C22/I/26

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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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*

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I. INTRODUCTION

1. Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby files his submissions on the jurisdictional issues raised by the Office of the Co-Investigating Judges ("OCIJ") in paragraphs 5 to 14 of the Provisional Detention Order,[1] pursuant to instructions given by the Pre-Trial Chamber ("PTC").[2]

2. The OCIJ, in its Provisional Detention Order, determined that the current prosecution of Mr. IENG Sary is not barred by either the principle of *ne bis in idem* or the Royal Pardon and Amnesty ("RPA") granted to Mr. IENG Sary in 1996.[3] It based its determination that *ne bis in idem* does not bar prosecution on the fact that Mr. IENG Sary is not currently charged with genocide,[4] and further noted that cumulative convictions are allowed under international law[5] and that the 1979 trial did not cover all of the offenses coming within the jurisdiction of the ECCC.[6] It determined that the RPA would not bar prosecution on the fact that the amnesty refers to the 1994 Law,[7] and that the 1994 Law does not cover offenses within the jurisdiction of the ECCC.[8]

3. The Defence submits that the ECCC does not have jurisdiction to try Mr. IENG Sary for the crimes set out in the Introductory Submission.[9] Pursuant to the PTC's Decision, the Defence has confined its submissions to addressing only those assertions made by the OCIJ in paragraphs 5 to 14 of the Provisional Detention Order. These are complex legal issues. Should the PTC find it necessary to consider issues beyond the scope of these ten paragraphs to which the Defence was directed to respond, it is respectfully submitted that in the interest of justice, the Defence should be granted leave to file supplemental submissions.

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[1] Case of IENG Sary, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 14 November 2007.

[2] Case of IENG Sary, Case No. 002/19-09-2007-ECCC-PTC(03), Decision on Expedited Request of Co-Lawyers of Ieng Sary for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 3 March 2008, p. 2, "the Co-Lawyers may file submissions not exceeding 15 pages on the jurisdictional issues addressed in paragraphs 5 to 14 of the Order for Provisional Detention…"

[3] Provisional Detention Order, paras. 7-14.

[4] Id., para. 8.

[5] Id., para. 9.

[6] Id., para. 10.

[7] Law on the Outlawing of the "Democratic Kampuchea" Group, [hereinafter 1994 Law].

[8] Provisional Detention Order, para. 13.

[9] Mr. IENG Sary is being prosecuted for "Crimes Against Humanity (Murder, Extermination, Imprisonment, Persecution and Other Inhumane Acts), and Grave Breaches of the Geneva Conventions of 1949 (Wilful Killing, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Wilful Deprivation of Rights to a Fair Trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian)." *See* Provisional Detention Order, para. 1. The OCIJ confirmed that these charges are "without prejudice to the outcome of on-going judicial investigations which may identify other offences referred to in the Introductory Submission that may implicate the Charged Person."

II. STATEMENT OF RELEVANT FACTS

4. In August 1979 Mr. IENG Sary was tried and convicted, *in absentia,* for having committed genocide.[10] The Judgement condemned Mr. IENG Sary to death and confiscated all of his property. Mr. IENG Sary was not in custody before, during or after the trial and so the sentence was not carried out.

5. On 15 July 1994, the Cambodian Parliament promulgated a Law outlawing the Democratic Kampuchea Group.[11] This law declared, *inter alia,* that the "Democratic Kampuchea" group and its armed forces were outlaws and that membership in the group was illegal.[12]

6. On 14 September 1996, the King, at the behest of the Co-Prime Ministers, exercised his lawful authority under the Cambodian Constitution,[13] granting Mr. IENG Sary a pardon for his 1979 sentence of death and confiscation of all his property and an amnesty for prosecution under the 1994 Law.[14] The issuance of this amnesty was in return for Mr. IENG Sary's defection to the side of the Cambodian Government, which led to an end of the conflict between Government forces and those forces

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[10] Judgement of the Revolutionary People's Revolutionary Court, U.N. A/34/491, 19 August 1979, p. 4 [hereinafter Revolutionary Judgement].

[11] 1994 Law.

[12] Id., Arts. 1-2.

[13] Article 27 of the Cambodian Constitution provides that the "King shall have the right to grant partial or complete amnesty", a right that has been repeatedly exercised on the King's birthday, around Khmer New Year in April and on the King's coronation day. *See, e.g., Cambodia's New King to Pardon 88 Prisoners Fri*, ASIAN POL. NEWS, Nov. 1, 2004. Under Cambodian law, there is no limitation on the subject-matter of the crime that may be pardoned or amnestied by the King. *See, e.g.*, the pardon granted to Prince Norodom Ranariddh for plotting to overthrow the Government. *Cambodian King Grants Pardon for Deposed Prince*, Agence France Presse, 22 March 1998.

[14] Royal Decree, NS/RKT/0996/72, 14 Sept 1996. The term "amnesty" can be defined as "a pardon extended by the government to a group or class of persons, usu. for a political offense; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted." BLACK'S LAW DICTIONARY 83 (7th ed.) 1999. The major purpose of granting amnesty is to create conditions for reconciliation and an end to conflict. Amnesties are often used as techniques for ending civil wars or enabling the transition from authoritarian to democratic governments. *See* Mahnoush Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC'Y INT'L L. PROC. 65 (1999). Their usefulness has been noted by many scholars. *See, e.g.*, William A. Schabas, *Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U. C. DAVIS J. INT'L L. & POL'Y, 145, 165-68 (2004), who stated that "[p]eace and reconciliation are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded." Schabas also noted that the UN Secretary-General's statement to the Security Counsel that they should reject any amnesty for genocide, war crimes, or crimes against humanity was unfortunate, because amnesty can be very useful in promoting peace and that its significance in this respect is even reflected in Article 6(5) of Additional Protocol II to the Geneva Conventions. Additional Protocol II states that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

which had been under the control of Mr. IENG Sary.[15] The validity of this amnesty has never been questioned.[16]

7. On 12 December 1997, the United Nations General Assembly requested the Secretary-General to examine the request by the Cambodian authorities for assistance in responding to past serious violations of Cambodian and international law.[17] Intensive negotiations followed between the United Nations and the Cambodian Government. This finally resulted in a law establishing a special court within the Cambodian court system to prosecute crimes committed during the period of Democratic Kampuchea.[18] The Extraordinary Chambers in the Courts of Cambodia ("ECCC") finally became operational as a domestic court within the Cambodian judicial system on 12 June 2007.[19]

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[15] *See* Dominick Faulder, *Bleeding the Khmer Rouge*, ASIA WEEK, Oct. 25, 1996, "Hun Sen told Asiaweek that Ieng Sary's departure would spark widespread defections and reduce the Khmer Rouge's numbers by as much as 80%. But the unraveling seems to be occurring even faster than Hun Sen's most optimistic estimate. Last week, eight divisions, totaling nearly 2,500 fighters by some counts, went over to the government side."

[16] *See* paras. 11 – 14 of the Provisional Detention Order, which do not question the validity of the amnesty, but only its applicability to the crimes at issue here.

[17] UN General Assembly Resolution, 52/135 Situation of Human Rights in Cambodia, A/RES/52/135, 12 December 1997, para. 16.

[18] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12. This law was subsequently amended on 27 October 2004. *See* amended law *infra* note 46.

[19] *See* Report of the Secretary-General on Khmer Rouge trials, A/57/769, 31 March 2003, para. 31, which declared that, based on the draft law, the "Extraordinary Chambers would therefore be national Cambodian courts, established within the court structure of that country." This is the position of the Cambodian Constitutional Council. "Utilising the existing Cambodian court system, and selecting Phnom Penh as the location for the proceedings again protect the sovereignty of the Kingdom of Cambodia." (Emphasis added.) Constitutional Council Decision No. 040/002/2001, 12 February 2001. According to OCIJ Legal Officer David Boyle, "The Khmer Rouge Tribunals are both legally and formally domestic Cambodian courts ... there is an international agreement regarding these trials, but that agreement does not create or establish the court, it simply organizes the international participation in that court. The recent report of the UN Secretary General referred to it as technical assistance." David Boyle, The Legal Framework of the Khmer Rouge Tribunal, Address at the FIDH-LICADHO-ADHOC International Criminal Court Program, Articulation between the International Criminal Court and the Khmer Rouge Tribunal: The Place of Victims, Mar. 2-3, 2005, available at: http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf. This has also been confirmed by the Pre-Trial Chamber in its first decision. The Chamber held that "for all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure" Case of Kaing Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", 3 December 2007, para. 19. (Emphasis added). Although the Chamber then referred to the submissions of the Co-Prosecutors, who had suggested that this independence makes the ECCC a "special internationalized tribunal," they purposefully did not adopt the statement that the ECCC was internationalized. Id., paras. 19-21. Any attempts by the Co-Prosecutors to transform the ECCC into an international tribunal by denominating it as 'internationalized" is incompatible with the intent of the Cambodian Government in establishing the ECCC as part and parcel of the Cambodian courts. Although the UN does provide assistance to the court, as the name United Nations Assistance to the Khmer Rouge Trials would suggest, this does not in any way alter the status of the ECCC as a domestic court firmly embedded within the national judicial system of Cambodia. The Cambodian Government, in establishing the ECCC, did not relinquish to the UN or to any international body its sovereignty over its court system - in part or in whole. See also Annex A which shows that the ECCC is much closer to a domestic court than a hybrid or international tribunal.

8. On 14 November 2007, the OCIJ issued a Provisional Detention Order for Mr. IENG Sary. In this Order, the OCIJ addressed *propio motu* the jurisdictional issues of *ne bis in idem* and the effect of the RPA without first giving the parties a chance to be heard on the matter.

III. SUMMARY OF THE ARGUMENT

9. This appeal will show that the OCIJ erred in its determination that the principle of *ne bis in idem* does not apply, because:

(1) this principle is without exception in Cambodian law, but even if it were determined that the ECCC may entertain exceptions to the principle, the exceptions mentioned (but not relied upon) by the OCIJ are not applicable in the present case;

(2) the fact that Mr. IENG Sary has not been charged with genocide in the present case does not nullify the applicability of the principle of *ne bis in idem* to this case. The principle of *ne bis in idem* applies to bar new trials based on the same conduct as was at issue in the previous trial. It does not matter that the crimes charged have different legal qualifications;

(3) the concept of cumulative convictions is not applicable to two different trials separated by nearly 30 years;

(4) the concept of cumulative convictions would also not apply, because crimes against humanity and grave breaches of the Geneva Conventions are subsumed within the crime of genocide in this case; and finally

(5) the 1979 trial did in fact cover all of the offenses for which Mr. IENG Sary is presently charged.

10. This appeal will further show that even should *ne bis in idem* be found not to apply in the present case, the RPA granted to Mr. IENG Sary bars his current prosecution, because the 1994 Law does indeed cover all of the offenses included in the Introductory Submission.

IV. ARGUMENT

A. *Ne bis in idem*[20]

11. The principle of *ne bis in idem*, recognized by the OCIJ in the Provisional Detention Order,[21] prevents prosecution by a subsequent court of an individual for the same conduct, facts or cause of action for which that individual was already convicted[22] or acquitted. *Ne bis in idem* is a fundamental principle of human rights law and has been recognized by a multitude of international instruments[23] as well as by Cambodian criminal procedure.[24] The agreement establishing the ECCC also clearly sets out that "no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."[25]

12. The OCIJ held that "as a general rule, the statutes and practice of international and internationalized tribunals permit the prosecution of a person for the same acts and under the same legal characterization,"[26] in particular where the prior proceedings:

> (a) were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court; or
> (b) otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[27]

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[20] The doctrine of *ne bis in idem* is known under a variety of different formulations from the *res judicata* rule, autrefois acquit/autrefois convict and the protection against double jeopardy. There is no substantive difference between these formulations. *See* Christine Van den Wyngaert & Tom Ogena, Ne bis in idem *Principle, Including the Issue of Amnesty*, in *The Rome Statute of the International Criminal Court: A Commentary*, 705, at 706 (Antonio Cassese, Paola Gaeta, John R. W. D. Jones, eds.).

[21] Provisional Detention Order, para. 7.

[22] Whether there was a previous valid conviction is not at issue; as the OCIJ observed, the pardon Mr. IENG Sary received was limited to an annulment of his sentence "without having any effect on the conviction decision as such." Provisional Detention Order, para. 12.

[23] *See e.g.*, International Covenant on Civil and Political Rights, Art. 14(7); European Convention for Human Rights, Art. 4, Protocol 7; ICTY Statute, Art. 10; ICTR Statute Art. 9.

[24] Criminal Procedure Code of the Kingdom of Cambodia, 10 August 2007, Art. 12 [hereinafter CPC], "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." (Emphasis added).

[25] Article 13 of the Agreement between the UN and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea 2003 provides that "the rights of the accused enshrined in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process."

[26] Provisional Detention Order, para. 8.

[27] Id.

13. The Defence submits that the right not to be tried again for the same offence is protected without exception under Cambodian law.[28] To the extent that the exceptions outlined by the OCIJ do exist and apply before the ECCC, the Defence submits that they are not applicable in the present case. The OCIJ simply outlined exceptions to the principle of *ne bis in idem*, but did not decide on the applicability of these exceptions in Mr. IENG Sary's case, "since, without prejudice to the outcome of on-going judicial investigation, IENG Sary is not currently charged with genocide."[29] However, as the exceptions were mentioned in the Provisional Detention Order, the Defence will address why they do not apply to the present case.

14. The first exception to the application of *ne bis in idem* highlighted by the OCIJ does not apply to the present case. The exception allows re-prosecution only when the prior proceedings were conducted "for the purpose of shielding the person concerned from responsibility."[30] Since the 1979 trial resulted in Mr. IENG Sary being sentenced to death, and all his property being ordered confiscated,[31] the Defence submits that the 1979 trial was obviously not meant to shield Mr. IENG Sary from criminal responsibility. For this reason, the first exception does not apply.

15. The second exception to the application of *ne bis in idem* highlighted by the OCIJ likewise does not apply to the present case. This exception applies where the prior proceedings "[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."[32] The 1979 trial was obviously not intended to help Mr. IENG Sary escape culpability, since he was sentenced to death and all his property was ordered to be confiscated.[33] For this reason, the second exception does not apply.

16. In the Provisional Detention Order, the OCIJ held that it does not need to consider whether the exceptions to the principle of *ne bis in idem* apply, because the issue "does not arise at this time since, without prejudice to the outcome of on-going judicial investigation, IENG Sary is not currently charged with genocide."[34] The

[28] Article 12 of the CPC lists no exceptions to this principle. *See* text of Art. 12 *supra* note 24.
[29] Provisional Detention Order, para. 8.
[30] Id.
[31] Revolutionary Judgement, p. 4.
[32] Provisional Detention Order, para. 8.
[33] Revolutionary Judgement, p. 4.
[34] Provisional Detention Order, para. 8.

fundamental human right not to be put twice in jeopardy cannot, however, be so easily dismissed. This principle does not apply only when an accused is charged with the same crime for which he was previously tried. Rather, it applies as a bar to prosecution when he has previously been tried for the same conduct. This can be clearly seen in the Cambodian CPC, which states that "[i]n 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."[35] This is equally evident in the statutes of the ICC, ICTY and ICTR.[36]

17. After stating that the principle of *ne bis in idem* does not apply since Mr. IENG Sary has not been accused of genocide, the OCIJ proceeded to find that there is "no impediment to the prosecution of IENG Sary for the acts covered by the 1979 Judgement under an international legal characterisation other than genocide," because international tribunals have allowed cumulative convictions since the time of the Nuremburg trials.[37] Even without regard to the fact that the ECCC is a domestic Cambodian court which must apply Cambodian law,[38] and is not an international tribunal, the concept of cumulative convictions is not applicable here, because cumulative convictions have only been used by the international tribunals where the accused was charged cumulatively in the same trial.[39] In the present case, the trials are separated by almost 30 years.

18. Even if the concept of cumulative convictions were to apply here, the OCIJ should have considered the criteria for allowing cumulative convictions in greater detail.

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[35] CPC, Art. 12. (Emphasis added).

[36] ICC Statute, Art. 20.1, "Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court"; ICTY Statute, Art. 10.1, "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal." (Emphasis added). *See also* ICTR Statute Art. 9.

[37] Provisional Detention Order, para. 9.

[38] Agreement, Art. 12(1), "The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level." *See also*, Göran Sluiter, *Due Process and Criminal Procedure in the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 314, 318-22 (2006).

[39] *See* Hong S. Wills, *Cumulative Convictions and the Double Jeopardy Rule: Pursuing Justice at the ICTY and the ICTR*, 17 EMORY INT'L L. REV. 341, 376 (2003) "the focus [of double jeopardy protection] is on the permissibility of subsequent prosecution for the same offense, rather than cumulative convictions in a single proceeding." *See also* Anne Bowen Poulin, *Double Jeopardy and Multiple Punishment: Cutting the Gordian Knot*, 77 U. COLO. L. REV. 595 (2006), which discusses (in US case law) the problem of confusing the principle of double jeopardy with the issue of cumulative convictions.

There are at least five major tests used by international tribunals and domestic courts to determine whether cumulative convictions will be allowed,[40] and certain of these tests may infringe upon fundamental rights of the accused.[41] The OCIJ conspicuously failed to discuss how it would choose between these various tests to determine which to apply, and did not clearly articulate the test it applied in its decision. It simply mentioned that cumulative convictions are possible as long as "each of these international offences has a distinct element not contained in the others and protects different values."[42]

19. It is submitted that an element is materially distinct from another if it requires proof of a fact not required by the other element.[43] However, the OCIJ did not specify how the elements of genocide, crimes against humanity, and war crimes materially differ.[44]

20. While the concept of cumulative convictions is not applicable here, the Defence submits that crimes against humanity and war crimes do not require proof of any element that is not required for genocide.[45] Conversely, genocide does require proof

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[40] These tests include the "*Akayesu* Different Elements or Interests Test," the "*Tadić* Totality of Culpable Conduct Test," the "*Kupreškić* Blockburger and Different Value Test," the "*Čelebići* Two-Prong Materially Distinct Element Test" and the "Judges Hunt and Bennouna's Substantive Distinct Element Test." *See* Wills, *supra* note 39. It is unclear which test the OCIJ may have used, because *Čelebići*, *Kupreškić* and *Akayesu* were each mentioned in the footnotes to para. 9 of the Provisional Detention Order.

[41] Wills, *supra* note 39.

[42] Provisional Detention Order, para. 9.

[43] *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 Feb. 2001, para. 412 [hereinafter *Čelebići* Appeals Judgement].

[44] In para. 9 of the Provisional Detention Order, the OCIJ simply explained that "it is accepted that a person may be prosecuted for genocide, crimes against humanity and war crimes based on the same acts" and that "in application of these principles, there seems to be no impediment to the prosecution of IENG Sary for the acts covered by the 1979 Judgement under an international legal characterisation other than genocide". Such a cursory and inadequate examination of a complex issue places the Defence in the difficult position of having to appeal an element of the decision when the reasoning employed by the OCIJ is palpably insufficient. The Defence is aware that the extent of the duty to give reasons varies depending on the importance of the argument being addressed and that not each and every argument put forth by one of the parties must be addressed in the same detail, but when the Judge or Chamber has *proprio motu* addressed such an issue, without prior notice to the parties, the obligation to properly explain the issue and the judicial reasoning behind the ultimate conclusion reached by the Chamber is of paramount importance.

[45] *See* attached Annex B, which lists the separate elements for the underlying acts of genocide, crimes against humanity, war crimes and offences under Cambodian domestic law. As can been seen from the table, proof of all the *mens rea* and *actus reus* elements of crimes against humanity, war crimes and Cambodian domestic offences are also necessary for genocide. In contrast, each act as genocide additionally requires proof of specific intent. As such genocide subsumes all the other types of crimes as it is the more specific offence. The elements of genocide, crimes against humanity and war crimes are derived from the ICC Elements of Crimes; *see,* http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf. The crimes that are punishable under Cambodian domestic law are derived from the 1956 Penal Code of Cambodia. The table compares the underlying acts of murder, torture, rape, persecution, cruel treatment, deportation, imprisonment and enslavement. In the jurisprudence of the ICTY, the underlying genocidal act of "causing serious bodily or mental harm to members of the group" is interpreted widely. It "is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with

of a specific intent not found in the other offences.[46] Thus, only the conviction under the more specific provision, genocide, can be entered when taking into account the principle of cumulative convictions.[47]

21. The more specific offence subsumes the less specific one because the commission of the former necessarily entails the commission of the latter.[48] Thus, crimes against humanity are subsumed within genocide.[49] It logically follows, therefore, that Mr. IENG Sary's initial conviction for genocide in 1979 prevents him from being subsequently prosecuted for crimes against humanity and war crimes on the same factual basis. Furthermore, Mr. IENG Sary is alleged by the OCP to be responsible for various crimes under the 1956 Penal Code. The OCIJ made no mention in the Provisional Detention Order which of the distinct elements it asserts are included within these various offences that are not subsumed in the crime of genocide. Simply, the OCIJ conducted no analysis.

22. Another consideration the OCIJ used in determining the permissibility of cumulative convictions is whether the different offenses protect different values.[50] This consideration should be read as conjunctive with the materially distinct element test: in addition to each crime having a different element, it should be found that each crime also protects different values.[51] The OCIJ failed to explain what the specific values were that each crime protected and why they are different, stating only that

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beatings, threats of death, and harm that damages health or causes disfigurement or serious injury to members of the targeted national, ethnical, racial or religious group. The harm inflicted need not be permanent and irremediable, but needs to be serious." *Prosecutor v. Brđanin,* IT-99-36-T, Judgement, 1 September 2004, para. 690 (emphasis added). "Inhuman treatment … and deportation are among the acts which may cause serious bodily or mental injury". *Prosecutor v. Krstić,* IT-98-33-T, Judgement, 2 August 2001, para. 513 (emphasis added). As such, a wide variety of offences are subsumed within this category. In relation to the war crime of denial of a fair trial, this is one of the underlying acts punishable as persecution as a crime against humanity as it constitutes the denial of a fundamental right, included as the first element of persecution as a crime against humanity in Article 7(1)(h) of the ICC Statute.

[46] Article 4 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with amendments promulgated 27 Oct 2004 [hereinafter Establishment Law], requires proof of an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group". In contrast, Articles 5 and 6, which set out the elements for Crimes Against Humanity and War Crimes, respectively, simply require that the crimes have been "committed", therefore not requiring any specific intent. It is this specific intent which has been consistently held to set genocide apart from other serious crimes. *See Prosecutor v. Kayishema & Ruzindana,* ICTR-95-1-T, Judgement, 21 May 1999, para. 91, "A distinguishing aspect of the crime of genocide is the specific intent (*dolus specialis*) to destroy a group in whole or in part."

[47] *Čelebići* Appeals Judgement, para. 413.

[48] *Prosecutor v. Krstić,* IT-98-33-A, Judgement, 19 April 2004, para. 218.

[49] *See Kayishema & Ruzindana,* ICTR-95-1-T, Judgement, 21 May 1999, para. 648, where the Trial Chamber held that murder and extermination as crimes against humanity were "subsumed fully by the counts of genocide."

[50] Provisional Detention Order, para. 8.

[51] *See Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 695.

"[i]n application of these principles, there seems to be no impediment to the prosecution of IENG Sary for the acts covered by the 1979 Judgement under an international legal characterisation other than genocide."[52]

23. Furthermore, the cases cited by the OCIJ[53] appear to have allowed cumulative convictions because no prejudice was caused to the accused person, as charging the accused concurrently with two forms of liability did not require a completely new trial. One of the cases relied upon by the OCIJ was *Čelibići.* The central reasoning of the ICTY Appeals Chamber on the issue of cumulative convictions in the *Čelibići* Appeals Judgement was based on "reasons of fairness to the accused."[54] Thus, the same consideration of fairness to Mr. IENG Sary mandates against allowing convictions based on the same conduct in two trials separated by almost 30 years.

24. In its discussion of *ne bis in idem*, the OCIJ finally held that "it already appears to be established that the 1979 Judgement did not cover all of the acts for which IENG Sary is currently being charged."[55] However, by the OCIJ's own admission, no in-depth analysis was conducted of the 1979 trial when the original detention order was made: "The Co-Investigating Judges will decide later whether they need to conduct an in-depth analysis of the trial that tool [sic] place before the People's Revolutionary Tribunal in 1979."[56] No information or justification was provided as to how or why such an assertion had been established, nor is it supported by any explanation by the OCIJ of exactly which parts of the Introductory Submission were not covered by the 1979 trial.

25. The factual basis of the 1979 indictment covers all of the alleged crimes in the Introductory Submission. For a comparative analysis, see Annex C, affixed hereto.[57]

B. The Royal Pardon and Amnesty

[52] Provisional Detention Order, para. 9.
[53] This applies to all cases cited by the OCIJ in footnotes 3 and 4 of the Provisional Detention Order.
[54] *Čelebići* Appeals Judgement, para. 412.
[55] Provisional Detention Order, para. 10.
[56] Id., para. 8.
[57] The Defence submits the table as a confidential annex to these submissions as the content of the Introductory Submission is confidential. In order to allow these submissions to remain public, the Defence has relied upon public decisions, such as the Provisional Detention Order. Thus, only this Annex is confidential.

26. The OCIJ did not question the legality of the RPA granted to Mr. IENG Sary in 1996. Moreover, the OCIJ did not find that Royal amnesties and pardons issued by the King pursuant to his constitutional authority prior to the inception or creation of the ECCC are nonbinding legal instruments before the ECCC. Both were legally granted in accordance with the Cambodian Constitution.[58] The OCIJ merely stated that the amnesty Mr. IENG Sary received is not applicable in the present case because the amnesty refers expressly to the 1994 Law, and "apart from an allusion to genocidal acts in its preamble, this law only refers to a number of domestic law offences subject to prosecution in accordance with national legislation applicable at the time, as well as a series of crimes against State security. Therefore, it does not cover the offences coming within the jurisdiction of the ECCC."[59] The OCIJ did not explain how it reached this conclusion.

27. The 1994 Law, in fact, does cover the crimes "coming within the jurisdiction of the ECCC."[60] The ECCC has jurisdiction over the crimes of homicide, torture, religious persecution, genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property, and crimes against internationally protected persons.[61] The preamble to the 1994 Law does not merely "allude to genocidal acts," but specifically states that the Law was enacted "[r]ealizing that the leadership of the 'Democratic Kampuchea' group can not ... conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78. The crime of genocide has no statute of limitations."[62]

28. The preamble also explains that the Khmer Rouge have continually committed "criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in April 1975 - forcible movement, abduction, killing and subsequently also robbery and banditry, laying mines indiscriminately throughout the plains and forests, destroying public and private property, leading the killing of civilians, forcibly taking and illegally occupying national territory, and selling natural

[58] Cambodian Constitution, Art. 27.
[59] Provisional Detention Order, para. 13.
[60] Id.
[61] Establishment Law, Art. 3-8.
[62] Preamble, 1994 Law (Emphasis added).

resources by violating the sovereignty of the Kingdom of Cambodia."[63] The crimes referred to in this Law are far wider, therefore, than the OCIJ highlights.

29. Articles 3 and 4 of the 1994 Law further describe the crimes this Law is intended to cover, including: murder, rape, robbery, destruction of property, and the taking up of arms against the public authority. This list is clearly not exhaustive, as Article 3 ends its list of crimes with the term, "etc."[64] Because the list of crimes is not exhaustive, the purpose and scope of the Law, as discussed in the preamble, should be taken into consideration.[65]

30. There is also clear support from the application of the 1994 Law to the prosecution of other Khmer Rouge members for crimes of murder that it was fully intended to cover the same crimes as those coming within the jurisdiction of the ECCC, namely those committed during the period from 17 April 1975 to 6 January 1979.[66]

31. The trial of CHHOUK Rin, one of those implicated in the murders of three backpackers in September 1994, was the most important case in terms of the interpretation of the 1994 Law.[67] Facing prosecution for murder, CHHOUK Rin attempted to rely upon the amnesty provision in Article 5 of the 1994 Law to prevent prosecution as he had defected to the Government within six months of the Law coming into effect in July 1994.[68] The Municipal Court Judge ruled that CHHOUK Rin should be released immediately because his defection to the government gave him immunity from prosecution under the amnesty provision in Article 5.[69] Extensive debate on the issue followed, before the issue was addressed at an Appellate Court hearing 28 August 2002.[70] The Appellate Court held that the six month amnesty provision, "refers only to offences which have been committed before this law comes

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[63] Id.

[64] 1994 Law, Art. 3.

[65] Preambles are generally taken into consideration when interpreting a law. *See e.g.*, *Prosecutor v. Dyilo*, ICC-01/04-01/06, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, p. 13-14, "The rule governing the interpretation of a section of the law is its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its object may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble." (Emphasis added.)

[66] Establishment Law, Art. 1.

[67] *See* John A. Hall, *In the Shadow of the Khmer Rouge Tribunal: The Domestic Trials of Nuon Paet, Chhouk Rin and Sam Bith, and the Search for Judicial Legitimacy in Cambodia,* 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 409 (2006).

[68] *Id.*, at 448-449.

[69] *Id.*, at 452.

[70] *Hall, supra* note 67, at p. 457, *citing* Appellate Court of Phnom Penh, Criminal Case No. 463/17.10.2000 [Chhouk Rin], Judgment of the Appellate Court, 6 September 2002, transcript.

into force."[71] Such a decision appears to have been based on both a logical interpretation of the effect of the provision and the intention of the legislators who passed it:

a. First, to allow any Khmer Rouge member to commit a crime within the six months following the 1994 Law and then defect to the government within that same period would amount to a "carte blanche for the KR to kill, rob and murder as long as they defected before the end of the amnesty period."[72] It would effectively create an amnesty-in-advance for crimes not yet committed.

b. Second, legislators who were involved in debating the 1994 Law expressly offered a different interpretation than that put forward by the Municipal Court. Opposition politician Sam Rainsy, who had been Finance Minister in 1994 and had participated in the National Assembly debate on the 1994 DK Law, argued that the law was intended to grant amnesty only for those crimes committed *before* the law was promulgated, and that the National Assembly had specifically had in mind crimes that had taken place during the period of Khmer Rouge rule from 1975 to 1979.[73] Therefore this Judgement, by a Cambodian Appellate Court, the only one to the knowledge of the Defence which directly addresses the scope of the 1994 Law, proves that the 1994 Law was intended to apply solely to crimes committed before its entry into force on 15 July 1994.

32. The Defence submits that the 1994 Law was intended to be the *lex specialis* for the prosecution of crimes committed by the Khmer Rouge – the sole basis for prosecution of Khmer Rouge members.[74] It effectively supplanted the application of criminal laws already in force, such as the 1956 Penal Code, in relation to crimes committed by members of the Khmer Rouge. A contrary interpretation would mean

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[71] *Id.*, at 460, *citing* Appellate Court of Phnom Penh, Criminal Case No. 463/17.10.2000 [Chhouk Rin], Judgment of the Appellate Court, 6 September 2002, transcript, p. 14.

[72] *Id.*, at 454, *citing* Anette Marcher, *US Lawyer Praises Chhouk Rin Judgement*, PHNOM PENH POST, issue 9/17, 18-31 August 2000.

[73] Gina Chon & Van Roeun, *Chhouk Rin Verdict Sets Uncertain Precedent for Other KR*, CAMBODIA DAILY, 20 July 2000.

[74] *See, e.g.*, Stan Starygin, *Should the Rudolph Höss of Cambodia be Entitled to the Minimum Procedural Guarantees?*, CAMBODIAN L. REV. (7 July 2007), p. 5-6. When discussing the amnesty offered by the 1994 Law, he states, "the 1994 Law offers a broad subject matter clemency by providing that the latter will be extended to include 'crimes which they [members of the political and military organization of DK] have committed' without limiting this clause temporally or restricting it to any substantive conditions... Although there is no question that 'genocidal acts' and other crimes against humanity listed in the Preamble to the 1994 Law are classified as jus cogens and are punishable under customary international law, they cannot be punished in this jurisdiction [due to the amnesty given in Article 5]" (Emphasis added).

that the amnesty provision would have been effectively useless as a shield against prosecution under the 1956 Penal Code even if it could prevent prosecution under the 1994 Law. As such, the offer of the amnesty under Article 5 would not have been successful in encouraging Khmer Rouge members to defect.

33. The 1994 Law and the 1996 RPA were local solutions promulgated by the King, with support from the parliament and at the behest of the Co-Prime Ministers, to end the civil war that had been raging in Cambodia for twenty-five years.[75] This comprehensive attempt to end the war[76] and begin the process of national reconciliation combined the 'stick' of prosecution for membership in the outlawed Democratic Kampuchea group, with the 'carrot' of a stay in the enforcement of the Law for a period of 6 months.

34. The RPA granted to Mr. IENG Sary in 1996 was a lawful, democratically legitimate[77] and ultimately successful decision by the Royal Cambodian Government to bring peace and stability to the country. Indeed, in an interview given in 1999, Samdech Akka Moha Sena Padei Techo Hun Sen, Prime Minister of Cambodia, explained that "without Ieng Sary leading 70 percent of the [Khmer Rouge] forces to integrate into government forces we could not have ended the war."[78] Prime Minister Hun Sen then explained that "if there is any attempt to prosecute Ieng Sary it may lead to war again, that is not a good intention. It is a betrayal of peace and national reconciliation."[79]

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[75] At the time that the 1994 Law was debated and passed, the Khmer Rouge were still active and the Paris Peace Accords appeared to have fallen apart. See Initial reports of States parties due in 1993: Cambodia. 23/09/98. CCPR/C/81/Add.12. (State Party Report), Human Rights Committee Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant, para. 95. "The Khmer Rouge, a signatory to the Paris Agreements of 23 October 1991, has not demobilized, confined or disarmed its troops under the supervision of United Nations representatives. They have kept their weapons and prolonged the war, by continuing to cause destruction and posing a threat to security. They are also continuing to murder civilians and officials, to wage a campaign of insurgency against the Royal Government and to pursue a policy of racism."

[76] Id., at para. 105. "The National Assembly passed a Law on the Outlawing of the Democratic Kampuchea Group with a view to ending the war and punishing the insurgents who continue to commit crimes against the population." (Emphasis added.)

[77] Id., at para 101. "The Law on the Outlawing of the Democratic Kampuchea Group, which was passed by the National Assembly on 7 July 1994, is a special law which satisfies the popular desire for peace and for an end to genocide. It applies only to a group of Cambodians who are resisting the popular will (art. 2 of the Law) and contains no provision harming or restricting citizens' rights and freedoms (art. 9). Furthermore, it has not exceeded the limitations allowed by the Covenant. It is in keeping with the circumstances and the situation in Cambodia."

[78] *Khmer Rouge trial law on track for December approval: Cambodian PM*, AGENCE FRANCE-PRESSE, November 30, 2000.

[79] *Id.* Amnesties which contribute towards peace or indeed prevent the slide into conflict have beneficial consequences for the country involved and may not simply be dispensed with by outsiders who have suffered none of the problems and receive none of the benefits of such amnesties. As noted by Kassie Neou & Jeffrey C.

35. Mr. IENG Sary's amnesty specifically grants immunity from prosecution for the crimes covered by the 1994 Law,[80] and these crimes are clearly the same crimes over which the ECCC now has jurisdiction. Therefore, it deprives the ECCC of jurisdiction over Mr. IENG Sary in relation to these crimes.

V. CONCLUSION & RELIEF SOUGHT

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

a. DECLARE that the 1979 trial of Mr. IENG Sary prevents the ECCC from investigating and prosecuting Mr. IENG Sary for any crimes contained within the Introductory Submission under the principle of *ne bis in idem*; and to

b. DECLARE that the Royal Amnesty and Pardon granted to Mr. IENG Sary on 14 September 1996 is lawful, valid and enforceable and deprives the ECCC of personal jurisdiction over Mr. IENG Sary.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

Michael G. KARNAVAS
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Signed in Phnom Penh, Kingdom of Cambodia on this **7th** day of **April, 2008**

Gallup in *Human Rights and the Cambodian Past: In Defense of Peace Before Justice*, HUM. RTS. DIALOGUE 1.8 (1997):

> The public has not only acquiesced, but it even supports the government's amnesties. A survey by a local nongovernmental organization, the Solidarity and Community Development Association (SODECO), published in the January 28, 1997 Cambodia Daily, reported two-thirds of the 1,120 respondents "satisfied" with the deal made with Ieng Sary, and a Phnom Penh Post street poll published in the August 23–September 5, 1996 edition had similar results. (SODECO is close to opposition leader Sam Rainsy.) ... In sum, the Cambodian government's failure to bring the Khmer Rouge to justice reflects both pragmatic interests and political constraints. Viscerally, the pardon of Ieng Sary was difficult to take, but the reasons for it have been accepted by a citizenry that hungers for peace. In the end, the Cambodian government gave a local response to local circumstances: it did not act for the sake of general principles, nor for the satisfaction of the international community, but for its idea of the future of Cambodia. It was a choice of peace over justice.

See also Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208 (2007); Arsanjani, *supra* note 14. For a list of peace treaties signed in the 17th, 18th, and 19th centuries which included amnesty clauses, *see* Fania Domb, *Treatment of War Crimes in Peace Settlements – Prosecution or Amnesty?*, 24 ISRAEL Y.B. HUM. RTS. 253, 254-55 (1994).

[80] RPA, Art. 1.