ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គជំនុំជម្រះសាលាដំបូង
Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

Before: **Judge NIL Nonn, President**
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: **3 November 2011**
Original language(s): **Khmer/English/French**
Classification: **PUBLIC**

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

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1. INTRODUCTION

1. The Chamber is seised of two Preliminary Objections filed by the Defence for IENG Sary ("the Accused") on 25 February 2011. The Defence alleges that the Trial Chamber lacks jurisdiction over the Accused because the Royal Decree of 14 September 1996 ("Royal Decree") granted him a valid amnesty and pardon and as the principle of *ne bis in idem* debars a new trial based on the same conduct for which he was tried *in absentia* in 1979 by the People's Revolutionary Tribunal.[1]

2. PROCEDURAL HISTORY

2. In August 1979, the Accused was tried by the People's Revolutionary Tribunal and convicted *in absentia* for the crime of genocide and a number of other crimes. He was condemned to death and the confiscation of his property ordered.[2] On 14 September 1996, King Sihanouk issued a Royal Decree granting the Accused pardon/amnesty in relation to the People's Revolutionary Tribunal sentence of death and confiscation of property and under the 1994 Law on the Outlawing of the Democratic Kampuchea Group ("1994 Law").[3] In return, the Accused alleges that he and several thousand of his followers were reintegrated into Cambodian society, bringing to an end the conflict between Government forces and his own.[4]

3. The Trial Chamber notes, at the outset, that questions of amnesty/pardon and *ne bis in idem* have been extensively litigated before the ECCC. In the course of proceedings in Case 002 to date, the Co-Investigating Judges and the Pre-Trial Chamber have examined on four previous occasions the issues arising from the People's Revolutionary Tribunal 1979 trial and the Royal Decree and consistently found that these not to debar the ECCC's jurisdiction over the Accused IENG Sary.

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1 "Summary of IENG Sary's rule 89 preliminary objections and notice of intent of noncompliance with future informal memoranda issued in lieu of reasoned judicial decisions subject to appellate review", E51/4, 2 February 2011 ("IENG Sary's Preliminary Objections"), paras 22 and 23.

2 "Judgement of the Revolutionary People's Tribunal held in Phnom Penh from 15 to 19 August", English translation reproduced in "Genocide in Cambodia, Documents from the Trial of POL Pot and IENG Sary", C22/I/32, p.549.

3 "Royal Decree", E51/8.1, 14 September 1996 (Original Khmer version in D366/7.1.191). Confiscation of IENG Sary's property in consequence of this sentence was never carried out.

4 T., 28 June 2011 (IENG Sary Defence), pp. 24, 82; Annex to "IENG Sary's Statement as to the Scope of, Intention Behind and Background to the Royal Amnesty and Pardon", E84.1, 5 May 2011. This account is verified by media accounts at the time (*see e.g. Bangkok Post* article entitled "Sihanouk pardons Ieng Sary", D427/1/6.1.85, 15 September 1996).

4. On 14 November 2007, the Co-Investigating Judges issued a Provisional Detention Order in which they found that neither the 1979 trial nor the Royal Decree prevented the prosecution or detention of the Accused before the ECCC.[5] The Pre-Trial Chamber, seized of an appeal against this order by the Defence, confirmed these findings with substituted reasoning on 17 October 2008.[6] The Co-Investigating Judges again considered these issues in the Closing Order[7], which the Pre-Trial Chamber extensively reviewed in its Decision on IENG Sary's Appeal against the Closing Order.[8]

5. In its 11 April 2011 decision on the Closing Order, the Pre-Trial Chamber dismissed IENG Sary's ground of appeal based on the 1996 Royal Decree.[9] It considered that the scope of IENG Sary's "amnesty from the 1979 sentence" was confined to the sentence pronounced in 1979. The effect of the amnesty was therefore merely to "abolish" or "forget" the 1979 sentence, and not to bar future prosecution in respect of acts allegedly committed by IENG Sary. It further held that the Royal Decree's amnesty from future prosecution was limited to prosecution under the 1994 Law and did not extend to those offences within the jurisdiction of the ECCC. The 1994 Law created new offences and penalties, but did not intend to supplant application of existing national or international criminal law. Finally, interpreting the Royal Decree as granting IENG Sary an amnesty for crimes such as genocide, torture, grave breaches of the Geneva Conventions and crimes against humanity would be inconsistent with Cambodia's international treaty obligations to prosecute and punish authors of such crimes and to afford their victims an effective remedy. Absent any indication that the King intended to disregard Cambodia's international obligations, the Royal Decree cannot be interpreted as granting an amnesty for these crimes.[10]

6. The Pre-Trial Chamber also held that subsequent prosecution of IENG Sary by the ECCC is not debarred by the principle of *ne bis in idem*.[11] Article 12 of the Cambodian

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5 Provisional Detention Order, C22, 14 November 2007, paras 5-14.

6 Pre-Trial Chamber Decision on Appeal against Provisional Detention Order of IENG Sary, C22/I/73, 17 October 2008, paras 41-63.

7 Closing Order, D427, 15 September 2010, paras 1329-1334.

8 Pre-Trial Chamber Decision on IENG Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011 ("PTC Decision" or "Pre-Trial Chamber Decision"), paras 118-176, 184-202.

9 PTC Decision, paras. 184-202. The PTC noted that the Khmer word for amnesty was used inconsistently and provided its own translation of the Decree, finding that the Royal Decree granted two "amnesties" to IENG Sary: "*[a]n amnesty* [...] for the sentence of death and confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and *an amnesty for prosecution* under the [1994 Law]" (emphasis added).

10 PTC Decision, paras. 191-201.

11 PTC Decision, paras 118-176.

Criminal Procedure Code ("CPC") must be read as applying to acquittals only.[12] The Pre-Trial Chamber further declared Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR") to be inapplicable, as this provision has solely a domestic effect and does not apply transnationally or to proceedings before an internationalised court such as the ECCC.[13]

7. In evaluating procedural rules established at the international level, the Pre-Trial Chamber held that there was a sufficiently uniform rule to the effect that where fundamental defects exist in a national proceeding, the *ne bis in idem* principle does not apply.[14] Examining the 1979 trial, it found that although there might have been the intention to prosecute, convict and sentence the Accused, the 1979 trial was not conducted by an impartial and independent tribunal with regard to the requirements of due process. The Pre-Trial Chamber consequently concluded that the People's Revolutionary Tribunal's prosecution, conviction and sentencing of the Accused did not bar the ECCC's jurisdiction over him. The basis for the Pre-Trial Chamber's finding included:

- the questionable legal basis for the establishment of the People's Revolutionary Tribunal;
- the insufficiency of guarantees before the People's Revolutionary Tribunal of the separation of powers to ensure that judges would be free from external pressure and interference (the Decree establishing the People's Revolutionary Tribunal contained views on the guilt of the Accused and many of its members were connected to the executive branch of the government);
- several members of the People's Revolutionary Tribunal were not impartial;
- the Defence counsel appointed to represent the Accused *in absentia* showed bias and acted against the Accused;
- the various deficiencies in the witness statements relied upon by the People's Revolutionary Tribunal; and
- the brevity of the proceedings and its work schedule, which indicated that guilt was predetermined.[15]

8. On 9 May 2011, IENG Sary filed a statement as to the scope of, intention behind and background to the 1996 Royal Decree.[16] According to this statement,

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[12] Article 12 of the 2007 Criminal Procedure Code ("CPC") stipulates that "[i]n applying the principle of *res judicata*, any person who has been finally acquitted by a judgement cannot be prosecuted once again for the same act, even if such act is subject to a different legal qualification".

[13] Article 14(7) of the International Covenant on Civil and Political Rights of 16 December 1966, 999 U.N.T.S. 171, ratified by Cambodia on 26 May 1992 ("ICCPR") provides 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"; PTC Decision, paras 130-131.

[14] PTC Decision, paras 122-158.

[15] PTC Decision, paras. 165, 167, 169-74.

> prior to the discussions for reintegration, [IENG Sary and other military groups who had broken away from POL Pot] discussed with the Royal Government of Cambodia the necessity of a guarantee that [IENG Sary] would be protected from any kind of prosecution for any acts committed during my membership of the Khmer Rouge. It was emphasized that [he] must have a pardon from the 1979 sentence and an amnesty from any possible future prosecutions for any acts committed by [him], including any acts which [he] was tried for in the 1979 trial. This was a non-negotiable condition for reintegration.[17]

9. On the same date, the IENG Sary Defence requested the Chamber to summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim to testify during the Initial Hearing as to "the background to, scope of, and intention behind the 1996 Royal Decree".[18] The Co-Prosecutors opposed this request, on grounds that the meaning of the Royal Decree was sufficiently clear, that no witnesses needed to be heard on this issue, and as the request was premature in advance of the Chamber's determination as to whether the amnesty could legitimately cover genocide and the other crimes in the indictment.[19]

10. On 12 May 2011, the Chamber invited the IENG Sary Defence to file submissions limited to new arguments arising from the Pre-Trial Chamber Decision, in addition to "the question of whether the Royal decree purportedly granting an amnesty, once issued by the King, was subsequently adopted by vote as envisaged by the Cambodian Constitution (in Article 90 new)".[20]

11. As differing unofficial translations of the Royal Decree existed on the case file, the Trial Chamber filed on 12 May 2011 a new translation of the Royal Decree prepared by the Interpretation and Translation Unit at the Chamber's request. This translation reads:

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[16] "IENG Sary's Statement as to the scope of, intention behind and background to the Royal Amnesty and Pardon", E84, 9 May 2011 and Annex (E84.1).

[17] Annex to IENG Sary's Statement as to the scope of, intention behind and background to the Royal Amnesty and Pardon, E84.1, 5 May 2011; *see also* T., 28 June 2011 (IENG Sary Defence), p. 17.

[18] "IENG Sary's Motion to Summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim", E85, 9 May 2011 ("IENG Sary's Motion to Summon Witnesses"); "Addendum to IENG Sary's Motion to Summon Witnesses", E85/2, 19 May 2011; *see also* T., 28 June 2011 (IENG Sary Defence), pp. 26-28, 76-77.

[19] T., 28 June 2011 (Co-Prosecutors), pp. 38-39, 56; Co-Prosecutors' response to IENG Sary's Motion to Summon Witnesses, E85/4, 24 May 2011; *see further* Agenda for Initial Hearing, E86/1, 14 June 2011, para. 3 (noting that the Trial Chamber did not intend to hear during the Initial Hearing the witnesses sought by the IENG Sary Defence in support of its preliminary objection.)

[20] Trial Chamber Memorandum entitled "Additional preliminary objections submissions (amnesty and pardon)", E51/8, 12 May 2011; *see also* Trial Chamber Memorandum entitled "Directions to parties concerning Preliminary Objections and related issues", E51/7, 5 April 2011. Additional opportunity was granted to address these issues at the Initial Hearing (*see* Agenda for Initial Hearing, E86/1, 14 June 2011; T., 27-28 June 2011).

> A pardon is granted to Mr IENG Sary [...] for the sentence of death and confiscation of all his property imposed by judgement of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979, and for any penalty provided for in the [1994 Law].[21]

3. SUBMISSIONS

3.1. Amnesty and Pardon

3.1.1. Defence for IENG Sary

12. The IENG Sary Defence submits that the ECCC lacks jurisdiction over the Accused due to the King's 1996 Royal Decree, which granted him both a pardon and an amnesty.[22] The Trial Chamber has jurisdiction to consider only the scope of any amnesty and pardon, rather than their validity. The King legally granted these pursuant to Article 27 of the Constitution.[23] Article 90 of the Constitution applies only in cases of general amnesty laws, meaning that a formal vote by the National Assembly was not required in IENG Sary's case.[24] In any event, two thirds of the National Assembly's members approved the amnesty and pardon, which were therefore granted in conformity with the Constitution.[25]

13. In consequence of his pardon, IENG Sary submits that he should not serve any sentence for any acts at issue in the 1979 trial.[26] He further submitted that he is protected from ECCC proceedings by an amnesty from prosecution under the 1994 Law, and presents a detailed analysis of the 1994 Law and its Preamble to demonstrate that this law covers all crimes in

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[21] "Royal decree of King NORODOM Sihanouk regarding 'A pardon is granted to Mr IENG Sary'", E51/8.1. Given the ambiguity in the Khmer term "loekaentoh" (meaning "to lift guilt"), and inconsistencies in the translations, the IENG Sary Defence urges the Chamber to interpret the Decree in the light most favourable to the Accused, or consider the intent of its drafters and negotiators, including IENG Sary *(see* "IENG Sary's Supplement to his Rule 89 Preliminary Objection (Royal Pardon and Amnesty)", E51/10, 27 May 2011 ("IENG Sary's Supplement on Amnesty and Pardon"), paras 3-8, 25, 35-38; "IENG Sary's Statement as to the Scope of, Intention behind and Background to the Royal Amnesty and Pardon" dated 5 May 2011, E84.1. The Co-Prosecutors submit that the context of the Royal Decree does not vary depending on the translation used, as the Khmer word "loekaentoh" means both amnesty and pardon. The use of the word pardon in the first part of the Decree and the word amnesty in the latter is the most contextually accurate translation, but either word taken in their context carry the same legal effect ("Co-Prosecutors' Combined Response to Ieng Sary's Supplements to his Rule 89 Objection (*Ne bis in idem* and Royal Pardon and Amnesty)", E51/13, 7 June 2011 ("Co-Prosecutors' Response to IENG Sary's Supplements"), paras 21-28; T., 28 June 2011 (Co-Prosecutors), pp. 35-38).

[22] IENG Sary's Supplement on Amnesty and Pardon; *see also* IENG Sary's Preliminary Objections, para. 22.

[23] IENG Sary's Supplement on Amnesty and Pardon, paras 9-10 (arguing further that the validity of the Decree may only be reviewed by the Constitutional Council); *see also* T., 28 June 2011 (IENG Sary Defence), pp. 18-19.

[24] Article 90 of the 1993 Constitution provides that "[t]he National Assembly votes the [general] amnesty law" (March 2010 Unofficial translation version supervised by the Constitutional Council).

[25] IENG Sary's Supplement on Amnesty and Pardon, paras 10-12; *see also* T., 28 June 2011 (IENG Sary Defence), pp. 17-18.

[26] IENG Sary's Supplement on Amnesty and Pardon, para. 25.

the Closing Order.[27] The 1996 amnesty also created an exception allowing IENG Sary to benefit from the amnesty contained in the 1994 Law despite his leadership position and the earlier expiry of its amnesty provision.[28]

14. Further, the ECCC, as a domestic court, must abide by Cambodian law.[29] Domestic amnesties may apply to "*jus cogens* crimes", as there is no prohibition in the ECCC Law, the Constitution or prevailing international law preventing their application.[30] The content of these norms should be assessed at the time the amnesty was granted, in 1996.[31] The amnesty, which was only granted to one individual, is also very narrow in scope and therefore does not contravene international norms.[32] The United Nations has in the past endorsed domestic amnesties, which are acceptable and fulfil the function of peace-making and national reconciliation.[33] In addition, prosecution is not the only way to provide an effective remedy for victims of serious human rights violations.[34]

15. The Defence finally contends that while the royal pardon and amnesty may have been granted during conditions of conflict, it brought an end to the bloodshed, was "overwhelmingly supported by the people of Cambodia", and was therefore necessary and appropriate.[35]

3.1.2. Co-Prosecutors

16. The Co-Prosecutors argue that the Chamber has the competence to determine both the validity and the scope of the royal amnesty and pardon pursuant to Article 40 new of the ECCC Law.[36] They contend that the pardon in the Royal Decree was expressly limited to the death sentence and confiscation of property ordered by the People's Revolutionary Tribunal in 1979. The amnesty applied only in relation to any prosecution for future violations of the

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[27] IENG Sary's Supplement on Amnesty and Pardon, paras 26-34; *see also* T., 28 June 2011 (IENG Sary Defence), p. 19.
[28] T., 28 June 2011 (IENG Sary Defence), p. 29.
[29] IENG Sary's Supplement on Amnesty and Pardon, paras 16-18 (arguing that in any event, inconsistency with international obligations would not render the amnesty invalid).
[30] IENG Sary's Supplement on Amnesty and Pardon, paras 13-14, 16-23; T., 28 June 2011 (IENG Sary Defence), pp. 25-26, 31, 79-81 (arguing that regardless of any obligation to prosecute, states have the discretionary power to grant amnesties).
[31] T., 28 June 2011 (IENG Sary Defence), pp. 80-81.
[32] T., 28 June 2011 (IENG Sary Defence), p. 23.
[33] T., 28 June 2011 (IENG Sary Defence), pp. 25, 81-82; IENG Sary's Supplement on Amnesty and Pardon, para.15.
[34] IENG Sary's Supplement on Amnesty and Pardon, para. 14.
[35] T., 28 June 2011 (IENG Sary Defence), pp. 22, 81-82.
[36] "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 with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) ("ECCC Law").

1994 Law, which made it a crime to be a member of the "DK Group", and does not bar the prosecution of the crimes charged in the Closing Order.[37]

17. Further, pardons or amnesty for *jus cogens* crimes, such as genocide, crimes against humanity and grave breaches of the Geneva Conventions, are invalid under international law and do not bind the ECCC. This court, which is an internationalised court with the ability to directly apply international law, has an obligation or the discretion under international law not to uphold an amnesty for *jus cogens* crimes, regardless of its validity or conformity with the Constitution.[38] A developing international norm prohibits amnesties for crimes such as genocide, crimes against humanity, war crimes and other serious crimes and the ECCC has a duty to uphold the United Nations commitment to combat impunity for these crimes.[39]

3.1.3. Civil Parties

18. The Civil Parties contend that the Royal Decree is unlawful as the King has the power under the Constitution to grant pardons only, but not amnesties against future prosecution. The scope of the pardon was limited to IENG Sary's sentence before the People's Revolutionary Tribunal. Amnesties for international crimes which have the status of *jus cogens* norms are inconsistent with international obligations to prosecute these crimes. Further, IENG Sary cannot benefit from an amnesty, as Article 6 of the 1994 Law excluded senior leaders from the amnesty provision of that law.[40] The royal pardon and amnesty was also obtained in a climate of armed conflict, violence and threats, and should be considered null and void. No vote or debate took place in the National Assembly and its members were consulted only in a private capacity.[41] The pardon and amnesty would also allow IENG Sary to avoid accountability, which would conflict with internationally-recognised rights of victims of serious international crimes to an effective remedy, exclude significant portions of the historical record relating to IENG Sary's personal responsibility, and deny victims access to the full truth.[42]

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[37] T., 28 June 2011 (Co-Prosecutors), pp. 34, 39-40, 42-43, 46.
[38] Co-Prosecutors' Response to IENG Sary's Supplements, para. 30; T., 28 June 2011 (Co-Prosecutors), pp. 47-49, 55.
[39] T., 28 June 2011 (Co-Prosecutors), pp. 50-56.
[40] "Civil Party Co-Lawyers' Response to the Supplement to Rule 89 Preliminary Objection (Royal Pardon and Amnesty)", E51/10/3, 10 June 2011, paras 9-13.
[41] T., 28 June 2011 (Lead Co-Lawyers), pp. 59-63.
[42] T., 28 June 2011 (Lead Co-Lawyers), pp. 64-75.

3.2. Ne bis in idem

3.2.1. Defence for IENG Sary

19. The IENG Sary Defence submits that the ECCC lacks jurisdiction over the Accused due to the principle of *ne bis in idem* and that the present case is *res judicata* pursuant to Article 7 of the CPC.[43] Absent any absurdity, Article 12 of the CPC must not only extend to acquitted persons, but also convicted persons, as the purpose of *ne bis in idem* is to spare an individual from being prosecuted twice.[44] Several authorities support the contention that Article 14(7) of the ICCPR applies transnationally, and is applicable in this context as the People's Revolutionary Tribunal judgement was considered final and valid at the time.[45] Retrials in case of trials *in absentia* are not mandatory but rather, "it would be up to the Accused to determine whether he or she wished to have a retrial".[46] While conceding that the People's Revolutionary Tribunal was not a "model trial", this is irrelevant, as there is no exception to the *ne bis in idem* principle under the CPC and the ICCPR.[47]

20. Should the Chamber consider procedural rules established at the international level, it should apply Article 20(3)(b) of the ICC Statute, which prohibits a new trial when the previous trial was not independent or impartial, unless that trial was inconsistent with an intent to bring the suspect to justice.[48] As the 1979 trial was not a sham trial designed to enable IENG Sary to escape justice, *ne bis in idem* therefore continues to apply in spite of any defects in the 1979 trial.[49]

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[43] Article 7 ("Extinction of Criminal Actions") provides that "[t]he reasons for extinguishing a charge in a criminal action are as follows: ... 5. *Res judicata*. When a criminal action is extinguished a criminal charge can no longer be pursued or must be terminated"; *see also* T., 28 June 2011, pp. 4-5 (alleging that Article 7 applies to both acquittals and convictions) and p. 46; "IENG Sary's supplement to his rule 89 preliminary objection (*ne bis in idem*)", E51/11, 27 May 2011 ("IENG Sary's Supplement on *Ne Bis in Idem*"), paras. 5-6.

[44] T., 27 June 2011 (IENG Sary Defence), pp. 47-48; IENG Sary's Supplement on *Ne Bis in Idem*, paras. 7-10.

[45] IENG Sary's Supplement on *Ne Bis in Idem*, paras 11–24 ; T., 27 June 2011 (IENG Sary Defence), pp. 51-52, 58, 60-61; T., 28 June 2011 (IENG Sary Defence), p. 10 (noting that not appeal court existed in 1979, that the judgement was uncontested at the time, and the IENG Sary would have been executed had he been captured).

[46] T., 27 June 2011 (IENG Sary Defence), p. 53.

[47] IENG Sary's Supplement on *Ne Bis in Idem*, paras. 29-30; T., 27 June 2011 (IENG Sary Defence), p. 51.

[48] IENG Sary's Supplement on *Ne Bis in Idem*, paras 25-28; T., 27 June 2011 (IENG Sary Defence), pp. 49-50.

[49] T., 28 June 2011 (IENG Sary Defence), pp. 12-13; IENG Sary's Supplement on *Ne Bis in Idem*, para. 29.

3.2.2. Co-Prosecutors

21. The Co-Prosecutors submit that the Accused's prosecution is not barred under either domestic or international law.[50] Article 7 of the CPC should be read in light of Article 12, which limits application of the principle of *ne bis in idem* to cases where the accused has been acquitted.[51] Article 14(7) of the ICCPR also does not apply to proceedings before the ECCC.[52] Even were the Chamber to find Article 14(7) applicable, its requirements are not met. The Accused was tried *in absentia*, which prevents the 1979 judgement from being "final" under Cambodian law and procedure, a determination which would be required to establish double jeopardy under that provision.[53] Further, the principle of *ne bis in idem* debars the exercise of jurisdiction only if the first national proceedings were conducted impartially, independently and in accordance with the norms of due process recognized by international law.[54] The 1979 trial was not a "trial" in the legal sense as it was neither independent nor impartial.[55] Further, the purpose of this principle is to protect an accused from enduring multiple trials and penalties, whereas IENG Sary was not present at his trial and ultimately served no sentence.[56]

3.2.3. Civil Parties

22. The Civil Parties agree that the principle of *ne bis in idem* does not apply in the present case as the 1979 trial was not conducted in accordance with international standards. The Pre-Trial Chamber has previously determined the *ne bis in idem* principle to be inapplicable to the 1979 trial, and this issue is therefore settled before the ECCC. IENG Sary's submissions also

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[50] "Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections", E51/5/3/1, 21 March 2011, ("Co-Prosecutors' Response to Preliminary Objections"), paras 45-46.
[51] Co-Prosecutors' Response to Preliminary Objections, para. 45; T., 27 June 2011 (Co-Prosecutors), pp. 90, 93-96; Co-Prosecutors' Response to IENG Sary's Supplements, paras 11-14.
[52] T., 27 June 2011 (Co-Prosecutors), pp. 93, 96-97; Co-Prosecutors' Response to IENG Sary's Supplements, paras 16-17.
[53] Co-Prosecutors' Response to Preliminary Objections, para. 45 (submitting that convictions *in absentia* are set aside once a defendant is arrested or surrenders and a retrial follows); Co-Prosecutors' Response to IENG Sary's Supplements, para. 18; T., 27 June 2011 (Co-Prosecutors), p. 97.
[54] Co-Prosecutors' Response to Preliminary Objections, para. 45; T., 27 June 2011 (Co-Prosecutors), pp. 93-94, 97-100; Co-Prosecutors' Response to IENG Sary's Supplements, para. 19.
[55] Co-Prosecutors' Response to IENG Sary's Supplements, paras 4, 7, 8; T., 27 June 2011 (Co-Prosecutors), pp. 94, 101-104.
[56] T., 27 June 2011 (Co-Prosecutors), pp. 91, 105.

impermissibly exceed the scope of the Chamber's earlier directive, which instructed him to confine submissions to new arguments arising from the Pre-Trial Chamber Decision.[57]

4. FINDINGS

4.1. Introduction

23. Although the Trial Chamber is not a review or appellate body from decisions of the Pre-Trial Chamber, it is now confronted with preliminary objections addressing substantially similar issues to those adjudicated by the Pre-Trial Chamber Decision of 11 April 2011. For reasons of judicial economy, the Trial Chamber will not issue lengthy decisions where it concurs with the Pre-Trial Chamber in the result. As the Trial Chamber concurs with the Pre-Trial Chamber's earlier findings concerning the deficiencies of the 1979 trial (above, paragraph 7) and its ultimate disposition of this issue, it has generally limited its findings to an analysis of the consequences of these deficiencies on the effects of the People's Revolutionary Tribunal decision and the applicability of amnesties in relation to serious international crimes, which has been contested by the Defence.

4.2. Legal framework

24. Article 11 of the Agreement notes that "there has only been 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. 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."[58] Article 40 new of the ECCC Law provides that the scope of any amnesty or pardon that may have been granted prior to the enactment of the Law is a matter to be decided by the Extraordinary Chambers.

25. The Chamber observes that under Cambodian law, a pardon granted by the King pursuant to Article 27 of the Constitution merely exempts a convicted person from serving his

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[57] T., 27 June 2011 (Lead Co-Lawyers), pp. 107-109; "*Réponse des Co-avocats des parties civiles au mémoire supplémentaire sur l'exception préliminaire selon la règle 89 (Ne Bis In Idem)*", E51/11/1, 6 June 2011 ("Civil Parties' Response to IENG Sary's Supplement on *Ne bis in idem*"), paras 13-27.

[58] "Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea", signed 6 June 2003 and entered into force on 29 April 2005 ("Agreement"), Article 11; *see also* UN Doc. A/RES/57/228B (13 May 2003) (approving draft ECCC Agreement); UN Doc. A/60/565 (25 November 2005), para. 4.

sentence.[59] All other consequences of a criminal conviction remain.[60] Pardon traditionally applies only to an enforceable sentence resulting from a final judicial decision.[61]

26. By contrast, amnesties granted by the National Assembly pursuant to Article 90 of the Constitution discontinue prosecution, effectively creating immunity from prosecution for conduct which took place before the amnesty entered into force.[62]

27. The principle of *ne bis in idem* guarantees that an individual who has been tried and subjected to a final judgment will not be prosecuted or retried for the same facts, or subjected to additional or heavier sanctions.[63] Although no provision of the Agreement or the ECCC Law directly enshrines this principle, *ne bis in idem* is reflected in Cambodian law in the principle of *res judicata*.[64] This principle applies only when the first case resulted in a final judicial decision issued in respect of the same parties and facts.[65] It is clear from the wording of Article 12 of the CPC that this principle applies in respect of the same conduct rather than the same offence.[66]

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[59] *See* Article 27 of the 1993 Constitution provides that: "The King holds the right of commuting court's sentence and the power of pardon" (March 2010 Unofficial translation version supervised by the Constitutional Council); Article 147 of the 2009 Penal Code (providing that "Pardon within the meaning of Article 27 of the Constitution of the Kingdom of Cambodia shall exempt the offender from serving his or her sentence");Article 195 of the 1956 Penal Code ("Amnesty shall be granted by [Royal Ordinance] law.").

[60] *See* Articles 147 and 148 of the 2009 Penal Code, pursuant to which a pardon granted by Royal Decree waives the sentence but not compensation for victims; *see also* "Report by Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study on amnesty laws and their role in the safeguard and promotion of human rights", E/CN.4/Sub2/1985/16/Rev.1, para 5 ("pardon remits the penalty but does not expunge the conviction").

[61] This results from the principle of separation of the executive and judicial powers, which prohibits a pardon while a judicial decision is still subject to review by a judicial body.

[62] Convictions erased by amnesty have traditionally been removed from the criminal record (*see* Article 197 of the 1956 Penal Code ("official judicial records of amnestied convictions are deleted and cannot be used as reference to establish the existence of an aggravating circumstance of reoffending" (unofficial translation)); Article 149 of the 2009 Penal Code (noting that following amnesty, penalties shall not be enforced) and Article 195 of the 1956 Penal Code (providing that amnesty has the consequence of permanently vacating sentences).

[63] PTC Decision, para. 142.

[64] Articles 7 and 12 of the CPC (above, paragraph 6). The Pre-Trial Chamber has found the ordinary meaning of these provisions to limit their application to acquittals (PTC Decision, para 124). The Trial Chamber considers however that Article 12 of the CPC merely spells out an example of *res judicata* and that this principle applies to all decisions, whether acquittals or convictions; *see also* Article 443 of the CPC).

[65] *See* Article 12 of the CPC (referring to *res judicata* as applying to the final acquittal of a person on the basis of the same act) ; Article 443 of the CPC (relating to motions for review of « final judgement[s] which already ha[ve] the *res judicata* effect »); *see also* French Cour de Cassation, Crim. 2 avril 1990, Bull. crim. n°141: « *l'exception d'autorité de la chose jugée ne peut être valablement invoquée que lorsqu'il existe une identité de cause, d'objet et de parties entre les deux poursuites* »; Crim. 18 décembre 1989, Bull. crim. n°483 : « *le principe de l'autorité de chose jugée, fût-ce en méconnaissance de la loi, met obstacle à ce que des poursuites soient reprises devant une juridiction qui a précédemment épuisé sa saisine par une décision définitive* ».

[66] *See also* PTC Decision, para. 130 (on the scope of the *ne bis in idem* principle).

4.3. Interpretation of the 1996 Royal Decree

28. Legally, the most logical interpretation of the 1996 Royal Decree (above, paragraph 11), which embodies elements of both pardon and amnesty, is that it grants a pardon in relation to the death sentence and confiscation of all property pronounced by the 1979 People's Revolutionary Tribunal and an amnesty from prosecution or penalties for crimes under the 1994 Law. The Chamber observes however that a number of interpretative and legal ambiguities arise, in particular:

- whether, in light of the fundamental deficiencies of the 1979 trial (above, paragraph 7), the decision issued by the People's Revolutionary Tribunal can be considered to be a genuine judicial decision at all;

- whether the 1979 judgement was final and its sentence enforceable and subject to pardon;

- whether the pardon of the 1979 sentence in reality amounted to an amnesty for any acts tried by the People's Revolutionary Tribunal in 1979;

- whether the amnesty under the 1994 Law covers any or all of the charges in the Closing Order;

- whether the King had the constitutional power to grant an amnesty by means of a Decree.

29. In relation to the last point, the Chamber notes 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. In view of the general context in which the 1996 Decree was signed (below, para. 54), the Chamber 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 prosecution for any acts committed before 1996, including during the Democratic Kampuchea regime. It is accordingly unnecessary to call any witnesses to clarify the purpose of the Royal Decree.

4.4. Effects of the deficiencies of the 1979 trial (Pardon and *Ne bis in idem*)

4.4.1. Findings on Pardon and the applicability of res judicata *under Cambodian law*

30. The Trial Chamber adopts the Pre- Trial Chamber's findings that the 1979 trial was not conducted by an impartial and independent tribunal, in accordance with the requirements of due process. The Chamber finds that the deficiencies affecting these proceedings were so significant that the decision resulting from this trial cannot be characterised as a genuine judicial decision. It is therefore incapable of producing valid legal effects. Under Cambodian law, decisions resulting from trials *in absentia* may be opposed,[67] giving an accused the opportunity to benefit from a new trial in his presence and to conduct a defence.[68] The Accused has never expressly or tacitly waived his right to oppose the People's Revolutionary Tribunal decision, which was rendered *in absentia.* As the sentences pronounced against IENG Sary by the People's Revolutionary Tribunal cannot be considered as resulting from a genuine, enforceable and final judicial decision, they could not be subject to pardon. Further, and for the same reasons, the 1979 decision cannot be the basis for the application of the principle of *res judicata* under Cambodian Law.

31. The Chamber concludes that the 1996 pardon and the principle of *res judicata* do not debar the Chamber's jurisdiction under Cambodian law.

4.4.2. Findings on the applicability of the principle of ne bis in idem *under international law*

32. In considering whether prevailing international standards nonetheless exclude trial of the Accused before the ECCC on the basis of the *ne bis in idem* principle,[69] the Trial Chamber concurs with the Pre-Trial Chamber's findings on the effects of Article 14(7) of the ICCPR,

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[67] *See* Articles 362, 365-370 of the 2007 CPC. *See also* Articles 314, 321 to 325, 480 and 481 of the 1964 Code of Criminal Procedure. The right to oppose a judgment following a trial *in absentia* was subsequently encompassed in Cambodian law by Decree/Law/53K of 26 July 1989 on Criminal Trial Procedures (Articles 39, 68-71) and maintained in the 1993 State of Cambodia (SOC) Law on Criminal Procedure (Articles 111, 114 to 124).

[68] This also corresponds to the minimal fair trial guarantees pursuant to Article 14 of ICCPR, which was ratified by Cambodia in 1992. In addition, Article 29 of the 1992 UNTAC Code provided convicted persons with the possibility to request review of a judgment, in particular when determination was based on political considerations.

[69] *See* Article 12 of the Agreement, Article 33 new of the ECCC Law ("the Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights").

which held that this Article applies solely to proceedings within the domestic legal order and does not apply to proceedings before the ECCC, an internationalized court.[70]

33. The rationale for these limitations to the *ne bis in idem* principle in relation to proceedings before internationalized tribunals (many of which may follow defective prior national prosecutions for the same or similar crimes) stems from the unique characteristics of the interaction between domestic and international proceedings in situations of this type.[71] Where an international tribunal has jurisdiction over offences previously tried by domestic proceedings with manifest shortcomings, the *ne bis in idem* principle has been balanced against the interest of the international community and victims in ensuring that those responsible for the prosecution of international crimes are properly prosecuted.[72] As noted by the Secretary-General of the United Nations in his report to the Security Council on the adoption of the ICTY Statute:

> According to the principle of *non-bis-in-idem,* a person shall not be tried twice for the same crime. In the present context, given the primacy of the International Tribunal, the principle of *non-bis-in-idem* would preclude subsequent trial before a national court. However, the principle of *non-bis-in-idem* should not preclude a subsequent trial before the International Tribunal in the following two circumstances:
>
> (a) the characterization of the act by the national court did not correspond to its characterization under the statute; or
>
> (b) conditions of impartiality, independence or effective means of adjudication were not guaranteed in the proceedings before the national courts.[73]

34. The Chamber further notes that the jurisprudence of international human rights bodies has addressed the relationship between the obligations of accountability in relation to international crimes (below, Section 4.5.4) and the *ne bis in idem* principle. The Inter-American Court of Human Rights has found that the *ne bis in idem* principle is not absolute

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[70] Pre-Trial Chamber Decision, paras. 128-131 ("Taking into account its finding below that the ECCC is an internationalised court functioning separately from the Cambodian court structure, the Pre-Trial Chamber finds that the "internal *ne bis in idem* principle" as enshrined in Article 14(7) of the ICCPR does not apply to the proceedings before the ECCC" (citations omitted)); *see also* Decision on Request for Release, Case 001/18-07-2007/ECCC/TC, E39/5, 15 June 2009, para. 10 (finding that "the ECCC, which were established by agreement between the Royal Government of Cambodia and the United Nations, is a separately constituted, independent and internationalised court").

[71] *See* PTC Decision, paras 132-160 (indicating that international tribunals refrain from exercising jurisdiction against an individual who has already been tried before a national court on the basis of the *ne bis in idem* principle, as long as the domestic proceedings meet certain requirements).

[72] PTC Decision, para. 143.

[73] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1003, para. 66(b); *see* PTC Decision, paras. 132-160; *see* further Article 10 of the ICTY Statute, Article 9 of the ICTR Statute, Article 9 of the SCSL Statute, Article 5 of the STL Statute and Article 20 of the Rome Statute of the ICC..

and that "[a] State may not invoke [... it] to decline its duty to investigate and punish those responsible" for crimes against humanity.[74] It has also found that "[a] State cannot invoke the judgement delivered in proceedings that did not comply with the [fair trial] standards of the American Convention, in order to exempt it from its obligation to investigate and punish," on grounds that "judicial decisions originating in such internationally illegal events cannot be the first step to double jeopardy".[75] The Inter-American Court considered that:

> the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law, has the effect of discharging the accused from criminal liability, or when the proceeding has not been conducted independently or impartially pursuant to the due process of law. A judgment issued in the circumstances described above only provides 'fictitious' or 'fraudulent' grounds for double jeopardy.[76]

35. Although many of the above Inter-American Court cases concern acquittals, this jurisprudence provides general guidance in cases where a conviction for serious international crimes did not result in punishment, whether due to acquittal or failure to carry out sentences. It follows that the protection against double jeopardy does not negate states' international obligations to promote accountability in relation to perpetrators of genocide, crimes against humanity and war crimes. The *ne bis in idem* principle therefore does not debar the Chamber's exercise of jurisdiction in relation to Accused IENG Sary in the present case.

36. The Chamber further notes that IENG Sary, who denies any criminal responsibility for any facts tried in 1979, seeks to rely on the combined effects of this trial and the 1996 pardon to obtain immunity from prosecution for any crimes relating to these facts. Applying the *ne bis in idem* principle would amount to a *de facto* amnesty for the facts prosecuted in 1979.

4.5. Amnesty

37. The Chamber notes that IENG Sary has been charged with both domestic and international crimes. The Chamber has found that it is not validly seised of offences of

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[74] *Almonacid Arellano et al v. Chile,* Judgement (Preliminary Objections, Merits, Reparations and Costs), IACtHR, 26 September 2006, paras 151, 154; *see also* PTC Decision, para. 154.

[75] *Carpio-Nicolle et al. v. Guatemala*, Judgement (Merits, Reparations and Costs), IACtHR, 22 November 2004, para. 132; *Guitérrez-Soler v. Colombia,* Judgement (Merits, Reparations and Costs), IACtHR, 12 September 2005, para. 98.

[76] *La Cantuta v. Peru,* Judgement (Merits, Reparations and Costs), IACtHR, 29 November 2006, paras 153, 130(1); *see also Almonacid Arellano et al v. Chile,* Judgement (Preliminary Objections, Merits, Reparations and Costs), IACtHR, 26 September 2006, para. 154 (finding that *ne bis in idem* is not applicable where the proceedings were not conducted independently or impartially in accordance with due procedural guarantees) and *Carpio-Nicolle et al. v. Guatemala*, Judgement (Merits, Reparations and Costs), IACtHR, 22 November 2004, para. 131.

homicide, torture and religious persecution under the 1956 Cambodian Penal Code contained in the Closing Order.[77] The question of the scope of any amnesty in relation to these crimes is accordingly moot. In relation to the charges of crimes against humanity, genocide and grave breaches of the Geneva Conventions of 1949,[78] the Chamber will assesses whether any of these crimes must be excluded from the scope of the 1996 Royal Decree on the basis of a treaty or customary rule of international law requiring the prosecution of these crimes or prohibiting amnesties in relation to them.

4.5.1. Grave breaches of the Geneva Conventions, genocide and torture

38. A number of treaties to which Cambodia is a party, such as the four Geneva Conventions of 1949, the Genocide Convention and the Convention against Torture, impose an absolute duty to prosecute certain international crimes.[79] The Geneva Conventions require signatories to criminalise grave breaches of these conventions, search for alleged perpetrators, and either prosecute them or extradite them for trial in another state party.[80] Under the Genocide Convention, states parties undertake to prevent genocide, and to try and punish its perpetrators.[81] The Convention against Torture requires states parties to criminalise all acts of

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[77] Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011.

[78] Closing Order, D427, 15 September 2010, para. 1613, as amended by the Pre-Trial Chamber's Decision on Ieng Sary's Appeal Against the Closing Order, D427/1/30, 11 April 2011.

[79] Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 ("Geneva Convention I"); Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 UNTS 85 ("Geneva Convention II"); Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 ("Geneva Convention III"); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 ("Geneva Convention IV") (collectively "Geneva Conventions", ratified by Cambodia in 1958); Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, 78 U.N.T.S 277 ("Genocide Convention", ratified by Cambodia in 1950); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 January 1984, 1465 U.N.T.S. 85 ("Convention against Torture", ratified by Cambodia on 15 October 1992).

[80] Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146 (stipulating that "[t]he 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. Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case ..."); *see also* ICRC Commentary to Geneva Convention I, Article 51 (confirming that the obligation to prosecute grave breaches is absolute).

[81] Genocide Convention, Articles 1, 4 and 6 (providing that "[t]he Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish" and that '[p]ersons committing genocide or any other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals"); *see also Barcelona Traction, Light and Power Co. Ltd* (Belgium v. Spain) (1970), ICJ, 5 February 1970, para. 34 (ruling that all States must enforce the prohibition against genocide as an obligation *erga omnes*).

torture and to submit cases of torture to its competent authorities for the purpose of investigation and prosecution, or extradition of the alleged perpetrators.[82] International tribunals and treaty bodies have repeatedly considered amnesties for perpetrators of acts of torture incompatible with the duty to investigate and prosecute these acts.[83]

39. As 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 1996 Royal Decree cannot relieve it of the duty to prosecute these crimes or constitute an obstacle thereto.[84] In consequence of Cambodia's treaty obligations with respect to these crimes, the Chamber shall not construe the 1996 Royal Decree as granting immunity from prosecution for Accused IENG Sary in relation to grave breaches of the Geneva Conventions, genocide or torture.

4.5.2. Crimes against Humanity

40. As no international treaty expressly prohibits amnesties in relation to the remaining international crimes charged in the Closing Order, the Chamber has examined relevant *opinio*

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[82] Convention against Torture, Articles 4, 5, 7 and 12; *see also* African Commission on Human and People's Rights' "Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment or Punishment in Africa (Robben Island Guidelines)", 14 February 2002, Guideline 16 (urging States to "a) Ensure that those responsible for acts of torture or ill-treatment are subject to legal process; b) Ensure that there is no immunity from prosecution for nationals suspected of torture …").

[83] *See e.g. O.R., M.M. and M.S. v. Argentina*, Comm. 1/1988, 2/1988 and 3/1988, Decision on Admissibility, Committee against Torture, 23 November 1989, UN Doc. No. A/45/44 (1990), Annex V, p. 108-113, para. 9 (stating that "even before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture" and considering the Punto Final and Due Obedience Acts, which contained amnesties for serious human rights violations committed during the 1976-1983 military dictatorship, "to be incompatible with the spirit and purpose of the Convention"); Committee against Torture General Comment No. 2: Implementation of Article 2 [of the Convention against Torture] by States Parties, 24 January 2008, UN Doc. CAT/C/GC2, para. 5; UN Human Rights Committee General Comment No. 20 (44) on Article 7 of the ICCPR (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), 3 October 1992 ("General Comment No. 20"), para. 15 ("amnesties are generally incompatible with the duty of States to investigate [acts of torture]"); *Prosecutor v. Furundzija,* Case IT-95-17/1-T, Judgement, ICTY Trial Chamber, 10 December 1998, paras 151-157 ("[i]t would be senseless to argue … that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State … taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law"); *Ely Ould Dah v. France,* Decision on Admissibility, ECtHR (no. 13113/03), 17 March 2009, p.17 (considering that amnesties are generally incompatible with the duty of States to investigate acts of torture).

[84] Provisions of domestic law may not be used as a justification for failure to perform a treaty obligation (*see* Article 27 of the Vienna Convention on the Law of Treaties of 23 May 1969, 1155 U.N.T.S. 331, signed by Cambodia on 23 May 1969); *see also* Article 31 of the Constitution of Cambodia: "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights ….".

juris and state practice to ascertain whether a customary norm requires their prosecution or prohibits the retroactive application of amnesties to these crimes.[85]

41. The Chamber notes that early definitions of crimes against humanity imposed individual criminal responsibility for crimes against humanity "whether or not in violation of [the] domestic law of the country where perpetrated".[86] Since its inception in 1998, 119 States, including Cambodia, have also reaffirmed the necessity to prosecute serious international crimes by ratifying the Rome Statute, whose preamble states that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".[87]

42. United Nations human rights treaty bodies and regional human rights courts have also repeatedly stated that domestic 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. The Human Rights Committee, which interprets and supervises the implementation of the ICCPR, considers this obligation to include a duty to investigate allegations of such violations and bring their alleged perpetrators to justice, in particular in the case of crimes against humanity.[88] The Committee has also stated that states

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[85] The content of customary international law derives from the actual practice of states and *opinio juris*; *see North Sea Continental Shelf Cases* (1969), Judgment, ICJ, 20 February 1969, pp. 43-44, paras 74, 77 ("State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved. [...] Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it [*opinio juris*]"). Relevant sources of customary international law include conventions and treaties, statements of delegates during the negotiation of treaties, and the case law of international tribunals; *see e.g., Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Judgement, ICJ, 27 June 1986, pp. 98-101, paras. 185-191; *see also* Article 38(1)(b) of the Statute of the International Court of Justice (referring to "international custom, as evidence of a general practice accepted as law").

[86] *See e.g.* Article 6(c) of the Charter of the International Military Tribunal for the Trial of the Major War Criminals annexed to the London Agreement of 8 August 1945 (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 8 August 1945 (82 UNTS 279)); *see also* an identical reference to domestic law in Article 5(c) of the Charter of the International Military Tribunal for the Far East of 19 January 1946 Annexed to the Special Proclamation of 19 January 1946 by the Supreme Commander of the Allied Powers in the Far East and Article II of the Law No. 10 of the Control Council for Germany (1945), reprinted in *Trials of War Criminal Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. I, pp. XVI-XIX.

[87] Rome Statute of the International Criminal Court, 17 July 1998 (*entered into force* 1 July 2002), 2187 UNTS 90, ratified by Cambodia on 11 April 2002.

[88] UN Human Rights Committee General Comment No. 31 (80) (The nature of the legal obligation imposed on States parties), UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004 ("General Comment No. 31"), paras 15 and 18; *see also Bautista de Arellana v. Colombia,* Comm. No. 563/1993, Views, Human Rights Committee, 27 October 1995, paras 8.2 and 8.6. ("the Covenant does not provide a right for individuals to require that the State criminally prosecute another person [...]. The Committee nevertheless considers that the State party is under a duty to investigate thoroughly alleged violations of human rights ... and to prosecute criminally, try and punish those held responsible for such violations").

parties may not relieve perpetrators of such crimes from responsibility by means of amnesties, which are generally incompatible with States' duty to investigate such crimes.[89]

43. The American Convention on Human Rights has also been interpreted as including a prohibition of amnesties for violations of fundamental rights and a duty to investigate and prosecute such acts and to punish their perpetrators.[90] In the case of *Almonacid-Arellano v. Chile*, the Inter-American Court found that "the States cannot neglect their duty to investigate, identify and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty".[91] The Inter-American Commission of Human Rights and the Inter-American Court have consequently found amnesty laws in Argentina, Chile, El Salvador, Peru, Uruguay, and Brazil to violate or to be incompatible with the Convention.[92]

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[89] General Comment No. 31, para. 18 ("Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties ... and prior legal immunities and indemnities"); General Comment No. 20, para. 15 ("amnesties are generally incompatible with the duty of States to investigate [acts of torture]"); *Basilio Laureano Atachahua v. Peru*, Comm. No. 540/1993, Views, Human Rights Committee, 25 March 1996, para. 10 ("Under [Article 2(3)] of the Covenant, the State party is under an obligation to provide the victim and the author with an effective remedy. The Committee urges the State party to open a proper investigation ..., to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary"); *Hugo Rodríguez v. Uruguay*, Comm. No. 322/1988, Views, Human Rights Committee, 19 July 1994, para. 12.4 ("amnesties for gross violations of human rights ... are incompatible with the obligations of the State party under the Covenant."); *see also* Concluding Observations of the Human Rights Committee on Chile (UN Doc. No. CCPR/C/79/Add.104, 30 March 1999, para. 7), Republic of the Congo (UN Doc. CCPR/C/79/Add.118, 25 April 2000, para. 12), Peru (UN Doc. Nos. CCPR/C/79/Add.67, 25 July 1996, para. 9 and CCPR/CO/70/PER, 15 November 2000, para. 9), Lebanon (UN Doc. CCPR/C/79/Add.78, 1 April 1997, para. 12), El Salvador (UN Doc. No. CCPR/C/79/Add.34, 18 April 1994, paras 4, 5), Haiti (CCPR/C/79/Add.49, 3 October 1995, paras 230-235) and Uruguay (UN Doc. No. CCPR/C/79/Add.19, 5 May 1993, paras. 7, 11).

[90] *See Velásquez Rodríguez v. Honduras*, Judgement, Inter-American Court of Human Rights ("IACtHR"), 29 July 1988, Series C No.4, paras 166, 174, 176; *Barrios Altos Case (Chumbipuma Aguirre & Ors v Peru)*, Judgement, IACtHR, 14 March 2001, Series C No. 75, paras 41, 44 ("all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law"); *see also La Cantuta v. Peru Case*, Judgement, IAtHR, 19 November 2006, Series C No. 162 (2006), para. 152.

[91] *Case of Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), IACtHR, 26 September 2006, paras 99, 110-114, 119-120 ("the prohibition to commit crimes against humanity is a *jus cogens* rule, [and] the punishment of such crimes is obligatory pursuant to the general principles of international law"); *see also Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*, Judgement, IACtHR, 24 November 2010, para. 175 (available in Spanish only) (the prohibition of amnesties for grave human rights violations is not limited to self-amnesties granted by a regime to cover its own crimes).

[92] *See e.g. Consuelo Herrera et al v. Argentina*, IACHR, Report No. 28/92, Case 10.147, 2 October 1992, para. 41; *Garay Hermosilla et al v. Chile*, IACHR, Report No. 36/96, Case 10.843, 15 October 1996, para. 105; *Case of Almonacid-Arellano et al. v. Chile*, Judgment (Preliminary Objections, Merits, Reparations and Costs), IACtHR, 26 September 2006; *Lucio Parada Cea et al v. El Salvador*, IACHR, Report No. 1/99, Case 10.480, 27

44. The right to an effective remedy under the European Convention of Human Rights has also been interpreted to include an investigation capable of leading to the identification and punishment of those responsible for human rights violations.[93] The European Court of Human Rights further determined that amnesties are impermissible for crimes such as murder and torture[94] and that third States were not bound by amnesty clauses violating the duty to prosecute *jus cogens* crimes.[95]

45. The African Commission on Human and People's Rights has also considered that amnesties absolving perpetrators of serious international crimes from accountability violate the right of victims to an effective remedy and states parties' duty to prosecute and punish serious violations of certain rights under the African Charter on Human and People's Rights.[96]

46. The Special Court for Sierra Leone ("SCSL") has recognised a "crystallising international norm that a government cannot grant amnesty" for crimes under international law, finding that blanket amnesties were impermissible under international law.[97] In declaring

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January 1999, paras. 107 and 123; *Rodolfo Roble Espinoza and Sons v. Peru,* IACHR, Report No. 20/99, Case 11.317, 23 February 1999, paras 159-160; *Barrios Altos Case (Chumbipuma Aguirre & Ors v Peru)*, Judgement, IACtHR, 14 March 2001, Series C No. 75; *Mendoza et al v. Uruguay,* IACHR, Report No. 29/92, Case 10.029, 2 October 1992, paras 50-51; *Case of Gelman v. Uruguay,* IACtHR, 24 February 2011, Series C No. 221, para. 241; *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil,* Judgement, IACtHR, 24 November 2010, para. 172 (available in Spanish only) (finding that the manner in which the Brazilian Amnesty Law was interpreted and applied affected the State's international duty to investigate and punish grave violations of human rights and violated the Convention).

[93] *See e.g. Aksoy v. Turkey*, Application No. 21987/93, Judgement, ECHR, 18 December 1996, para. 98.

[94] *Abdulsamet Yaman v. Turkey*, Judgement, ECHR, Application No. 32446/96, 2 November 2004, paras 53, 55; *Tuna v. Turkey*, Judgement, ECHR, Appliction No. 22339/03, 19 January 2010, para. 71.

[95] *Ould Dah c. France*, Application No. 13113/03, ECHR, 17 March 2009 at pages 16-17 (French version).

[96] *Case of Mouvement Ivorien des Droits Humains (MIDH) v. Côte d'Ivoire,* Comm. No. 246/2002, Decision, ACHPR, July 2008, paras 97-98; *Case of Malawi African Association and Others v. Mauritania,* Comm. Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, Decision, ACHPR, 11 May 2000, paras 82-83. *See also* ACHPR *Case of Zimbabwe Human Rights NGO Forum v. Zimbabwe,* Comm. No. 245/02, Decision, ACHPR, 21 May 2006, paras 211 and 215.

[97] *Prosecutor v. Kallon and Kamara*, Decision on Challenge to jurisdiction: Lomé Accord Amnesty, Case No SCSL-04-15-AR72(E), and Case No SCSL-04-16-AR72(E), SCSL Appeals Chamber, 13 March 2004 ("*Kallon* Decision"), para. 82; *see also Prosecutor v. 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-04-15-PT, SCSL Appeals Chamber, 25 May 2004, paras 8-10 (finding that "states have a duty to prosecute crimes whose prohibition has the status of *jus cogens*" and that "there is [...] support for the statement that there is a crystallized international norm to the effect that a government cannot grant amnesty for serious crimes under international law"); *Prosecutor v. Norman, Fofana and Kondewa*, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, SCSL-04-14-AR72(E), SCSL Appeals Chamber, 25 May 2004 ("*Kondewa* Decision") (finding that blanket amnesties are impermissible for international crimes and for those most responsible of such crimes, that the grant of such amnesties violates *erga omnes* obligations under international law and that there is a crystallized norm of international law that a government cannot grant an amnesty for serious crimes under international law); *see also* Separate Opinion of Judge Robertson in this case (considering that the rule against impunity which has crystallized in international law is a norm which denies the legal possibility of pardon to those who bear the greatest responsibility for crimes against humanity and for widespread and serious war crimes and that international criminal law invalidates amnesties offered under any circumstances to persons most responsible for crimes against humanity (paras 49, 51).

itself not to be bound by the amnesty in question, the 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.[98] The International Criminal Tribunal for Former Yugoslavia ("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".[99]

47. The establishment of several international and hybrid criminal tribunals in the last two decades, including the ECCC, is further evidence of states' determination to ensure that international crimes do not go unpunished.[100] The Statutes of the ICTY and ICTR, adopted unanimously by the Security Council, evidence the types of crimes for which prosecution and punishment are considered imperative, and the Statutes of the SCSL and the Special Tribunal for Lebanon specifically provide that amnesties granted to persons falling within the jurisdiction of each respective court shall not be a bar to prosecution.[101]

48. Other subsidiary sources of international law, such as numerous resolutions of the United Nations General Assembly[102], Reports of the United Nations Secretary-General[103] and

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[98] *Kallon* Decision, paras 71, 82, 84 ("this court is entitled in the exercise of its discretionary power to attribute little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing and which is contrary to the obligations in certain treaties and convention the purpose of which is to protect humanity").

[99] *Prosecutor v. Erdemovic,* Case No. IT-96-22-T, Sentencing Judgement, Trial Chamber, 29 November 1996, para. 28; *see also Prosecutor v. Furundzija,* Case IT-95-17/1-T, Judgement, ICTY Trial Chamber, 10 December 1998, paras. 155-156 (noting in its analysis of torture as a *jus cogens* crime that "perpetrators of torture acting upon or benefiting from [national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law] may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime").

[100] *See e.g.* the ICTY (in 1993), the ICTR (1994), the SCSL (2002), the hybrid tribunals in Kosovo (1999), the Special Panels for Serious Crimes in East Timor (1999), the Special Tribunal for Lebanon (2007), the Court of Bosnia and Herzegovina War Crimes Chamber in 2005 and the ECCC (2003).

[101] *See* Security Council Resolution 827(1993) establishing the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827 (1993), 25 May 1993; Security Council Resolution 955 (1994) establishing the International Criminal Tribunal for Rwanda, UN Doc. S/RES/955 (1994), 8 November 1994; *see also* Article 10 of the 2002 the Statute of the Special Court for Sierra Leone, Article 16 of the 2007 Agreement between the UN and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon and Article 6 of the Statute of the Special Tribunal for Lebanon (providing that amnesties granted to persons falling within the jurisdiction of the respective court shall not be a bar to prosecution).

[102] *See e.g.* GA Resolution on the Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, G.A. Res. 2840 (XXVI), U.N. GAOR Supp (No. 29) at 88, U.N. Doc. A/8429 (1971) (urging States "to ensure the punishment of all persons guilty of [war crimes and crimes against humanity]"); the 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity (G.A. Res. 3074 (XXVIII), U.N. GAOR Supp. (No. 30), at 79, UN Doc. A/9030 (1973), Principle 1 ("war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment") and GA Resolution on the Question of the Punishment of War Criminals and of Persons who have Committed Crimes against Humanity, G.A. Res. 2583 (XXIV), U.N. GAOR Supp. (No. 30) at 58, UN Doc.

Reports of various Special Rapporteurs[104] have also recognised a duty to prosecute grave international crimes and the incompatibility of amnesties for such crimes with these goals, and further reflect the views of the majority of states of the international community.

49. This emerging international consensus is supported by a review of the adoption, scope and application of amnesties in a selection of conflict or post-conflict countries in the last three decades.[105] In examining the context surrounding various amnesties (in particular, their exclusion of certain crimes, intended beneficiaries, conditions, and subsequent interpretation and application by the judiciary), the Chamber concludes that state practice regards blanket amnesties for serious international crimes to be in breach of international norms. Further, the

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A/7630 (1969), para.1 (calling on States "to take the necessary measures for the thorough investigations of war crimes and crimes against humanity ... and for the detection, arrest, extradition and punishment of all war criminals and all persons guilty of crimes against humanity").

[103] *See e.g.* Report of the Secretary-General entitled "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", UN Doc. S/2004/616, 23 August 2004, paras. 10 and 64(c) (recommending that the Security Council ensure that peace agreements and its resolutions and mandates "reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity, [... and] that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court" and stating that amnesties cannot be granted for international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law); *see further* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 22(noting that "[w]hile recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law").

[104] *See e.g.* Final report of the Special Rapporteur, Mr. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33 (Civil and Political Rights, including the questions of: ... Impunity), UN Doc. E/CN.4/2000/62, 18 January 2000, Principle 3; Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 1. The UN Special Representative of the Secretary General for Sierra Leone, when signing the Lomé Peace Agreement, appended a disclaimer stating that the amnesty provision contained therein did not apply to crimes under international law, including genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law (*see* Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 23, *cited in Prosecutor v. Kondewa,* para. 8).

[105] The Chamber has reviewed the practice surrounding amnesties in 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), Argentina (1986 Full Stop Law and 1987 Due Obedience Law, covering crimes committed before December 1983), Uruguay (1986 Law of Caducity), Honduras (1991 Decree No.87-91), Suriname (1992 Act providing for the granting of amnesty, Decree No.5544), 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), Nicaragua (1993 Amnesty Law), 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), Guatemala (1996 National Reconciliation Law), Poland (1998 Act on the Institute of National Remembrance), Federation of Bosnia and Herzegovina (1996 Amnesty Law and 1999 Law on Amnesty), Republika Srpska (1996 Law on Amnesty and 1999 Law on Charges and Amendments to the Law on Amnesty), Sierra Leone (1999 Lomé Peace Accord), Venezuela (2000 Law of General Political Amnesty), Uganda (2000 Amnesty Act); Côte d'Ivoire (2003 Amnesty Law and 2007 Amnesty Ordinance), Angola (2006 Memorandum of Understanding for Peace and Reconciliation in Cabinda Province implemented in a domestic Amnesty Law); Colombia (2005 Justice and Peace Law), Algeria (2005 Charter for Peace and National Reconciliation), Philippines (2007 Proclamation No. 1377), Democratic Republic of the Congo (2009 Amnesty Law), Honduras (2010 Amnesty Decree), and Tunisia (2011 Legislative Decree no. 2011-1 granting amnesty).

courts of Chile,[106] Argentina,[107] Uruguay,[108] Honduras,[109] Peru[110] and Colombia[111] have either retroactively repealed their blanket amnesty laws or limited their scope of application.

50. A number of third states and international tribunals have found amnesties covering serious international crimes to be incompatible with international standards and thus non-binding on them, on the basis of the principle of universal jurisdiction. In the case of *Ely Ould Dah*, the French Cour de Cassation declined to apply the Mauritanian amnesty law on the basis that the principle of universal jurisdiction would be deprived of any effect if the court was obliged to apply the amnesty.[112] In the *Pinochet case*, the Spanish court held that Chile's 1978 Decree-Law on General Amnesty did not preclude the exercise of universal jurisdiction by Spanish courts.[113] The Special Court for Sierra Leone has reached the same conclusion.[114]

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[106] Supreme Court of Chile, *Claudio Lecaros Carrasco Case*, 18 May 2010, Rol. No. 47.205, Recurso No. 3302/2009 (stating that as illegal confinement was a Crime against humanity, it could not be covered by an amnesty and finding that self-amnesty was a violation of Chile's international obligations).

[107] Supreme Court of Argentina, *Simón, Julio Hector y otros s/privación ilegítima de la libertad*, 14 June 2005, Causa No. 17.768 (finding the 1986 Full Stop Law and the 1987 Due Obedience Law unconstitutional and null and void as violating both Argentina's international obligations, especially the duty to prosecute, which was seen as a *jus cogens* norm. The Supreme Court also found that although the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and the Inter-American Convention on the Forced Disappearance of Persons had been ratified by Argentina after the laws of amnesty were adopted, they were not being retroactively applied since they merely codified pre-existing customary law).

[108] Supreme Court of Uruguay, *Nibia Sabalsagaray Curutchet*, 19 October 2009, Case 365/09 (finding that the 1986 "Ley de Caducidad" was unconstitutional). In April 2011, Uruguay's Senate voted to void the 1986 Law but on 19 May 2011, Uruguay's House of Representatives failed to repeal it. However, the President subsequently annulled all administrative acts implementing the 1986 Law, thereby removing the block on investigations and prosecutions in cases of human rights violations committed between 1973 and 1985 (Resolución No. 322/011, President of Uruguay, 30 June 2011).

[109] Supreme Court of Honduras, *Hernandez Santos Case* (Recurso de Amparo en Revisión), 18 January 1996, No. 60-96 (finding that the amnesty decree did not apply to illegal detention and attempted murder committed by security agents in the context of a number of forced disappearances and assassinations).

[110] Constitutional Court of Peru, *Santiago Martin Rivas*, EXP. N.° 4587-2004-AA/TC, 29 November 2005 (annulling the amnesty law). Prosecutions and trials have been conducted in Peru (*see e.g.* trials of former Peruvian president Alberto Fujimori, convicted by the Supreme Court of Justice for human rights violations amounting to crimes against humanity committed under his presidency in 1991 and 1992, *Cases of Barrios Altos, La Cantuta y sótanos SIE*, Sentencia de la Sala Penal Especial en el Expediente N° AV 19-2001 (acumulado), 7 April 2009.)

[111] Constitutional Court of Colombia, Revisions Ley 742, 5 June 2002 (finding that blanket amnesties, auto-amnesties or other measures depriving victims of an effective remedy violate States' duty to provide judicial remedies for protection of human rights); Supreme Court of Colombia, *Caso de Masacre de Segovia*, May 2010 (citing IACtHR jurisprudence on unacceptability of amnesty provisions for grave violations of human rights).

[112] Mauritania's Law of Amnesty, 14 June 1993 ; *see* France, Cour de cassation, 23 October 2002, Bull. crim. 2002, No 195, p.725 (« l'exercice par une juridiction française de la compétence universelle emporte la compétence de la loi française, même en présence d'une loi étrangère portant amnistie »). The ECHR subsequently approved this finding in *Ould Dah v. France*, Decision on admissibility (n°13113/03), ECHR, 17 March 2009 (considering that amnesty laws are generally incompatible with the duty of States to investigate acts of torture. The ECHR also found that the Mauritanian Amnesty Law could not prevent the applicability of French Law before the French Courts seized of the case because of their universal jurisdiction).

[113] Spain, *Pinochet case,* Judgement, Sala de lo Penal de la Audiencia Nacional, 5 November 1998; *see also* Netherlands, *Public Prosecutor v. F,* LJN: BA9575, District Court in The Hague, 09/750001-06, ILDC 797 25 June 2007 (affirming the exercise of universal jurisdiction over war crimes charges despite the alleged existence

51. Although the practice of granting amnesties remains commonplace, there is nonetheless a trend toward the limitation of their scope.[115] Whereas blanket amnesties were previously the norm, an increasing number of amnesties exclude their application to certain serious international crimes. This has been the case in Suriname,[116] Nicaragua,[117] Guatemala,[118] Federation of Bosnia and Herzegovina,[119] Venezuela,[120] Côte d'Ivoire,[121] Colombia,[122] the Philippines,[123] the Democratic Republic of the Congo[124], Tunisia[125] and Poland.[126] An increasing number of constitutions have provisions prohibiting amnesties for international crimes.[127]

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of an amnesty in Afghanistan); Spain, *Case of Galtieri,* Orden de prisión provisional incondicional de Leopoldo Fortunato Galtieri por delitos de asesinato, desaparición forzosa y genocidio, por el Magistrado-Juez del Juzgado Número cinco de la Audiencia Nacional española, March 1997 (holding that Argentina's amnesty laws were contrary to Argentina's international treaty obligations).

[114] *Kallon* Decision, paras 71, 84.

[115] *See e.g.* Tunisia's 2011 Legislative Decree no. 2011-1 granting amnesty; *Non-Compliance Action of the Fundamental Principle No. 153,* Federal Supreme Court of Brazil, 29 April 2010 (upholding the 1979 Amnesty Law on the basis that it represented, at the time, a necessary step in the reconciliation and redemocratisation process, and as it was not a self-amnesty. This decision attracted widespread criticism, including by the UN Committee Against Torture); *see also Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil,* Judgement, IACtHR, 24 November 2010, para. 175 (invalidating the Brazilian amnesty) (in Spanish only).

[116] Suriname's 1992 Act providing for the granting of amnesty, Decree No.5544 (excluding crimes against humanity from the scope of the amnesty).

[117] Nicaragua's Amnesty Law, 1993 (excluding war crimes and crimes against humanity from its scope).

[118] Guatemala's National Reconciliation Law, 18 December 1996 (excluding from the amnesty the crimes of genocide, torture, forced disappearance and crimes which are not subject to limitations or which, in conformity with internal law or international treaties ratified by Guatemala, do not allow release from penal responsibility). The Guatemalan courts have applied this amnesty on a case-by-case basis.

[119] Federation of Bosnia and Herzegovina's 1999 Law on Amnesty (excluding "criminal acts against humanity and international law as stipulated in Section XVI of the [SFRY Criminal Code]" from the amnesty).

[120] Venezuela's 2000 Law of General Political Amnesty (excluding from its scope Crimes against humanity, grave crimes against human rights and war crimes).

[121] Côte d'Ivoire's 2003 Amnesty Law (excluding crimes against humanity from the amnesty) and 2007 Amnesty Ordinance (excluding "crimes and offences against international law" from the amnesty).

[122] Colombia's 2005 Justice and Peace Law (excluding from the complete amnesty combatants who committed certain serious crimes under international law, but limiting instead their sentences to 5- 8 years).

[123] Philippines' 2007 Proclamation No. 1377 (excluding from the amnesty "Crimes against chastity, rape, torture, kidnapping for ransom, use and trafficking of illegal drugs and other crimes for personal ends and violations of international law" (even if alleged to have been committed in pursuit of political beliefs)).

[124] Democratic Republic of the Congo's 2009 Law of Amnesty (excluding genocide, war crimes and crimes against humanity).

[125] Legislative Decree No. 2011-1 granting amnesty, 2011 (excluding international crimes).

[126] Poland's 1998 Act on the Institute of National Remembrance (excluding crimes against humanity from any prior amnesties).

[127] *See e.g.* Article 28(1) of the Ethiopian Constitution (1994) (providing that "[t]he legislature or any other organ of state shall have no power to pardon or give amnesty with regard to [crimes against humanity]"); Article 80 of the Constitution of Ecuador (2008) (stating that "[p]roceedings and punishment for the crimes of genocide, crimes against humanity, war crimes, forced disappearance of persons or crimes of aggression against a State shall not be subject to statutes of limitations. None of the above-mentioned cases shall be liable to benefit from amnesty" (unofficial translation)); Article 29 of the Constitution of Venezuela (1999, as amended) (stipulating that "[human rights violations and crimes against humanity] are excluded from any benefit that may result in their impunity, including pardons and amnesty" (unofficial translation)).

52. Amnesties aimed at releasing political prisoners of a former regime or facilitating the return of refugees are, conversely, frequently accepted or even encouraged.[128] Certain conditional amnesties such as those providing for some form of accountability have also met widespread approval, such as in the case of South Africa, where amnesties were granted as part of the reconciliation process.[129] In exchange for the grant of amnesty, applicants were under an obligation to make full disclosure of all relevant facts, which ensured at least a modicum of accountability and access for victims to the truth.[130] Other amnesties impose conditions such as surrendering to authorities, ceasing armed activities, or handing over weapons.[131] Such amnesties have generally not been invalidated, but rather, applied on a case-by-case basis, depending on a number of factors, including the process by which the amnesty was enacted, the substance and scope of the amnesty, and whether it provided for any alternative form of accountability.[132]

4.5.3. Conclusion on the scope of the 1996 amnesty

53. Based on the foregoing, the Chamber concludes that an emerging consensus prohibits amnesties in relation to serious international crimes, based on a duty to investigate and prosecute these crimes and to punish their perpetrators. As previously indicated, relevant

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[128] *See e.g.* Federation of Bosnia and Herzegovina's 1996 Amnesty Law and 1999 Law on Amnesty and Republika Srpska's 1996 Law on Amnesty and 1999 Law on Charges and Amendments to the Law on Amnesty; *see also* Spain's 1976 Royal Amnesty given by King Juan Carlos to those convicted of political crimes during the rule of General Francisco Franco.

[129] Promotion of National Unity and Reconciliation Act, 1995. In 1996, the Constitutional Court of South Africa upheld the section of the 1995 Act relating to the amnesty, finding that there was an exception to the peremptory rule prohibiting an amnesty in relation to crimes against humanity contained in Article 6(5) of Additional Protocol II of the 1949 Geneva Conventions (applying to internal conflicts) (*Case of AZAPO v. the President of the Republic of South Africa*, 25 July 1996, Case CCT 17/96).

[130] *See e.g.* Colombia's 2005 Justice and Peace Law (Law 975) (providing for reduced sentences for serious international crimes). Further to the Constitutional Court of Colombia's judgement of 18 May 2006 (C.370/2006), combatants were required to fully and truthfully disclose their crimes in order to benefit from the legislation.

[131] Sierra Leone (1999 Lomé Peace Accord), Cambodia (1994 Law), Angola (2006 Memorandum of Understanding for Peace and Reconciliation in Cabinda Province implemented in a domestic Amnesty Law) and Uganda's Amnesty Act (2000); *see also* Algeria's Law on National Reconciliation (also called Law on Civil Concord), 1999 (conditional on informing the stopping of "terrorist or subversive activity" within 6 months of the promulgation of the law and on handing oneself in to the competent authorities). This amnesty law also excluded from its scope "terrorist or subversive acts; acts leading to death or permanent disability; rapes; bombings in public places"; Algeria's 2005 Charter for Peace and National Reconciliation, supplemented by a number of Ordinances and Decrees (requiring applicants to surrender to authorities in a limited time-period and providing information about their crimes and ceasing armed activities) and Haiti's 1994 Law relating to Amnesty, enacted further to the Port-au-Prince Agreement between the United States and Haiti (1994) whereby certain military officers of the Haitian armed forces consented to an "early and honorable retirement" in exchange of an amnesty, which allowed President Aristide to return to the country and to end the conflict.

[132] *See e.g.* Ugandan Constitutional Court's ruling on Petition No. 036/11, *Thomas Kwoyelo alias Latoni v. Uganda*, 22 September 2011, lines 531-582 (analysing the circumstances of the applicant and the general context of the country, and finding that the applicant, who was a former Lord's Resistance Army (LRA) commander, should have been granted an amnesty under the 2000 Amnesty Act, which was not a blanket amnesty, for crimes committed during the conflict opposing his rebel group to governmental forces).

treaty obligations impose an absolute prohibition in relation to genocide, torture and grave breaches of the 1949 Geneva Conventions (Section 4.5.1). Although state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them, this 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. These norms further evidence a clear obligation on states to hold perpetrators of serious international crimes accountable and to provide victims with an effective remedy, and support the conclusion that amnesties for these crimes (especially when unaccompanied by any form of accountability) are incompatible with these goals.

54. The Chamber is accordingly 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 and to Cambodia's international obligations. The Chamber further notes that the 1996 Royal Decree did not condition the grant of amnesty or provide for any form of accountability for the crimes committed during the Democratic Kampuchea period. It is uncontested that IENG Sary and a large number of combatants reintegrated with the Government as a result of the Royal Decree, and that this may have contributed to restoring peace in Cambodia. While the 1996 amnesty may have been a useful negotiation tool in ending the conflict, the Chamber nonetheless notes that it was unaccompanied by any truth or reconciliation process through which information regarding Accused IENG Sary's alleged crimes could be revealed or the internationally-enshrined rights of victims to an effective remedy otherwise acknowledged.[133]

55. The Chamber consequently finds that the scope of application of the 1996 amnesty of necessity excludes the crimes of genocide, torture and grave breaches of the 1949 Geneva Conventions. For the above reasons, the Chamber further declines to extend the 1996 Royal Decree to the remaining serious international crimes for which the Accused is charged. The 1996 Royal Decree accordingly does not debar the Trial Chamber's exercise of jurisdiction over the Accused IENG Sary.

[133] The amnesty was enacted by the King, but there was no debate, vote or formal approval by the National Assembly; *see* "Clarification from Norodom Sihanouk, King of Cambodia", D427/1/6.1.3, 17 September 1996 (indicating that the amnesty decree had been made public and enforceable without having previously obtained the support of two thirds of the National Assembly, as he had recommended).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

DISMISSES the Defence preliminary objection based on the principle of *ne bis in idem*;

DISMISSES the Defence preliminary objection based on the 1996 Royal Decree, finds that the sentences pronounced by the 1979 People's Revolutionary Tribunal could not be subject to pardon and declares the amnesty contained in the Royal Decree to be inapplicable to charges of grave breaches of the 1949 Geneva Conventions, genocide and crimes against humanity in the Closing Order in Case 002;

REJECTS in consequence the IENG Sary Defence's request to hear witnesses to determine the intended scope of the 1996 Royal Decree; and

DECLARES the question of the application of the 1996 Royal Decree to national crimes to be moot following the Trial Chamber's determination of 22 September 2011 (E122) that these crimes shall not form the basis of trial proceedings in Case 002.

Phnom Penh, 3 November 2011
President of the Trial Chamber

Nil Nonn