E22/I/32

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

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# PROSECUTION'S RESPONSE TO IENG SARY'S SUBMISSION ON JURISDICTION

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## I. INTRODUCTION

1. The Co-Prosecutors request the Pre-Trial Chamber to reject the Charged Person IENG Sary's submission that the ECCC has no jurisdiction to investigate or prosecute him because of his trial, *in absentia,* of 1979 and the royal amnesty and pardon of 1996.[1]

## II. RELEVANT FACTUAL BACKGROUND

2. After overthrowing the Democratic Kampuchea regime on 7 January 1979, the government of the People's Republic of Kampuchea promulgated the Decree Law No. 1 ("Decree Law") that established the People's Revolutionary Tribunal ("PRT") to "try the acts of genocide committed by the Pol Pot-Ieng Sary clique."[2] The PRT indicted, prosecuted and convicted this Charged Person *in absentia.* The indictment sought to charge him with "genocide" under the Decree Law and under the Genocide Convention of 1948.[3] The PRT sentenced him to death and ordered the confiscation of his property.[4] He never served this sentence.

3. On 15 July 1994, the Government of Cambodia enacted the Law on the Outlawing of the Democratic Kampuchea Group ("Outlawing Law").[5] This law made it a crime to be a member of the "political organization or the military forces of the Democratic Kampuchea Group."[6] It empowered the King to grant an amnesty or a pardon to those who violated it.[7] Upon the Charged Person's defection from the Khmer Rouge in 1996, the King granted him a pardon for his PRT conviction and an amnesty from any future prosecution under the Outlawing Law.[8]

4. The ECCC Law provides that this Court shall decide the scope of any amnesty or pardon granted prior to its establishment.[9] Accordingly, while deciding on the issue of this Charged Person's provisional detention, the Co-Investigating Judges ruled on the impact of the PRT conviction and the

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[1] *Case of IENG Sary,* Ieng Sary's Submission Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 03), 7 Apr 2008 [*hereinafter* "Submission"].

[2] 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, signed by the President of the People's Revolutionary Council of Kampuchea, 15 Jul 1979 [*hereinafter* "Decree Law"] in *Genocide in Cambodia – Documents from the Trial of Pol Pot and Ieng Sary,* University of Pennsylvania Press, Philadelphia, 2000 [*hereinafter* "Genocide in Cambodia"].

[3] Genocide in Cambodia, Indictment.

[4] Genocide in Cambodia, Judgment.

[5] Law on the Outlawing of the Democratic Kampuchea Group promulgated by Reach Kram No. 01.NS.94 on 15 July 1994, available on the website http://www.cambodia.gov.kh/krt/pdfs/Law%20to%20Outlaw%20DK%20Group%201994.pdf [*hereinafter* "Outlawing Law"].

[6] Outlawing Law, art. 2.

[7] Outlawing Law, art. 7. This reiterated the King's constitutional power of pardon and amnesty.

[8] Submission, para. 6.

[9] ECCC Law, art. 40.

royal pardon and amnesty on this Court's ability to prosecute him. They held that (1) the principle of *ne bis in idem* (double jeopardy) did not apply because this Court had not yet charged this Charged Person with genocide, the only offence for which the PRT convicted him, and (2) the royal decree did not bar this Charged Person's prosecution for any crime within this Court's jurisdiction. [10]

## III. DOUBLE JEOPARDY IS NOT APPLICABLE

### Introduction

5. Relying on the principle of double jeopardy, the Charged Person argues that his PRT conviction for genocide subsumes all the charges that this Court is investigating against him and, as such, any investigation and prosecution before this Court is barred.[11] He claims that, under Cambodian law, there are no exceptions to the principle of double jeopardy and if there are exceptions, they do not apply.[12] He contends that the applicable law prohibits cumulative charging for different offences arising out of the same conduct - especially, where the charges arise out of two trials separated in time and where the former charges subsume the latter.[13]

6. The Co-Prosecutors request the Pre-Trial Chamber to reject these arguments. The principle of double jeopardy is not applicable in this case because the PRT did not conform to international fair trial standards. The exceptions to the principle of double jeopardy are implicit in the Cambodian Law, or alternatively, should be applied in accordance with international standards of justice, fairness and due process of law.[14] Further, if the trial was held to conform to international fair trial standards the double jeopardy principle would not bar the prosecution for the crime of genocide as recognized under international law or for other crimes under the ECCC Law. Cumulative charging for different offences arising out of the same conduct is not prohibited under international law where any unfairness can be taken into account at sentencing.

### The Law

7. Article 14 of the International Covenant of Civil and Political Rights ("ICCPR"), applicable before this Court, prohibits double jeopardy.[15] It requires that no one should be tried or punished again for

[10] *Case of Kaing Guek Eav*, Order of Provisional Detention, Case File No. 001/18-07-2007-ECCC/OCIJ, 31 Jul 2007, para. 10, 14 [*hereinafter* "Provisional Detention Order"].
[11] Submission, para. 9(4).
[12] Submission, para. 9(1).
[13] Submission, para. 9(2) - (4).
[14] Agreement, art. 12.
[15] ECCC Law, art 33(new).

an offence for which he has already been *finally* convicted or acquitted in accordance with law.[16] The purpose of this principle is to spare an individual from undergoing, more than once, the psychological, emotional, physical and monetary stress associated with a criminal prosecution.[17] This principle, however, is subject to exceptions.[18] These exceptions apply when, in the first trial:

(i) The court did not fully comply with the fundamental safeguards of a fair trial, or did not act independently or impartially;

(ii) The court conducted a trial essentially to shield the accused from international criminal responsibility;

(iii) The prosecution or the court did not act with the diligence recognized by international standards; or

(iv) The defendant was prosecuted for the same fact or conduct, but the crime was characterized as an ordinary crime instead of an international crime with a view to deliberately avoiding the stigma and implications of international crimes[19]

*A Tribunal Must Uphold Fair Trial Standards*

8. Reflecting a crystallisation of international law, the statutes of international tribunals provide that double jeopardy does not apply when an international tribunal conducts a second prosecution after the first national prosecution was not conducted independently or impartially in accordance with internationally recognised due process norms or was conducted in a manner inconsistent with the intent to bring accused to justice.[20] The ICCPR stipulates such due process norms including: (1) the right to a fair and public hearing by a competent, independent and impartial tribunal *established by law,*[21] (2) the right to be presumed innocent until proven guilty,[22] (3) the right to the conviction reviewed by *a higher tribunal, etc.*[23]

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[16] ICCPR, art. 14(7).
[17] *Prosecutor v. Aleksovski*, Transcript, Case No. IT-95-14/1, 24 Mar 2000; *Green v. United States*, 355 U.S. 184 (1957), para. 187-88.
[18] European Convention on Human Rights, art. 4, protocol 7; Rome Statute of the International Criminal Court, art. 20(3).
[19] Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 319-321 [*hereinafter* "Cassese Book"]. See, also., Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, art. 4(2), entered into force 1 November 1988; Princeton University Program in Law and Public Affairs, Princeton Principles on Universal Jurisdiction 28, Principle 9: Ne bis in Idem/Double Jeopardy (2001), available at HTUhttp://www1.umn.edu/humanrts/instree/princeton.htmlUTH.
[20] ICC Rome Statute, art. 20(3)(b); ICTY Statute, art. 10; ICTR Statute, art. 9; SCSL Statute, art. 9(2)(b).
[21] ICCPR, art. 14(1).
[22] ICCPR, art. 14(2).
[23] ICCPR, art. 14(5).

9. The ICCPR also provides that a defendant has a right to be tried in his presence.[24] Accordingly, under Cambodian law, convictions, *in absentia,* are set aside once the defendant is arrested or voluntarily surrenders. A retrial follows.[25] Because of the retrial, the prior conviction is not considered *final.* The defendant, therefore, cannot claim double jeopardy.[26]

*Prosecution of Different Crimes Emanating from the Same Conduct is Permitted*

10. A defendant's second prosecution for different crimes based on the same criminal act does not violate the principle of double jeopardy so long as any unfairness emanating from dual convictions is accounted for in sentencing. International tribunals permit multiple convictions for the same act (or omission) where it clearly violates multiple distinct provisions of a charging statute, i.e. where each provision contains a distinct element that requires a materially distinct proof of fact. The determination of whether each provision contains a materially distinct element is a question of law.[27] Specifically, the fact that, in practical application, the same conduct will often support a finding that the accused intended to commit both genocide and a specific crime against humanity does not make the two intents identical in law.[28]

11. In *Delalic*, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") ruled that multiple convictions based on the same set of proven facts may be "upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase."[29] Numerous other cases before international tribunals adopted this same-element test.[30] The European Court of Human Rights in *Oliveira*[31] and the United States Supreme Court in *Blockburger* too applied this test.[32]

12. This principle serves twin aims; it ensures that the defendant is convicted only for distinct offences and ensures that the convictions fully reflect his criminality.[33] Multiple convictions serve to

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[24] ICCPR, art. 14(3)(d).
[25] Code of Criminal Procedure of Cambodia, art. 410, 412, 489-493.
[26] ICCPR, art. 14(7); *Prosecutor v. Semanza*, , Decision, Case No. ICTR-97-20-A, 31 May 2000, para. 74.
[27] *Prosecutor v. Kordic and Cerkez*, Judgment, Case No. IT-95-14/2-A, ICTY Appeals Chamber, 17 Dec 2004, para. 1033 [*hereinafter* "Kordic and Cerkez Appeals Judgment"].
[28] *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-A, ICTY Appeals Chamber, 19 Apr 2004, para. 226 [*hereinafter* "Krstic Appeals Judgment"].
[29] *Prosecutor v. Delalic,* Judgment, Case No. IT-96-21-A, ICTY Appeals Chamber, 20 Feb 2001, para. 405.
[30] *Prosecutor v. Kupreskic et al.,* Judgment, Case No. IT-95-16-T, ICTY Trial Chamber, 14 Jan 2000, para 718; *Prosecutor v. Akayesu,* Judgment, Case No. ICTR-96-4-T, ICTR Trial Chamber, 2 Sep 1998, para. 468.
[31] *Oliveira v. Switzerland*, 25711/94 [1998] ECHR 68. This was a narrower view than adopted by the ECHR in *Gardinger v. Austria,* 15963/90 1995 [ECHR] 36 where it found that art. 4 had been violated because both charges were based on the same conduct.
[32] *Blockburger v. United States*, 284 US 299, 304 (1932).
[33] Kordic and Cerkez Appeals Judgment, para. 1033.

describe the full culpability of the defendant and to provide a complete picture of his criminal conduct.[34]

## Argument

### *(1) PRT Did Not Meet International Standards*

13. The PRT did not meet international fair trial safeguards.[35] First, the Decree Law, that created the PRT, was not promulgated by a legislature.[36] In addition, one of its judges submitted a witness statement against the accused.[37] Witness statements often included written allegiances to the government.[38] The PRT was limited by the severely deficient facilities, as a result, the trial lasted only five days compared to other genocide trials in history that have lasted months and years.[39]

14. Second, the PRT was established in haste and seemingly with the sole purpose of denouncing the "POL Pot - IENG Sary clique" in the immediate aftermath of the ouster of the Khmer Rouge from power.[40] Third, the PRT presumed the accused guilty (not innocent) before judgment.[41] The preamble of the Decree Law stated that the accused had "massacred millions of persons" and that it established the PRT to try acts of genocide "committed" by the POL Pot–IENG Sary clique.[42] The presiding judge declared in a press conference before the trial began that the accused were guilty of genocide and other criminal acts.[43] The schedule of the trial prematurely stated that the PRT would render its judgment the same day the closing statements would be made.[44]

15. Fourth, the PRT did not try the accused in their presence.[45] Counsel appointed on their behalf did not have their consent nor did they seek to receive any instructions.[46] They failed to contest the

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[34] Krstic Appeals Judgment, para. 217.
[35] ICCPR, art. 14(1); Universal Declaration of Human Rights, art. 10 [*hereinafter* "UDHR].
[36] Genocide in Cambodia, p. 45. The Decree Law was created by the executive body "People's Revolutionary Council of Kampuchea". There was a lack of separation between the executive, legislative, and judicial branches of the state. *See* John Quigley, *Introduction*, Genocide in Cambodia, p. 7.
[37] *Witness Statement of Mr. Pen Nauvuth*, 25 Jun 1979, Genocide in Cambodia, p. 94-6; *Decree Law No. 25, Appointment of Members of the Tribunal*, 20 Jul 1979, Genocide in Cambodia, p. 49-50.
[38] John Quigley, *Introduction*, Genocide in Cambodia, p. 15.
[39] *See, e g, Prosecutor v. Krstić*, Judgment, Case No. IT-98-33-T, ICTY Trial Chamber, 2 Aug 2001.
[40] Between the proclamation of the Decree Law on 15 July 1979 and the 19 August 1979, a time period of about one month, the Tribunal was established, the trial held and the conviction entered.
[41] ICCPR, art. 14(2); UDHR, art. 11(1).
[42] Decree Law, art. 1.
[43] *Press Conference of Keo Chanda, Minister of Information, Press, and Culture and Chair of the Legal Affairs Committee*, 28 Jul 1979, Genocide in Cambodia, p. 47.
[44] *Working Schedule for the People's Revolutionary Tribunal During Its Present Session,* 19 Aug 1979, *reprinted in* Genocide in Cambodia, p. 67-9.
[45] ICCPR, art. 14(3)(d); UDHR, art. 11(1).
[46] ICCPR, art. 14(3)(d).

jurisdiction of the PRT and did not examine or cross-examine witnesses or challenge evidence.[47] Their closing statement confessed the accused's guilt and applauded their prosecution.[48] One counsel even submitted a witness statement against the accused.[49]

16. Fifth, the PRT conviction was not *final* as the Decree Law did not grant a right of appeal to the accused.[50] No proceedings can be *final* without a right of appeal.[51] The PRT was the forum of first instance and the last resort.[52] Consequently, its trial cannot shield the Charged Person from a future prosecution. In any event, the Charged Person never underwent any hardships associated with a criminal prosecution that would justify barring future prosecutions. This is consistent with the underlying policy that double jeopardy does not apply to a defendant whose prior conviction was the product of a trial *in absentia* – as a trial without the defendant does not create the unfairness that provides the rationale for the applicability of this principle.

*(2) ECCC Investigation and Prosecution – Not Barred*

17. The PRT prosecuted and convicted the Charged Person for genocide by applying a definition that does not match the definition of genocide contained in the Genocide Convention and the ECCC Law.[53] Its indictment merely referred to that Convention but used the term genocide in the colloquial and popular sense and not in the sense understood in international law.[54] This is clear from the inclusion of crimes of forced evacuations, forced labour, destruction of social relations, slavery, destruction of the economy, starvation, *etc* within the definition of genocide.[55] Clearly, these crimes do not form part of the crime of genocide as known to international law. The Co-Prosecutors submit that a sweeping definition of genocide (evidentiary ingredients of which were never legally led and proved) in a flawed previous trial cannot bar prosecution of properly defined international crimes before an internationalised tribunal like this Court. The Defence does not submit any evidence to

[47] William Schabas, *Cambodia: Was It Really Genocide?*, 23 Hum. Rights. Q. 476 (2001).
[48] *Closing Remarks of Hope R. Stevens: Defence Counsel*, 19 Aug 1979, Genocide in Cambodia, p. 504-08.
[49] *Witness Statement of Mr. Dith Munty*, 22 May 1979, Genocide in Cambodia, p. 134-38; *Decision No. 25: Presiding Judge, Appointment of Defence Counsel*, 6 Aug 1979, Genocide in Cambodia, p. 59-60.
[50] ICCPR, art. 14(5).
[51] Reading ICCPR, art. 14(5) and art. 14(7).
[52] Decree Law, art. 2, 7; *Judgment of the Tribunal*, 19 Aug 1979, Genocide in Cambodia, p. 523.
[53] Genocide Convention, art. 2, 3; ECCC Law, art 4.
[54] Genocide in Cambodia, Indictment, p. 486 (stating "with reference to international law punishing the crime of genocide, in particular, the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, we consider that the conscious criminal acts recounted above committed by Pol Pot-Ieng Sary clique constitute the crime of genocide").
[55] Indictment for Genocide Committed by Pol Pot and Ieng Sary, Genocide in Cambodia, p. 463-88.

demonstrate that the PRT indictment and judgment actually applied a definition of genocide that was consistent with international law.

18. The Defence has also cited no law or factual analysis to contend that the definition of genocide prosecuted by the PRT subsumes *all* crimes against humanity and grave breaches of the Geneva Conventions, charged in the Introductory Submission.[56] Indeed, international jurisprudence supports a diametrically opposite view. International law first recognised genocide as a sub-class of crimes against humanity.[57] Only after the adoption of the Genocide Convention, genocide became a category of crimes *per se* with its own specific *actus reus* and *mens rea*.[58]

19. The subjective and objective elements of genocide and crimes against humanity differ in many material aspects. As for the subjective elements, the crimes against humanity have a broader scope, for they may encompass acts that do not come within the purview of genocide (for instance, imprisonment and torture). Similarly, there may be acts of genocide that normally (at least under the Statutes of the ICTY, ICTR and the ICC) are not held to fall within crimes against humanity (for instance, killing detained military personnel belonging to a particular religious or racial group, by reasons of their membership of that group).[59]

20. As for the objective elements, the crimes against humanity require the intent to commit the underlying offence in addition to the knowledge of a widespread or systematic practice constituting the general context of the offence. For genocide, what is required is the special intent to destroy in whole, or in part, a particular group in addition to the intent to commit the underlying offence.[60] From this point of view, the two categories are indeed mutually exclusive. The only exception is the case where the underlying *actus reus* is the same, for instance, murder; in this case the intent to kill is required in both categories; nevertheless genocide remains an autonomous category, for it is only genocide that *also* requires the intent to destroy the group. Similarly, it is only for crimes against humanity that knowledge of the widespread or systematic practice is required.[61]

21. The Co-Prosecutors submit that international law does not recognise some crimes as more serious than others. All international crimes are serious offences and there is no hierarchy of gravity between

[56] Submission, para. 9.
[57] Cassese Book, p. 96.
[58] Cassese Book, p. 106.
[59] Cassese Book, p. 106.
[60] Cassese Book, p. 106.
[61] Cassese Book, p. 106.

them.[62] Specifically, international tribunals have described both genocide and crimes against humanity as "crime(s) of crimes"[63] and have noted that their statutes do not rank the various crimes within their jurisdiction or the sentences that they impose upon those accused of them. However, in imposing sentences, the tribunals do take into account factors like the gravity of the offence, *etc.*[64] Thus, it cannot be argued, as this Charged Person does, that a previous prosecution of genocide (howsoever flawed it may have been) bars a further prosecution of crimes against humanity and other serous international crimes.

## IV. AMNESTY AND PARDON NOT APPLICABLE

### Introduction

22. As an alternative argument, this Charged Person submits that even if double jeopardy does not apply, the royal amnesty and pardon of 1996 prohibits the ECCC from exercising its jurisdiction over him. He argues that (1) the Outlawing Law covers the offences alleged in the Introductory Submission, (2) the pardon covers the 1979 conviction, and (3) the amnesty and pardon are binding on this Court.

23. The Co-Prosecutors request the Pre-Trial Chamber to reject these arguments. First, the Outlawing Law does not relate to the offences alleged in the Introductory Submission and, therefore, the amnesty is not applicable before this Court. Second, the scope of the pardon is limited to the non-execution of the sentence of death and confiscation of property and does not preclude the Charged Person's future investigation and prosecution. Third, assuming *arguendo* that the pardon was issued in relation to the crimes for which he is charged, such pardon is not valid for these crimes as they have a *jus cogens* status in international law. Fourth, if the pardon was deemed valid, even then, this Court, being a special internationalised tribunal, is not bound by national pardons.

### The Law

24. Amnesty and pardon are different concepts under law. Amnesty refers to the act of a sovereign granting immunity from criminal prosecutions to a person or a group for past acts. A pardon, on the other hand, is granted after a court finds a person guilty of an offence. The significant difference is that a pardon happens after a court finds a perpetrator criminally liable, that is, it holds the person

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[62] *Prosecutor v. Dusko Tadic*, Judgment in Sentencing Appeals, Separate Opinion of Judge Cassese, Case No. IT-94-1-A and IT-94-1-A*bis*, App. Ch., 26 Jan 2000, para. 7 [*hereinafter* "Tadic Sentencing Judgment"]

[63] *Prosecutor v. Furundzija*, Judgment, 21 Jul 2000, ICTY Appeals Chamber, Declaration of Judge Vorah, para. 5.

[64] *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No. ICTR-97-23-S, Trial Chamber I, 4 Sep 1998, para. 12-13.

accountable after a presentation of evidence.[65] An amnesty, however, prevents a court from going through the process of discovering the truth about the crime through a trial.

25. The two distinct acts, however, have the same operative legal effect in one very important way – both shield a person from criminal punishment or civil liability.[66] Consequently, amnesties and pardons are sometimes referred to interchangeably.[67]

26. International human rights jurisprudence and practice underlines the position that for serious violations of international criminal law, as in this case, neither pardon nor amnesty is permitted.[68] The Agreement establishing this Court demands that international standards be upheld.[69] Such international standards necessarily flow from the law and procedure developed through international and internationalised criminal tribunals, which have themselves dealt with similar crimes of mass atrocity as are being tried before the ECCC. The Co-Prosecutors, therefore, invite the PTC to uphold and apply the principles established by the jurisprudence of such tribunals.

*International Jurisprudence*

27. Genocide is a *jus cogens* crime.[70] It is a peremptory norm of international law from which no derogation is permitted.[71] In the *Barcelona Traction* Case, the International Court of Justice ("ICJ") ruled that all states must enforce the prohibition against genocide as an obligation *erga omnes*.[72] By implication, all states have a general duty to act to prevent and *punish* acts of genocide.[73]

28. The Special Court of Sierra Leone ("SCSL") has recognized a "crystallizing international norm" that a state cannot grant amnesty for serious violations of international humanitarian law.[74] Accordingly, it ruled that it could exercise its discretion to attribute no weight to an amnesty that was granted contrary to the evolving principles of international law and to "obligations under certain treaties and

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[65] Diane Orenlichter, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L J 2537, 2604 (1991).
[66] Black's Law Dictionary, Eighth Edition, 2004, Amnesty.
[67] *Prosecutor v. Kallon and Kamara,* Decision on Challenge to Jurisdiction; Lome Accord Amnesty, Case No. SCSL-2004-15-AR72(E) & SCSL-2004-16-AR72(E), 13 Mar 2004, para. 21 [*hereinafter* "Kallon Decision"].
[68] Leila Sadat, *Exile, Amnesty and International Law*, 81 Notre Dame L R 955, 957 (2006).
[69] Agreement, art. 12.
[70] *Prosecutor v Rutaganda,* Judgment and Sentence, Case No. ICTR 96-3-T, ICTR Trial Chamber, 6 Dec 1999, para. 451; *Prosecutor v Servashago*, Sentence, Case No. ICTR-98-39-T, 2 Feb 1999, para. 15.
[71] Vienna Convention on the Law of the Treaties, art. 53.
[72] *Barcelona Traction, Light and Power Co. Ltd.* (Belgium v Spain) (1970) ICJ, 5 Feb 1970, para. 34.
[73] Genocide Convention, art. 1. (emphasis added)
[74] Kallon Decision, para 82.

conventions the purpose of which is to protect humanity."[75] It held that, in international law, states have a duty to prosecute crimes whose prohibition has attained the status of *jus cogens*.[76] The Special Court referred to a United Nations report that stated that amnesties, being illegal, could not be granted in respect of international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law.[77]

29. In *Furundzija*, the ICTY held that not only was the prohibition on torture *jus cogens*, but that any amnesty for that crime would be inconsistent with international law.[78] The Statutes and Rules of the ICTY and the ICTR contemplate pardons only where the convicted person has already served a portion of his or her sentence[79] and only under certain conditions.[80] An absolute pardon would be inconsistent with this practice.

30. The Inter-American human rights system has also consistently held amnesties to be incompatible with a state's obligations to provide appropriate punishment for those responsible for violations of human rights.[81] As has been held by the Inter-American Court of Human Rights, any grant of amnesty or pardon for human rights violations would itself violate a state's international obligations.[82]

*UN Human Rights Mechanisms*

31. Various UN Human Rights mechanisms have repeatedly stated that domestic amnesties precluding prosecution for serious international crimes are incompatible with states parties' obligations. The Human Rights Committee ("HRC") has emphasized that such amnesties contribute to creating an atmosphere of impunity for perpetrators of human rights violations and undermine efforts to re-

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[75] Kallon Decision, para. 82, 84.
[76] *Prosecutor v. Augustine Gbao,* Decision on Preliminary Motion on the Invalidity of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Case No. SCSL-2004-15-PT, SCSL Appeals Chamber, 25 May 2004, para. 10 [*hereinafter* "Gbao Decision"].
[77] Gbao Decision, para. 10.
[78] *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/I-T, ICTY Trial Chamber, 10 Dec 1998, para. 153, 156.
[79] ICTY Statute, art. 28; ICTR Statute, art. 27.
[80] The statutes allow a reduction in sentence only where the President of the Tribunal determines, in consultation with the judges, that such a reduction is warranted "in the interests of justice and the general principles of law". The Rules of Procedure and Evidence of these tribunals provide that, in making this determination, the President must take into account, among other things, "the gravity of the crime or crimes for which the prisoner was convicted".
[81] Inter-American Court of Human Rights, *Velásquez Rodriguez Case*, Judgement of July 1988, series C No. 4, par. 174 and Godínez Cruz Case, Judgement of Jan 20, 1989, Series C, No. 5, par. 184.
[82] Inter-American Court of Human Rights, Series C: Decisions and Judgments, No.4, *Caso Velázquez Rodríguez,* Judgement of 29 Jul 1988, para. 176.

establish respect for human rights and the rule of law.[83] It describes amnesties for international crimes as "generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future".[84] It made similar findings in cases from Chile,[85] Peru,[86] Lebanon,[87] El Salvador,[88] Haiti[89] and Uruguay.[90] The findings of the UN Committee Against Torture ("CAT") also support this view.[91]

*State Practice*

32. State practice supports this crystallizing norm. National courts have annulled several domestic amnesties granted to military and political leaders suspected of international crimes as violating international law.[92] They have held so based on the supremacy of international law in the domestic constitutional order,[93] the incompatibility of domestic legislation with international treaty law and the fact that the crime involved a violation of a *jus cogens* norm.[94] There is also a growing trend towards prohibiting amnesties in national constitutions.[95] States granting amnesties are also increasingly excluding from their purview persons guilty of serious crimes like torture, forced disappearances and crimes against humanity.[96]

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[83] International Commission of Jurists & Amnesty International, *Legal Brief on the Incompatibility of Chilean Decree Law no. 2191 of 1978 with International Law*, 15 Dec. 2000, p. 9. *Available at* http://www.icj.org/IMG/pdf/Chile-eng.pdf [*hereinafter* "International Commission of Jurists"].

[84] Human Rights Committee's General Comment No. 20 (44) on ICCPR art. 7, at para. 15. A*vailable at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument.

[85] Concluding Observations of the Human Rights Committee: Chile, 30 Mar 1999, United Nations Document CCPR/C/79/Add.104, para. 7.

[86] United Nations Document CCPR/C/79/Add.67, para 9. *See also* Concluding Observations of the Human Rights Committee: Peru, in United Nations document CCPR/CO/70/PER, para. 9.

[87] United Nations Document CCPR/C/79/Add.78, para. 12.

[88] United Nations Document CCPR/C/79/Add.34, para. 7.

[89] United Nations Document A/50/40, paras. 224-241.

[90] United Nations Documents CCPR/C/79/Add.19 paras. 7 and 11.

[91] United Nations Committee Against Torture, Decision Relative to Communications 1/1988, 2/1988 and 3/1988, of 23 Nov 1989, para. 7.2.

[92] Cassel, Douglass, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court* 3 J. Int'l Crim. Just. 695, 720 (2005) [*hereinafter* "Cassel Article"]; Fannie Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile* 3 J. Int'l Crim. Just. 469, at 471 [*hereinafter* "Lafontaine Article"].

[93] Lafontaine. Article, p. 475.

[94] Cassel Article, p. 720.

[95] Cassel Article, p. 720.

[96] Cassel Article, fn. 25. (A 1982 Colombian amnesty law excluded persons guilty of torture, forced disappearances and executions; a constitutional provision in Portugal excluded from amnesty any high-level security-force official accused of ordering torture; and an amnesty granted to Albanian fighters in Macedonia excluded war crimes, crimes against humanity, torture and other serious violations of international humanitarian law.)

**Argument**

*(1) Outlawing Law Does Not Relate to ECCC Crimes*

33. The amnesty from future prosecution under the Outlawing Law given to this Charged Person is inapplicable before this Court. The Outlawing Law prospectively criminalizes membership of the Khmer Rouge from six months after its enactment.[97] It refers to those "who commit"[98] (not those who *have committed*) resistance activities against the State.[99] On the other hand, the ECCC Law grants temporal jurisdiction to this Court strictly for the crimes committed between 17 April 1975 and 6 January 1979.[100] Therefore, the crimes chargeable under the Outlawing Law are beyond the temporal jurisdiction of this Court.

34. The Agreement also clarifies that this Charged Person's pardon only pertains to the PRT conviction and does not relate to the Outlawing Law. It states: "*with regard to matters covered in the* [ECCC] *law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide.*"[101]

*(2) Scope of Pardon and Amnesty Limited*

35. Contrary to his assertion, this Charged Person did not receive a pardon for any punishment for the crime of genocide.[102] The language of the pardon is narrow and specific.[103] It is limited in scope to spare this Charged Person only of "the sentence of death and confiscation of all his property".[104] It does not refer to any conduct or crime for which he was pardoned and, consequently, does not grant him a pardon "for the crime of genocide." Nor did this Charged Person receive a pardon for any other offences that may have been committed from 1975 to 1979. The pardon is, therefore, no bar to his prosecution for any crimes within the jurisdiction of this Court.

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[97] Outlawing Law, art. 2, 5.
[98] Outlawing Law, art. 3.
[99] Outlawing Law, art. 4.
[100] ECCC Law, art. 1; Agreement, art. 1.
[101] Agreement, art. 11(2) (emphasis added).
[102] Submission, para. 10.
[103] In assessing the scope of the Charged Person's pardon, it is helpful to compare the narrow language of his pardon with the much broader language of the pardon granted by the Government of Sierra Leone to obtain a cessation of conflict in that country. Kallon Decision, para. 7.
[104] The pertinent language of the Agreement regarding IENG Sary's pardon is consistent with this interpretation. Article 11(2) of that Agreement refers to the pardon as "a pardon [which] was granted to only one person *with regard to* a conviction on the charge of genocide." It does *not* describe this as a pardon "for" or "of" a conviction on the charge of genocide. The more general language – "with regard to" – serves only to identify the one pardon with which Article 11 is concerned.

36. Interpreting the pardon in this manner and limiting it to its exact language gives real recognition to its scope while also honouring Cambodia's obligations under international law. It also best reflects the intent of the Government of Cambodia at the time of the pardon. Contrary to the Charged Person's assertion regarding the intentions of the Government of Cambodia,[105] the Prime Minister contemporaneously indicated that the scope of the pardon was carefully limited to leave room for future prosecutions.[106]

37. Thomas Hammarberg, the United Nations' Representative to Cambodia for Human Rights from 1996 to 2000, frequently met with the Prime Minister. He has stated that: *"[The Prime Minister] explained to me that the purpose of the amnesty was to encourage more defections. Also, the amnesty decree for Ieng Sary had been deliberately formulated so that it protected him only against the punishment meted out at the 1979 tribunal and the possible prosecution for having violated a 1994 law banning Khmer Rouge activities."*[107]

(3) *Pardons of Jus Cogens Crimes Not Permissible*

38. As stated above, genocide is a *jus cogens* crime. Any pardon of this serious international crime is impermissible. Thus, the royal pardon for this Charged Person's conviction of 1979 is invalid. Any absolute pardon for a *jus cogens* crime, where the convicted person has served no sentence, also violates Cambodia's international obligations to punish those responsible for crimes under the Genocide Convention. That Convention stipulates that persons committing genocide or any of the other acts enumerated therein *shall be punished*, whether they are constitutionally responsible rulers, public officials or private individuals.[108] It requires contracting parties to enact legislation providing *effective penalties* for persons guilty of genocide and contains no provisions permitting any derogation from these obligations.[109] Consequently, any pardon for genocide amounts to a breach of treaty obligations from which there can be no excuse or exception.[110] A similar argument applies

[105] Submission, para. 34.
[106] *Tom Fawthrop & Helen Jarvis*, Getting Away With Genocide? Elusive Justice And The Khmer Rouge Tribunal, 2004, p. 172 (quoting the *Phnom Penh Post* report of the Prime Minister saying that "If you study the wording of the Royal Decree], you will see that there is still the possibility to try the crimes committed by Ieng Sary .... We paid much attention o the wording of the pardon . . . there are no words in it which ban the accusation of Ieng Sary in front of a court which ıay be formed in the coming times.").
[7] *Thomas Hammarberg*. "How the Khmer Rouge Tribunal was Agreed: Discussions Between the Cambodian Government d the UN." Searching for the Truth, Documentation Centre of Cambodia, (2001) *available at* p://www.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm.
Genocide Convention, art. 4.
Genocide Convention. art. 5.
Vienna Convention on the Law of the Treaties, art. 26.

with respect to Cambodia's obligations to prosecute and punish under the Geneva Conventions, the Convention Against Torture and the ICCPR.

*(4) ECCC Not Bound by National Pardons*

39. As a special internationalised tribunal, bound by international law, a domestic pardon (even if validly granted) shall not apply in respect of the prosecution of an international *jus cogens* crime before this Court.[111] The pardon is not actually for the crime of genocide and, even if it were, it is not applicable before this *sui generis* Court.[112] This Court is a unique hybrid institution, which is subject to specific rules and procedures and is not part of the hierarchy of the Cambodian judiciary.[113] The Pre-Trial Chamber, in reaching this conclusion in *Duch*, cited a number of indicia of an international court—including that it be an "expression of the will of the international community", part of "the machinery of international justice" and having a jurisdiction that "involves trying the most serious international crimes".[114] It concluded that this Court is distinct from other Cambodian courts in a number of respects.[115] It is, and it operates as, an independent entity.[116] It is entirely self-contained from the commencement of an investigation to the determination of the appeals.[117] There is no right to have any decision of this Court reviewed by courts outside its structure and *vice versa*.[118] Its judiciary includes both national and foreign judges.[119]

40. Therefore, consistent with the SCSL decision in *Kallon*, which found that a national amnesty for an international crime could not bar prosecution of those crimes before an international tribunal, any domestic pardon for the *jus cogens* crime of genocide is not applicable before this Court.[120]

Respectfully submitted,

CHEA Leang
Co-Prosecutor

Robert PETIT
Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this sixteenth day of May 2008.

[111] Provisional Detention Order, para. 20.
[112] *Case of Kaing Guek Eav*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "DUCH", Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 01), 3 Dec 2007, para. 18 – 20 [*hereinafter* "Duch Appeals Decision"].
[113] Duch Appeals Decision, para. 18 – 20.
[114] Duch Appeals Decision, para. 18 – 20.
[115] Duch Appeals Decision, para. 18.
[116] Duch Appeals Decision, para. 19.
[117] Duch Appeals Decision, para. 18.
[118] Duch Appeals Decision, para. 18.
[119] Duch Appeals Decision, para. 18.
[120] Kallon Decision, para 86.