E51/11

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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

Party Filing: The Defence for IENG Sary

Filed to: The Trial Chamber

Original language: ENGLISH

Date of document: 27 May 2011

CLASSIFICATION

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

Classification by OCIJ or Chamber: សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

IENG SARY'S SUPPLEMENT TO HIS RULE 89 PRELIMINARY OBJECTION (*NE BIS IN IDEM*)

Filed by:

The Co-Lawyers:
ANG Udom
Michael G. KARNAVAS

Distribution to:

The Trial Chamber Judges:
Judge NIL Nonn
Judge THOU Mony
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge YOU Ottara
Reserve Judge Claudia FENZ

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams

All Civil Parties

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to the Trial Chamber's memorandum entitled "Additional preliminary objections submissions *(ne bis in idem)*,"[1] this supplement to his preliminary objection to the ECCC's jurisdiction based on *ne bis in idem*. This supplement incorporates by reference all previous arguments the Defence has made concerning this issue.[2]

I. INTRODUCTION

1. The Trial Chamber has requested the Defence to limit this supplementary submission to addressing the Pre-Trial Chamber's Decision on IENG Sary's Appeal Against the Closing Order[3] and specifically to address whether the Defence "consider[s] that the 1979 trial by the People's Revolutionary Tribunal was conducted in conformity with basic fair trial standards, including the legal framework upon which it was based."[4]
2. The Pre-Trial Chamber determined that *ne bis in idem* did not prevent Mr. IENG Sary's present prosecution because: **a.** the principle as set out in the Cambodian Criminal Procedure Code ("CPC") only applies to bar new prosecutions in cases where the previous prosecution resulted in an acquittal;[5] **b.** the principle as expressed in the International Covenant on Civil and Political Rights ("ICCPR") has a solely domestic effect and does not apply at the ECCC, which it found to be an "internationalized" tribunal;[6] and **c.** procedural rules established at the international level contain an exception to the principle where the previous trial was not independent or impartial and Mr. IENG Sary's previous trial falls within this exception.[7]
3. This supplementary submission addresses the following issues:
    A. Whether the Pre-Trial Chamber erred in determining that the CPC was inapplicable;
    B. Whether the Pre-Trial Chamber erred in determining that the ICCPR was inapplicable;

---

[1] Trial Chamber Memorandum re: Additional preliminary objections submissions *(ne bis in idem)*, 12 May 2011, E51/9.
[2] *See* pleadings listed in Summary of IENG Sary's Rule 89 Preliminary Objections and Notice of Intent of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4; Transcript – Provisional Detention Hearing – Days 1-4, 30 June 2008 - 3 July 2008.
[3] Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30 ("PTC Decision").
[4] Trial Chamber Memorandum re: Additional preliminary objections submissions *(ne bis in idem)*, 12 May 2011, E51/9.
[5] PTC Decision, paras. 119-24.
[6] *Id.*, paras. 127-31.
[7] *Id.*, paras. 132-75.

C. Whether the Pre-Trial Chamber erred in its consideration of procedural rules established at the international level; and

D. Whether the 1979 trial was conducted in conformity with basic fair trial standards, including the legal framework upon which it was based.

II. ARGUMENT

A. The CPC prevents the current prosecution of Mr. IENG Sary

4. The Pre-Trial Chamber erred in its analysis of the CPC and in determining that the CPC does not bar Mr. IENG Sary's current prosecution. The Pre-Trial Chamber held that the wording "finally acquitted" in Article 12[8] means that this provision cannot apply in Mr. IENG Sary's case because he was not finally acquitted in 1979, but was convicted.[9] The Pre-Trial Chamber found that the ordinary sense of "finally acquitted" in Article 12 does not create any inconsistency with the rest of the CPC and that absent any absurdity or inconsistency, it must adhere to the ordinary sense of Article 12.[10]

5. This interpretation is flawed. First, Article 7 of the CPC states that criminal actions must be extinguished in the case of *res judicata*.[11] *Res judicata* means:

> [Latin 'a thing adjudicated'] 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgement on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties....[12]

Mr. IENG Sary's case is *res judicata*; the present trial deals with an issue which has been definitively settled by a judicial decision in 1979.[13] Article 7 thus prevents the current prosecution of Mr. IENG Sary. As noted by Dutch legal scholars André Klip and Harmen van der Wilt, "The rule of law requires that if the state has initiated prosecution versus one of its citizens that it will respect the outcome of the proceedings. Decisions of

---

[8] Article 12 of the CPC states, "In applying the principle of *res judicata*, any person who has been finally acquitted by a court order cannot be accused once again for the same causes of action, including the case where such action is subject to different legal qualification."

[9] PTC Decision, paras. 122-24.

[10] *Id.*

[11] Article 7 of the CPC states, "Extinction of Criminal Actions. The reasons for extinguishing a charge in a criminal action are as follows: ... 5. The *res judicata*. When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated."

[12] BLACK'S LAW DICTIONARY 1312 (7th ed. 1999).

[13] For a discussion of the finality of the 1979 Judgement, *see* IENG Sary's Reply to the Co-Prosecutors' Joint Response to NUON Chea, IENG Sary, and IENG Thirith's Appeals Against the Closing Order, 6 December 2010, D427/1/23, para. 35.

the court should therefore be respected. If res judicata would not be final, this would undermine the legitimacy of the state."[14]

6. Article 12 does not define *res judicata* for purposes of Article 7 or limit its application. On the contrary, it ensures that the principle of *res judicata* is read broadly to encompass acquittals and situations where an accused is charged with the same causes of action as in a previous case but such action is subject to different legal qualification. It is not necessary to interpret Article 12 in this case, because Mr. IENG Sary's present trial is prohibited based on the broader principle contained in Article 7.
7. Should the Trial Chamber find it necessary to apply Article 12 in conjunction with Article 7, Article 12 must be interpreted to apply to those who have been finally convicted as well as those who have been finally acquitted. The Pre-Trial Chamber considers that reading Article 12 as applying to convicted persons would be inconsistent with other portions of the CPC.[15] This is because certain provisions of the CPC allow proceedings to be reopened in the case of convictions – to review the proceedings in cases of convictions and to allow retrial for trials conducted *in absentia*. The Pre-Trial Chamber believes that applying Article 12 in these situations would "rule out" the possibility of reopening proceedings.[16]
8. The Pre-Trial Chamber's analysis is erroneous. The principle of *ne bis in idem* is intended to protect the accused. It is a right that the accused may invoke. It does not act to his detriment by preventing him from reopening his case where he wishes to invoke a different protection afforded by the CPC. It is thus not inconsistent with other provisions of the CPC which act to protect the interests of the accused. André Klip and Harmen van der Wilt, analyzing Dutch law on *ne bis in idem*, explain: "Theoretically, review ... is not regarded as being related to *ne bis in idem*. The initiative lies with the convicted person and his situation may not get worse as a result of this procedure."[17]
9. Limiting Article 12 to only those who have been finally acquitted would lead to an absurd result. There is no valid basis for distinguishing between those finally convicted and those finally acquitted, especially when considering the purpose of the *ne bis in idem* principle, which applies equally in either case. The *ne bis in idem* principle "has been

---

[14] André Klip & Harmen van der Wilt, *The Netherlands Non Bis in Idem*, 73 REVUE INTERNATIONALE DE DROIT PENAL 1091, 1094 (2002) ("Klip & van der Wilt").
[15] PTC Decision, para. 123.
[16] *Id.*
[17] Klip & van der Wilt, at 1097.

characterised as a corollary of the recognition of the *res judicata* effect of other judgments, aimed at protecting the finality of judgments. The idea is that once a case has been dealt with, it should not be reopened (*factum praeteritum*) as this would seriously undermine respect for judicial proceedings and the judiciary in general."[18] This has been termed the "procedural effect" of the principle of *ne bis in idem*.[19] The need for the ECCC to act as a model court for Cambodia,[20] by adhering to the rule of law and the principle of legality, and to increase respect for the judiciary and judicial proceedings should lead the ECCC to respect and apply the principle of *ne bis in idem*.

10. Another purpose of the *ne bis in idem* principle is to spare an individual from undergoing the psychological, emotional, physical and monetary stress associated with a criminal prosecution twice. This purpose does not only apply when an accused has been acquitted. The anxiety and stress caused by repeated prosecutions affects families, witnesses, and even victims and is likely to be exacerbated by media attention.[21] These purposes of the *ne bis in idem* principle demonstrate that it would be absurd to limit the *ne bis in idem* protection afforded by the CPC to only those who have been finally acquitted.

B. The ICCPR prevents the current prosecution of Mr. IENG Sary

11. The Pre-Trial Chamber erred in its analysis of whether the ICCPR bars Mr. IENG Sary's present prosecution and in its conclusion that it does not. The Pre-Trial Chamber analyzed the application of the ICCPR in the following manner:

    A. First, it found that the Human Rights Committee has held that Article 14(7) "does not guarantee *ne bis in idem* with respect to the national jurisdiction of two or more states" but only prevents double jeopardy with regard to an offense adjudicated in a given State;[22]

---

[18] YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 307-08 (T.M.C. Asser Press 2010) ("NAQVI").

[19] *Id.*, at 292-93.

[20] "The ECCC is designed to be a model for the Cambodian legal and judicial reform." Recommendations Regarding Additional Transparency at the Extraordinary Chambers of the Courts of Cambodia (ECCC) Submitted by members of Civil Society and Members of the Cambodian Press, 24 March 2008, *available at* http://www.cambodiatribunal.org/CTM/Recommendations%20Regarding%20Additional%20Transparency.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e. The Trial Chamber recently reiterated this, stating that the ECCC serves to "encourage and underscore the significance of institutional safeguards of judicial independence and integrity" and that it will ensure that proceedings are "conducted in accordance with international standards." Decision on IENG Sary's Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, paras. 14-15.

[21] NAQVI, at 307.

[22] PTC Decision, para. 128, *quoting A.R.J. v. Australia,* CCPR/C/60/D/692/1996, 11 August 1997, para. 6.4 (emphasis added).

B. Next, it found that the ICTY *Tadić* Trial Chamber observed that Article 14(7) of the ICCPR "has not received broad recognition as a mandatory norm of transnational application;"[23]

C. It concluded that most European states must accept the position that Article 14(7) of the ICCPR does not apply transnationally since the European Convention on Human Rights ("ECHR") explicitly states that the *ne bis in idem* principle applies solely to proceedings within domestic legal orders;[24]

D. It stated that not applying Article 14(7) transnationally can be explained by the fact that a State has no obligation to recognize a foreign judgment unless it has agreed to do so;[25]

E. It noted "that the scope of Article 14(7) is very limited as it applies to the same 'offence', namely the same legal characterization of the acts, while the international protection focuses on the 'conduct' of the accused, thus taking into account for the application of the *ne bis in idem* principle the fact that international proceedings might trigger legal characterisation that differ from the domestic ones";[26]

---

[23] *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 14 November 1995, para. 19.

[24] PTC Decision, para. 128, *citing* Article 4(1) of Protocol No. 7 to the ECHR.

[25] *Id.*, para. 129.

[26] This observation by the Pre-Trial Chamber will not be addressed herein, because the Pre-Trial Chamber did not make its determinations based on this observation. This observation is furthermore immaterial in the present situation as Mr. IENG Sary appears to be currently charged with the same offenses he was convicted for in 1979, although the Defence is prepared to address this in oral argument at the Initial Hearing if necessary. In addition to genocide, in 1979, Mr. IENG Sary was convicted of:

I. Implementation of a plan of systematic massacre of many strata of the population on an increasingly ferocious scale; indiscriminate extermination of nearly all the officers, and soldiers of the former regime, liquidation of the intelligentsia, massacre of all persons and destruction of all organizations assumed to be opposing their regime;

II. Massacre of religious priests and believers, eradication of religions; systematical extermination of national minorities without distinction between opponents and non-opponents, for the purpose of assimilation; extermination of foreign residents.

III. Forcible evacuation of the population from Phnom Penh and other liberated towns and villages; breaking or upsetting of a family and social structures; mass killing and creation of lethal conditions.

IV. Herding of people into 'communes' i.e. disguised concentration camps where they were forced to work and live in the conditions of physical and moral destruction, were massacred or died in large numbers.

V. Massacre of small children, persecution and moral poisoning of the youth, transforming them into cruel thugs devoid of all human feeling.

VI. Undermining the structures of the national economy; abolition of culture, education, and health service.

VII. After their overthrow by the genuine revolutionary forces, the Pol Pot – Ieng Sary clique still persisted in opposing the revolution and committed new crimes in massacring those

F. It found that Article 14(7) of the ICCPR does not apply at the international tribunals;[27] and

G. It referred to its finding that the ECCC is an "internationalized" court and concluded that Article 14(7) does not apply at the ECCC.[28]

12. This analysis is flawed in several respects. First, the present situation does not involve the transnational application of Article 14(7). Second, the ECCC cannot be equated with the ICTY. Finally, even if the present situation could be considered an issue of transnational application, the Pre-Trial Chamber erred in determining that the ICCPR does not apply.

1. This is not an issue of transnational application, even if the ECCC is considered an "internationalized" court

13. The ordinary dictionary definition of "transnational" is "extending or going beyond national boundaries."[29] This is the meaning of the term in the cases referred to by the Pre-Trial Chamber.[30] Mr. IENG Sary's previous trial in 1979 was held in Cambodia by a Cambodian court. Likewise, the ECCC is a court "established in the existing court structure" of Cambodia.[31] There is no issue of going beyond national boundaries in the present situation.

14. Even if the ECCC could be considered "internationalized"[32] because of the international technical assistance it receives and its unique structure, this does not mean that the ECCC is a foreign court of another State. There is thus no "transnational" application of *ne bis in idem* involved. The ECCC has not been requested to recognize a foreign judgment, but a Cambodian one. The "transnational" considerations cited by the Pre-Trial Chamber, i.e. whether the subsequent proceedings occur in a different domestic legal order and whether

---

who refused to follow them. During their four years in power the Pol Pot – Ieng Sary clique have used the most barbarous methods of torture and killing.

See Judgement of the Revolutionary People's Revolutionary Court, U.N. A/34/491, 19 August 1979, p. 3-21.

[27] PTC Decision, para. 130.

[28] *Id.*, para. 131.

[29] Merriam Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/transnational.

[30] *See A.R.J. v. Australia, CCPR/C/60/D/692/1996*, 11 August 1997, para 6.4; *A.P et al. v. Italy*, Communication No. 204/1986, 2 November 1987, para 7.3. While these cases do not define the term "transnational," they considered whether Article 14(7) would apply so that a judgment rendered in one national jurisdiction would be recognized in a second national jurisdiction.

[31] Establishment Law, Art. 2 new.

[32] For an in depth discussion on the status of the ECCC as a domestic court and what the term "internationalized" may mean, *see* IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 8-20. *See also* the forthcoming supplementary submissions the Defence intends to make on this issue in the supplementary submission on the applicability of international law.

a foreign judgement requires recognition, simply do not apply in the specific context of the ECCC.

15. The ECCC acquired its jurisdiction and competence in the same way as other Cambodian courts – through domestic Cambodian law. It is not in a "vertical" relationship to other Cambodian courts,[33] even though its Chambers may be considered "extraordinary Chambers" with certain distinctions from other Cambodian courts.

16. Finally, the Trial Chamber should bear in mind, when considering the nature of the ECCC and whether this would allow for the *ne bis in idem* principle to be bypassed, that "[i]f the concept 'state' loses its meaning, it should not result in less protection for the individual."[34]

2. The ECCC may not be equated with the ICTY or other *ad hoc* tribunals

17. The Pre-Trial Chamber has erred in equating the ECCC with the ICTY and other international tribunals. The ECCC, whatever the term "internationalized" may denote, is not an international court.[35] The international courts may not be bound to apply Article

---

[33] Consider the relationship of the ICTY to other States, which has been explained by the ICTY Appeals Chamber in *Blaškić*: "Clearly, under Article 1 of the Statute, the International Tribunal has criminal jurisdiction solely over natural 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since [1 January] 1991'. The International Tribunal can prosecute and try those persons. This is its primary jurisdiction. However, it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The International Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal. The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal. This obligation is laid down in Article 29 and restated in paragraph 4 of Security Council resolution 827 (1993). Its binding force derives from the provisions of Chapter VII and Article 25 of the United Nations Charter and from the Security Council resolution adopted pursuant to those provisions. The exceptional legal basis of Article 29 accounts for the novel and indeed unique power granted to the International Tribunal to issue orders to sovereign States (under customary international law, States, as a matter of principle, cannot be 'ordered' either by other States or by international bodies). Furthermore, the obligation set out - in the clearest of terms - in Article 29 is an obligation which is incumbent on every Member State of the United Nations *vis-à-vis* all other Member States. The Security Council, the body entrusted with primary responsibility for the maintenance of international peace and security, has solemnly enjoined all Member States to comply with orders and requests of the International Tribunal. The nature and content of this obligation, as well as the source from which it originates, make it clear that Article 29 does not create bilateral relations. Article 29 imposes an obligation on Member States towards all other Members or, in other words, an 'obligation *erga omnes partes*'. By the same token, Article 29 posits a community interest in its observance. In other words, every Member State of the United Nations has a legal interest in the fulfilment of the obligation laid down in Article 29...." *Prosecutor v. Blaškić*, IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 26. *See also* paras. 27-31.

[34] Klip & van der Wilt, at 1135.

[35] Even the Agreement (the most "international" of the ECCC's constitutive instruments) only has force of law because it was incorporated into Cambodian domestic law – not because it was promulgated by the Security Council (as in the case of the *ad hoc* tribunals) or has the legal force of a treaty (like the ICC's Statute).

14 of the ICCPR, but the ECCC is mandated by the Cambodian Constitution,[36] the Agreement,[37] and the Establishment Law[38] to do so.

18. It is interesting to note the difference between the Pre-Trial Chamber's treatment of Article 14(7) of the ICCPR and Article 15. When considering whether the principle of legality to be applied at the ECCC is that set out in Article 15, the Pre-Trial Chamber states, "Given [the Establishment Law's] express reference to Article 15 of the ICCPR, there is no doubt that, insofar as international crimes are concerned, the principle of legality envisaged by the ECCC Law is the international principle of legality...."[39] However, the Pre-Trial Chamber does not consider itself bound to apply Article 14(7) even though, like Article 15, the Establishment Law mandates its application.

19. The Pre-Trial Chamber's reference to the *Tadić* Trial Chamber's *ne bis in idem* decision is inapposite in this case. The *Tadić* Trial Chamber did not determine that the ICCPR was inapplicable. It merely noted that the "provision is generally applied so as to cover only a double prosecution within the same State...."[40] It did not need to determine whether the ICCPR would bar prosecution because it had already found that there had not yet been a previous trial[41] and, as it noted, the ICCPR "applies only to cases where an accused has already been tried."[42] Nevertheless, it did note that under the ICTY Statute, if Germany had attempted prosecution after the ICTY had prosecuted the Accused, this "would indeed raise an issue of *non-bis-in-idem*...."[43]

3. Even if the present situation could be considered to involve an issue of transnational application, the Pre-Trial Chamber erred in determining that the ICCPR does not apply

---

[36] 1993 Constitution, as amended in 1999, Art. 31.

[37] Article 12(2) of the Agreement states, "The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party" (emphasis added). *See also* Article 13(1), which states, "The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

[38] Article 33 new of the Establishment Law states, "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights."

[39] PTC Decision, para. 213 (emphasis added).

[40] *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motion on the Principle of *Non-Bis-In-Idem*, 14 November 1995, para. 19.

[41] *Id.*, paras. 10-12.

[42] *Id.*, para. 20.

[43] *Id.*, para. 13.

20. Even if the present situation could be considered "transnational," the Pre-Trial Chamber erred in determining that the ICCPR does not apply in such situations. The Pre-Trial Chamber relies on the fact that the Human Rights Committee has held that Article 14(7) does not guarantee *ne bis in idem* with respect to the national jurisdiction of two or more States.[44] However, there are no provisions in the ICCPR which formally authorize the Human Rights Committee to interpret the ICCPR. The Human Rights Committee interpretation is not binding "despite the fact that from time to time the Committee may insinuate a different view."[45]
21. It is not at all clear or universally accepted that the *ne bis in idem* principle contained in Article 14(7) of the ICCPR applies only within States and has no transnational effect. The International Congress of Penal Law[46] has adopted a resolution stating, "[t]he principle of ne bis in idem should be regarded as a human right that is also applicable on the international or transnational level."[47]
22. The Special Panels for Serious Crimes in East Timor found that the principle of *ne bis in idem* is applicable in East Timor due to UNTAET Regulations establishing the Special Panels and because it is set out in Article 14(7) of the ICCPR, which has the force of law in East Timor.[48] It determined that this principle did not bar prosecution at the Special Panels of an Accused who had been arrested in Indonesia – not because the principle did not have transnational application, but because it found that the principle was not applicable at the arrest warrant stage of the proceedings.[49]
23. The Netherlands entered a reservation to Article 14(7) of the ICCPR because "the Dutch government was in doubt whether Article 14, paragraph 7, would only cover the national application or also the international application of the ne bis in idem principle. In the

---

[44] PTC Decision, para. 128.

[45] Shiyan Sun, *The Understanding and Interpretation of the ICCPR in the Context of China's Possible Ratification*, 6 CHINESE J. INT'L L. 17, 23 (2007). The article goes on to state, "One bold step taken by the Committee in this respect is the provocative expression in its General Comment No. 24 that '[t]he Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence', though the General Comment itself has no legal binding force." *Id.*

[46] The International Association of Penal Law was founded in Paris in 1924. It is the successor of the International Union of Penal Law which had been founded in 1889 in Vienna. It is the oldest association of specialists in penal law and one of the oldest scientific associations in the world. *See* International Association of Penal Law website, *available at* http://www.penal.org/?page=mainaidp&id_rubrique=13&lang=fr.

[47] Resolution Section IV B.4 adopted by the XVIth International Congress of Penal Law, *available at* http://www.penal.org/IMG/pdf/NEP21anglais.pdf.

[48] *Deputy General Prosecutor for Serious Crime v. Wiranto et al.*, Case No. 05/2003, Legal Ruling Concerning the Applicability of *Ne Bis In Idem* at the Arrest Warrant Stage of the Proceedings, 5 May 2005, paras. 5-17.

[49] *Id.*, paras. 18-34.

latter case, the [Dutch] courts would probably be obliged to deduct the sentence served abroad in case the sentence had not been completely enforced, a requirement which [Dutch penal law] does not mention."[50]

24. The Pre-Trial Chamber was further incorrect to conclude that European States hold the position that *ne bis in idem* is not a mandatory norm of transnational application on the basis that Article 4 of Protocol No.7 to the ECHR states that the *ne bis in idem* principle applies solely to proceedings within domestic legal orders.[51] The ECHR does not state that the principle may not be applied more broadly.[52] Further, recognition of the principle as set out in the ECHR does not preclude recognition of a broader principle set out in another instrument. This is clear from the fact that certain Member States of the European Union are party to the Schengen Agreement, which prohibits, with certain exceptions, prosecution by one State party if there has already been a trial for the same acts by another State party.[53] Furthermore, in Europe:

> The classical inter-State cooperation in criminal matters has been replaced by enhanced judicial cooperation directly between the actors of the criminal justice system. Moreover, these now have to recognize each other's judicial decisions based on the principle of mutual recognition. As a result, essential aspects of the functioning of the criminal justice system are now taking place in a European area without internal borders, a transnational judicial area. By several framework decisions the mutual recognition principle has been elaborated for pre-trial judicial decisions, such as seizure, evidence gathering and arrest. Judicial decisions in one Member State have legal effect in the legal area of the EU. The most famous framework decision in this context must certainly be the European Arrest Warrant which replaces the classic extradition procedure. Mutual recognition of each other's arrest warrants not only leads to the quicker surrender of suspects within the EU, but also to the fact that legal principles such as the *ne bis in idem* principle have to be applied transnationally.[54]

C. "Procedural rules established at the international level" prohibit the current prosecution of Mr. IENG Sary

[50] Klip & van der Wilt, at 1101 (emphasis added).
[51] PTC Decision, para. 128.
[52] Article 4 of Protocol No. 7 of the ECHR states, "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention."
[53] Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, 19 June 1990, Arts. 54-58.
[54] John A.E. Vervaele, *The Transnational* Ne Bis in Idem *Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights*, 1(2) UTRECHT L. REV. 100, 101 (2005).

25. The Pre-Trial Chamber erroneously determined that it should follow procedural rules established at the international level which contain an exception to the *ne bis in idem* principle when the previous trial was not conducted independently or impartially. The Pre-Trial Chamber did not need to consider procedural rules established at the international level since the CPC and ICCPR apply to bar re-prosecution. If consideration of such procedural rules is necessary, the appropriate procedural rule to follow is that set out by Article 20(3)(b) of the ICC Statute, which does not allow for a new trial when the previous trial was not conducted independently or impartially, unless that trial was also "inconsistent with an intent to bring the person concerned to justice."[55]

26. The Pre-Trial Chamber considered "procedural rules established at the international level" to determine whether the principle of *ne bis in idem* would bar Mr. IENG Sary's prosecution because Article 33 new of the Establishment Law requires the ECCC to:

> ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure [sic] do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

27. Procedural rules established at the international level need not be applied in the present situation because existing applicable procedure (the CPC and ICCPR) deals with the matter at hand and there is no question regarding its consistency with international standards. Put differently, the CPC and ICCPR apply, so international procedural rules are inapplicable and must not be considered or preferred over existing applicable law.

28. Should the Trial Chamber find it necessary to consider procedural rules established at the international level, the ICC Statute must be preferred over the Statutes of the *ad hoc* tribunals and the Special Tribunal for Lebanon ("STL"). The ICC Statute, as a treaty signed by 115 State parties, is more representative of international consensus than the Statutes of the *ad hoc* tribunals and the STL. The ICC Statute has also been signed by Cambodia, whereas Cambodia had nothing to do with drafting the Statutes employed at the *ad hoc* tribunals and STL.

D. The 1979 trial

[55] ICC Statute, Art. 20(3)(b).

29. The Trial Chamber has requested the Defence specifically to address whether "the 1979 trial by the People's Revolutionary Tribunal was conducted in conformity with basic fair trial standards, including the legal framework upon which it was based."[56] The Defence has never claimed that the 1979 trial was a model trial. The Defence submits that the Trial Chamber need not determine whether the 1979 trial was conducted in conformity with basic fair trial standards because there is no exception under the CPC or ICCPR which would allow for the current prosecution if Mr. IENG Sary's 1979 trial was not conducted in conformity with fair trial standards. Nonetheless, it is worth noting that the King granted a pardon, which was approved by the National Assembly, for the sentence Mr. IENG Sary received in 1979, indicating that the Cambodian government recognized the validity of the 1979 trial in 1996.[57] To the knowledge of the Defence, no one in the international community at that time raised the issue that the 1979 trial was not valid.
30. It is furthermore worth noting that certain shortcomings in the 1979 trial which were noted by the Pre-Trial Chamber bear similarity to shortcomings which exist at the ECCC today. For example, the Pre-Trial Chamber notes that certain judges were connected with the executive branch of the government.[58] At the ECCC, there have been numerous allegations that some judges are controlled by the executive branch or by their own governments based on certain statements made by the Prime Minister,[59] as well as on certain decisions they have taken which appear to be politically motivated, or not judicially independent.[60] The Pre-Trial Chamber considered the lack of separation between the executive and judicial branch to be indicative that the 1979 trial was not conducted in conformity with basic fair trial standards. Yet the Pre-Trial Chamber's assessment of the separation of powers may not be reflective of the appropriate test for impartiality and conformity with basic fair trial standards in the context of communist government in 1979. For example, the centralization of political control, including the

---

[56] Memorandum re: Additional Preliminary Objections Submissions *(ne bis in idem)*, 12 May 2011, E51/9.
[57] *See* IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 51-62, for a discussion of the background concerning the grant of amnesty and pardon.
[58] PTC Decision, para. 167.
[59] *See, e.g., Case of IENG Sary*, 002-20-10-2009-ECCC(PTC03), IENG Sary's Request for Appropriate Measures to be Taken Concerning Certain Statements by Prime Minister Hun Sen which Challenge the Independence of Pre-Trial Chamber Judges Katinka LAHUIS and Rowan DOWNING, 20 October 2009, 1.
[60] *See, e.g.*, IENG Sary's Motion to Support IENG Thirith's Application to Disqualify Judge You Ottara from the Special Bench for Lack of Independence & Request for a Public Hearing, 18 March 2011, E63/1; Alex Bates, *Transitional Justice in Cambodia: Analytical Report*, ATLAS PROJECT, October 2010, para. 145. Presiding Judge Nil Nonn is quoted as stating, ***"We also have problems because judges aren't independent in Cambodia – [the government] threaten and put pressure on judges, the judges accept money, so all this is not very good."*** (Emphasis added).

abolition of the separation of powers, is a feature of communist government to this day, and cannot be considered to mean that the 1979 trial necessarily lacked independence and impartiality.[61]

III. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to FIND that the principle of *ne bis in idem* bars Mr. IENG Sary's prosecution at the ECCC.

Respectfully submitted,

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **27th** day of **May, 2011**

[61] For example, in the People's Republic of China, the separation of powers has been analyzed in the following terms: "Some ... regard that only the 'separation of (three) powers is genuine democracy and can guarantee the benign operation of the political system, so they stand for copying Western models and implementing the checks and balance of power. Some extremists even label the separation of powers as the most 'democratic' form of government. This absurdity is one-sided of course. In fact, the separation of powers can indeed stem [sic] one given interest group from monopolizing or arrogating to some extent all power to itself, so the 'democracy' is ensured for the ruling clique. This form of government, however, is not designed to guarantee the democratic rights of people. Some people assert that the system of the separation of powers can possibly guard against corruption, and this also doest [sic] not tally with facts. In the last few years, six arms dealers, including Boeing and Lockheed, were awarded numerous billion-dollar contracts with huge direct and indirect profits for their lobbing [sic] on Capitol Hill, and such illegal covert deals so far exposed is only the tip of the 'iceberg'. Some advocators of the separation of powers even cite the 'separation of powers' as the international convention with some sort of universality and, therefore, China should also follow suit. This notion is also groundless. It must be pointed out that there are no political or social basis [sic] for separating legislative, judicial and executive powers in China, let alone the economic basis and the class base. If it does copy the political system with a separation of powers from capitalist countries in defiance of its own national conditions and fundamental interests of its people, the foundation of its political stability will be undermined, Chinese society will be fall [sic] into the state of disorder, and people would suffer too. So, it is imperative for China to keep to the intrinsic unity of Party leadership, people assuming as masters of their own destiny and the managing of state affairs according to law. This essential practice has given an eloquent proof that people in the country must keep to this point and never sway on it..." *NPC system to be adhered to and further improved*, PEOPLE'S DAILY ONLINE, 19 June 2009, *available at* http://english.peopledaily.com.cn/90001/90780/6682417.html (emphasis added).