BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS (*NE BIS IN IDEM* AND AMNESTY AND PARDON)

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), pursuant to Rule 104 of the ECCC Internal Rules ("Rules"), hereby appeals the Trial Chamber's Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon) ("Impugned Decision").[1] This Appeal is made necessary because the Trial Chamber has erred in law and has abused its discretion by deciding that neither the principle of *ne bis in idem* nor Mr. IENG Sary's Royal Pardon and Amnesty ("RPA")[2] bar Mr. IENG Sary's prosecution at the ECCC.

I. GROUNDS OF APPEAL

A. *Pardons prevent an Accused from serving a sentence based on the conduct pardoned, and the principle of* ne bis in idem *prevents an Accused from being re-tried for crimes based on the same conduct that was at issue in a previous trial. Mr. IENG Sary was tried in 1979 for the same conduct at issue in his present trial, and he received a Royal Pardon for the sentence imposed by his 1979 Judgement.*[3] *Did the Trial Chamber err by failing to apply his Royal Pardon and the principle of* ne bis in idem *to bar his current prosecution?*

B. *The Constitution of Cambodia confers the right to the King to grant an amnesty. In 1996, the King granted Mr. IENG Sary the Royal Amnesty covering all Mr. IENG Sary's acts during the temporal jurisdiction of the ECCC. Did the Trial Chamber err by not applying the Royal Amnesty at the ECCC?*

II. SUMMARY OF ARGUMENT

1. The Trial Chamber erred in finding that the 1979 Judgement against Mr. IENG Sary was not a genuine, enforceable and final judicial decision. The Trial Chamber does not have the competence to determine whether a judicial decision of another court is valid. Even if the Trial Chamber does have such competence, the 1979 Judgement was genuine, enforceable and final. It was issued by the People's Revolutionary Tribunal, was enforceable when granted and is final since Mr. IENG Sary is not required to request review of the 1979 Judgement, nor would such review be possible.

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[1] Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis in Idem* and Amnesty and Pardon), 3 November 2011, E51/15.
[2] Royal Decree, NS/RKT/0996/72, 14 September 1996.
[3] Judgement of the Revolutionary People's Revolutionary Court, U.N. Doc. A/34/491, 19 August 1979, ("1979 Judgement"). Mr. IENG Sary was tried and convicted *in absentia* in 1979, by the People's Revolutionary Tribunal. *See* Annex 1: Background.

2. The Trial Chamber erred in failing to apply the Royal Pardon or the principles of *res judicata* and *ne bis in idem*, all of which would bar Mr. IENG Sary's current prosecution. The Royal Pardon grants Mr. IENG Sary immunity from serving a sentence based on the acts at issue in the 1979 trial. The principle of *res judicata*, as set out in Article 7 of the Cambodian Code of Criminal Procedure ("CPC"), has no exceptions. It bars prosecutions when there is an earlier judicial decision in respect of the same parties and acts, such as in the present case. The principle of *ne bis in idem*, as enshrined in the International Covenant on Civil and Political Rights ("ICCPR"), is applicable to all ECCC proceedings and bars Mr. IENG Sary's prosecution by this tribunal.

3. The Trial Chamber does not have jurisdiction to determine the validity of the Royal Amnesty. The Trial Chamber has acted *ultra vires* by determining the validity of the Royal Amnesty.

4. Cambodia is not under an absolute obligation to ensure the prosecution or punishment of perpetrators of grave breaches of the 1949 Geneva Conventions, genocide and torture. Even if such an obligation should exist, this obligation is different from and can be supplanted by the right to grant and uphold an amnesty from prosecution for these crimes.

5. The Trial Chamber must apply customary international law as it stands; not the direction in which the Trial Chamber perceives customary international law to be developing. Customary international law permits amnesties for serious international crimes.

6. The Royal Amnesty can be applied at the ECCC without violating the obligation to prosecute serious international crimes and provide victims with the right to an effective remedy. Case 002 has already been investigated. The Royal Amnesty only applies to Mr. IENG Sary. As Case 002 involves other Accused, the Royal Amnesty does not prevent prosecutions stemming from acts which allegedly occurred during the Democratic Kampuchea ("DK") period. Six days prior to the promulgation of the Royal Amnesty, Mr. IENG Sary published a document entitled "The True Fact about Pol Pot's Dictatorial Regime," which provided accountability for victims and access to the truth. The Royal Amnesty ended a 17-year civil war.

III. PRELIMINARY MATTERS

A. Admissibility of the Appeal

7. Rule 104, which relates to the jurisdiction of the Supreme Court Chamber, states:

> 1. The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds:
>
> a) an error on a question of law invalidating the judgment or decision; or
> b) an error of fact which has occasioned a miscarriage of justice.
>
> Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.
> ...
> 4. The following decisions of the Trial Chamber are subject to immediate appeal:
> a) decisions which have the effect of terminating the proceedings...

8. The Grounds of Appeal concern the Trial Chamber's error of law and abuse of discretion in failing to apply the RPA to bar Mr. IENG Sary's prosecution. This error and abuse of discretion do not consist solely of erroneous factual findings or the misapplication of a properly stated rule of law. Rather, they also concern erroneous legal conclusions and abuse of discretion relating to the applicability of Mr. IENG Sary's RPA. The Grounds of Appeal are admissible pursuant to Rule 104(1) and 104(4)(a). These errors have the effect of invalidating the Impugned Decision. Because Mr. IENG Sary's prosecution should have rightfully been terminated, the errors have occasioned a miscarriage of justice and have resulted in prejudice to Mr. IENG Sary.

9. The Impugned Decision is immediately appealable pursuant to Rule 104(4)(a); if not for the Trial Chamber's error, proceedings would have been terminated. It is illogical to argue that if the Trial Chamber had decided the issue correctly, the OCP could have appealed immediately, but since the issue was decided incorrectly, the Defence is not entitled to a remedy until after the Judgement. To respect the principle of equality of arms, the Defence must be afforded an immediate right to appeal.[4]

[4] *See Prosecutor v. Bagosora et al.*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor's Appeal from the Decision of a Confirming Judge Dismissing an Indictment against Theonéste Bagosora and 28 others, 8 June 1998, paras. 34-35: "Article 24 [of the ICTR Statute], it is said, provides that the Appeals Chamber may hear appeals against decisions taken by the Trial Chambers from 'persons convicted by the Trial Chambers' or from 'the Prosecutor' *simpliciter*. However, this reading of Article 24, which would grant the Prosecutor an unfettered right of appeal, while that of the accused is limited, would violate the principle of equality of arms. Indeed, the principle of equality of arms requires that the parties enjoy corresponding rights of appeal.... Consistent with this principle, the Appeals Chamber finds that, in the instant case, where the matter affects the right of the accused, the Prosecutor can have no greater power of appeal than accused persons."

10. If – as the Defence submits – the principle of *ne bis in idem* is applicable in the present case, Mr. IENG Sary's right not to be tried twice for the same conduct will be violated if the Supreme Court Chamber does not make a determination on this matter prior to the commencement of Mr. IENG Sary's trial. Furthermore, Mr. IENG Sary must not be forced to undergo a lengthy trial if the ECCC has no jurisdiction over him.[5]

11. If there is any doubt as to the above interpretation of Rule 104(4)(a), Rule 21(1), as well as the constitutionally guaranteed principle of *in dubio pro reo*,[6] requires the Supreme Court Chamber to interpret Rule 104(4)(a) so as to safeguard Mr. IENG Sary's interests.[7]

B. Request for a Public Oral Hearing

12. The Defence requests a public, oral hearing to address the issues raised in this Appeal. Rule 109(1) indicates that appeal hearings should generally be conducted in public.[8] This Appeal affects Mr. IENG Sary's fair trial rights and the future course of the proceedings; it is of interest to the Cambodian public. None of the issues raised are confidential.

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[5] As explained by the International Criminal Tribunal for the former Yugoslavia ("ICTY") *Tadić* Appeals Chamber: "Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial.... Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected." *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

[6] Article 38 of the Constitution states in pertinent part: "Any case of doubt shall be resolved in favor of the accused." The principle of *in dubio pro reo* applies to findings of law, subject to Civil Law rules of interpretation. Paragraph 31 of the Decision on Immediate Appeal by KHIEU Samphan on Application for Immediate Release, 6 June 2011, E50/3/1/4 states: "In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it is limited to doubts that remain after interpretation. Therefore, *in dubio pro reo* is primarily applied to doubts about the content of a legal norm that remain after the application of the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective." Article 22(2) of the Statute of the International Criminal Court ("ICC Statute") – an authoritative source of international criminal law – affirms the applicability of *in dubio pro reo* to findings of law: "In case of ambiguity [as to the definition of a crime], the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." Although the ICC Statute is treaty-based law, not customary law, Article 22 constitutes international recognition and acceptance of the fundamental principle of *in dubio pro reo.*

[7] The Pre-Trial Chamber has previously held that Rule 21 required it to "adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded...." Decision on IENG Sary's Appeal Against Co-Investigating Judges' Decision Refusing to Accept the Filing of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of Proceedings, 20 September 2010, D390/1/2/4, para. 13. *See also* Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, para. 36; Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, A371/2/12, paras. 13-14.

[8] Rule 109(1) states: "Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only."

IV. APPLICABLE LAW

A. *Ne Bis in Idem*

13. Article 7 of the CPC states that charges in a criminal action are extinguished in cases of *res judicata.* Article 12 of the CPC states that "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." Article 14(7) of the ICCPR, which has the force of law at the ECCC,[9] requires that "[n]o 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."

B. Pardon and Amnesty

14. The Constitution provides that the King and/or the National Assembly may grant an unrestricted amnesty.[10] The ECCC expressly has competence only to determine the scope of the Royal Amnesty.[11]

V. ARGUMENT

A. The Trial Chamber erred in failing to apply the Royal Pardon and the principle of *ne bis in idem* to bar Mr. IENG Sary's current prosecution

15. The Trial Chamber determined that, because of deficiencies in the 1979 trial, the 1979 Judgement is not valid and thus not subject to pardon or to the application of *res judicata* as set out in the CPC.[12] The Trial Chamber held that the principle of *ne bis in idem* enshrined in Article 14(7) of the ICCPR applies solely to proceedings within the domestic legal order and does not apply to proceedings before the ECCC.[13] The Trial Chamber erred in law and abused its discretion: **1.** The Trial Chamber abused its discretion by determining that the 1979 Judgement was invalid, leading it to abuse its discretion by effectively determining that the Royal Pardon is invalid; **2.** Even if the Trial Chamber could determine the validity of the 1979 Judgement, it erred in law in finding it invalid; **3.** The Trial Chamber erred in law in holding that the principle of *ne bis in idem* enshrined

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[9] Constitution, Art. 31; Agreement, Art. 12(2); Establishment Law, Art. 33 new.
[10] Article 27 of the Constitution states: "The King shall have the right to grant partial or complete amnesty." Concerning Mr. IENG Sary's RPA, though not required by the Constitution, the National Assembly did in fact approve it, thus effectively expressing the will of the people. Article 90 new of the Constitution states: "The National Assembly shall adopt the law on the general amnesty."
[11] Article 40 new of the Establishment Law states in pertinent part: "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."
[12] Impugned Decision, para. 30.
[13] *Id.*, para. 32.

in the ICCPR is inapplicable at the ECCC; **4.** The Trial Chamber erred in law and abused its discretion in failing to apply the Royal Pardon to bar Mr. IENG Sary's prosecution at the ECCC; and **5.** The Trial Chamber erred in law and abused its discretion in failing to apply the principles of *res judicata* and *ne bis in idem* to bar Mr. IENG Sary's prosecution at the ECCC.

1. Trial Chamber abused its discretion by determining that the 1979 Judgement was invalid, leading it to abuse its discretion by effectively determining that the Royal Pardon is invalid

16. The Trial Chamber did not have the competence to determine that the 1979 Judgement was not a "genuine judicial decision."[14] The jurisdiction of the ECCC, as set out in the Agreement and Establishment Law,[15] is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes set out in the Agreement and Establishment Law. Nowhere in the Agreement or Establishment Law was the Trial Chamber granted the jurisdiction to review decisions and judgements of other Cambodian courts.[16] The Trial Chamber itself has recognized that the ECCC "is composed of Cambodian and international staff and judicial officers, who have no competence to appear before or to sit in judgment over a decision by a domestic Cambodian court…. There is no line of authority between the ECCC and other courts in the Cambodian judicial system."[17]

17. By holding that the 1979 Judgement was not a valid judicial decision, the Trial Chamber effectively invalidated the Royal Pardon. The Royal Pardon would have been void when granted were it intended to pardon a sentence which was invalid. The Trial Chamber, as

[14] *Id.*, para. 30. The Trial Chamber's determination that the 1979 Judgement was not a valid judicial decision differs from the Pre-Trial Chamber's review of the 1979 Judgement. The Pre-Trial Chamber never determined that the 1979 Judgement was not a valid judicial decision; it did not have the competence to do so. It simply considered whether certain flaws in the 1979 trial would create an exception to the application of *ne bis in idem* as that principle exists in procedural rules at the international level. Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30 ("Decision on IENG Sary's Appeal Against the Closing Order"), paras. 132-75.
[15] *See* Agreement, Arts. 1-2; Establishment Law, Arts. 2 new – 8.
[16] Article 291 of the CPC sets out the methods of seizing first instance courts. Nowhere in the CPC is it stated that first instance courts (such as the Trial Chamber of the ECCC) may review the judgements of other courts.
[17] *Case of Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Decision on Request for Release, 15 June 2009, E39/5, paras. 11-12.

it has itself recognized, does not have competence to determine the validity of the Royal Pardon.[18] It has abused its discretion by effectively doing so.

2. Even if the Trial Chamber could determine the validity of the 1979 Judgement, it erred in law in finding it invalid

18. The Trial Chamber found that the 1979 Judgement was not "genuine, enforceable and final"[19] but failed to explain what it meant by a "genuine" or an "enforceable"[20] judicial decision. The 1979 Judgement was "genuine" in the sense that it was a real judgement, actually produced by the People's Revolutionary Tribunal. It was enforceable, regardless of whether it was actually enforced. Were the 1979 Judgement not a genuine and enforceable judicial decision, the Royal Cambodian Government would not have negotiated the Royal Pardon pertaining specifically to this judicial decision and the King would not have granted it.

19. The Trial Chamber stated that it considers the 1979 Judgement not to be a final judicial decision, because Cambodian law allows decisions resulting from trials *in absentia* to be opposed and Mr. IENG Sary has never expressly or tacitly waived his right to oppose the 1979 Judgement.[21] The fact that Mr. IENG Sary has not requested a retrial or waived any right he may have to a retrial does not cause the judgement against him to lack finality and may not be used against him to his detriment. The right to request a retrial is intended to protect the accused. It is a discretionary, personal right that an accused may invoke. Dutch legal scholars 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."[22]

20. Furthermore, because a retrial was not available at the time, the fact that there was no retrial may not be used against Mr. IENG Sary. According to the Decree Law which established it, the People's Revolutionary Tribunal was:

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[18] The Trial Chamber stated that "it is not in a position to determine the respective powers of the King and the National Assembly, and in consequence, the constitutional validity of the 1996 Royal Decree, as this is first and foremost the prerogative of the Constitutional Council." Impugned Decision, para. 29.
[19] *Id.*, para. 30.
[20] The Trial Chamber notes that the confiscation of Mr. IENG Sary's property was never carried out, which may imply that the Trial Chamber equates "enforceable" with "enforced." *See Id.*, n. 3.
[21] *Id.*, para. 30.
[22] André Klip & Harmen van der Wilt, *The Netherlands* Non Bis in Idem, 73 REVUE INTERNATIONALE DE DROIT PENAL 1091, 1097 (2002) ("Klip & van der Wilt").

> a court of last resort. A person sentenced to death has the right to ask for mercy from the People's Revolutionary Council of Kampuchea within 7 days from the date the sentence is pronounced. If the defendant is convicted in absentia, that time limit is calculated from the day when the text of the sentence is posted at the office of the Municipal People's Committee in Phnom Penh.[23]

There was no other competent court at the time which could re-try Mr. IENG Sary. The Decree Law makes it clear that Mr. IENG Sary could not have had his sentence reviewed by a higher court, nor can he now. The current proceedings at the ECCC are not a "retrial" – Mr. IENG Sary is being tried by a different Cambodian court under different laws, although for the same conduct as was at issue in 1979. Even if there may have been some brief period of time when Mr. IENG Sary could have found a court to re-try him, the 1979 Judgement must now be considered final. Mr. IENG Sary does not have the possibility to be retried, nor is he required to request a retrial for a judgement against him to be considered final.

3. The Trial Chamber erred in law in holding that *ne bis in idem* as enshrined in the ICCPR is inapplicable at the ECCC

21. The Trial Chamber held that Article 14(7) of the ICCPR applies solely to proceedings within the domestic legal order and does not apply to proceedings before the ECCC, "an internationalized court."[24] The Trial Chamber erred in law in three respects: **a.** the present situation solely involves "proceedings within the domestic legal order" and does not involve any international application of Article 14(7);[25] **b.** even if the present situation could be considered an issue of international or transnational application, the Trial Chamber erred in holding that the ICCPR does not apply; and **c.** the Trial Chamber erred in considering procedural rules at the international level. Should such procedural rules have been considered, it erred in only considering procedural rules at the ICTY and Inter-American Court of Human Rights ("IACtHR").

a. This is not an issue of international or transnational application

22. 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

[23] Decree Law No. 1: Establishment of People's Revolutionary Tribunal at Phnom Penh to Try the Pol Pot-Ieng Sary Clique for the Crime of Genocide, 15 July 1979.
[24] Impugned Decision, para. 32.
[25] The Pre-Trial Chamber, with whose reasoning the Trial Chamber concurred, referred to the application of the ICCPR in this case as one involving "transnational" application. *See* Decision on IENG Sary's Appeal Against the Closing Order, para. 128. The Trial Chamber, however, does not use the word "transnational."

Cambodia.[26] The ICCPR is applicable as law in Cambodia, and in particular at the ECCC, in accordance with the Constitution,[27] Agreement[28] and Establishment Law.[29]

23. Even if the ECCC could be considered "internationalized"[30] because of the international technical assistance it receives and its unique structure, this does not signify that the ECCC is a foreign court of another State. The ECCC, whatever the term "internationalized" may denote, is not an international court.[31] The ECCC acquired its jurisdiction and competence in the same way as other Cambodian courts – through domestic Cambodian law. Unlike international courts, the ECCC is not in a "vertical" relationship to other Cambodian courts,[32] even though its Chambers may be considered "extraordinary Chambers" with certain distinctions from other Cambodian courts. There

[26] Establishment Law, Art. 2 new.
[27] Constitution, Art. 31.
[28] Agreement, Art. 12(2).
[29] Establishment Law, Art. 33 new.
[30] *See* Impugned Decision, para. 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 ("IENG Sary's Appeal against the Closing Order"), paras. 8-20.
[31] 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).
[32] 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.

is thus no international application of *ne bis in idem* involved. The ECCC has not been requested to recognize a foreign judgement, but a Cambodian one. As Klip and van der Wilt have explained: "If the concept 'state' loses its meaning, it should not result in less protection for the individual."[33]

b. Even if there is an issue of international or transnational application, the ICCPR applies

24. Even if the ECCC could be considered international, the Trial Chamber erred in holding that the ICCPR does not apply in such situations. The ICCPR contains no language which limits it to domestic proceedings. The ICCPR may not have the force of law in some of the international settings considered by the Trial Chamber, but it has the force of law in Cambodia and in particular at the ECCC and must therefore be applied.

25. The Special Panels for Serious Crimes in East Timor, a "hybrid" tribunal, 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.[34] The ICCPR similarly has the force of law in Cambodia and at the ECCC.

26. 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 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."[35] The International Association of Penal Law[36] has adopted a resolution stating: "[t]he principle of ne bis in idem should be regarded as a

[33] Klip & van der Wilt, at 1135.
[34] *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. 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. *Id.*, paras. 18-34.
[35] Klip & van der Wilt, at 1101.
[36] The International Association of Penal Law was founded in Paris in 1924. It is the successor of the International Union of Penal Law which was 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.

human right that is also applicable on the international or transnational level."[37] These examples demonstrate that even if the ECCC is considered to be "internationalized" and in a vertical relationship to the People's Revolutionary Tribunal, the ICCPR is applicable.

c. Procedural rules established at the international level should not have been considered. Should they have been considered, they should not have been limited to the ICTY and IACtHR

27. Pursuant to Article 33 new of the Establishment Law, where existing Cambodian law and procedure "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."[38] Although it did not state so explicitly, it appears that the Trial Chamber considered the principle of *ne bis in idem* as it has been interpreted at the ICTY and IACtHR because it found that there is uncertainty regarding the interpretation or application of Article 14(7) of the ICCPR at the ECCC. The Trial Chamber does not appear to have followed the approach of the Pre-Trial Chamber, which first considered the application of the CPC, then the application of the ICCPR, before finally considering whether procedural rules established at the international level would require a broader application of the principle.[39]

28. Procedural rules established at the international level should not have been considered in the present situation because the Agreement and Establishment Law both confirm that Article 14 of the ICCPR is to be applied at the ECCC. The wording of Article 14(7) is clear. It bars prosecutions where an accused has already been finally convicted or acquitted in accordance with the law and penal procedure of each country. There is no uncertainty as to whether Article 14(7) applies or as to its interpretation. As a widely accepted international convention, there is no question regarding its consistency with international standards. International procedural rules are thus inapplicable and must not be considered or preferred over existing applicable law.

[37] Resolution Section IV B.4 adopted by the XVIth International Congress of Penal Law, *available at* http://www.penal.org/IMG/pdf/NEP21anglais.pdf.
[38] Establishment Law, Art. 33 new.
[39] Decision on IENG Sary's Appeal Against the Closing Order, paras. 118-75.

29. Even if procedural rules established at the international level should have been considered, the Trial Chamber erred in its analysis of international procedural rules. First, the Trial Chamber should have recognized that, although international tribunals may not be bound to apply Article 14 of the ICCPR, the ECCC is mandated to do so by the Constitution, the Agreement, and the Establishment Law.[40] The procedure of international tribunals cannot simply be adopted without taking this distinction into account. Second, the Trial Chamber erred by limiting its analysis of international procedural rules to the ICTY and IACtHR. The Trial Chamber should have considered Article 20(3)(b) of the ICC Statute, which only allows for a new trial when the previous trial was not conducted independently or impartially, *and* was "inconsistent with an intent to bring the person concerned to justice."[41] In the present case, there has been no evidence or even an allegation that the 1979 trial was not conducted with the intent to bring Mr. IENG Sary to justice. The ICC Statute must be preferred over the Statutes and jurisprudence of the ICTY and IACtHR. The ICC Statute, as a treaty signed by 115 State Parties including Cambodia, is more representative of international consensus than the Statutes and jurisprudence of the ICTY and IACtHR.[42]

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[40] Constitution, Art. 31; Agreement, Art. 12; Establishment Law, Art. 33 new.

[41] ICC Statute, Art. 20(3)(b). When considering procedural rules at the international level, the Trial Chamber could have also considered the Schengen Agreement. Certain Member States of the European Union are parties to this 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. *See* 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. 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.

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).

[42] "The ICC Statute 'internationalises' many general principles of criminal law that are recognized in national legal systems, by providing what is increasingly being perceived as a de facto codification or consolidation of those principles on an international level. Furthermore, the content of the ICC Statute is a blend of procedural international criminal law and substantive international humanitarian law. The fact that 120 States voted in favour of the Statute at the 1998 Rome Conference can be said to provide strong evidence of an emerging *opinio juris* as to the nature and ambit of genocide, crimes against humanity and war crimes in customary international

4. The Trial Chamber erred in law and abused its discretion by failing to apply the Royal Pardon

30. In Cambodia, pardons may be applied in the case of *in absentia* convictions. Prince Norodom Sirivudh, for example, was convicted *in absentia* in 1996 for plotting to kill Prime Minister Hun Sen. He was sentenced to ten years imprisonment. In November 1998, he was pardoned. In 1999, he returned to Cambodia and went on to be appointed Deputy Prime Minister and Co-Minister of the Interior.[43] In March 1998, Prince Norodom Ranarridh was convicted *in absentia* of conspiring to overthrow the government. He was pardoned, led FUNCINPEC in the 1998 national elections and was appointed President of the National Assembly.[44] Also in March 1998, FUNCINPEC generals Nhek Bun Chhay and Serei Kosal were convicted *in absentia* for conspiring to overthrow the government. They were pardoned in November 1998 and Nhek Bun Chhay went on to become Co-Minister of National Defence.[45] In December 2005, Sam Rainsy was convicted *in absentia* for defamation. He was pardoned in February 2006.[46] To find, as the Trial Chamber has done, that pardons may not be granted based on judgements resulting from *in absentia* trials because these trials are not final would mean that none of the above-mentioned pardons are valid. The fact that Mr. IENG Sary's conviction was *in absentia* cannot be employed to invalidate the 1979 Judgement or, by extension, the Royal Pardon.

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law." DOMINIC MCGOLDRICK ET AL., THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 340, (Hart Publishing, 1st ed., 2004).

[43] *King Sihanouk Says Amnesty for Exiles Depends on Hun Sen*, ASIAN POLITICAL NEWS, 17 August 1998, *available at* http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id+53002588; *Coalition Agreement for Cambodia Comes with Royal Pardons*, CNN WORLD, 13 November 1998, *available at* http://articles.cnn.com/1998-11-13/world/9811_13_cambodia.01_1_coalition-government-pardons-new-coalition?_s=PM:WORLD; *King Sihanouk's Half-Brother Returns Home*, ASIAN POLITICAL NEWS, 25 January 1999, *available at* http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id=53642360; *Cambodia's PM Fires Two Officials in Cabinet Reshuffle*, TAIPEI TIMES, 22 March 2006, *available at* http://www.taipeitimes.com/News/world/archives/2006/03/22/2003298602.

[44] *Cambodian Court Convicts Ousted Premier*, NEW YORK TIMES, 5 March 1998, *available at* http://www.nytimes.com/1998/03/05/world/cambodian-court-convicts-ousted-premier.html?ref=norodomranariddh; *Pardon Issued as a Step to Cambodian Elections*, NEW YORK TIMES, 22 March 1998, *available at* http://www.nytimes.com/1998/03/22/world/world-news-briefs-pardon-issued-as-a-step-to-cambodian-elections.html?ref=norodomranariddh; *Cambodian Emerges as Sole Prime Minister*, NEW YORK TIMES, 14 November 1998, *available at* http://www.nytimes.com/1998/11/14/us/cambodian-emerges-as-sole-prime-minister.html?ref=norodomranariddh.

[45] *King Sihanouk Says Amnesty for Exiles Depends on Hun Sen*, ASIAN POLITICAL NEWS, 17 August 1998, *available at* http://www.thefreelibrary.com/_/print/PrintArticle.aspx?id+53002588; *Coalition Agreement for Cambodia Comes with Royal Pardons*, CNN WORLD, 13 November 1998, *available at* http://articles.cnn.com/1998-11-13/world/9811_13_cambodia.01_1_coalition-government-pardons-new-coalition?_s=PM:WORLD; *Cambodia's PM Fires Two Officials in Cabinet Reshuffle*, TAIPEI TIMES, 22 March 2006, *available at* http://www.taipeitimes.com/News/world/archives/2006/03/22/2003298602.

[46] *Sam Rainsy Returns to Cambodia*, BBC NEWS, 10 February 2006, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/4699574.stm.

31. The Royal Pardon was intended to ensure that Mr. IENG Sary was pardoned for all of the acts at issue in the 1979 trial, and he therefore should not serve any sentence for these acts. By the time the Royal Pardon was granted, the death penalty had already been abolished in Cambodia.[47] Thus, the King did not intend to issue the Royal Pardon simply to ensure that Mr. IENG Sary's death sentence would not be carried out. The King would have known that it would be unnecessary to issue a pardon for something that the Constitution already prohibited. Yet, the King issued the Royal Pardon. It is reasonable to infer that he intended to ensure that Mr. IENG Sary would not serve any sentence related to a conviction based on the acts at issue in the 1979 trial. The Trial Chamber acknowledged as much when it found that it "cannot exclude the possibility that [the RPA's] purpose, as alleged by the Defence, may have been to grant IENG Sary general immunity from enforcement of any sentence and from prosecution for any acts committed before 1996, including during the Democratic Kampuchea regime."[48] In accordance with the fundamental principle of *in dubio pro reo*, which must be respected in accordance with the Constitution,[49] this possibility must be considered as the intended scope of the Royal Pardon. The Royal Pardon must be interpreted as barring Mr. IENG Sary's current prosecution.

5. The Trial Chamber erred in law and abused its discretion by failing to apply *res judicata* and *ne bis in idem*

32. Because the 1979 Judgement was genuine, enforceable and final, the principle of *res judicata*[50] set out in Article 7 of the CPC[51] and the international principle of *ne bis in*

[47] *See* Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, para. 57.
[48] Impugned Decision, para. 29.
[49] Constitution, Art. 38.
[50] *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…." BLACK'S LAW DICTIONARY 1312 (7th ed. 1999).
[51] As the Trial Chamber correctly recognized, Article 12 of the CPC, which prohibits new trials based on the same cause of action once a person has been finally acquitted, 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. *See* Impugned Decision, n. 64. It is not necessary to interpret Article 12 in this case, because Mr. IENG Sary's present trial is prohibited based on Article 7. *See also* IENG Sary's Supplement to his Rule 89 Preliminary Objection (*Ne Bis in Idem*), 27 May 2011, E51/11, paras. 4-10.

idem set out in Article 14(7) of the ICCPR bar Mr. IENG Sary's current prosecution.[52] The Cambodian legal principle of *res judicata* set out in Article 7 of the CPC does not recognize an exception where the previous trial had "deficiencies." Mr. IENG Sary's case is *res judicata*; the present trial deals with an issue which has been definitively settled by the 1979 Judgement.[53] As noted by Klip and 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 the court should therefore be respected. If res judicata would not be final, this would undermine the legitimacy of the state."[54]

33. As the ICCPR is applicable Cambodian law, which must be respected pursuant to the Constitution, Agreement and Establishment Law, the principle of *ne bis in idem* set out in the ICCPR equally bars prosecution of Mr. IENG Sary. This principle applies to domestic proceedings, such as at the ECCC, but is not limited to domestic proceedings. It does not contain any exceptions if there were "deficiencies" in the prior proceedings.

34. In determining that the principle of *ne bis in idem* set out in the ICCPR would not bar Mr. IENG Sary's current prosecution, the Trial Chamber stated that "[a]pplying the *ne bis in idem* principle would amount to a *de facto* amnesty for the facts prosecuted in 1979."[55] When determining applicability, it is improper to consider whether applying the principle of *ne bis in idem* would amount to a *de facto* amnesty, i.e. to consider whether it would frustrate the result which the Trial Chamber has predetermined as the most desirable. The application of result-determinative considerations delegitimize the essence of holding a trial – particularly in a place such as Cambodia – where the objective is to apply the rule of law in all its facets and complexities without regard for whether the results will cause inconvenience or discontent. The Trial Chamber's reasoning appears to be inapposite:

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[52] 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."

[53] *See* Annex 2, which has been attached for the Supreme Court Chamber's convenience. This Annex was originally affixed to 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*, 7 April 2008, C22/I/26 as Annex C. This Annex compared the 1979 Judgement with the Introductory Submission, demonstrating that the crimes for which Mr. IENG Sary was charged, tried and convicted are effectively the same crimes his is charged with in Case 002. The charges set out in the Closing Order do not add anything not addressed in the 1979 Judgement.

[54] Klip & van der Wilt, at 1094.

[55] Impugned Decision, para. 36.

the Trial Chamber interprets and applies the principle of *ne bis in idem* in a manner that justifies its desired result, as opposed to interpreting and applying the principle of *ne bis in idem* in a manner that achieves a fair and just result, albeit one that may be distasteful or disheartening.

35. The principle of *ne bis in idem* is not related to amnesty. Its purpose is to ensure respect for judicial proceedings. This principle has been characterized 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."[56] The ECCC must act as a "model" court for Cambodia by adhering to the rule of law.[57] Thus, it must respect and apply the principle of *ne bis in idem* without regard for whether the effect of such application is equivalent to amnesty. Nonetheless, as will be demonstrated *infra*, there is no international law prohibiting amnesties for the crimes at issue.

B. The Trial Chamber erred in failing to apply the Royal Amnesty to bar Mr. IENG Sary's current prosecution

36. The Trial Chamber held that the Royal Amnesty cannot grant Mr. IENG Sary immunity from prosecution due to Cambodia's treaty obligations[58] and international obligations which entitle it to "attribute no weight to a grant of such amnesty."[59] The Trial Chamber: **1.** abused its discretion by determining the validity of the Royal Amnesty; **2.** erred in law in holding that Cambodia's treaty obligations prevent the Royal Amnesty from providing Mr. IENG Sary with immunity from prosecution at the ECCC; **3.** abused its discretion by

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

[57] "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 acknowledged this objective and *theoretically* accepted its responsibility (though its actions belie its intent) when it 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.

[58] Impugned Decision, paras. 38-39.

[59] *Id.*, paras. 40-52, 54.

attributing no weight to the Royal Amnesty due to its finding that the Royal Amnesty is contrary to the direction in which customary international law is developing; and **4.** erred in law in finding the Royal Amnesty violates Cambodia's human rights obligations.

1. The Trial Chamber cannot determine the validity of the Royal Amnesty

37. The Trial Chamber held that the Royal Amnesty cannot grant Mr. IENG Sary immunity from prosecution due to: **a.** Cambodia's treaty obligations;[60] and **b.** international obligations which entitle it to "attribute no weight to a grant of such amnesty."[61] The Trial Chamber has acted *ultra vires* as these holdings determine the validity of the Royal Amnesty. The Agreement and Establishment Law authorize the ECCC only to determine the *scope* of the Royal Amnesty, not its validity.[62]

38. Throughout the Impugned Decision, the Trial Chamber erred by confusing the terms "scope" and "validity." The term "scope" is defined as "[s]omething aimed at or desired; something which one wishes to effect or attain; an end in view; an object, purpose, aim."[63] "Scope" is a matter of fact; a determination of what the Royal Amnesty was intended to cover. With respect to the scope of the Royal Amnesty, the Trial Chamber found that it "cannot exclude the possibility that its purpose, as alleged by the Defence, may have been to grant IENG Sary general immunity from enforcement of any sentence and from any acts committed before 1996, including during the Democratic Kampuchea regime."[64]

39. The term "valid" is defined as "[l]egally sufficient."[65] "Validity" is a legal determination; a determination of whether the Royal Amnesty is legally valid. The ECCC has no jurisdiction to determine this issue. Even if, as the Trial Chamber incorrectly found, internationalized and domestic courts can set aside or limit amnesties should they be

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[60] *Id.*, paras. 38-39.
[61] *Id.*, paras. 40-52, 54.
[62] *See* Agreement, Art. 11(2): "The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers"; Establishment Law, Art. 40 new: "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."
[63] OXFORD ENGLISH DICTIONARY (2nd ed., 1989; online version September 2011), *available at* http://www.oed.com/view/Entry/172974?rskey=Yfhs9S&result=2#eid. The term "scope" is not in Black's Law Dictionary.
[64] Impugned Decision, para. 29.
[65] BLACK'S LAW DICTIONARY 1548 (7th ed. 1999).

deemed incompatible with international norms,[66] the ECCC lacks the jurisdiction to limit the Royal Amnesty's applicability to certain crimes. Indeed, the Trial Chamber recognized that "it is not in a position to determine the respective powers of the King and the National Assembly, and in consequence, the constitutional validity of the 1996 Royal Decree, as this is first and foremost the prerogative of the Constitutional Council."[67]

2. Cambodia's treaty obligations do not prevent the Royal Amnesty from providing Mr. IENG Sary immunity from prosecution at the ECCC

40. The Trial Chamber held that "[a]s Cambodia is under an absolute obligation to ensure the prosecution or punishment of perpetrators of grave breaches of the 1949 Geneva Conventions, genocide and torture, [the Royal Amnesty] cannot relieve it of its duty to prosecute these crimes or constitute an obstacle thereto."[68] The Trial Chamber erred in its holding. Cambodia is under an obligation to implement national legislation in order to provide penal sanctions for persons who have committed the crimes specified in each convention.[69] The Geneva Conventions, the Genocide Convention and the Convention against Torture are treaties between Cambodia and other States. Cambodia's obligations under these treaties exist in an international legal regime between States.

41. A separate domestic legal regime exists between Cambodia and individuals within its territorial boundary. The Trial Chamber confuses Cambodia's legal obligations vis-à-vis the international community and Cambodia's obligations vis-à-vis individuals within its territory. In 1996, when the Royal Cambodian Government granted the Royal Amnesty,

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[66] Impugned Decision, para. 53.

[67] *Id.*, para. 29. The validity of laws promulgated by the King may be reviewed for constitutionality by the Constitutional Council. *See* Constitution, Arts. 136 New – 144 New. Other acts of the King may not be challenged by State organs. This flows from Article 7 of the Constitution, which states that the King shall be inviolable.

[68] Impugned Decision, para. 39. Similarly, the Trial Chamber erred in holding that "[i]n consequence of Cambodia's treaty obligations with respect to these crimes, the Chamber shall not construe the [Royal Amnesty] as granting immunity from prosecution for Accused IENG Sary in relation to grave breaches of the Geneva Conventions, genocide and torture." *Id.*, para. 38.

[69] The Geneva Conventions state: "The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article." *See* Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; and Geneva Convention IV, Art. 146. Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948, entry into force 12 January 1951 states: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III." Article 4(2) of the Convention Against Torture states: "Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature."

Cambodia did not fulfill its treaty obligations set out in the Geneva Conventions, the Genocide Convention and the Convention against Torture to provide for penal sanctions for persons who have committed the crimes specified in each convention.[70] Consequently the Royal Amnesty was granted without violating national laws.

42. Even if the Supreme Court Chamber finds that the ECCC can determine the validity of the Royal Amnesty, the obligation to prosecute serious international crimes – should any such obligation exist – is different from the right to grant and uphold an amnesty from prosecution for these crimes. One scholar has found that "customary international law today *does* impose a duty on States to prosecute all core crimes committed within their jurisdiction,"[71] but has concluded that amnesty laws may be considered an *exception* to this duty, rather than a violation of the duty.[72] The *jus cogens* status of international crimes does not alter this analysis.[73] National jurisdictions have authority to grant and uphold amnesties for *jus cogens* crimes; such a grant or upholding of an amnesty is a matter of national sovereignty and domestic law.[74] The Royal Amnesty can provide immunity from prosecution for Mr. IENG Sary in relation to grave breaches of the Geneva Conventions, genocide and torture.

3. The Trial Chamber must apply customary international law as it stands and not the direction in which customary international law is developing

[70] The proper course of action in this instance would be for a State to bring a case against Cambodia at the International Court of Justice. Such a case must be brought against Cambodia, as a party to the Genocide Convention, by another State party. *See* Genocide Convention, Art. 9.

[71] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 202 (T.M.C. Asser Press 2006). Ferdinandusse is a legal officer with the Dutch Public Prosecutions Department, specializing in international criminal law.

[72] *Id.*, at 200. Ferdinandusse notes that amnesties may be reconciled with a duty to prosecute provided the conditions of the amnesty reflect a proper balance of the different interests involved. He states that "[t]his fact is aptly demonstrated by the ICC Statute, which in a general sense recognizes the necessity to prosecute but at the same time allows for prosecutorial discretion, and is silent on the legality and effects of amnesties because the negotiating States could not reach agreement on that point." *Id.*, at 201.

[73] Apart from the issue of Cambodia's compliance with its international obligations, the OCP has previously argued that the Establishment Law requires the ECCC to take into account certain "international standards" which it asserts would require the Royal Amnesty not to be applied to *jus cogens* crimes. For a discussion of the error of this argument, *see* IENG Sary's Appeal Against the Closing Order, paras. 71-72.

[74] The Abidjan Agreement, for example, was an agreement granted within the national jurisdiction of Sierra Leone which provided a blanket amnesty for all crimes committed by the Revolutionary United Front of Sierra Leone. The Abidjan Agreement ensured "that no official or judicial action is taken against any member of the RUF in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement." Abidjan Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996 ("Abidjan Agreement"), Art. 14, *available at* http://www.sierra-leone.org/abidjanaccord.html.

a. State practice and *opinio juris* do not prohibit amnesties for serious international crimes

43. The Trial Chamber found that it is "entitled in the exercise of its discretion to attribute no weight to a grant of such amnesty which it considers contrary to the direction in which customary international law is developing."[75] The Trial Chamber erred in its finding. The Trial Chamber must apply customary international law as it stands; not as it perceives customary international law to be developing.[76] Customary international law is defined by "extensive and virtually uniform" State practice and *opinio juris*.[77] The Trial Chamber found that "state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them."[78] This finding is supported by the Trial Chamber's review of the adoption, scope and application of amnesties in conflict or post-conflict countries in the last three decades. The Trial Chamber found that State practice of 28 States in the past three decades encompassed the implementation of amnesty laws, of which 18 cover the crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions.[79] As recently as 23 November 2011, States have granted immunity for *jus cogens* crimes. Yemeni President Saleh signed an agreement where he will step down from power in exchange for immunity from prosecution. The Yemeni authorities have been accused of

[75] Impugned Decision, para. 54.
[76] Similarly, the Trial Chamber found that "the practice of granting amnesties remains commonplace [but] there is nonetheless a trend towards the limitation of their scope." *Id.*, para. 51. A "trend" is not customary international law.
[77] *North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. The Netherlands), Judgement, I.C.J. Reports 1969*, p. 43, para. 74; p. 44, para. 77.
[78] Impugned Decision, para. 54. The reference to "other" in the Trial Chamber's finding refers to those international crimes not covered by the Geneva Conventions, the Genocide Convention and the Convention Against Torture.
[79] *Id.*, n. 105, *citing* Chile (1978 Decree-Law on Amnesty, covering crimes committed between September 1973 and March 1978); Brazil (1979 Amnesty Law, covering crimes committed between 1961 and 1974, except terrorism, assault and kidnapping); Argentina (1986 Full Stop Law and 1987 Due Obedience Law, covering crimes committed before December 1983, except rape, kidnapping and the hiding of minors, change of civil status and appropriation of immovable through extortion); Uruguay (1986 Law of Caducity); Honduras (1991 Decree No.87-91); El Salvador (1992 Law of National Reconciliation, Legislative Decree No. 147 and the 1993 Law of General Amnesty for the Consolidation of Peace, Legislative Decree No. 486, except kidnapping, extortion and drug related activities); Mauritania (1993 Amnesty Law); Cambodia (1994 Law); Haiti (1994 Law relating to Amnesty); Peru (1995 Amnesty Law No. 26479); South Africa (1995 Promotion of National Unity and Reconciliation Act); Republika Srpska (1996 Law on Amnesty and 1999 Law on Charges and Amendments to the Law on Amnesty); Sierra Leone (1996 Abidjan Agreement and 1999 Lome Peace Accord); Uganda (2000 Amnesty Act); Angola (2006 Memorandum of Understanding for Peace and Reconciliation in Cabinda Province implemented in a domestic Amnesty Law); Algeria (2005 Charter for Peace and National Reconciliation, except for collective massacres, rapes and bombings in public places); Honduras (2010 Amnesty Decree): and Tunisia (2011 Legislative Decree No. 2011-1 granting amnesty).

attacking its civilians.[80] No crimes appear to be barred from this immunity. UN Secretary-General Ban Ki-moon is reported to have stated that he was "encouraged by the positive development of the situation in Yemen."[81] If there is such extensive practice demonstrating that States have implemented amnesty laws for serious international crimes, there cannot be extensive and virtually uniform State practice establishing an absolute prohibition of amnesties in relation to serious international crimes.

44. In addition to the lack of extensive and virtually uniform State practice, *opinio juris* supports the use of amnesties for serious international crimes. The UN has encouraged States to grant amnesties on several occasions. In 1996 – the same year as the Royal Amnesty was granted – the government of Sierra Leone signed an agreement with the Revolutionary United Front of Sierra Leone ("RUF") in Abidjan which provided a blanket amnesty for all crimes committed by the RUF, both national and international.[82] The UN, the Organization of African Unity, the Commonwealth and Cote d'Ivoire signed this agreement as moral guarantors.[83] In 1993 the UN helped negotiate a blanket amnesty agreement in order to resolve the internal conflict in Haiti.[84] The agreement consisted of an amnesty for the military junta in exchange for the reinstatement of President Aristide.[85] In 1994, the UN supported the South African amnesty.[86] Under the proposed amnesty plan, members of the apartheid government security forces and apartheid activists would receive blanket immunity. In exchange, the government would free the remaining political prisoners.[87] As recently as May 2011, French President Nicolas Sarkozy publicly urged former Libyan leader Colonel Gaddafi to step down as "all options are open."[88] All options would include an amnesty.

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[80] *See e.g.*, *Q&A: Yemen Crisis*, BBC NEWS, 23 November 2011, *available at* http://www.bbc.co.uk/news/world-middle-east-14988945: "In June, government planes bombed cities said to be under militant control in southern Abyan province, causing tens of thousands of people to flee, and attacks in the area continued for months."
[81] *Yemeni President Saleh Signs Deal on Ceding Power*, BBC NEWS, 23 November 2011, *available at* http://www.bbc.co.uk/news/world-middle-east-15858911.
[82] Abidjan Agreement, Art. 14.
[83] *Id.*, Art. 28.
[84] Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 293-94 (2008).
[85] *Id.*
[86] *Id.*, at 293.
[87] *Id.*
[88] *G8 Summit: Sarkozy Offers Libya's Gaddafi 'Options'*, BBC NEWS, 26 May 2011, *available at* http://www.bbc.co.uk/news/world-europe-13564999.

45. The Trial Chamber found that "[State] practice demonstrates at a minimum a retroactive right for third States, internationalised and domestic courts to evaluate amnesties and to set them aside or limit their scope should they be deemed incompatible with international norms."[89] This finding cannot be applied to the Royal Amnesty. The Trial Chamber only finds State practice of this "retroactive right." State practice alone does not create customary international law; *opinio juris* is needed. Even if the ECCC is considered an international or an internationalized court, as stated *infra*, the Royal Amnesty is not incompatible with the international norms referred to by the Trial Chamber.[90]

b. International Statutes and jurisprudence do not prohibit amnesties for serious international crimes

46. The Trial Chamber relied on the finding from the Special Court for Sierra Leone ("SCSL") that the SCSL "has recognized a 'crystallising international norm that a government cannot grant an amnesty' for crimes under international law, finding that blanket amnesties were impermissible under international law…. [T]he SCSL noted that states are under a duty to prosecute *jus cogens* crimes and that the amnesty granted by Sierra Leone could not cover crimes under international law which were the subject of universal jurisdiction."[91] The Trial Chamber did not address the Defence's submissions that the SCSL erred in its finding.[92] The Trial Chamber erred in law in several respects. First, there is no crystallized norm of customary international law to invalidate a validly granted amnesty or pardon.[93] A crystallizing norm is not an existing norm of

[89] Impugned Decision, para. 53.
[90] The international norms which the Trial Chamber has referred to are the obligation to prosecute serious international crimes and the obligation to provide victims with the right to an effective remedy. *Id.*, paras. 40-52, 54.
[91] *Id.*, para. 46.
[92] IENG Sary's Supplement to His Rule 89 Preliminary Objection (Royal Pardon and Amnesty), 27 May 2011, E51/10, paras. 20-23.
[93] *See, e.g.*, John Dugard, *Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1002-04 (1999): "[S]uccessor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.… The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija* which held that amnesties for torture are null and void and will not receive foreign recognition. *It is, however, doubtful, whether international law has reached this stage.* State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution. The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of South Africa and El Salvador, expressing the view that international law not only fails prohibit amnesty but rather encourages it" (emphasis added); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1022 (2006): "The International Criminal Court Statute is explicit on certain challenges to accountability such as superior orders, head of state

international law. The applicable law must be the law as it stands, not the direction in which it is perceived to be heading. Second, the Royal Amnesty is not a blanket amnesty. The Royal Amnesty was only for Mr. IENG Sary in exchange for his reintegration with the Royal Cambodian Government. Third, there is currently no norm of customary international law that requires States to punish the commission of *jus cogens* crimes.[94] If a crime has *jus cogens* status, it requires States not to engage in it, but does not necessarily require States to punish its commission. If the punishment of *jus cogens* crimes has not attained customary international law status, the invalidity of amnesties for *jus cogens* crimes cannot have obtained such status. Fourth, as stated *supra*, amnesties have been granted for crimes under international law which were the subject of universal jurisdiction.

47. The Trial Chamber found that "the Statutes of the SCSL and the Special Tribunal for Lebanon [("STL")] specifically provide that amnesties granted to persons falling within the jurisdiction of each respective court shall not be a bar to prosecution."[95] The Trial Chamber's finding supports the submission that there is no customary international law prohibiting amnesties for serious international crimes. It would be superfluous for the SCSL and STL Statutes to specifically prohibit amnesties falling under their respective jurisdictions if customary international law existed prohibiting amnesties for the serious international crimes. Each international/hybrid/internationally assisted tribunal has its own statute or agreement, only some of which deal with amnesties.[96] There is no article in the ICTY or ICTR Statutes prohibiting amnesties for the serious international crimes

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immunity, and statute of limitations, but is silent both as to any duty to prosecute and with regard to amnesties. Although the issue was raised during the Rome Conference at which the Statute was adopted, no clear consensus developed among the delegates as to how the question should be resolved. This too suggests that customary international law had not crystallized on this point, at least not in 1998."

[94] *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 302 (Oxford University Press 2003): "Besides there being no customary rule with a general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community." For further analysis on this point, *see* IENG Sary's Appeal Against the Closing Order, paras. 126-29.

[95] Impugned Decision, para. 47.

[96] For a discussion of why the SCSL must be distinguished from the ECCC and why the SCSL's decision not to recognize an amnesty for *jus cogens* crimes does not demonstrate that amnesties for such crimes are invalid, *see* IENG Sary's Appeal Against the Closing Order, paras. 75-82.

falling under their respective jurisdictions. At the ECCC, only the scope of the Royal Amnesty can be determined.[97]

c. The National jurisprudence cited by the Trial Chamber cannot create customary international law permitting courts to retroactively repeal or limit amnesties

48. The Trial Chamber has found that "the courts of, Chile, Argentina, Uruguay, Honduras, Peru and Colombia have either retroactively repealed their blanket amnesty laws or limited their scope of application."[98] Such scenarios must be differentiated from the Royal Amnesty. The Royal Amnesty is not a blanket amnesty; it only applies to Mr. IENG Sary. Customary international law retroactively repealing amnesty laws or limiting their legal validity cannot be formed through the practice of the domestic courts of six States.

d. Should any such conditions exist, Mr. IENG Sary meets the conditions for granting amnesties

49. The Trial Chamber found that "[w]hereas blanket amnesties were previously the norm, an increasing number of amnesties exclude their application to certain serious international crimes…. [A]n increasing number of constitutions have prohibitions prohibiting amnesties for international crimes."[99] Such a finding cannot be applied to the Royal Amnesty. The Royal Amnesty, which was approved by the National Assembly (of whose members are the representatives of the electorate), voicing the will of the people, is *not* a blanket amnesty.[100] It is narrowly tailored: it *only* applies to Mr. IENG Sary, and it does not deprive or frustrate the rights of the victims or Civil Parties, since it does not prevent the prosecution of others. The Constitution does not prohibit amnesties for international crimes.[101]

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[97] Agreement, Art. 11(2). "The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers"; Establishment Law, Art. 40 new. "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."
[98] Impugned Decision, para. 49.
[99] *Id.*
[100] *Sihanouk Pardons Ieng Sary*, BANGKOK POST, 15 September 1996: "Hun Sen said it had been easy to collect the signatures from MPs in the 120-member national assembly…."
[101] Constitution, Arts. 27, 90 new.

50. The Trial Chamber found that amnesties under certain conditions have been "frequently accepted or even encouraged."[102] The Trial Chamber provided examples of amnesties which have been exchanged for facts "which ensured at least a modicum of accountability and access for victims to the truth,"[103] and "surrendering to authorities."[104] Similarly, in exchange for the Royal Amnesty, Mr. IENG Sary reintegrated with the Royal Government of Cambodia, effectively ending a 17-year civil war, and provided victims with access to the truth through publishing "The True Fact about Pol Pot's Dictatorial Regime."

4. The Royal Amnesty does not violate Cambodia's human rights obligations

51. The Trial Chamber relied on the International Military Tribunal ("IMT") Charter, and the International Military Tribunal for the Far East ("IMTFE") Charter, the ICC Statute, the ICTY Statute, and the ICTR Statute as international instruments which oblige the prosecution of international crimes.[105] As stated *supra*, the obligation to prosecute serious international crimes – should any such obligation exist – is different from the right to grant and uphold an amnesty from prosecution for these crimes. The IMT Charter, the IMTFE Charter, ICTY Statute, ICTR Statute, and the ICC Statute are silent as to whether an amnesty can be granted for international crimes. Thus, these international instruments cannot create customary international law in relation to whether an amnesty violates a State's obligation to prosecute serious international crimes.

52. The Trial Chamber found amnesties for perpetrators of serious international crimes to be incompatible with the duty to investigate and prosecute these acts.[106] The Royal Amnesty does not violate any duty to investigate and prosecute any criminal acts which may have occurred during the DK period. First, Case 002 has already been investigated. The

[102] Impugned Decision, para. 52.
[103] *Id.*
[104] *Id.*
[105] Impugned Decision, para. 41. The Trial Chamber found that the ICC Statute "reaffirmed the necessity to prosecute serious international crimes." *Id.* The Trial Chamber found that the ICTY and ICTR Statutes "evidence the type of crimes for which prosecution and punishment are considered imperative." *Id.*, para. 47. The Trial Chamber also states that the ICTY "has also held that '[crimes against humanity] are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment,'" *citing Prosecutor v. Erdemović*, IT-96-22-T, Sentencing Judgement, 29 November 1996, para. 28 and *Prosecutor v. Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, paras. 155-56.
[106] Impugned Decision, para. 38. The Trial Chamber further found that subsidiary sources of international law have "recognised a duty to prosecute grave international crimes and the incompatibility of amnesties for such crimes…" *Id.*, para. 48.

Closing Order – a public document – was rendered by an independent and impartial organ of the ECCC, the Co-Investigating Judges,[107] whose duty was to "ascertain the truth."[108] Second, the Royal Amnesty only applies to Mr. IENG Sary. Third, as Case 002 involves other Accused, the Royal Amnesty does not prevent prosecutions stemming from acts which occurred during the DK period.

53. The Trial Chamber provides examples from the IACtHR, the European Court of Human Rights and the African Commission on Human and People's Rights which found amnesty laws to be incompatible with their respective human rights conventions.[109] These examples range in date from 1988 to 2010.[110] Each State being brought before a regional human rights courts must have implemented an amnesty or amnesty laws for the validity of these amnesties or amnesty laws to be questioned. This is indicative of a State practice – a necessary ingredient for the formation of customary international law – of promulgating amnesties or amnesty laws. State practice permits the application of amnesties for serious international crimes.

54. The Trial Chamber found that the duty to prosecute grave international crimes and the incompatibility of amnesties for such crimes "further reflect[s] the views of the majority of states of the international community."[111] The Trial Chamber *does not* support its finding. The State practices of many States in the international community do not reflect the Trial Chamber's finding.[112] As stated *supra*, States and the UN are pragmatic and will turn to amnesties when necessary.

55. The Trial Chamber found that amnesties barring prosecution for serious international crimes are incompatible with the international obligations of states to provide victims of these violations with an effective remedy.[113] The Trial Chamber erred in its finding. First, the Trial Chamber provides no support or authority for this finding. Second, the right to an effective remedy in this instance does not necessarily require the prosecution

[107] Article 5(3) of the Agreement states in pertinent part: "The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."
[108] Rule 55(5) states in pertinent part: "In the conduct of judicial investigations, the Co-Investigating Judges may take any investigative action conducive to ascertaining the truth."
[109] Impugned Decision, paras. 43-45.
[110] *Id.*, ns. 91-96.
[111] *Id.*, para. 48.
[112] *Id.*, n. 105.
[113] *Id.*, para. 42.

of Mr. IENG Sary. The Royal Amnesty can be applied without violating Cambodia's obligations to provide victims with an effective remedy. Case 002 has already been investigated, the Closing Order is available to the public, and prosecutions of the other Accused are still possible in Case 002. Six days prior to the promulgation of the Royal Amnesty, Mr. IENG Sary's published document, "The True Fact about Pol Pot's Dictatorial Regime," provided accountability and access for victims to the truth. The Royal Amnesty ended a 17 year civil war which prevented further victims from the civil war. Prime Minister Hun Sen in as much acknowledges this fact.[114]

VI. CONCLUSION

56. The Impugned Decision must be annulled and Mr. IENG Sary's prosecution must be immediately terminated. The Trial Chamber, which had no competence and thus no discretion to determine the validity of the 1979 Judgement or the Royal Pardon, erred by finding the 1979 Judgement invalid. This error led to its failure to apply the Royal Pardon, which is valid and applicable Cambodian law, to ensure that Mr. IENG Sary serves no sentence for the acts at issue in 1975-79. This was the intended scope of the Royal Pardon. If there is any doubt as to this intended scope, such doubt *must* be resolved in Mr. IENG Sary's favor. The Trial Chamber further erred in failing to apply the principle of *ne bis in idem* as set out in the CPC and ICCPR. The *res judicata / ne bis in idem* provisions of the CPC and ICCPR are valid and applicable Cambodian law and contain no exceptions which would limit their application in this instance.

57. The Trial Chamber acted *ultra vires* by determining the validity of the Royal Amnesty. The Trial Chamber erred in concluding that there is an emerging consensus which prohibits amnesties in relation to serious international crimes.[115] An emerging consensus is not a crystallized international norm. The Trial Chamber correctly concluded that "state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them."[116] Not only is there insufficient State practice, there is also insufficient *opinio juris*. An absolute prohibition of amnesties does not exist in customary international law.

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[114] "[W]ithout Ieng Sary leading 70 percent of the [Khmer Rouge] forces to integrate into government forces we could not have ended the war." *Khmer Rouge Trial Law on Track for December Approval: Cambodian PM*, AGENCE FRANCE-PRESSE, 30 November 2000.
[115] *Id.*, para. 53.
[116] *Id.*

58. Cambodia's obligations under the Geneva Conventions, the Genocide Convention and the Convention Against Torture are to implement national legislation in order to provide penal sanctions for persons who have committed the crimes specified in each convention. These obligations do not mean an absolute prohibition of amnesties in relation to genocide, torture and grave breaches of the 1949 Geneva Conventions. The Royal Amnesty is not incompatible with the obligation to prosecute serious international crimes and the obligation to provide victims with the right to an effective remedy.

VII. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to:

a. FIND the Appeal admissible;
b. GRANT a public oral hearing;
c. ANNUL the Impugned Decision; and
d. ORDER the immediate termination of Mr. IENG Sary's prosecution.

Respectfully submitted,

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **5th** day of **December, 2011**