មជ្ឈមណ្ឌលឯកសារកម្ពុជា

MEMORANDUM

TO: Anne Heindel, Legal Advisor, Documentation Center of Cambodia
FROM: Jennifer Ford Walker, University of Michigan Law School, Summer Legal Associate, Documentation Center of Cambodia
DATE: August 9, 2010
RE: The Extent to Which Ieng Sary's Prosecution in the Extraordinary Chambers Is Barred by His Prior Conviction

BACKGROUND

In August 1979 Ieng Sary and Pol Pot were convicted *in absentia* of "genocide"[1] by the People's Revolutionary Tribunal, a court established after the fall of Democratic Kampuchea by the new Vietnamese-backed regime.[2] They were convicted and sentenced to death and the confiscation of their property,[3] but neither served his sentence.[4] In 2007 Ieng Sary was arrested by the Extraordinary Chambers in the Courts of Cambodia (ECCC), and to date he has been charged with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, murder, torture, and religious persecution.[5] He has argued that, under

[1] The Tribunal found Pol Pot and Ieng Sary guilty of what was termed "genocide"; however, the crime was not defined as in the Genocide Convention, and contained elements such as "forced evacuation of people from towns and villages" and "planned massacre of groups of innocent inhabitants." Judgment of People's Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique (1979), *reprinted in* GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 523, at 547-549 (Howard J. De Nike et al. eds., 2000) [hereinafter PRT Judgment].
[2] John D. Ciorciari, *History and Politics Behind the Khmer Rouge Trials, in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 33, 39-40 (John D. Ciorciari & Anne Heindel eds., 2009).
[3] PRT Judgment, *supra* note 1 at 549.
[4] ECCC, Prosecution's Response to Ieng Sary's Submission on Jurisdiction, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 2 (Pre-Trial Chamber, May 16, 2008); Interview with Youk Chhang, Dir., Documentation Ctr. of Cambodia, in Phnom Penh, Cambodia (July 15, 2010).
[5] Press Release, Extraordinary Chambers in the Courts of Cambodia, Pre-Trial Chamber Dismissed Appeals from Ieng Sary, Khieu Samphan and Ieng Thirith Against Extension of Provisional Detention (Apr. 30, 2010), http://www.eccc.gov.kh/english/press_release.list.aspx; ECCC, Provisional Detention Order, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 1 (Office of the Co-Investigating Judges, Nov. 14, 2007).

ne bis in idem, his prosecution in the Extraordinary Chambers is barred by his prior conviction.[6]

DISCUSSION

Ne bis in idem is the criminal law principle that no one should be subject to double prosecution or punishment for the same crime; it is the civil law analogue to double jeopardy.[7] Although the principle is widely recognized across criminal law systems, its formulations vary.[8] The ECCC has not fully expounded *ne bis in idem* as it will apply in the Chambers, preferring to defer the matter until after the Closing Order for Case 002 is issued.[9] The manner in which the ECCC chooses to define *ne bis in idem* could have a significant effect on Ieng Sary's prosecution.

I. Applicable Law

There are no provisions for *ne bis in idem* in either the Law Establishing the ECCC or the ECCC Internal Rules, but the Cambodian Code of Criminal Procedure (CCCP) defines its application[10]:

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[6] ECCC, Ieng Sary's Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, Case No. 002/19-09-2007-ECCC/OCIJ, ¶¶ 9-10 (Pre-Trial Chamber, Apr. 7, 2008).

[7] KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 288-89 (2001). The principle is also referred to as *non bis in idem*.

[8] *See* Gerard Conway, Ne Bis In Idem *in International Law*, 3 INT'L CRIM. L. REV. 217, 217-18 (2003).

[9] *See* ECCC, Public Decision on Appeal Against Provisional Detention Order of Ieng Sary, Case No. 002/19-09-2007-ECCC/OCIJ, ¶¶ 41-54 (Pre-Trial Chamber, Oct. 17, 2008).

[10] ECCC procedure must be "in accordance with Cambodian law." Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (June 6, 2003), art. 12(1). This provision was modified slightly in the Law Establishing the Extraordinary Chambers: "The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses." Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as amended and promulgated on Oct. 27, 2004, NS/RKM/1004/006, Unofficial Translation by the Council of Jurists and the Secretariat of the Task Force, art. 33 new [hereinafter ECCC Law]. The Pre-Trial Chamber has held that "[p]rovisions of the

Article 7 Extinction of Criminal Actions

The reasons for extinguishing a charge in a criminal action are as follows:

1. The death of the offender;
2. The expiration of the statute of limitations;
3. A grant of general amnesty;
4. Abrogation of the criminal law;
5. The *res judicata*.

When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated.

. . . .

Article 12 Res Judicata

In applying the principle of *res judicata*, any person who has been finally acquitted by a court judgment cannot be prosecuted once again for the same act, even if such act is subject to different legal qualification.[11]

It is not clear how the Cambodian law should be interpreted. It is curious that Article 12 of the CCCP does not set out the required elements for a decision to be *res judicata*, as might be expected in a provision entitled "Res Judicata." It is possible that the concepts of *res judicata* and *ne bis in idem* were confused or conflated. On its face, Article 12 appears to render *ne bis in idem* inapplicable to Ieng Sary's case, as it bars a double prosecution only in the event of an acquittal, not a conviction. This is in contrast to the International Covenant on Civil and Political Rights (ICCPR)[12] and other international instruments, which bar subsequent prosecutions after convictions as well as acquittals.[13] Only the American Convention on Human Rights formulates the *ne bis in idem* principle so as to apply only to

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[Cambodian Criminal Procedure Code] should only be applied where a question arises which is not addressed by the Internal Rules." ECCC, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC/OCIJ, ¶ 15 (Pre-Trial Chamber, Aug. 26, 2008). The Internal Rules do not address *ne bis in idem*.

[11] Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English translation 2008, arts. 7 and 12.

[12] International Covenant on Civil and Political Rights, art. 14(7), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171.

[13] *See, e.g.*, Rome Statute of the International Criminal Court, art. 20, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90. Article 12 of the CCCP also appears to run contrary to civil law tradition, which allows for prosecutorial appeals of acquittals. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 364 (2d ed. 2008).

those who have been acquitted.[14] In addition, the Note on Translation of the Khmer-English CCCP suggests that only judgments of the Cambodian Supreme Court acquire the force of *res judicata*;[15] since Ieng Sary was not convicted by the Cambodian Supreme Court, his prior conviction does not seem able extinguish the current criminal charge under Article 7 of the CCCP, nor does it seem able to prevent a further prosecution as provided by Article 12 of the CCCP.

If the Cambodian law suffers from uncertainty either in interpretation or consistency with international standards, the ECCC must seek guidance from "procedural rules established at the international level":

> If these existing procedures no [sic] not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard [sic], guidance may be sought in procedural rules established at the international level.[16]

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[14] American Convention on Human Rights, art. 8(4), *opened for signature* Nov. 22, 1969, O.A.S. T.S. 36 ("An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.").

[15] *See* Code of Criminal Procedure of the Kingdom of Cambodia, Note on the Translation of the Law ("Some recourse to Latin legal terms was inevitable, such as the *res judicata* effect of certain decisions. Only decisions of the Court can obtain this effect prohibiting any further prosecution (see Article 41), either because the time limits for challenging the decision on the merits have expired or because a request for cassation has been rejected (Article 439). A decision that has obtained this quality can only – under very narrow conditions – be challenged before the Supreme Court according to Book 6, Title 2."). This seems to suggest that only decisions of the Cambodian Supreme Court ("the Court") can attain the force of *res judicata*. Decisions which have achieved the force of *res judicata* apparently can only be challenged before the Supreme Court in a limited number of circumstances.

[16] ECCC Law, *supra* note 10, art. 33 new. However, the court may have difficulty determining international standards and seeking out procedural rules established internationally. Göran Sluiter, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, 6 INTERNATIONAL CRIMINAL LAW REVIEW 605, 626 (2006) ("Outside the realm of human rights law, one will thus have difficulty to identify what has been referred to in the context of the Cambodian Extraordinary Chambers as 'international standards'."); CASSESE, supra note 13, at 6 ("[E]ven procedural law remains at a rather underdeveloped stage and in any case has no general purport (in that each international tribunal has its own rules of procedure)."). The debate on the ECCC Law in the Cambodian National Assembly suggests that "international standards" was intended as a reference to the ICCPR:

> I'd like the session to take into consideration the words *International Standards* because these two words have clear definitions regarding the court. We have discussed these words several times because there is an international convention on this issue.

II. *Ne Bis In Idem* "at the International Level"

There are a number of international *ne bis in idem* provisions from which the ECCC can seek guidance. The ICCPR, Rome Statute, Statute of the International Tribunal for the Former Yugoslavia, Statute of the International Tribunal for Rwanda, American Convention on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, and Schengen Agreement all contain *ne bis in idem* provisions.[17] Distilled from the provisions in these instruments are the basic principles of international *ne bis in idem*:

1) The first proceeding must result in a final judgment acquitting or convicting the accused.
2) The second proceeding or penalty must be for the same crime as the first proceeding.
3) Subsequent proceedings are allowed in exceptional circumstances, such as when new evidence is discovered, or when the first proceeding was conducted

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> For instance, in 1966 the International Covenant on Civil and Political Rights was signed in New York. . . . These standards are set forth in international law: the International Covenant on Civil and Political Rights of 1966.

1st Sess., 3d Term, Cambodian National Assembly, Debate and Approval of the Agreement Between the United Nations and the Royal Government of Cambodia and Debate and Approval of Amendments to the Law on Trying Khmer Rouge Leaders (Oct. 4, 2004) (statement of H.E. Sok An), *reprinted in* SEARCHING FOR THE TRUTH, Special Eng. Edition Third Quarter 2004, at 26, 32, *available at* http://www.dccam.org/Projects/Magazines/English_version.htm.

[17] *See* International Covenant on Civil and Political Rights, *supra* note 12, art. 14(7); Rome Statute of the International Criminal Court, *supra* note 13, art. 20; Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 10, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 9, U.N. Doc. S/RES/955 (Nov. 8, 1994); American Convention on Human Rights, *supra* note 14, art. 8(4), European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Apr. 11, 1950, Protocol 7, art. 4, Europ. T.S. No. 005; Convention Applying the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders, arts. 54-58, June 19, 1990, 30 I.L.M. 84.

improperly.

4) Subsequent proceedings by a different State are discouraged but not barred.

A. A Final Judgment Is Required

Before *ne bis in idem* can be invoked, a final judgment of acquittal or conviction must have been issued.[18] The jurisprudence on what constitutes a final judgment is not particularly relevant to Ieng Sary's case. The cases concern the question of precisely when a trial is completed[19] and are not analogous to Ieng Sary's case, as the 1979 trial was unambiguously

[18] *See* International Covenant on Civil and Political Rights, *supra* note 12, art. 14(7) ("No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."); Rome Statute of the International Criminal Court, *supra* note 13, art. 20 ("Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court."); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 4 ("No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offense for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."). The statute for the ICTR does not explicitly require a final judgment of conviction or acquittal: "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda." Statute of the International Tribunal for Rwanda, *supra* note 17, art. 9. The ICTY provision is identical in substance. Statute of the International Tribunal for the Former Yugoslavia, *supra* note 17, art. 10. The difference in formulations is likely not significant, as the ICTR Appeals Chamber cites the ICCPR in support of the proposition that "[t]he *non bis in idem* principle aims to protect a person who has been finally convicted or acquitted from being tried for the same offense again." Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, ¶ 16 (Mar. 24, 2009). An ICTY trial chamber decision likewise clarifies the statutory language: "[I]t is undisputed that the accused had not been tried in the full sense, i.e., he was neither convicted nor acquitted by the German court." Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defense Motion on the Principle of *Non-Bis-In-Idem*, ¶ 8 (Nov. 14, 1995). The American Convention on Human Rights is the outlier, in that it allows only a final judgment *acquitting* the accused to be grounds for *ne bis in idem*. American Convention on Human Rights, *supra* note 14, art. 8(4) ("An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.").

[19] *See* Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defense Motion on the Principle of *Non-Bis-In-Idem*, ¶ 12 (Nov. 14, 1995) (finding that the deferral of the accused's case to the ICTY after he had been indicted in Germany did not violate *non-bis-in-idem* because the German trial had not been completed); Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Accused's Motion for Finding of *Non-Bis-In-Idem*, ¶ 13 (Nov. 16,

completed. ECCC co-prosecutors have argued that the 1979 People's Revolutionary Tribunal conviction was not a final judgment because there was no right of appeal and because the accused were tried *in absentia*.[20] The co-prosecutors contend that a conviction cannot be final without a right of appeal, and that trials *in absentia* cannot result in final judgments because, under Cambodian law, the accused is retried once he is arrested or voluntarily surrenders.[21] However, it is not clear that these features relate to the finality of judgments; rather, they are more likely to be considered defects that may constitute separate grounds for re-prosecution, as discussed below.

The European Court of Human Rights (ECtHR) has explained what constitutes a final judgment:

> According to the Explanatory Report to Protocol No 7 to the Convention, which itself refers back to the European Convention on the International Validity of Criminal Judgments, a "decision is final 'if, according to the traditional expression, it has acquired the force of *res judicata*. This is the case when it is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time-limit to expire without availing themselves of them.'"[22]

The relevant distinction here is between ordinary and extraordinary remedies, not whether there exists the possibility of reopening proceedings. The mere possibility of reopening criminal proceedings does not necessarily affect the finality of a judgment; it is acceptable to reopen criminal proceedings in exceptional circumstances, such as the discovery of new evidence.[23] It is not clear whether the subsequent arrest or surrender and retrial of an accused

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2009) (finding that removal by the prosecution of crime sites from an indictment does not constitute a completed trial for the purpose of *non-bis-in-idem*).

[20] ECCC, Prosecution's Response to Ieng Sary's Submission on Jurisdiction, Case No. 002/19-09-2007-ECCC/OCIJ, ¶¶ 9, 16 (Pre-Trial Chamber, May 16, 2008).

[21] *Id.*

[22] Nikitin v. Russia, European Court of Human Rights ¶ 37 (2004), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=NIKITIN&sessionid=56857150&skin=hudoc-en.

[23] *See* Xheraj v. Albania, European Court of Human Rights ¶¶ 51-54 (2008), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=XHERAJ&sessionid=56857442&skin=hudoc-en ("[T]he Court observes that the requirements of legal

person previously tried *in absentia* constitutes a similar exceptional circumstance, or whether the retrial is merely an ordinary remedy. As to the right of appeal, the prosecution bases its claim on the ICCPR, but the Human Rights Committee's interpretation of the relevant provisions makes no reference to the availability of review by a higher tribunal affecting the finality of a judgment; rather, the unavailability of review is a violation of the right to a fair trial.[24]

B. The Proceedings Must Be for the Same Crime

Ne bis in idem prevents a re-prosecution of the same crime, but there is a split over the scope of "same crime." It includes either the same offense (same criminal charge), or any offense relating to the same set of underlying acts, no matter how that offense is characterized. For example, if the accused attacks a person in a "same offense" jurisdiction, he may first be tried for assault, and later tried for attempt murder. In a "same acts" jurisdiction, this later charge of attempt murder would be barred by *ne bis in idem*, since it relates to the same acts that formed the basis of the first conviction.

It is not at all clear which formulation should be preferred by the ECCC. The Cambodian Code of Criminal Procedure uses "same acts,"[25] but the ICCPR, which the ECCC must act in accordance with,[26] uses "same offense."[27] However, it may not be problematic for

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certainty are not absolute. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character or if serious legitimate considerations outweigh the principle of legal certainty.") (citations omitted).

[24] *See* U.N. Office of the High Comm'r for Human Rights [OHCR], Human Rights Comm., *International Covenant on Civil and Political Rights General Comment No. 32*, ¶¶ 45-51, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007).

[25] Code of Criminal Procedure of the Kingdom of Cambodia, Khmer-English translation 2008, art. 12.

[26] That the ECCC must act in accordance with the relevant ICCPR provision is evident from the ECCC Law and the Cambodian Constitution. ECCC Law, *supra* note 10, art. 33 new ("The Extraordinary Chambers of the trial court 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."); Constitution of the Kingdom of Cambodia art. 31 ("The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of

Cambodian law to offer more protections to the accused than the ICCPR.[28] The ICTY and ICTR statutes use "same acts,"[29] although one ICTR decision refers to "same offences," citing the ICCPR.[30] The Rome Statute uses "same conduct."[31] The American Convention on Human Rights uses "same cause," which the Inter-American Court of Human Rights has explicitly interpreted to be broader than the ICCPR's provision.[32] Finally, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) uses "same offense,"[33] which the ECtHR has interpreted in various ways, finally "harmonizing" its interpretations in the current formulation: "the Court takes the view that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second

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Human Rights, the covenants and conventions related to human rights, women's and children's rights.").

[27] International Covenant on Civil and Political Rights, *supra* note 12, art. 14(7).

[28] *See, e.g.*, EU LAW 385-86 (Paul Craig & Graínne de Búrga eds., 4th ed. 2008) (discussing whether human rights instruments are a floor or a ceiling).

[29] Statute of the International Tribunal for Rwanda, *supra* note 17, art. 9; Statute of the International Tribunal for the Former Yugoslavia, *supra* note 17, art. 10.

[30] Prosecutor v. Muvunyi, Case No. ICTR-2000-55A-AR73, Decision on the Prosecutor's Appeal Concerning the Scope of Evidence to Be Adduced in the Retrial, ¶ 16 (Mar. 24, 2009) ("The non bis in idem principle aims to protect a person who has been finally convicted or acquitted from being tried for the same offense again."). Other ICTR and ICTY decisions refer to "same acts." Prosecutor v. Bagosora, Case No. ICTR-96-7-D, Decision on the Application by the Prosecutor for a Formal Request for Deferral, ¶ 13 (May 17, 1996) ("Therefore, should the Prosecutor subsequently wish to prosecute Théoneste Bagosora for the same facts, characterising them as genocide and crimes against humanity, he would not be able to do so, if Théoneste Bagosora had already been tried by Belgian jurisdictions."); Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defense Motion on the Principle of *Non-Bis-In-Idem*, ¶ 9 (Nov. 14, 1995) ("Whether characterized as *non-bis-in-idem*, double jeopardy or autrefois acquit, autrefois convict, this principle normally protects a person from being tried twice or punished twice for the same acts.").

[31] Rome Statute of the International Criminal Court, *supra* note 13, art. 20.

[32] Loayza-Tamayo v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 33, at 27 (Sept. 17, 1997) ("[*Non bis in idem*] is intended to protect the rights of individuals who have been tried for specific facts from being subjected to a new trial for the same cause. Unlike the formula used by other international human rights protection instruments (for example, the United Nations International Covenant on Civil and Political Rights, Article 14(7), which refers to the same 'crime'), the American Convention uses the expression '*the same cause*,' which is a much broader term in the victim's favor.").

[33] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 4.

'offence' in so far as it arises from identical facts or facts which are substantially the same."[34] This formulation was clarified in a subsequent decision: "Under this test, the Court must disregard the legal characterisation of the offences in domestic law and take their facts as its sole point of comparison."[35]

The ECtHR's struggle to define the ECHR's *ne bis in idem* provision highlights the difficulty of attempting to divine the Cambodian law's application without the aid of judicial rulings. The ECtHR's most recent definition of "same offense" is not at all apparent from the text, and it is very different from its previous rulings: "Article 4 of Protocol 7 . . . does not preclude separate offences, even if they are all part of a single criminal act, being tried by different courts. . . ."[36] Courts have found the meaning of *ne bis in idem* provisions to be quite different from what the plain language suggests. Without available decisions elucidating the application of *ne bis in idem* in Cambodian law, its application is uncertain.

The ECCC's choice of "same acts" or "same offenses" could have a significant impact on Ieng Sary's case. A "same acts" formulation is broader and has the potential to bar more charges, especially since the People's Revolutionary Tribunal held Pol Pot and Ieng Sary liable for many actions committed by the regime.[37] Even applying the narrower "same offense" approach, the "genocide" conviction of 1979 may still bar some of the current offenses with which Ieng Sary has been charged. There are numerous crimes that the People's Revolutionary Tribunal included under the genocide umbrella, and these crimes may be the same as or similar to other crimes with which Ieng Sary is currently charged.

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[34] Zolotukhin v. Russia, European Court of Human Rights ¶ 82 (2009), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ZOLOTUKHIN&sessionid=56314442&skin=hudoc-en.

[35] Tsonyo Tsonev v. Bulgaria (No. 2), European Court of Human Rights ¶ 51 (2010), http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=TSONYO&sessionid=56315122&skin=hudoc-en.

[36] Oliveira v. Switzerland, European Court of Human Rights ¶ 27 (1998), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=OLIVEIRA%20|%20SWITZERLAND&sessionid=57060717&skin=hudoc-en.

[37] *See* PRT Judgment, *supra* note 1 at 525-549.

Since the 1979 "genocide" charge was not defined the way ECCC law defines genocide, the current genocide charge may not be barred. But until the Co-Investigating Judges decide to indict Ieng Sary (if they decide to indict him) we cannot know the details of the crimes he is currently charged with, such as the specific instances of murder and torture under investigation. Without this information, it is not possible to determine whether he is being tried again for either the same offenses or the same acts.

C. Exceptions to *Ne Bis In Idem*

Ne bis in idem provisions tend to make exceptions for extraordinary circumstances. These exceptions relate to newly discovered evidence, or to severe defects in the initial proceedings. The ICTR and ICTY can re-try cases that were improperly tried at the national level, such as when the national trial shielded the accused, or was not conducted impartially.[38] The Rome Statute has a similar provision:

> No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
> (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
> (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[39]

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[38] Statute of the International Tribunal for Rwanda, *supra* note 17, art. 9(2); Statute of the International Tribunal for the Former Yugoslavia, *supra* note 17, art. 10(2). The ICTR provision is identical in substance to the ICTY provision and provides that

> A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
> a) The act for which he or she was tried was characterised as an ordinary crime; or
> b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Statute of the International Tribunal for Rwanda, *supra* note 17, art. 9(2).

[39] Rome Statute of the International Criminal Court, *supra* note 13, art. 20(3). The comments on the 1996 Draft Code further explain the provision:

> In such a case, the individual has not been duly tried or punished for the same act or the same crime because of the abuse of power or improper administration of justice by the national authorities in prosecuting the case or conducting the proceedings. The

It does not appear that there have been any instances in which the international tribunals have applied the exception for defective proceedings,[40] but the People's Revolutionary

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> international community should not be required to recognize a decision that is the result of such a serious transgression of the criminal justice process.

International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries 1996*, p. 38, U.N. Doc. A/51/10 (SUPP) (Sept. 9, 1996). The ECHR also provides for exceptions, European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 4(2) ("The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case."), and the Human Rights Committee has interpreted article 14(7) of the ICCPR, which does not explicitly address exceptions, to allow for exceptions, *International Covenant on Civil and Political Rights General Comment No. 32*, *supra* note 24, at ¶ 56 ("Furthermore, [article 14(7)] . . . does not prohibit the resumption of a criminal trial justified by exceptional circumstances, such as the discovery of evidence which was not available or known at the time of the acquittal."). Although the American Convention on Human Rights does not include exceptions in its text, it too has been interpreted to provide for exceptions similar to those discussed above:

> With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right, and therefore, is not applicable where: i) the intervention of the court that heard the case and decided to dismiss it or to acquit a person responsible for violating human rights or international law, was intended to shield the accused party from criminal responsibility; ii) the proceedings were not conducted independently or impartially in accordance with due procedural guarantees, or iii) there was no real intent to bring those responsible to justice. A judgment rendered in the foregoing circumstances produces an "apparent" or "fraudulent" *res judicata* case. On the other hand, the Court believes that if there appear new facts or evidence that make it possible to ascertain the identity of those responsible for human rights violations or for crimes against humanity, investigations can be reopened, even if the case ended in an acquittal with the authority of a final judgment, since the dictates of justice, the rights of the victims, and the spirit and the wording of the American Convention supersedes the protection of the *ne bis in idem* principle.

Almonacid-Arellano *et al* v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 154, at 62-63. (Sept. 26, 2006).

[40] The human rights bodies have touched on defective proceedings. The ECtHR has applied the ECHR provision for defective proceedings in the context of supervisory review of a final judgment, allowing for the reopening of proceedings in cases when there was a fundamental defect in the initial proceedings, where "fundamental defect" is akin to judicial or procedural error. Bratyakin v. Russia, European Court of Human Rights p. 5 (2006), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BRATYAKIN&sessionid=56900764&skin=hudoc-en (holding that a supervisory review resulting in the quashing of a final judgment on the grounds of serious procedural defects did not violate the *ne bis in idem* provision). The ECtHR appears to draw a distinction between a retrial and the

Tribunal probably falls within this exception. It is widely thought that the PRT was not conducted with the intent to bring Pol Pot and Ieng Sary to justice.[41] Rather, their convictions were a foregone conclusion,[42] and many believe the trial proceedings were used to justify the Vietnamese invasion and occupation, and to foster negative sentiment toward the Chinese, with whom the Vietnamese were engaged in a struggle over control of Indochina.[43]

The PRT suffered from a number of defects that cast serious doubts on its impartiality and adherence to norms of due process, especially the rights of the accused. Pol Pot and Ieng Sary were tried *in absentia*, represented by attorneys with whom they had no communication.[44] The presiding judge publicly declared their guilt before the trial began,[45]

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reopening of proceedings, classifying supervisory review as a reopening of proceedings. Nikitin v. Russia, European Court of Human Rights ¶ 46 (2004), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=NIKITIN&sessionid=56857150&skin=hudoc-en ("The Court therefore concludes that for the purposes of the ne bis in idem the supervisory review may be regarded as a special type of re-opening falling within the scope of art 4(2) of Protocol No 7."). The Inter-American Court of Human Rights has found the trial of a civilian before a military tribunal not to constitute a "real proceeding" for the purposes of *ne bis in idem*, as it violates "the principle of access to a competent, independent and impartial tribunal. . . ." Lori Berenson-Mejía v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 119, at 95 (Nov. 25, 2004).

[41] *See, e.g.*, Ciorciari, *supra* note 2, at 39-40.

[42] Before the trial the presiding judge made the following remark at a press conference: "Trying the Pol Pot-Ieng Sary Clique for the crime of genocide will on the one hand expose all the criminal acts they have committed . . . and on the other hand show the peoples of the whole world the true face of the criminals who are posing as the representatives of the people of Kampuchea." *Id.* at 40.

[43] *Id.* ("Many outsiders thus viewed the proceedings as 'show trials' orchestrated by the Kremlin to justify Vietnam's occupation of Cambodia and hegemony over Indochina. Although Chinese support of the Khmer Rouge regime was clear, the tribunal's pointed references to a Chinese master plan of genocide fueled impressions that the trials were nakedly political in nature."). Witness statements often included language praising the new regime: "I have recently managed to escape from the clutches of the Pol Pot-Ieng Sary gang, thanks to the great efforts of the National United Front for the Salvation of Kampuchea." Witness Statements of People's Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique (1979), *reprinted in* GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 75, 92 (Howard J. De Nike et al. eds., 2000).

[44] Ciorciari, *supra* note 2, at 40. However, Helen Jarvis has argued that some of the features of the trial, including trying the accused *in absentia*, were in line with civil law tradition.

and the defense seemed to denounce the accused as well.[46] If the ECCC decides to recognize exceptions to *ne bis in idem* similar to those of the other international tribunals, it may very well find that the 1979 trial was defective, allowing the ECCC to try Ieng Sary without deciding the "same acts" or "same offenses" issue.

D. *Ne Bis In Idem* Applies Only to Proceedings Within the Same State

Double prosecution is only barred within the same state; its application is not transnational, absent an additional agreement.[47] However, there appears to be a trend in recognizing *ne bis in idem* across states. While the Human Rights Committee has interpreted the ICCPR not to protect against proceedings by another state, it also makes clear that states

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TOM FAWTHROP & HELEN JARVIS, GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 47 (2004).

[45] Ciorciari, *supra* note 2, at 40.

[46] The defense strategy apparently was to shift responsibility to the Chinese, though this was expressed in statements that appear to find Pol Pot and Ieng Sary no less culpable than the Chinese: "We recognize that Pol Pot and Ieng Sary were the perpetrators of their criminal acts, that they voluntarily applied Maoism in Kampuchea, and that they must, as a consequence, assume full responsibility." Closing Statements of People's Revolutionary Tribunal Held in Phnom Penh for the Trial of the Genocide Crime of the Pol Pot-Ieng Sary Clique, *reprinted in* GENOCIDE IN CAMBODIA: DOCUMENTS FROM THE TRIAL OF POL POT AND IENG SARY 489, 510 (Howard J. De Nike et al. eds., 2000). Another defense attorney submitted, "It is now clear to all that Pol Pot and Ieng Sary were criminally inane monsters carrying out a program the script of which was written elsewhere for them." *Id.* at 507.

[47] *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 4(1) ("No one should be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."); Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defense Motion on the Principle of *Non-Bis-In-Idem*, ¶ 9 (Nov. 14, 1995) ("This principle has gained a certain international status since it is articulated in Article 14(7) of the ICCPR as a standard of a fair trial, but it is generally applied so as to cover only a double prosecution within the same State."). The ICCPR wording is ambiguous, International Covenant on Civil and Political Rights, *supra* note 12, art. 14(7) ("No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country."), but the Human Rights Committee has interpreted it to mean that *ne bis in idem* applies only within a single state: "Furthermore, [article 14(7)] . . . does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more States." *ICCPR General Comment No. 32*, *supra* note 24, at ¶ 57.

are free to bar such double proceedings through other instruments.[48] In addition, the Schengen Agreement prevents double prosecution within contracting parties, a number of European countries.[49] Finally, extradition laws generally allow for the refusal of extradition when the accused has already been tried,[50] lending further support to the trend in recognizing *ne bis in idem* among states.

This is relevant because if the current Kingdom of Cambodia is not considered the same state as the 1979 Vietnamese-backed People's Republic of Kampuchea (PRK), then *ne bis in idem* will not be available to bar a second proceeding against Ieng Sary, although retrial may be discouraged. At the time of the 1979 tribunal, Vietnamese forces occupied Cambodia and backed the communist People's Republic of Kampuchea, headed by Heng Samrin, a former resistance leader.[51] After the withdrawal of Vietnamese troops, PRK leaders changed the name of the country to the State of Cambodia, and their party was known as the Cambodian People's Party (CPP), led by Hun Sen, another former member of the resistance.[52] In 1993, the United Nations sponsored national elections, which resulted in Hun Sen and the leader of rival party FUNCINPEC serving as Co-Prime Ministers, with Norodom Sihanouk as the king.[53] The country became a constitutional monarchy, named the Kingdom of Cambodia.[54] Today, Hun Sen and the CPP continue to hold power in Cambodia.

Even if it is considered the same state, if the ECCC is a hybrid or international—rather than a national—court, then the current proceedings may not be by the same state as the 1979

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[48] *ICCPR General Comment No. 32*, *supra* note 24, at ¶ 57 ("This understanding should not, however, undermine efforts by States to prevent retrial for the same criminal offence through international conventions.").
[49] Schengen Agreement, *supra* note 17, art. 54 ("A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting party for the same acts . . . .").
[50] *See* Conway, *supra* note 8, at 233. Extradition treaties vary as to whether the accused must already have been prosecuted in the requesting state, the requested state, or a third state. *Id.*
[51] Ciorciari, *supra* note 2, at 39.
[52] *Id.* at 62.
[53] *Id.*
[54] *Id.*

tribunal, and *ne bis in idem* will not be available to bar a second proceeding against Ieng Sary, although retrial may still be discouraged. The status of the ECCC is not clear. It was established by Cambodian law as an institution within the existing Cambodian court system, pursuant to an agreement between the UN and the Royal Government of Cambodia.[55] The Pre-Trial Chamber has declared that the ECCC is an "independent entity within the Cambodian court structure," and referenced a decision by the Appeals Chamber of the Special Court for Sierra Leone, which set out a number of characteristics of international courts.[56] The ECCC shares some of these characteristics, such as its establishment appearing to be "an expression of the will of the international community," but not others, such as being clearly separate from the Cambodian judiciary.[57]

F. Other Considerations

Beyond the above requirements, common among international *ne bis in idem* provisions, there are other requirements less widely shared, which the ECCC may want to consider. The French Code of Penal Procedure, on which the Cambodian Code of Criminal Procedure is based,[58] includes an additional requirement for the application of transnational *ne bis in idem* in certain cases: the accused must have served his sentence, or had it extinguished by limitation.[59] The Schengen Agreement, too, requires that any penalty imposed must either have been enforced, be in the process of being enforced, or no longer be able to be enforced.[60] Although these provisions concern the application of *ne bis in idem* among states, the ECCC may want to consider this requirement, even if Ieng Sary is being tried by

[55] Anne Heindel, *Overview of the Extraordinary Chambers*, *in* ON TRIAL: THE KHMER ROUGE ACCOUNTABILITY PROCESS 85, 87 (John D. Ciorciari & Anne Heindel eds., 2009).
[56] ECCC, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav Alias "Duch", Case No. 001/18-07-2007-ECCC/OCIJ, ¶¶ 19-20 (Pre-Trial Chamber, Dec. 3, 2007).
[57] *See* SCSL, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, ¶¶ 37-42 (Appeals Chamber, May 31, 2004).
[58] Rupert Skilbeck, *Defending the Khmer Rouge*, 8 INT'L CRIM. L. REV. 423, 431 (2008).
[59] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] art. 692 (Fr.).
[60] Schengen Agreement, *supra* note 17, art. 54.

the same state. Ieng Sary did not serve his sentence and, further complicating matters, had his sentence pardoned by King Sihanouk in 1996.[61]

Some of the provisions outlining exceptions to *ne bis in idem* allow for additional proceedings only if there is a possibility of a different outcome. Under the French Code of Penal Procedure a newly discovered fact is grounds for a retrial if the fact is "liable to raise doubts about the guilt of the person accused."[62] In the event of defective initial proceedings, the ECHR allows a retrial only if a fundamental defect in the initial proceedings could affect the outcome of the case.[63] In Ieng Sary's case, this places the ECCC in the unfortunate position of evaluating counterfactuals to determine whether, absent the defects of the PRT, there would have been a different outcome.[64]

III. The Purpose of *Ne Bis In Idem*

Ne bis in idem exists to protect the accused, though it is related to *res judicata* and preserving the finality of judgments.[65] It is designed to protect the accused from the hardships associated with multiple trials and multiple punishments, to prevent false convictions that result from trying an acquitted person until he is eventually convicted, and to allow the accused to be free from the hardship of knowing he could be tried again at any

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[61] Ciorciari, *supra* note 2, at 64.

[62] CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] art. 622 (Fr.) ("In the cases set out in the preceding chapter, no prosecution may be initiated against a person who proves that he has been finally tried abroad for the same matters and, in the case of conviction, that the sentence has been served or extinguished by limitation."). The preceding chapter referred to in Article 622 is entitled "Offences Committed Outside the Territory of the Republic." CODE DE PROCÉDURE PÉNALE [C. PR. PÉN] tit. IX, ch.1 (Fr.).

[63] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 17, art. 4.

[64] It is not clear what falls within the scope of "different outcome." Surely a different judgment would qualify, but it is not apparent whether different charges or sentences constitute a different outcome. The ECtHR appears to focus on whether or not there were serious defects, rather than how they affect the outcome. Bratyakin v. Russia, European Court of Human Rights p. 5 (2006), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=BRATYAKIN&sessionid=56900764&skin=hudoc-en.

[65] *See* Conway, *supra* note 8, at 222-24.

time.[66] It is not clear that trying Ieng Sary again at the ECCC violates these objectives.

For the most part, Ieng Sary was free from these hardships, as he was not present at the proceedings and he was not subjected to any punishment. Arguably, the death sentence he received was itself a hardship, since presumably Ieng Sary believed it would have been carried out had he been captured[67] (at least until Cambodia abolished the death penalty in 1989).[68] Without more, though, it is difficult to see why Ieng Sary should be protected from additional proceedings, when he was largely untouched by the hardships of the original trial. In addition, this is not a case of an acquitted person being tried repeatedly until a conviction is achieved. Finally, while the accused should be able to rely on the finality of his conviction and not fear subsequent proceedings, this must be balanced with other objectives, such as those embodied in the limited exceptions to *ne bis in idem* discussed above. The need to remedy improper or defective initial proceedings may receive greater weight than the right of the accused to rely on the finality of his conviction.

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[66] *See id.*

[67] However, the death sentence may not have been carried out even if Ieng Sary had been captured, as international law appears in certain circumstances to require a retrial of those convicted *in absentia*. The ECtHR has ruled that "[a]lthough proceedings that take place in the accused's absence are not of themselves incompatible with art 6 of the Convention, a denial of justice nevertheless undoubtedly occurs where a person convicted in absentia is unable subsequently to obtain from a court which has heard him a fresh determination of the merits of the charge, in respect of both law and fact, where it has not been established that he has waived his right to appear and to defend himself or that he intended to escape trial." Sejdovic v. Italy, European Court of Human Rights ¶ 82 (2006), http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SEJDOVIC&sessionid=57198952&skin=hudoc-en (citations omitted).

[68] Amnesty International, Death Penalty: Countries Abolitionist for All Crimes, http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes (last visited July 23, 2010).