

**Jurisdictional Hearing of Ieng Sary Before the Pre-Trial Chamber of the
ECCC
Regarding Issues Related to Amnesty and Pardon**

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Questions relating to the 1979 *in absentia* genocide conviction entered against Ieng Sary by the People's Revolutionary Tribunal ("PRT") and his 1996 pardon and amnesty were discussed in oral hearings before the ECCC June 30-July 3, 2008. The Pre-Trial Chamber ("PTC") heard submissions regarding double jeopardy and issue preclusion as well as the jurisdictional effect of the amnesty and pardon. The pardon was granted for the death sentence entered against Ieng by the PRT. The amnesty protected Ieng from prosecution under the 1994 Law Outlawing the Khmer Rouge ("1994 Law") and was granted to facilitate Ieng's defection from the Khmer Rouge.

I. Double Jeopardy and Waiver of Fair Trial Rights

The Pre-Trial Chamber asked for oral submissions regarding what effect, if any, Ieng's acceptance of the 1979 *in absentia* genocide conviction would have on *non bis in idem* or "double jeopardy" issues. Considering the large number of due process flaws in the conduct of the 1979 trial, the Chamber wanted to know whether Ieng could waive the right to a fair trial by accepting the verdict, and what effect such waiver would have on the ECCC's ability to try Ieng for criminal acts for which he was previously prosecuted.

The Prosecution argued that the right to a fair trial protects both the accused and the legitimacy of the legal process and therefore may not be waived. Furthermore, respect for international due process rights demands that the judgment entered by the PRT be considered null and void, as it was inherently flawed due to bias, lack of meaningful representation of the Ieng's interests, lack of Ieng's participation in the process and lack of

appellate review as well as other crucial process flaws. The Civil Parties joined the submissions of the Prosecution and reminded the Court that Ieng only acquiesced to the PRT conviction after being pardoned. According to the lawyer for the Civil Party, the convenient timing of Ieng's acceptance of the judgment puts his sincerity into serious doubt.

The Defense countered by arguing that the right to a fair trial is similar to other, waivable rights such as the right to be present at trial and the right to counsel. In support of this position the Defense noted that the nascent Lebanese Tribunal gives the defendant the option to accept or reject the results of a trial *in absentia*. Furthermore, according to the Defense many jurisdictions, such as the United States, allow defendants to plead *nolo contendere* or "no contest" and accept punishment without admitting guilt, thereby waiving their right to a trial without pleading guilty.

The Defense further argued that the KRT prosecution covered all acts of Ieng during the period of Democratic Kampuchea. As discussed below, in its view all alleged criminal acts committed by Ieng were included or subsumed by his genocide charge. Therefore prosecution for these acts by the ECCC would violate the principle of double jeopardy.

II. Issue Preclusion and Applicable ECCC Law

The Court also heard submissions from the parties on the related question of *res judicata* or "issue preclusion," a doctrine that bars further litigation of an issue once a final judicial decision has been made. The parties discussed whether the Cambodian or international law definition of issue preclusion should apply in this case. The ECCC law requires the Court to apply Cambodian procedures, but also requires that the Court abide by minimum international standards. The Cambodian Criminal Code ("CCC") bars cumulative prosecutions of the same criminal *acts*. In contrast, the International Covenant on Civil and Political Rights ("ICCPR"), the controlling international human rights instrument, bars cumulative prosecutions of the same *crimes*.

The Prosecution, joined by the Civil Parties, argued that international law and the “same crime” test must control for two main reasons. First, the nature of international crimes not only allows, but also commands, multiple prosecutions for the same acts in order to properly reflect and condemn their seriousness. Second, there was no valid final acquittal, the triggering mechanism for *res judicata*, which differentiates it from double jeopardy. The Civil Parties argued that the CCC does not clearly and completely define *res judicata* and thus, as prescribed by ECCC law, international law must be used to fill in this *lacuna* or “gap” in the law.

The Defense argued that there is absolutely no difference between an acquittal and a conviction for the purposes of *res judicata* and that to create one would frustrate the underlying purpose of the doctrine, which is to allow parties to rely the finality of legal decisions. Furthermore, the Defense argued that there is no ambiguity in CCC law, and that therefore the “same act” test for *res judicata* must be applied. Additionally, the Defense argued that the plain language of the CCC indicates that the doctrine of *res judicata* should be applied to any and all acts of Ieng that were prosecuted as criminal by the PRT.

III. Jurisdictional Effect of the Amnesty and Pardon

A. The Submissions of the Defense

The Defense argued that the amnesty and pardon are both legal and valid. In support of this position, the Defense noted that no party, except the Civil Parties in passing, had challenged their legality under Cambodian law. Furthermore, the Defense submitted that granting an amnesty and a pardon to Ieng were necessary for ending thirty years of civil war in Cambodia and ushering in an era of peace and prosperity.

The Defense submitted that the pardon and amnesty both cover all of Ieng’s actions as a member of the Khmer Rouge up to 1996, including the period from 1975-79 that constitutes the jurisdiction of the ECCC. The Defense argued that the amnesty was intended

to provide total immunity for any crime Ieng may have committed prior to 1996. This is in opposition to the Co-Investigative Judges' interpretation of the law in its order on provisional detention, which found the 1994 Law to encompass only a handful of enumerated domestic crimes.

In support of its interpretation of the scope of the amnesty, the Defense argued that the 1994 Law must be read in light of its "object and purpose," which, according to the Defense, was to entice the Khmer Rouge to put down their weapons and integrate into Cambodian society. For this enticement to be meaningful it had to be fully retroactive and inclusive. Moreover, the preamble of the 1994 Law, in particular its condemnation of Khmer Rouge's commission of crimes including "genocidal acts" and its notation that these crimes were "characteristic" of the Khmer Rouge since "April 1975," shows that the law was intended to subsume all crimes allegedly committed by Ieng.

B. The Submissions of the Prosecution and Civil Parties

The Prosecution argued that the amnesty and pardon do not excuse Ieng from the jurisdiction of the ECCC. Moreover, they are two separate issues, which must be addressed individually before the Court and not conflated into one topic. The Civil Parties largely joined the submissions of the Prosecution. In addition, the Civil Parties argued that the pardon was invalid as an improper exercise of power by the King, as the Constitution only grants him the power "to lift guilt," which is technically different than granting pardons.

1. The Amnesty Relates Solely to the 1994 Law and the Pardon Merely Vacated the Sentence Entered by the KRT

The Prosecution argued that the amnesty was intended solely to immunize Ieng from prosecution for specific violations of the 1994 Law outlawing the Khmer Rouge. Likewise, the pardon was solely applicable to the death sentence entered against him *in absentia* by the PRT. The only reason the pardon was granted was to facilitate Ieng Sary's defection while

keeping open the possibility of future trials. Therefore, the effect of the pardon was only to vacate the sentence passed by the PRT, not to excuse any of his underlying criminal activity.

2. Alternatively, (1) Domestic Authorities Cannot Excuse International Crimes, or (2) the ECCC May Disregard the Amnesty and Pardon

The Prosecution argued in the alternative that a national government has no authority to pardon or provide an amnesty for serious international crimes. This inability is especially clear for crimes that violate *just cogens* norms (“peremptory norms from which no derogation is permitted”) like the crime of genocide. In support of this argument, the Prosecution cited to the International Court of Justice’s finding in the *Barcelona Traction* case that the prohibition against genocide is a *just cogens* norm. Following logically from this is a duty on all states to prevent and punish the crime. Therefore, the pardon and amnesty granted to Ieng for the crime of genocide is invalid as it violates the international law obligations of the Cambodian government.

For further support, the Prosecution cited the case of *Prosecutor v. Furundzija*, which held that domestic law has no effect on the applicability of *jus cogens* norms. It also noted that the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) only considers the effect of pardons if the accused has served a significant portion of the sentence, whereas Ieng has never been subject to any punishment whatsoever. Finally, the Prosecution pointed out that courts applying international criminal law – in particular Special Court for Sierra Leone (“SCSL”) and the International Criminal Tribunal for Rwanda (“ICTR”) – have regularly set aside domestic pardons as irrelevant to the determination of an accused’s rights.

As a second alternative argument, the Prosecution submitted that the ECCC is an internationalized judicial organ divorced from the Cambodian judiciary and is thus not bound to honor domestic amnesties or pardons, regardless of their validity either domestically and internationally. The Prosecution cited the case of *Prosecutor v. Kallon*,

where the SCSL – a mixed national/international court like the ECCC – dismissed a national amnesty for the crime of genocide, giving it no weight whatsoever.

C. The Defense's Rebuttal

The Defense agreed that the prohibition against genocide is a *jus cogens* norm but argued that this did not automatically invalidate a pardon or amnesty given for a genocide conviction. According to the Defense, not all national amnesties or pardons granted for international crimes are null and void. For example, Ireland and Sierra Leone granted amnesties for international crimes in order to facilitate the peace process. In Sierra Leone, the United Nations even acquiesced to and signed the Lomé Agreement, though it did not agree to accept the negotiated amnesty. The Defense distinguished the SCSL's holding in *Kallon*, noting that the amnesty agreement between the government and the accused was only rescinded after the accused breached the terms of the agreement and continued fighting. For these reasons the Defense submitted that amnesties and pardons may preclude prosecution in some circumstances. Finally, the Defense disagreed that the ECCC is an internationalized judicial body, and argued that it is a domestic court that may look to international law only in the case of a *lacuna* in the law.

IV. Conclusion

The PTC adjourned after hearing the oral submissions of the parties. Substantive arguments by the parties regarding Ieng Sary's appeal of the Provisional Detention Order entered against him by the CIJs were scheduled for the following day. A decision by the PTC regarding jurisdictional issues relevant to Ieng's case is expected by mid-September.