) respectively) allow a retrial, this time before the International *Ad Hoc* Tribunal, only if the conduct was exclusively treated as "an ordinary crime," the national court did not prosecute diligently, lacked impartiality or independence, or if the court's intervention was devoted to shield the accused against a declaration of international criminal

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[22] Likewise the ECJ in the Case against Leopold Henri Van Esbroeck, C-436/04, 9 March 2006 para 2 of the Summary and 36 of the judgement "offence…must be interpreted ..as identity of the material acts, understood as the existence of a set of facts which are inextricable linked together, irrespective of the legal classification given to them or the legal interest protected"

[23] José Luis de Lacuesta, Concurrent national and international criminal jurisdiction and the principle of 'ne bis in idem General Report, in: Revue internationale de droit pénale 2002, Vol.73, p. 707, para 20, with a comparison of numerous countries

[24] See supra note 22, para 20

[25] Provisional Detention Order, Court Document C22, paras 8 and 9

[26] The cases that are quoted under footnote 3-5 in the PDO refer to other settings.

responsibility. The enumerated exceptions from the principle *ne bis in idem* apply alternately as indicated by the "or" and not cumulatively.

22. With regard to Article 20 (3) (a) and (b) of the ICC Statute the provisions for an exception are as follows: if the other Court shielded the person concerned or – if the trial was not conducted independently or -impartially in accordance with the norms of due process recognized by international law and -were conducted in a manner which was inconsistent to bring the person concerned to justice.

The first exception concerns "sham trials" which serve the purpose of shielding the concerned person.

The second refers to norms of due process which is an objective and measurable characteristic and may be assessed by the ICC. The examination of this circumstance, however, may lead to decisions either way. It may be decided against the accused, if it leads to the conclusion that in this way he was acquitted or too mildly punished. But it may also be decided in his favour, if it leads to the conclusion that he was not given a fair trial, and thus the ICC would be turned into a body for the protection of the basic rights of the accused. [27]

However, the "intent to bring a person to justice" and the "shielding of the concerned person" as subjective facts may be difficult to prove. Even if in the Statute the intent of the trial is connected by an "and" with the other provisions like due process, impartiality or independency the soft criterion of intent has to be secondary.

23. Thus, the 1979 Trial must be examined in-depth, to determine whether the former conviction of the Charged Person is an impediment to the current prosecution or not.

C. The 1979 Trial

24. **Preliminary Remark**

It should be considered that the 1979 trial was the first genocide trial after the 'Tokyo' and 'Nuremberg Trials'.

Despite the 1979 tribunal was set up and it was an achievement to gather some evidences, but this tribunal can not be competent and qualified in situation where a

[27] Dionysios Spinellis, Global Report, The *Ne Bis In Idem* Principle in "Global" Instruments, International Review of Penal Law, 2002 (Vol.73) 1149(1160)

legal system had not been built and no professional judges participating in the process and the circumstances were controversial.

John Quigley as international observer and expert noted: "At the time of the trial, Phnom Penh was a ghost town, having been emptied by the Khmer Rouge. My initial reaction on arriving in Phnom Penh was to wonder why anyone was bothering to hold a trial when so much was needed to restore normal life."[28]

However, the trial provided the opportunity to witnesses and victims (including co-plaintiffs/civil parties) to give moving testimony of their suffering. Despite of the legal shortcomings of the 1979 Trial, "it was the logic of the cold war that determined that its verdict, [and the trial itself][29] would be ignored.[30] Thus, either international engagement or support in the attempt to bring the responsible to court was discernible.

(i) Pursuant to Article 14 (3) (b) of the ICCPR[31], a charged person should "[have] adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his own choosing".

The legal basis of the 1979 Trial was the Decree Law No.1 which was created on the 15th of July 1979; the indictment dated from the 30th of July 1979; the trial started on the 15th of August 1979.[32]

Obviously, adequate time to prepare the defence was not given and it is a violation of the rights of the accused person to have a trial of such seriousness only two weeks after indictment and one month after implementation of the Decree. A serious Defence could not be mounted on such a large case within two respective four weeks.

The Co-Lawyers submit that a fundamental principle, Article 14 (3) (b) was violated.

(ii) According to Decree Law No.25,[33] the Court was composed by 10 "People's Assessors". The 'Presiding Judge' was Keo Chanda, a member of the Cambodian Revolutionary Council and Minister of Propaganda, Culture and Information. Among the (alternating) Judges and Counsellors, several held degrees in law and had practiced

[28] See para 8, page 1
[29] Added by the authors of this submission
[30] "Getting away with genocide?" Tom Fawthrop and Helen Jarvis (2005), page 50 and 51
[31] Article 33 (new) of the ECCC Law refers to Article 14 of the ICCPR
[32] See supra note 8, page 45-47; 463-488; 523
[33] See supra note 8, page 50 -51

prior to the Khmer Rouge regime.[34] But the People's Revolutionary Court was more a Tribunal of the People who represented the different sectors of their society than a real professional Court. For these serious crimes a People's Tribunal, mainly composed by lays is not the appropriate body to implement the Rule of Law.
The composition of the Tribunal already demonstrates that the Court was more a political motivated one than a neutral, independent and impartial Court.

(iii) The 1979 Court was a Court of first and last instance.[35] The right to appeal as laid down e.g. in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms[36] and in other Conventions was violated. Even if the right to appeal is not an absolute right in cases where the highest Court has decided, but in such case the highest Tribunal should be vested only with professional Judges and act in a professional manner.[37] In the present case the person concerned was convicted by a "People's Revolutionary Tribunal" which did not comply with the standards of a professional Court. Therefore, the right to appeal was not granted to the convicted person and violates his rights under the aforementioned Conventions.

(iv)The terms used in the Decree establishing the Tribunal, such as "Pol Pot-Ieng Sary Clique" suggest that the Court was neither impartial nor independent.[38] The term shows precisely the impartiality and prejudice of the People's Revolutionary Tribunal.

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[34] Fair Trial Principles by Khmer Institute for Democracy
http://www.khmerrough.com/pdf/FairTrialPrinciples160606.pdf, page 3, visited on 2 May 2007, 16 pm
[35] See supra note 8, page 523
[36] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) combined with Art. 2 of the Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms(1984) and its article 2: – "Right of appeal in criminal matters states: (1) Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law. (2) This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was following an appeal against acquittal."
The right to appeal is recognized in the ECHR, Protocol 7, Art. 2; ICCPR, Article 14(5)
[37] See supra note 8, page 8 where John Quigley, invited as international expert, experienced in international law and US- American Lawyer on the Genocide Issue concluded: "As of August 1979, no one practiced law in the country, and there were no regular courts. There were non personnel with knowledge of scientific methods of evidence gathering. Moreover, bias against the accused was inevitable in the situation....In 1979 it was not possible to find in Cambodia persons who had not formed a strong opinion about the guilt of Pol Pot and Ieng Sary.
[38] However, it is not unknown that Courts deal with short forms like e.g. in Germany in the 70ies the trials against the "Baader-Meinhof- Bande". These trials were largely criticized for their prejudice.

Thus, the rights of the accused and convicted person to be tried by an impartial and independent court were violated.

(v) The interrogated witnesses were not submitted to a cross-examination. Defence Lawyers made little use of this right. This shows that the Defence was not seriously committed to their duties[39] and were more or less lay figures to give the impression that the trial complied with international standards.

(vi) One of the assessors, a member of the panel of ten that decided the case, had filed a statement as a victim[40], another assessor, a medical doctor, had written a report about the affects of Khmer Rouge policy on the health of children.[41]
These examples show that the bias against the accused and later convicted persons was endemic and that the trial was not at all independent and impartial.

(vii) The 1979 trial was politically motivated in order to gain international recognition for the new regime. Ros Samy a government official, denounced at a reception in China and the United States for "trying by any and all means to shield and aid the remnants of the Pol Pot-Ieng Sary clique with a view to restoring the barbarous regime of genocide in Kampuchea" and that the establishment of the tribunal "places before the Kampuchean people and the peace-loving and progressive forces in the world, a burning issue that will do away with the after effects of the Pol Pot-Ieng Sary clique, and at the same time, prevent the crimes of the Peking expansionists and their like."[42]
Consequently, the 1979 trial was not an independent and impartial trial. Thus, the trial violated international standards of *impartiality* and *independence* and the Charged Person can not refer to this sentence and assert being already convicted. [43]

25. At that time, the 'Presiding Judge' of the 1979 trial, Keo Chanda, held the position of Minister of Information, Press and Culture and Chair of Legal Affairs Committee. On

[39] See supra note 8, page 15
[40] See supra note 8, page 8
[41] See supranote 35
[42] Supra note 8, page 8
[43] Ieng Sary's submission, 7 April 2008, paras 11-25; ERN 00177265- 00177280; Court Document No. C22/I/26

28 July 1979, before the trial started, he gave a press conference[44] and showed clearly how biased he was. The trial was predetermined. To give only a few examples from his speech: "It is clear that the Pol Pot-Ieng Sary clique committed the crime of genocide not only against a particular ethnic group or against a particular social stratum of the population, but against the Kampuchean people as a whole[45]....The Pol Pot-Ieng Sary clique has committed the crime against our whole people"[46]

Likewise, this fact shows that the Trial Chamber was not at all impartial and independent. The general and crucial principle of presumption of innocence as is recognized all over the world was strongly violated.

26. In the light of a biased 'Presiding Judge' another provision seems to be the violation of the right of a defendant to be tried by an impartial and independent court. On the 4th of August 1979 the 'Presiding Judge' Keo Chanda decided the 'Trial Procedure' and issued a statement that "The prosecutor, the accused and the counsel have no right to ask for a change in the composition of the People's Revolutionary Tribunal."[47]

Thus, to object to the 'Presiding Judge' on grounds of interest was already excluded by the 'Trial Procedure' itself.

27. The credibility of witnesses may also be questioned. Some statements include a declaration of loyalty with the government, such as the expressed gratitude for the new government and the troops of liberation. Numerous witnesses used the jargon of the new government. That may suggest the impression that the witnesses wanted to distance themselves from the former regime or/and to set up good relationships with the new government.[48] Thus, it may be that under these circumstances and the 'Cold War' climate particular witnesses "may have embellished facts to strengthen their denunciations".[49]

28. The numerous serious violations of the rights of the accused person leads us to the conclusion that the former trial can not endure. The fundamental principles of being tried by an impartial and independent court were violated.[50]

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[44] See supra note 8, page 47-49; document of the speech of Keo Chanda
[45] See supra note 8, page 48, emphasis added
[46] See supra note 8, page 49, emphasis added
[47] See supra note 8, page 53, provision I.3
[48] See supra note 8, page 15
[49] See supra note 8, page 15
[50] The Civil Party Lawyers express their astonishment to observe the contradiction of the Charged Person who refers on one hand to the 1979 Trial which violates massively the defendant's rights and complains on the other hand the bias by David Boyle and Stephen Heder.

As outlined above[51] International Ad Hoc Tribunals and the ICC provide in their statutes exceptions from the principle *ne bis in idem* in the case where the former trial was not impartial or independent. This provision is not connected with the subjective fact of "intent to shield a person".

The Charged Person can not effectively refer to the former 1979 conviction and rely on the *ne bis in idem* principle.

From this perspective, the question of whether the 1979 conviction covered the same facts as the charges before the ECCC, and the definition of genocide need not be discussed.

V. The Royal Pardon and Amnesty

A. Relevant Law and Definition

29. The Constitution of the Kingdom of Cambodia[52] *("Constitution")* states in Article 27,

> "The King shall have the right to grant partial or complete amnesty."

Article 38 (7) provides:

> "The accused shall be considered innocent until the court has judged finally on the case"

30. The Law to Outlaw the Democratic Kampuchea Group[53] *("Outlawing Law")* provides *inter alia*:

> Article 3
>
> Members of the political party and the military forces of the 'Democratic Kampuchea' group, or anyone who has committed crimes of deliberate murder, rape, plundering people's property, destructing public and private property, etc. shall be condemned according to the existing criminal law.
>
> Article 4
> Members of the political body and military forces of the 'Democratic Kampuchea' group or anyone who committed acts of
> - conducting secession
> - destroying the Royal Government
> - destroying bodies of public power
> - provoking or coercing the citizens to take up weapons against the public authorities,

[51] See paras 15 and 16 of this submission
[52] Constitution of the Kingdom of Cambodia (1993) with amendments (1999), in: A Selection of Laws Currently in Force in the Kingdom of Cambodia, Unofficial Translation January (2002), United Nations
[53] Law on the Outlawing of the 'democratic Kampuchea Group' (1994) in: A Selection of Laws Currently in Force in the Kingdom of Cambodia, Unofficial Translation January (2002), United Nations

shall be deemed as criminals against internal security, and condemned to a term of 20 to 30 years of imprisonment or to a life sentence.

Article 5
After it has been brought to force, this law allows an amnesty of six months for members of the political body or belonging to the military forces of the 'Democratic Kampuchea' group to reintegrate, under the administration of the Royal Government, into the Kingdom of Cambodia, without being charged with offenses they caused.

Article 6
No amnesty of the above type may be given to the leader(s)[MEY DEUK NOAM] of the 'Democratic Kampuchea' group.

Article 7
The King can reduce or offer amnesty according to the rights stipulated in Article 27 of the Constitution.

31. Normally, an *amnesty* is given to alleged offenders before their conviction for a crime whereas a *pardon* is given to those who have been convicted of crimes.
The constitution of the kingdom of Cambodia offers the king a *pardon* as stipulated in Article 27 while Article 90 of the constitution provides the competence of an *amnesty* to the National Assembly.

B. Effectiveness of the 'amnesty' for prosecution under the Outlawing Law

32. Following the meaning for loeklaengtoh, "to lift guilt", and regarding the provision in the Constitution that only a court can state the guilt of a person[54], the power of the King is limited to grant a *pardon* to a person who is already convicted.
Pursuant to Article 27 of the Constitution, the King has no power to declare 'an amnesty' for a potential future prosecution without a preceding conviction.
If the guilt of a person is not determined by a court, which is the only body to state guilt, the King is not allowed to "lift guilt".
Thus, the King exceeded his constitutional power by granting the 'amnesty' for prosecution under the Outlawing Law to the Charged Person.

33. An 'amnesty' which is not legal, is not binding for the ECCC and no impediment for the prosecution.

[54] See Article 38 of the Constitution

34. Assuming that the granted RA was covered by the constitutional power of the King the Co-Lawyers for the Civil Parties submit that an acceptance of the RA had the meaning of impunity.

Since the establishment of International Ad Hoc Tribunals and the ICC, and the broad successful movements, particularly in Latin-America against impunity of Head of States and the most responsible, a general bar to prosecution for the most serious crimes is not longer accepted by the international community.

35. Even to end an ongoing war and to make a peace agreement combined with an amnesty for the former armed forces and combatants, can not include a blanket amnesty for the most responsible.[55]

Moreover, such an amnesty violated international obligations to prosecute serious crimes under international law.

36. On the 18th of March 2004[56] the SCSL rejected amnesty in a landmark decision. The Special Court held that the general amnesty granted in 1999 in the Lomé peace agreement was 'ineffective' in preventing international courts, such as the SCSL, or foreign courts, from prosecuting crimes against humanity and war crimes. The judges mainly drew on the doctrine of universal jurisdiction. They determined that a grant of amnesty falls under the authority of the State exercising its sovereign powers.[57]

However, where a jurisdiction is universal, such a State could not deprive another State of its jurisdiction to prosecute perpetrators by granting amnesty.[58]

The appeals chamber concluded that the crimes in Article 2-4 of its Statute are international crimes, which can be prosecuted under the principle of universality.[59]

Amnesties granted by Sierra Leone, therefore, cannot cover crimes under international law, as they are subject to universal jurisdiction and by reason of the fact that "the obligation to protect human dignity is a peremptory norm and has assumed the nature

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[55] Supported by Daniel Kemper Donovan, 'Joint U.N.-Cambodia Efforts to establish a Khmer Rouge Tribunal'(2003) 44 Harvard International Law Journal 551, 575. He votes for the offer of an amnesty to all lower –level Khmer Rouges members on condition that they tell story of their participation in the atrocities while senior leader should be prosecuted.

[56] *Case against Morris Kallon and Brima Bazzy Kamara*, Decision on Challenge to Jurisdiction: Lomè Accord Amnesty, 13 March 2004, Case No. SCSL -2004-15-AR72(E) and SCSL-2004-16-AR72(E)

[57] Ibid. para 67

[58] Ibid.

[59] Ibid. paras 68, 70

of obligation *erga omnes*."[60] The grant of amnesty for international crimes consequently is not only a breach of international law, "but is in breach of an obligation of a State towards the international community as a whole."[61]

37. The appeals chamber's decision was criticised with regard to the development of international humanitarian law but at least recognized as a landmark decision "towards the abolition of blanket amnesties for mass atrocities".[62]

38. To support these findings it should be noted that Cambodia ratified, before granting the RPA to the Charged Person, the Genocide Convention[63], the four Geneva Conventions[64] with their obligations to prosecute grave breaches[65] and the Convention against Torture[66] which obliges Cambodia as a signatory state much more than non-signatory states to abide by these treaties.

39. Of course in general, amnesty and pardon are recognized as a necessary measure to end an armed conflict, but limited to particular prerequisites, such as the grade of responsibility, the scale and seriousness of the committed crimes[67] and the obligation of States to prosecute grave crimes by international treaties and customary law.

40. The UN Human Rights Committee[68] as well as the Inter-American Commission on Human Rights[69] and the Inter-American Court of Human Rights[70] repeated that

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[60] Ibid para 71
[61] Ibid. Para 73
[62] Simon M. Meisenberg, Legality of amnesties in international humanitarian law The Lomè Amnesty Decision of the Special Court for Sierra Leone, International Review of the Red Cross, 2004, No. 856, page 851 and Phenyo Kreiseng Rakate, Is the Sierra Leonean Amnesty Law Compatible with International Law? MennschenRechtsMagazin 2000, Vol. 3
[63] Convention on the Prevention and Punishment of the Crime of Genocide from 1948, 78 UNTS 277 (entered into force 12 January 1951)
[64] Geneva Convention, ratified 8 December 1958
[65] Art. 146, 147 of the 4th Geneva Convention
[66] Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment, ratified 15 October 1992
[67] Naomi Roht-Arriaza, Transitional Justice and Peace Agreements, International Council on Human Rights Policy, 2005 gives a comprehensive overview about different post conflict solutions and their accordance with international standards
[68] *Inter alia* Report of the Human Rights Committee, General Assembly Forty-ninth Session Supplement No. 40 (A/49/40); page 10;
[69] Inter-American Commission on Human Right, report No. 28/92; 2 October 1992, Cases No. 10.147; 10.181; 10.240; 10262; 10.309; 10.311 declared *inter alia* that Argentina's decree of Pardon No. 1002 which ordered that any proceedings against persons indicted for human rights violations who had not benefitted from the earlier laws be discontinued, is not in accordance with the American Convention on Human Rights and violates the rights of the petitioners, (conclusion)
[70] Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru* Judgement 14 March 2001,para 41-44, "This court considers that all amnesty provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigations and punishment

amnesties are generally incompatible with the duty of States to investigate such acts. [71]

41. These examples show that even if the RA should be interpreted to be within the constitutional authority of the King, it is not in accordance with international standards and is consequently a non-binding instrument before the ECCC.

C. Effectiveness of the 'pardon' for the 1979 conviction

42. The RP has no further meaning if the 1979 decision does not comply with the standards of impartiality and independence of the 'People's Revolutionary Court' and thus, can not hinder the actual prosecution.
The RP which refers to this former conviction has no bearing on the future prosecution and proceedings before the ECCC.

VI. Relevant Law, Rule 63 (3) (b) of Internal Rules

43. Ieng Sary's Appeal Against Provisional Detention Order[72] *("Appeal")*1 is limited[73] on the discussion of the prerequisites of Rule 63 (3) (b) Internal Rules *("IR")*.
Thus, the response by Co-Lawyers for the Civil Parties is likewise directed on the issue if provisional detention is a necessary measure.
Pursuant to Rule 63 (3) (b) IR the Co-Investigating Judges may order the provisional detention of a Charged Person under the following conditions:

> b) The Co-Investigating Judges consider provisional detention to be a necessary measure to:
>
> > (i) prevent the Charged Person from exerting pressure on any witnesses or victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;

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of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

[71] Kai Ambos, Grenzüberschreitungen, 1995, page 335, 336 considered already 1995 (three years before the Rome Statute was set in force) in his comprehensive comparison of amnesty-laws, pardons and acts of mercy in five Latin-American countries that these measures are in contrary to the state's duty to prosecute under international law if grave breaches are concerned.

[72] See supra note 2

[73] See para 5 of the Appeal

(ii) preserve evidence or prevent the destruction of any evidence;

(iii) ensure the presence of the Charged Person during the proceedings:

(iv) protect the security of the Charged Person; or

(v) preserve public order."

VII. Relevant Facts

44. (a) The Defence argues that the release of the Charged Person would not cause any risk to Pubic Order[74] and that the OCIJ did not submit any substantiated grounds, facts or evidence and thus, abused their discretion. The Defence quoted various international bodies[75] to suggest that at the present time Cambodian society is stable.

(b) Likewise, the Defence states that the safety of the Charged Person is not at risk and that he resided until his detention, openly in Phnom Penh, having never been threatened or attacked.[76] The OCIJ did not present any facts or evidence and abused their discretion.[77]

(c) Further, the Defence argues that the Charged Person never before interfered with witnesses, although he knew the establishing process of the ECCC and that the OCIJ failed to demonstrate facts and based their decision on speculative and general assertions.[78]

(d) Concerning the risk to flee the Defence asserts that the OCIJ referred only to abstract perceptions and general assertions such as the possession of a passport and the necessary means to flee and did not submit any facts and evidence,[79] which was an abuse of the discretion.

(e) Additionally, the Defence stated that the conditions in detention, had led to a deterioration in the already fragile health of the Charged Person and he should be put under house arrest.

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[74] See paras 10-15 of the Appeal
[75] See paras 16-19 of the Appeal
[76] See para 24 of the Appeal
[77] See para 25, 26 of the Appeal
[78] See para 31 of the Appeal
[79] See para 33-36 of the Appeal

VIII. Scope of the Appeal and role of the Pre-Trial Chamber

45. The Co-Lawyers for the Civil Parties already comprehensively showed in the response[80] to the Appeal of Ieng Thirith that the Appeal is rather limited. These submissions are hereby incorporated by reference. Thus, the Pre-Trial Chamber may only overturn the OCIJ decision if the Judges erred and abused their discretion and – summarized- if the decision is "logically perverse or evidentially unsustainable".[81]

IX. Argument

46. **a) Public Order and Safety of the Charged Person.**

In so far, the OCIJ arguments are sustainable.

The picture of the today's Cambodian society as depicted by the Defence cannot be shared. The daily experience, e.g. before the upcoming elections in July, shows a tense atmosphere in society.

According to the poverty report, 35 per cent of Cambodian's live on less than 50 US cents per day, (which is a long way from the internationally agreed 1 $-per day poverty line) and that furthermore, chronic corruption remains.[82]

It can be concluded and should be common knowledge that Cambodian society is still fragile. How can Cambodian society gain trust in justice and due process if the Head of Government, who himself served under the Khmer Rouge Regime, warned: "Trial of Khmer Rouge's Ieng Sary would mean war."[83] This happened some days after a bill was unanimously approved by the National Assembly to set up the U.N. assisted tribunal.

The PTC accurately noted in the Nuon Chea Appeal Decision[84] the wide interest in the court hearings, the aggressive reaction against Duch by the public and what it would

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[80] Case of Ieng Thirith, case no. 002/19-09-2007-ECCC/OCIJ (PTC02), Civil Party Co-Lawyers' Joint Submission to the Appeal of Ieng Thirith against the Provisional Detention Order, ERN 00181297-00181310; Court Document no. C20/I/17, paras 6-13

[81] *Prosecutor v. Moinina Fofana,* Case No. SCSL-04-14-AR65, Appeal against Decision refusing bail, 1 March 2005, para 20

[82] 'World Bank head urges Cambodia to tackle corruption', International Herald Tribune, 5 August, 2007

[83] 'Trial of Khmer Rouge's Ieng Sary would mean war: Hun Sen', Asian Political News, 15 January 2001

[84] *Case of Nuon Chea*, case no. 002/19-09-2007-ECCC/OCIJ (PTC01), ERN 00172907-00172934, Court Document no. C1/I/54, Decision on Appeal Against Provisional Detention Order of Nuon Chea

mean to Cambodian society if he (or the other Charged Persons) were to be released.[85] Obviously, the OCIJ's observations about the likelihood that a release would disturb Public Order and be a risk for the safety of the Charged Person are appropriate and far away from an abuse of discretion.

b) Interfering with witnesses

47. The OCIJ Order is justifiable and reasonable. Since the Charged Person has full access to the file and knows the statements of witnesses and their names and addresses The risk is rather high that he will use his influence himself or by thirds to prevent them from testifying. .
The Judges' Decision shows no abuse of discretion.
Furthermore, as the PTC has outlined, a climate of fear to testify dominates.[86] The powerful influence and authority of the Charged Person was and is to this day, still in existence.
The circumstances of his defection in 1996 and his obvious influence on the armed forces of the Khmer Rouge show his power. Activities such as regular visits to Pailin for meetings with 30 government officials to 'tell' them to abstain from armed movement[87] show his authority.

c) The risk of flight

The Defence' objections in this regard show no reason to overrule the OCIJ's Order. The Charged Person's backing in Pailin, the possession of the means to fly and of course the expected life imprisonment if convicted, are reasonable grounds to consider the flight risk.
The argument that the Charged Person did not flee, although he knew about the establishment of the ECCC, does not count for a great deal. The Charged Person, who enjoys a Royal Pardon, and a Royal Amnesty and the support of the Head of

[85] See supra note 79, para 71, 74 77-81
[86] See supra note 79, para 62, 63
[87] "Ieng Sary satisfied with his reconciliation role in Cambodia", Asian Political News, 25 December 2000

Government who commented that he [Ieng Sary] will not be tried, due to his key role in initiating peace and national reconciliation.[88]
Under these circumstances, the Charged Person would not have expected to be detained.

d) State of Health

The Charged Person gets regular medical treatment. The detention is (still) compatible with the state of health.

X. Conclusion

48. The Appeal must fail. The Provisional Detention Order of the OCIJ is reasonable, justifiable and the discretion is properly exercised. The *ne bis in idem* principle does not apply. The Royal Pardon and Amnesty in 1996 are not lawful and thus, non-binding before the ECCC.

For these reasons,

may it please the Pre-Trial Chamber

To declare that the principle of *ne bis in idem* referring to the 1979 trial does not bar the ongoing prosecution and proceedings before the ECCC;

To declare that the Royal Amnesty and Pardon is unlawful and not-binding before the ECCC

To reject the Defence' Appeal

[88] See supra note 82

Respectfully submitted

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Signed the 19th of May 2008.

Phnom Penh, The Hague