BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/OCIJ(PTC 75) **Party Filing:** The Defence for IENG Sary

Filed to: The Pre-Trial Chamber **Original language**: ENGLISH

Date of document: 13 December 2010

CLASSIFICATION

Classification of the document suggested by the filing party: PUBLIC

Classification by OCIJ or Chamber: សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

IENG SARY'S REPLY TO THE COMBINED RESPONSE BY *ADVOCATS SANS FRONTIÈRES* FRANCE CO-LAWYERS FOR THE CIVIL PARTIES TO THE APPEALS BY IENG SARY, IENG THIRITH AND NUON CHEA AGAINST THE CO-INVESTIGATING JUDGES' CLOSING ORDER

Filed by:

The Co-Lawyers:

ANG Udom
Michael G. KARNAVAS

Distribution to:

The Pre-Trial Chamber Judges:

PRAK Kimsan
NEY Thol
HUOT Vuthy
Catherine MARCHI-UHEL
Rowan DOWNING

Co-Prosecutors:

CHEA Leang
Andrew CAYLEY

All Defence Teams

Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits this Reply to the Combined Response by *Advocats Sans Frontières* France Co-Lawyers for the Civil Parties ("Civil Parties") to the Appeals by IENG Sary, IENG Thirith and NUON Chea against Co-Investigating Judges' Closing Order ("Response").[1] This Reply will address the issues raised in the Response which are relevant to Mr. IENG Sary's Appeal[2] following the general order in which they have been raised by the Civil Parties.

I. SUMMARY OF RESPONSE

1. The Civil Parties assert the following:

   a) the application of genocide, crimes against humanity, and grave breaches of the Geneva Conventions ("grave breaches") does not violate the principle of legality;

   b) the application of national crimes does not violate the principle of legality;

   c) joint criminal enterprise ("JCE") is applicable;

   d) command responsibility is applicable;

   e) fair trial rights have not been violated; and

   f) amnesty and *ne bis in idem* do not bar Mr. IENG Sary's prosecution.

II. REPLY

A. The Closing Order violates the principle of legality

2. In paragraph 8, the Civil Parties assert that the principle of legality applicable at the ECCC is that set out in Article 15 of the International Covenant for Civil and Political Rights ("ICCPR"). In paragraph 9, the Civil Parties assert that this principle also requires "that the alleged acts were sufficiently foreseeable to the accused under both national law and international at the time they were committed...."[3] While the Civil Parties are correct that the principle of legality set out in the ICCPR must be respected, the Civil Parties fail to recognize that the principle of legality set out in relevant Cambodian law – Article 6 of the 1956 Penal Code – must also be respected. Article 6 is stricter than the principle as set out in the ICCPR.[4] Unlike the ICCPR, it allows no exception for the retroactive application of crimes which were "criminal according to the general principles of law

[1] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), Combined Response by *Advocats Sans Frontières* France Co-Lawyers for the Civil Parties to the Appeals by IENG Sary, IENG Thirith and NUON Chea against Co-Investigating Judges' Closing Order, 26 November 2010, D427/1/18, ERN: 00630408-00630421.
[2] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, ERN: 00617486-00617631 ("Appeal").
[3] Emphasis added.
[4] *Id.*, paras. 104-10.

recognized by the community of nations."[5] It requires crimes to have existed in Cambodian law at the time of the conduct in order to be applicable.[6]

3. In paragraph 10, the Civil Parties assert that the 1956 Penal Code was the governing law nationally, but that "[i]nternationally, Cambodia relied on customary international law, the general principles of law and ratified conventions." It is unclear what is meant by this assertion. If the Civil Parties intend to assert that Cambodia relied on customary international law, general principles of law and ratified conventions when it acted in an international setting, such as when it acted as part of the United Nations General Assembly, this assertion may be true. However, this does not have any bearing on the work of the ECCC, a domestic court.

4. In paragraph 11, the Civil Parties assert that Articles 1, 2, and 29 new of the Establishment Law incorporate international crimes and forms of liability into Cambodian law. The Establishment Law, as even the OCP admits,[7] is an enabling statute, which will allow the ECCC to apply law which was applicable in Cambodia in 1975-79. It cannot create new domestic law to be retroactively applied.[8]

5. In paragraph 12, the Civil Parties assert that Cambodia was bound by international law provisions prohibiting genocide, crimes against humanity and grave breaches. Cambodia's obligations as a State do not change the fact that the ECCC cannot apply law which did not exist in domestic Cambodian legislation at the relevant time. Any such obligations are not a concern for the judiciary.[9] Furthermore, the obligation to prohibit international crimes does not equate to an obligation to punish the crimes.[10]

1. Genocide

6. In paragraphs 13 through 15, the Civil Parties assert that Cambodia ratified the Genocide Convention and the fact that there was no national legislation criminalizing genocide does not exempt perpetrators from prosecution. The Civil Parties cite the Vienna Convention

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[5] ICCPR, Art. 15.

[6] Article 6 states, "Criminal law has no retroactive effect. No crime can be punished by the application of penalties which were not pronounced by the law before it was committed. Nevertheless, when the Law abolishes a breach or reduces a punishment, the new legal dispositions are applicable to past justiciable breaches of the law, even if the breach discovered was committed at a time previous to the enactment of the new law, under the condition however that no definitive conviction already took place." (emphasis added).

[7] OCP Response, para. 134.

[8] This would violate the principle of *nullum crimen sine lege*, as international law was not directly applicable in Cambodia. *See* Appeal, paras. 111-25.

[9] *See* Appeal, paras. 126-29.

[10] *Id.*

on the Law of Treaties to argue that genocide is applicable because "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Again, this deals with Cambodia's obligation as a State, and is not applicable to the present situation. Cambodia is not charged with failing to abide by its treaty obligations.

7. In paragraph 16, the Civil Parties assert that "whether or not genocide is applicable through the ratification of the Convention or through custom, a penalty is prescribed pursuant to the Convention in Article 4 of the ECCC Law, which refers to the provisions of Rule 98 of the Internal Rules." This assertion is unclear, but as explained above, the Establishment Law may not create new law to be retroactively applied. The fact that the Establishment Law may have created a penalty[11] in 2001 for genocide does not change the fact that the crime was not punishable in Cambodia in 1975-79.

8. In paragraphs 17 and 18, the Civil Parties assert that liability for genocide was accessible because of the customary status of forms of liability, their partial incorporation into the 1956 Penal Code, and the case law of the International Tribunals. It is unclear why the Civil Parties would assert that the status of forms of liability in customary international law or the 1956 Penal Code would have any effect on the foreseeability of liability for genocide in Cambodia in 1975-79. It is similarly unclear how the jurisprudence of the International Tribunals would have made liability in Cambodia foreseeable in 1975-79. The first conviction for genocide occurred at the International Criminal Tribunal for Rwanda in 1998.[12]

9. In paragraph 19, the Civil Parties assert that "the submission that customary law is not applicable at the ECCC is untenable, to the extent that that [sic] owing to the virtually universal ratification of the conventions, the universality principle applies to serious crimes such as genocide, crimes against humanity, torture and grave breaches of customary international humanitarian law." The Civil Parties do not seem to recognize the fact that Cambodia is a domestic court.[13] It is not an international tribunal which exercises universal jurisdiction. The Civil Parties' reference to the Antonio Cassese article *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction* is unclear. The page number cited does not exist and the footnote cited does not appear relevant. The principle of universality is not relevant to whether the ECCC

[11] Note that Rule 98 refers to the Trial Judgement and not specifically to any penalty for genocide.
[12] *Prosecutor v. Akayesu*, ICR-96-4-T, Judgement, 2 September 1998, verdict.
[13] *See* Appeal, paras. 8-20.

may apply international crimes. As is clear from the article cited, the principle comes into effect in domestic courts where there is national legislation which allows a State to exercise universal jurisdiction.[14] Jurisdiction may then be asserted through a universality principle when a State would otherwise have no jurisdiction over an Accused.

2. Crimes Against Humanity

10. In paragraphs 20 through 28, the Civil Parties assert that since crimes against humanity were not part of Cambodian law in 1975-79, they must have existed in customary international law to be applicable. They then explain why they consider that crimes against humanity were part of customary international law at the time and assert that as part of customary international law, liability would have been foreseeable. The Defence has not argued that crimes against humanity as a whole did not exist in customary international law. This is not the issue. The issue, as extensively explained in the Appeal,[15] was that customary international law was not directly applicable in Cambodian courts in 1975-79. It required implementing legislation to be applied and such implementing legislation did not exist at that time. Liability would thus not have been foreseeable in a Cambodian court in 1975-79.

11. In paragraph 26, the Civil Parties assert that the principle of legality does not bar reliance on unwritten custom or from determining the elements of a crime through a process of interpretation and clarification. Even if Cambodia could apply customary international law, the Pre-Trial Chamber must first determine what the elements and underlying acts of crimes against humanity are. These elements and underlying acts cannot be interpreted or clarified until they have first been found to exist.

3.Grave Breaches

12. In paragraphs 29 through 36, the Civil Parties assert that Cambodia was party at the relevant time to the Geneva Conventions, which contained grave breaches provisions, and was bound by the Conventions. They assert that grave breaches were also part of customary international law at the time. Because of the status of grave breaches in conventional and customary international law, as well as their atrocious nature, the Civil Parties assert that liability would have been foreseeable. These arguments must fail for the reasons already discussed *supra*. Cambodia's obligations as a State do not equate

[14] Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589 (2003).
[15] Appeal, paras. 111-14, 121-25.

with an individual's obligations within a State.[16] Conventional law and customary international law were not directly applicable in Cambodia. No implementing legislation existed at the time.[17] As the crime of grave breaches did not exist in Cambodia, liability in a Cambodian court could not have been foreseeable.

13. In paragraph 32, the Civil Parties assert that "the principle of legality is satisfied where a State is already treaty-bound by a specific convention." They cite the *Duch* Trial Judgement for this assertion. The *Duch* Trial Chamber erred in reaching this conclusion. The *Duch* Trial Chamber cited a report by the Group of Experts, which did not state that the principle of legality is satisfied where a State is already treaty-bound by a specific convention. The paragraph cited in the *Duch* Judgement states, "Cambodia, Laos, Thailand and Viet Nam were parties to all four Geneva Conventions of 1949 during the period at issue, although none became a party to the 1977 Additional Protocols before 1980. The grave breaches of the provisions of the Geneva Conventions thus apply, although criminality extended beyond these grave breaches under the customary law of the time."[18] The Group of Experts was established pursuant to a General Assembly Resolution in order to consider options for bringing Khmer Rouge leaders to justice. The Group of Experts recommended that an international tribunal be established.[19] The recommendations in their report as to applicable law were not made specifically with the domestic status of the ECCC in mind. The principle of legality in Cambodian law requires that all crimes exist in domestic law before they may be applied.[20] Cambodian law did not contain any provisions criminalizing grave breaches in 1975-79. It would therefore violate the principle of legality to apply grave breaches at the ECCC.

B. Domestic Crimes

14. In paragraph 38, the Civil Parties assert that "it is widely recognized in light of the events during the 1975 to 1979 and 1979 to 1993 periods, there was no functioning judicial system in Cambodia; therefore the alleged crimes could not be prosecuted." In paragraph

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[16] Each of the four Geneva Conventions has an article requiring States to implement national legislation in order to provide for penal sanctions for persons who have committed grave breaches of the Geneva Conventions, demonstrating that the Geneva Conventions were never intended to be self-executing. Cambodia has not implemented any such legislation. Without any penal legislation, no individual can be held criminally liable for a violation of grave breaches in a national court.

[17] *Id.*, paras. 119-20.

[18] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Judgement, 26 July 2010, E188, para. 404.

[19] *See* Identical letters dated 15 March 1999 from the Secretary-General to the President of the General Assembly and the President of the Security Council, 16 March 1999, UN Doc No. S/1999/231, p. 2.

[20] *See* 1956 Penal Code, Art. 6.

39, the Civil Parties assert that the statute of limitations was interrupted for the period from 1979 to 1993. The Civil Parties provide no support for these assertions. The Defence has demonstrated[21] and the international *Duch* Trial Chamber judges have recognized[22] that there was evidence of a functioning judicial system during this period.

15. In paragraph 40, the Civil Parties assert that the extension of the statute of limitations is not incompatible with the principle of non-retroactivity because it was simply a matter of procedure and did not run counter to Article 14 of the ICCPR. It is actually Article 15 of the ICCPR which contains the principle of non-retroactivity. Regardless, the extension of a statute of limitations – especially after its expiry – is considered by many States not to be a mere procedural matter because of the effect it has upon an accused. France, for example, does not allow extension of a statute of limitations after its expiry.[23] In the United States, the Supreme Court has explained, "[a]fter (but not before) the original statute of limitations had expired, [the Accused] was not 'liable to any punishment.' California's new statute therefore 'aggravated' [the Accused's] alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past conduct that [when the law extending the statute of limitations was enacted] did not trigger any such liability."[24]

16. In paragraph 41, the Civil Parties assert that the absence of a majority decision on this issue in Case 001 does not bar the application of Article 3 new in Case 002. They assert that it does not matter that the OCP did not appeal the fact that Duch was not found guilty of national crimes. It is true that the decisions made in Case 001 are not binding in Case 002. The Defence has not argued to the contrary. It is instructive, however, that the Trial Chamber was not able to apply Article 3 new even without considering the Defence argument that it would violate Mr. IENG Sary's right to equal treatment.

17. In paragraph 42, the Civil Parties assert that "in light of the 5 December 2008 Decision on the Co-Prosecutors' Appeal (D99/3/42), in which the Pre-Trial Chamber decided to amend the Co-Investigating Judges' Closing Order, the Accused ought to be indicted for the domestic crimes in order to avert the risk of acquittal at trial of all the other charges."

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[21] *See* Appeal, paras. 170-72.
[22] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on the Defence Preliminary Objection Concerning the Statute of Limitations of Domestic Crimes, 26 July 2010, E187, Opinion of Judges Silvia Cartwright and Jean-Marc Lavergne, paras. 31-35.
[23] *See* Appeal, para. 160.
[24] *Stogner v. California*, 539 U.S. 607, 613 (2003).

This is not a valid reason to apply retroactive law which would violate Cambodian law and international standards of justice. If valid law with which to charge an accused does not exist or no longer exists, law may not be created or reactivated to fill the gap. Furthermore, it is unclear why the Civil Parties assert that if national crimes are not charged, there would be a risk of acquittal of all other charges. This seems to imply that the Civil Parties recognize that international crimes may not be validly applied.

C. Joint Criminal Enterprise

18. In paragraphs 43 through 48, the Civil Parties assert that JCE is applicable at the ECCC. The Civil Parties do not distinguish between the different forms of JCE and appear not to realize that the Pre-Trial Chamber has already found that JCE III is not applicable because it did not exist in customary international law in 1975-79. The Civil Parties fail to take into account any Defence arguments concerning the Closing Order's defective pleading of JCE. The Civil Parties appear to confuse common law conspiracy with JCE.[25] They fail to recognize that for a form of liability to exist in customary international law, State practice with regard to the form of liability must be "extensive and virtually uniform."[26] JCE is not a form of liability that is extensively and virtually uniformly applied across States. Nor do States apply it out of a sense of *opinio juris*. In fact, other Civil Party groups have argued that JCE may not be applied at the ECCC.[27]

19. In paragraph 49, the Civil Parties assert that "the particular forms of liability mentioned in Article 29 (new) were set forth in the 1956 Penal Code of Cambodia, with the exception of participation through planning and the theory of joint criminal enterprise. The notion of planning is nonetheless included in the provisions of the 1956 Penal Code, and it was therefore foreseeable that acts of planning could constitute crimes." The Civil Parties fail to explain in what way the notion of planning is included in the 1956 Penal Code and do not refer to any specific provisions of the Code. Liability pursuant to a form of liability that did not exist in applicable Cambodian law in 1975-79 would not have been foreseeable.

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[25] *See* Response, para. 46.
[26] *North Sea Continental Shelf Cases*, ICJ Reports (1969), para. 74.
[27] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Response of Co-Lawyers for the Civil Parties on Joint Criminal Enterprise, 30 December 2008, D97/3/4, ERN: 00268488-00268498; *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Response of Foreign Co-Lawyer for the Civil Parties to the *amicus curiae* briefs, 17 November 2008, D99/3/32, ERN: 00239077-00239087; *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC/TC, Transcript of Trial Proceedings - Kaing Guek Eav "Duch" Public – Redacted, 23 November 2009, E1/78.1, p. 5, l. 25 – p. 6, l. 9.

D. Command Responsibility

20. In paragraph 51, the Civil Parties assert that perpetrators of grave breaches of international humanitarian law during an internal armed conflict are criminally liable under customary international law. Whether this is true, this does not mean that liability through command responsibility was part of customary international law in 1975-79.

21. In paragraph 52, the Civil Parties assert that "the command responsibility principle was already set out in Article 1 of Convention (IV) respecting the Laws and Customs of War on Land and its annex...." This Convention may set out a principle of responsible command, but it does not set out individual criminal liability through command responsibility. As the Defence has previously explained,[28] the principle of responsible command does not equate to command responsibility. The Civil Parties also assert that command responsibility was set out in Article 43(1) of Additional Protocol I.[29] Article 43(1), again, refers to a principle of responsible command, rather than to command responsibility. It is actually Articles 86 and 87 of Additional Protocol I which are now considered to codify command responsibility. Additional Protocol I, however, was not binding on Cambodia in 1975-79 and did not codify customary international law at that time.[30]

22. In paragraph 53, the Civil Parties assert that "[t]his also applies to internal armed conflicts. The notion of command responsibility was an integral part of the prohibition of certain acts during internal armed conflicts set forth in Common Article 3 of the Geneva Conventions." Command responsibility as a notion of individual criminal liability did not exist in the Geneva Conventions. Even if Additional Protocol I were reflective of customary international law in 1975-79, it only applied to international armed conflicts. Additional Protocol II,[31] which applied to internal armed conflicts, does not contain a similar provision.[32]

23. In paragraph 55, the Civil Parties state, "The Defence also claims that command responsibility only applies to war crimes." The Civil Parties assert that command

[28] *See* Appeal, pars. 285-86; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 75), IENG Sary's Reply to the Co-Prosecutors' Joint Response to Nuon chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 6 December 2010 ("Reply to OCP"), para. 114.
[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Additional Protocol I"), 8 June 1977.
[30] *See* Appeal, paras. 285-86; Reply to OCP, paras. 121-22.
[31] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 ("Additional Protocol II").
[32] *See* Appeal, para. 308.

responsibility must not only apply to war crimes because they assert that command responsibility may apply to civilian officials as well as military commanders.[33] It is unclear why the application of command responsibility to civilian leaders would require that command responsibility's application extend to crimes other than war crimes. In fact, all the examples provided by the Civil Parties to support the existence of command responsibility in customary international law relate only to war crimes.[34]

24. The fact that the Statues of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court provide for command responsibility for civilians has no bearing on whether that form of liability existed in customary international law – let alone in domestic Cambodian law – in 1975-79, long before those international tribunals were established.

E. Fair Trial Rights

25. In paragraphs 60 through 62, the Civil Parties assert that the Defence has failed to identify any breaches of fundamental fair trial rights. This assertion is false. The Closing Order violates at least the following rights:

a. Mr. IENG Sary's right to be presumed innocent;[35]

b. Mr. IENG Sary's right to equal treatment;[36]

c. Mr. IENG Sary's right to prepare a defence;[37]

d. Mr. IENG Sary's right to protection against double jeopardy;[38]

e. Mr. IENG Sary's right to legal certainty;[39] and

f. Mr. IENG Sary's right to be safe from the non-retroactive application of law;[40]

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[33] Response, paras. 58-59.
[34] The Civil Parties cite: Article 1 of Convention (IV) respecting the Laws and Customs of War on Land and its annex (in Response, para. 52), Common Article 3 to the Geneva Conventions (in Response, paras. 51, 53), Additional Protocol I (in Response, para. 52), and give the example that "in the Tokyo trial, some civilian officials were convicted of war crimes according to the command responsibility doctrine." Response, para. 59 (emphasis added).
[35] *See* Appeal, paras. 21-22, 40, 174-75.
[36] *Id.*, paras. 154-57.
[37] *Id.*, opening, para. 3.
[38] *Id.*, paras. 21-41.
[39] *Id.*, paras. 103-35.
[40] *Id.*, paras. 138-79.

F. Amnesty and *Ne Bis in Idem*

26. In paragraph 63, the Civil Parties assert that the principle of *ne bis in idem* is provided by Article 14(7) of the ICCPR. While this is correct, the principle is also contained in Article 12 of the Cambodian Code of Criminal Procedure, which does not contain any exceptions. The Civil Parties assert that the purpose of the principle is "aimed at ensuring that individuals are not put under physical, psychological, emotional or financial pressure several times for the same offence." This is not the only purpose of the principle. The *ne bis in idem* principle "has been characterised as a corollary of the recognition of the *res judicata* effect of other judgments, aimed at protecting the finality of judgments. The idea is that once a case has been dealt with, it should not be reopened (*factum praeteritum*) as this would seriously undermine respect for judicial proceedings and the judiciary in general."[41] This has been termed the "procedural effect" of the principle of *ne bis in idem.*[42] The need for the ECCC to act as a model court for Cambodia[43] and to increase respect for the judiciary and judicial proceedings should lead the ECCC to respect and apply the principle of *ne bis in idem.*

27. In paragraph 65, the Civil Parties assert that Mr. IENG Sary's 1979 trial was not in conformity with international standards, implying that the principle of *ne bis in idem* is not applicable to bar Mr. IENG Sary's present prosecution. First, the Civil Parties provide no support for their claim that the 1979 trial did not meet "international standards." Second, the Cambodian Code of Criminal Procedure provides no exception to the principle of *ne bis in idem.*[44] Even if an exception were found to exist, the purpose of the exception is to prevent sham trials designed to shield an accused from liability.[45] The 1979 trial resulted in a death sentence. It was not a sham trial designed to shield Mr. IENG Sary from liability.

28. In paragraph 66, the Civil Parties assert that the offenses for which Mr. IENG Sary received amnesty are not the same as those contained in the Closing Order because Mr.

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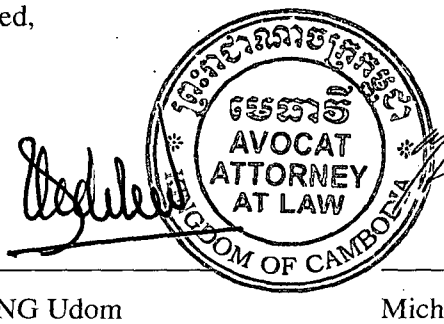
[41] YASMIN Q. NAQVI, IMPEDIMENTS TO EXERCISING JURISDICTION OVER INTERNATIONAL CRIMES 307-08 (T.M.C. Asser Press 2010).
[42] *Id.*, at 292-93.
[43] "The ECCC is designed to be a model for the Cambodian legal and judicial reform." Recommendations Regarding Additional Transparency at the Extraordinary Chambers of the Courts of Cambodia (ECCC) Submitted by members of Civil Society and Members of the Cambodian Press, 24 March 2008, *available at* http://www.cambodiatribunal.org/CTM/Recommendations%20Regarding%20Additional%20Transparency.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e.
[44] *See* Cambodian Code of Criminal Procedure, Art. 12.
[45] *See Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 14 November 2007, C22, ERN: 00153253-00153260, para. 8.

IENG Sary only received amnesty for prosecution under the 1994 Law. The Civil Parties do not explain how they consider that the crimes contained in the 1994 Law differ from the crimes currently charged. As the Defence has explained, Mr. IENG Sary has received an amnesty for all alleged acts on which the current charges are based.[46] The Civil Parties also assert that Mr. IENG Sary's pardon only applied to the death penalty and seizure of property, rather than to the offenses committed. This is not the case. By the time the Pardon was granted, the death penalty had already been abolished in Cambodia.[47] Thus, it is clear that the King did not intend to issue the Pardon simply to ensure that Mr. IENG Sary's death sentence would not be carried out. The King would have known that it would be unnecessary to issue a pardon for something that the Constitution already prohibited. Yet, the King issued the Pardon. This must be because he intended to ensure that Mr. IENG Sary would not serve any sentence related to a conviction based on the acts at issue in the 1979 trial. The King's Royal Decrees should not be interpreted in a way that would make them redundant.

29. Finally, the Civil Parties assert that the offenses charged in the Closing Order have a *jus cogens* status under international law. The Civil Parties do not explain what effect they believe this status to have. Amnesties and pardons for *jus cogens* crimes are not forbidden by Cambodian law or by customary international law.[48]

WHEREFORE, for all the reasons stated in the Appeal and herein, the Defence respectfully requests the Pre-Trial Chamber to grant the Appeal and the relief requested therein.

Respectfully submitted,



ANG Udom Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary
Signed in Phnom Penh, Kingdom of Cambodia on this **13th** day of **December, 2010**

[46] *See* Appeal, paras. 84-95.
[47] *Id.*, para. 96.
[48] *Id.*, paras. 70-82; Reply to OCP, paras. 30-31.