

# Legal barriers to the exercise of jurisdiction in international criminal law

A special focus on the ECCC

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## Abbreviations

CPC	Criminal Procedural Code of the Kingdom of Cambodia
ECCC	Extraordinary Chambers in the Courts of Cambodia
edn.	edition
et al.	and others ( <i>et alii</i> )
etc.	and so forth ( <i>et cetera</i> )
i.e.	that is ( <i>id est</i> )
ibid	in the same place ( <i>ibidem</i> )
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHT	Iraqi High Tribunal
KR	Khmer Rouge
no.	number
p.	page
para./paras.	paragraph(s)
PRK	The People's Republic of Kampuchea
PRT	The People's Revolutionary Tribunal
PTC	Pre-Trial Chamber
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
TC	Trial Chamber
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

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# PART I

## Introduction

### 1.1 Object of the thesis

Where the international community has failed in its obligation to prevent the commission of mass atrocities and serious violations of international criminal law, it has a subsequent duty to ensure that those most responsible are held to account. Its earliest attempt at ensuring accountability was the establishment of the first international criminal tribunal in Nuremberg 1945 as a response to the atrocities perpetrated during the Second World War.<sup>1</sup>

Subsequent international criminal tribunals began proceeding under UN authority, most notably the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>2</sup> and the International Criminal Tribunal for Rwanda (ICTR).<sup>3</sup> Both were established in the 1990s as an *ad hoc* response to the Bosnian and Rwandan genocides. It was not until 2002 that the International Criminal Court (ICC), the first permanent international criminal court, was established with the mandate to prosecute ‘the most serious crimes of concern to the international community as a whole’.<sup>4</sup> While the success of the ICC can be debated, with several states recently withdrawing from its jurisdiction,<sup>5</sup> the success of the two *ad hoc* tribunals seems well-established. This is primarily due to their almost immediate establishment following the end of the respective genocides, their creation through Security Council resolutions, the large number of individuals indicted and their momentous budgets.<sup>6</sup>

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<sup>1</sup> This tribunal, the International Military Tribunal at Nuremberg, was established by the USSR, the USA, Great Britain and France on 8 August 1945.

<sup>2</sup> The ICTY was established by UNSC Res 827 (25 May 1993) UN Document S/RES/827.

<sup>3</sup> The ICTR was established by UNSC Res 955 (8 November 1994) UN Document S/RES/955.

<sup>4</sup> Article 5 of the Rome Statute of the ICC (adopted 17 July 1998, entered into force 1 July 2002) ISBN No. 92-9227-227-6 (Rome Statute). The ICC was not established through a Security Council resolution but is an international treaty that was adopted at a UN diplomatic conference in 1998.

<sup>5</sup> South Africa and Burundi have recently announced the withdrawal of their signatures from the ICC <https://www.icc-cpi.int/Pages/item.aspx?name=ma206> (last accessed 28 November 2016). Since this press release, Russia and Gambia have also expressed intentions to withdraw their signatures.

<sup>6</sup> Antonio Cassese, *International Criminal Law* (3rd edn., Oxford University Press 2013) p. 259-261.

After learning about the efforts and successes of the ICTY and ICTR in particular, this author was shocked to learn about the circumstances surrounding the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC). It seemed almost implausible that it took the international community over 30 years to respond to the mass atrocities that occurred in Cambodia in the 1970s. Was it that the genocides in Rwanda and Bosnia were on a much larger scale than Cambodia and therefore sparked a greater public outrage and warranted a more immediate response? The figures suggest otherwise, as the death toll in Cambodia was considerably larger than in Bosnia and approximately the same as in Rwanda.<sup>7</sup> Why then had the international community seemingly failed in their response to the Cambodian people? Much to this author's dismay, the answer to this question was uncovered to be deeply rooted in politics. The UN had attempted to propose a model very similar to both the ICTY and ICTR but when the Cambodian government refused, years of political negotiations ensued.

Instead of trying to comprehend these complex political issues that expand far beyond the scope of this thesis, this thesis will instead address the efforts of the ECCC to ensure accountability through its legal mechanisms. Since its operations, the ECCC has been faced with numerous legal obstacles that could potentially hinder the court's ability to ensure accountability. This is because criminal law provides immunity from prosecution to certain categories of individuals in four situations: 1) those who have been accorded amnesties for their crimes; 2) those who have already been prosecuted for their crimes; 3) where there has been a passage of a statutory amount of time; and 4) those who hold position as either head of state or senior state official.<sup>8</sup> The first three arose as procedural challenges to the ECCC's jurisdiction in several of the cases and are predicted to arise as challenges before future ECCC cases. The fourth situation arises as a procedural bar to criminal prosecution

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<sup>7</sup> It is impossible to find accurate representation of these figures but it is estimated that around 1.7million Cambodians were killed, 800,000-1million in Rwanda and around 100,000 in Bosnia <http://endgenocide.org/learn/past-genocides/> (last accessed 10 November 2016).

<sup>8</sup> Cassese (n 6) p. 309.

only where incumbent heads of state or senior state officials are indicted and prosecuted by a national or foreign court.<sup>9</sup> Due to the ECCC's prolonged establishment, at the time indictments were issued by the court none of the accused were still in positions as either senior state officials or heads of state and thus the challenge did not arise. Former heads of state and senior state officials can also raise this immunity as a substantive defence, but this thesis is limited to procedural issues and so will not address the matter.

This thesis therefore purports to evaluate each of the three relevant legal impediments to the exercise of jurisdiction and their effect on the ECCC proceedings: 1) amnesties; 2) statute of limitations; and 3) *ne bis in idem*. One of the main questions this thesis will seek to address is whether the ECCC has done enough to compensate for this 30-year delay in its establishment. The thesis will also assess whether the court has successfully managed to overcome these legal impediments to accountability and what likely future challenges remain.

So despite all the political hurdles the ECCC has had to overcome in the past, has it also successfully overcome subsequent legal hurdles? Or has the court allowed these procedural challenges to further hinder the already over-delayed proceedings and thus failed in its duty to ensure accountability for serious international crimes?

## **1.2 Methodology and structure**

The sources for international law are listed in Article 38 (1) of the Statute for the International Court of Justice (ICJ)<sup>10</sup> as: international conventions, international custom, the general principle of law and judicial decisions and teachings of the most highly qualified publicists. This thesis will refer primarily to these sources, however the ECCC forms an integral part of the Cambodian legal system and so both national and international

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<sup>9</sup> Ramona Pedretti, 'Immunity of Heads of State and State Officials for International Crimes' (2014) 69 BRILL p. 331.

<sup>10</sup> Statute of the ICJ (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1179, 59 Stat. 1055, TS No. 993.

standards are adopted by the court. This thesis will assess Cambodian law only insofar as it aids a better understanding to the ECCC's application of international criminal law principles. The caseload of the ECCC will be assessed in great depth, as will the Law on the Establishment of the ECCC (ECCC Law). For a better understanding, the statutes of the *ad hoc* tribunals and the ICC will also be consulted but will not be assessed in the same depth.

As already mentioned, both the creation of the ECCC and its operations are rife with politics. According to Etcheson, "issues of transitional justice and accountability for serious violations of international humanitarian law are always intensely political".<sup>11</sup> As this is an international criminal law thesis, matters of political science will be excluded from its scope and will be confined to legal discussion. However, politics will be discussed in Parts 2.1 and 2.3 as an aide to better understand the historical context to the atrocities and the composition and jurisdiction of the court. Politics will also briefly be discussed in the introductory remarks in Part III and Part V to provide context to the issues.

This thesis will begin in Part II by looking to the historical events leading to the court's establishment and will provide a brief overview of the case history to date. Background information will also be provided in this section to the jurisdiction of the court and its composition.

Part III will discuss the amnesties granted by the Cambodian government, their merit and the position the Court took on this issue. Part IV will discuss how the *ne bis in idem* rule arose before the Court, which procedural rules apply and will assess the Court's interpretation of this issue. Part V will evaluate the statute of limitations and the effect of delay on proceedings. This section will assess the merit of the Courts' rules governing the

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<sup>11</sup> Craig Etcheson, 'The Politics of Genocide Justice in Cambodia' in Cesare Romano, André Nollkaemper and Jann Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press 2004) p. 182.

statute of limitations and will evaluate what impact the delay in the Court's establishment had in its ability to adequately provide accountability.

Finally, a conclusion will be drawn in Part VI on the main findings of this thesis. The conclusion will evaluate the overall approach of the ECCC and it will identify the main challenges that the court continues to face.

## **PART II**

### **Background and History**

#### **2.1 Historical background**

The People's Republic of Kampuchea (PRK), today's Cambodia, was a French colony until the year 1953 when King Sihanouk regained the country's independence from France. This decolonization, the Cold War, the Sino-Soviet split and the war in Vietnam are important factors that led to the massive internal conflicts in Cambodia from the 1900s-1990s.<sup>12</sup> King Sihanouk ruled the PRK from 1941 until 1955, in which year he abdicated the throne in favour of his father, Summarit. In late 1955 Sihanouk became the Prime Minister of Cambodia and when Summarit died in 1960, Sihanouk introduced a constitutional amendment that made him also the head of state. The former Prime Minister, Lon Nol, successfully staged a coup to overthrow Sihanouk in 1970.

In 1975 the US completely evacuated all American personnel from Cambodia and ceased funding the Lon Nol government.<sup>13</sup> This gave rise for the opportunity of the Khmer Rouge (KR) fighters to quickly overwhelm the Lon Nol government on 17 April 1975. During this regime the KR were responsible for the deaths of some 1.7 million people, approximately

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<sup>12</sup> Wolfgang Form, 'Justice 30 Years Later? The Cambodian Special Tribunal for the Punishment of Crimes against Humanity by the Khmer Rouge' (2009) 37(6) Routledge p. 889 and 891.

<sup>13</sup> William Shawcross, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia* (Simon and Schuster 1986) p. 18. The aid was given by the US to supply anti-communist forces in Southeast Asia to fight the guerillas on their own.

25% of the entire population.<sup>14</sup> A trigger for the intensity of these atrocities was the Vietnamese alliance with the Soviet Union.<sup>15</sup> This alliance terminated comradery between Vietnam and China and led to an increase of Chinese aid to the KR, a group that starkly opposed the Vietnamese.<sup>16</sup> This support allowed the KR to maintain their rule over the newly declared state, Democratic Kampuchea, for almost four years. During this period, Pol Pot served as Prime Minister of the state, with Ieng Sary as his Deputy Prime Minister.

During this regime, anyone that embodied Western values or was perceived to be a threat to the KR regime was brutally exterminated. This comprised mainly of students, intellectuals, professors, scientists, religious leaders and opposition organisations. These individuals were herded into disguised concentration camps and put to hard labour. The entire population of several cities, including the capital Phnom Penh, were forcibly evacuated from their homes, had their property stolen by the state and were left to die either of starvation or disease.<sup>17</sup> Tens of thousands were also brutally tortured by KR members, with several torture chambers subsequently discovered throughout the state.<sup>18</sup> Those subjected to torture were mainly governmental officials, former military officials and civil servants that were suspected by the KR of being counter-revolutionaries.<sup>19</sup> Torture mechanisms included body mutilation, electroshock therapy and waterboarding.<sup>20</sup>

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<sup>14</sup> Wendy Lambourne, 'Justice After Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 *Genocide Studies and Prevention: An International Journal* p. 30.

<sup>15</sup> Ramses Amer, *The Sino-Vietnamese Approach to Managing Boundary Disputes* (International Boundaries Research Unit 2002) p. 6.

<sup>16</sup> *ibid.*

<sup>17</sup> Judgment of the Revolutionary People's Tribunal held in Phnom Penh from 15 to 19 August, English translation reproduced in Howard De Nike, John Quigley and Kenneth Robinson, *Genocide in Cambodia, Documents from the Trial of Pol Pot and Ieng Sary* (University of Pennsylvania Press 2000) C22/I/32 (*Genocide in Cambodia*).

<sup>18</sup> The most notorious of these was Toul Sleng, also known as S-21, located in Phnom Penh. UNGA 'Report of the Group of Experts for Cambodia established by UNGA Resolution 52/135' (16 March 1999) 52nd session, UN Document A/RES/52/217.

<sup>19</sup> *ibid* p. 12 para. 32.

<sup>20</sup> Wolfgang (n 12) p. 893.

The regime ended only when the Vietnamese invaded Cambodia on 6 January 1979. In July 1979, this newly-installed Vietnamese government established the People's Revolutionary Tribunal (PRT) to prosecute the two main leaders of the KR regime, Pol Pot and Ieng Sary. Later that month, the tribunal convicted both the accused *in absentia* for crimes of genocide, confiscated them of their property and sentenced them to death.<sup>21</sup> These trials were never given international legitimacy and were regarded as show trials in an attempt to both legitimize Vietnam's invasion and to tarnish China's reputation.<sup>22</sup> Neither of the accused served their sentence and Pol Pot died in 1998 under house arrest. Ieng Sary was subsequently brought before the ECCC in 2007, but died in 2013 before a determination of his guilt could ever be made.

The Vietnamese withdrew in 1989, and this resulted in a reinstatement of the Hun Sen government under the newly formed state of Cambodia. The Paris Peace Agreement was signed in 1991, marking an official end to the conflict in Cambodia. The Agreement provided for a UN peacekeeping mission in Cambodia to be aimed at supervising the ceasefire, preparing the country for the creation of a new Constitution and for free and fair elections.<sup>23</sup> The UN successfully supervised national elections in May 1993, which resulted in a coalition government.<sup>24</sup> The success of these trials was countered in 1997 when another coup was staged, this time by Hun Sen, after which he declared himself sole Prime Minister of Cambodia. Hun Sen continues to be Prime Minister until this day.

In 1997 the Cambodian government sought UN for assistance in the establishment of a criminal tribunal. The UN initially proposed an international tribunal similar to that of the ICTY and ICTR; Hun Sen, however, was in stark opposition as he wished to retain more

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<sup>21</sup> *Genocide in Cambodia* (n 17) p. 549.

<sup>22</sup> Evan Gottesman, *Cambodia After the Khmer Rouges; Inside the Politics of Nation Building* (New Haven: Yale University Press 2003) p. 61. Due to international criticism of the Vietnam invasion, the UN continued to recognise the Pol Pot regime as the official cambodian government. The trials thus became a tool of progoganda, Lambourne (n 14) p. 30.

<sup>23</sup> The peacekeeping mission was subsequently established in 28 February 1992 under UNSC Resolution S/RES/745.

<sup>24</sup> This government comprised of Hun Sen and Sihanouk's son, Prince Ranariddh.

control over the court's proceedings and operations.<sup>25</sup> This resulted in ongoing negotiations from 1999 until 2002, when the establishment of a hybrid tribunal was finally agreed upon. In 2003 an agreement was reached between the UN and the Cambodian government (UN Agreement) regulating the cooperation between the parties with respect to the tribunal. The ECCC Law was reached in early 2003 but the tribunal only became operational in 2007 with the adoption of the internal rules of procedures.<sup>26</sup>

## **2.2 Case history overview**

Ten KR leaders have been indicted thus far by the ECCC. This has resulted in the creation of four separate cases, only one of which has been concluded.<sup>27</sup> These cases will be analysed in greater depth throughout the course of this thesis, but a factual overview and summary of each case's progress will first be provided to aid contextual understanding.

### **2.2.1. Case 001**

Case 001 was concluded in 2012. The defendant, Kaing Guek Eav, infamously known as Duch, was the former chairman of the S-21 security prison and torture centre. As chairman, he presided over the torture and murder of some 14,000 individuals. The Supreme Court Chamber convicted Duch of crimes against humanity and for grave breaches of the Geneva Conventions of 1949 (Geneva Conventions). He was sentenced to life imprisonment, the maximum sentence available under the law.

### **2.2.2 Case 002**

Case 002 is split into two separate trials, each addressing different parts of the indictment. The defendants in Case 002 were Khieu Samphan, Nuon Chea, Ieng Sary and Ieng Thirith.

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<sup>25</sup> Hun Sen is a KR defector, along with many other current governmental officials, and feared that complete UN control would render him within the ambit of the court's jurisdiction. Donald Beachler, 'The Quest for Justice in Cambodia: Power, Politics and the Khmer Rouge Tribunal' (2014) 8 *Genocide Studies and Prevention: An International Journal* p. 72.

<sup>26</sup> Padraic Glaspy, 'Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (2008) 21 (1) *Harvard Human Rights Journal* p. 147.

<sup>27</sup> Case 002/01 has recently been concluded but not the second part of the case, Case 002/02.

Samphan was appointed as Head of State by the KR in 1976 and succeeded Pol Pot as the official head of the KR in 1987. He had no direct military authority but was responsible as head of state for facilitating and legitimising the perpetration of criminal acts. Chea served as Pol Pot's right-hand man and was thus known as "Brother No.2".<sup>28</sup> As Deputy Secretary of the KR, Chea had primary responsibility for propaganda and education, military matters and the administration of the Democratic Kampuchea.<sup>29</sup>

Sary served as Deputy Prime Minister and Deputy Minister of Foreign Affairs during the KR regime. Within these positions he was most notably responsible for the planning and implementation of the evacuation of entire towns and cities and for the creation of an "agrarian utopia" in which the people were forced to work full days without rest or food.<sup>30</sup> Proceedings were terminated against Sary, however, in March 2013 following his death. Thirith, Sary's wife, was the Social Affairs Minister during the regime and participated in the targeting of specific ethnic minorities, mainly the Vietnamese.<sup>31</sup> She was responsible in her official position for the coordination of re-education camps and worksites and for the elimination of all modern medicines during the regime.<sup>32</sup> Thirith was deemed unfit to stand trial due to dementia in November 2011 and released from provisional detention in 2012. Samphan and Chea are the only two remaining accused in Case 002.

Case 002/01 commenced in November 2011. The Trial Chamber (TC) found Chea and Samphan guilty of crimes against humanity in April 2014 and sentenced them each to life imprisonment. The Supreme Court Chamber recently upheld the TC's conviction and the

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<sup>28</sup> Glaspy (n 26) p. 150. Glaspy argues that he could have potentially played a greater role than Pol Pot himself.

<sup>29</sup> Closing Order, Nuon Chea and others (002/19-09-2007/ECCC-D427), Office of the Co-Investigating Judges, 15 September 2010 p. 217 paras. 874-875; p. 219 para. 881.

<sup>30</sup> *ibid* p. 256 paras. 1021-1039.

<sup>31</sup> *ibid* p. 322 para. 1288.

<sup>32</sup> *ibid* p. 315 para. 1253.

case is now closed.<sup>33</sup> Collective reparations from this case are also currently underway.<sup>34</sup> Case 002/02 commenced in October 2013 and focuses on grave breaches of the Geneva Conventions and on the alleged genocide against the ethnic Muslim Cham and the Vietnamese minority groups. Evidence is still being testified for Case 002/02.

### **2.2.3 Cases 003 and 004**

Two individuals were named as suspects for Case 003, Sou Met and Meas Muth. Investigations against Met were extinguished in 2014 following his death. Investigations are currently ongoing and a closing order has not yet been issued for this case. Case 004 is also currently under investigation by the Co-Investigating Judges. Thus far, no persons have been charged and the identity of the three suspects remains confidential.<sup>35</sup>

## **2.3 Jurisdiction and composition of the ECCC**

The ECCC has jurisdiction to ‘bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia’.<sup>36</sup>

The temporal jurisdiction of the court is limited from 17 April 1975 to 6 January 1979.<sup>37</sup> During the UN negotiations, Hun Sen requested that the ECCC be given jurisdiction to investigate the American bombings on Cambodia prior to 1975 and the Chinese government’s support to the KR.<sup>38</sup> He believed, among others, that these events encouraged

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<sup>33</sup> The judgment was pronounced on the 23rd November 2016. The press release issued by the Supreme Court can be found here: <https://www.eccc.gov.kh/en/articles/supreme-court-chamber-quashes-part-convictions-affirms-life-imprisonment-nuon-chea-and-khie> (last accessed 15 November 2016).

<sup>34</sup> Lambourne (n 14) p. 34.

<sup>35</sup> <https://www.eccc.gov.kh/en/case/topic/98> (last accessed 29 November 2016).

<sup>36</sup> Article 1 of the ECCC Law.

<sup>37</sup> These dates denote the official beginning and ending of the KR regime.

<sup>38</sup> Beachler (n 25) p. 30.

and even inspired the atrocities committed by the KR.<sup>39</sup> This request was refused, as was the request by various interest groups to include human rights violations perpetrated by the preceding Lon Nol government and subsequent Hun Sen government within the court's jurisdiction.<sup>40</sup> For these reasons, the ECCC's temporal jurisdiction has been widely criticised.<sup>41</sup>

The ECCC Chambers consists of a majority of Cambodian judges, unlike any other international criminal tribunal.<sup>42</sup> The ECCC is also unique in its composition as a 'super-majority', stipulating that no decision can be made without at least one international judge agreeing on it.<sup>43</sup> This gives the international judges a veto power over judges of a national legal system still widely distrusted, while simultaneously preserving a measure of Cambodian sovereignty.<sup>44</sup> The most differing aspect of the ECCC compared to other transitional justice regimes is that its establishment did not entail an accompanying truth and reconciliation commission.<sup>45</sup>

As previously mentioned, the ECCC was established as a hybrid criminal tribunal, consisting of both international and national elements. It was hoped that this structure would help to transform the Cambodian legal system and provide training to national judges and lawyers.<sup>46</sup> In reality, this structure was widely contested in the belief that the

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<sup>39</sup> Lambourne (n 14) p. 39. She states that the US and other foreign powers helped to create the structural context that enabled Pol Pot to carry out his revolutionary genocide.

<sup>40</sup> *ibid.*

<sup>41</sup> Beachler (n 25) p. 69. Beachler notes how many UN human rights groups favoured a more extensive series of trials than was agreed upon.

<sup>42</sup> Glaspy (n 26) p. 147. For example, international judges outnumber the national judges in the SCSL and East Timor tribunal.

<sup>43</sup> Internal Rules (4th Revised Edition), 11 September 2009, Internal Rule 18(3).

<sup>44</sup> Beachler (n 25) p. 69.

<sup>45</sup> There have been numerous truth and reconciliation commissions established worldwide as part of a transitional justice initiative. This includes: South Africa, Sierra Leone, East Timor, Argentina, Bolivia, Colombia, etc.

<sup>46</sup> Beachler (n 25) p. 76. Perhaps a bit too optimistically, Menzel even suggests that the establishment of the ECCC may even urge the outside world to take the time to reflect upon its own responsibilities. Jörg Menzel, 'Justice Delayed or Too Late for Justice? The Khmer Rouge Tribunal and the Cambodian "Genocide" 1975-79' (2007) 9(2) *Journal of Genocide Research* p. 228.

process would be subject to manipulation by political forces in Cambodia, with the possibilities for undue influence being manifold.<sup>47</sup> Horsington predicted that one of the main difficulties with this hybrid nature would prove to be the potential conflict between the international and Cambodian personnel about the extent to which international procedures or Cambodian procedures should apply.<sup>48</sup> Neither the UN Agreement nor the ECCC Law provided any real guidance on this issue. As will be further discussed, this procedural issue proved to be one of the most contentious among the judges.

## **PART III**

### **Amnesties**

#### **3.1 Introduction to amnesties**

Amnesties are measures designed to foreclose criminal prosecution for past offences.<sup>49</sup> Two general consequences of amnesties are: 1) that the prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and 2) any sentence passed for the crime is obliterated.<sup>50</sup> Amnesties can be distinguished from pardons, where the latter gives protection from liability after a finding of guilt but the former provides protection prior to any such determination. The rationale for granting amnesties is that in the aftermath of periods of turmoil and deep rift it can be best to heal social wounds by forgetting past misdeeds.<sup>51</sup> In this way, amnesties may be more expeditious in bringing about the cessation of hatred and animosity and in attaining national reconciliation.

The obligation on states to ensure accountability for serious crimes can be significantly hindered by the granting of amnesties. This is because unlike statute of limitations, that allows proceedings to be initiated within a certain time frame, amnesties differ in that they

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<sup>47</sup> Helen Horsington, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5(2) Melbourne Journal of International Law p. 479.

<sup>48</sup> *ibid* p. 477.

<sup>49</sup> Yasmin Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 International Committee of the Red Cross p. 584.

<sup>50</sup> Cassese (n 6) p. 309.

<sup>51</sup> *ibid*.

usually provide no such opportunity for accountability.<sup>52</sup> States are urged to pursue criminal prosecutions so as to avoid the emergence of collective guilt that would unfairly stigmatise parts of society connected with perpetrators of human rights violations.<sup>53</sup> Perhaps most importantly, amnesties impinge upon the victims' rights to reparation and remedies.<sup>54</sup> For these reasons, amnesties are usually at variance with the core principles of international criminal law including deterrence, restorative justice and retribution.<sup>55</sup>

Those in favour of amnesties argue that the moral duty to stop or prevent mass atrocities should trump any moral duty to individual victims.<sup>56</sup> It is also never desirable to prolong conflict, human suffering and human rights violations that would likely to result in a rigid application of a prohibition on amnesties.<sup>57</sup> In this way, amnesties are regarded as a necessary evil to achieve peace and security.<sup>58</sup> They are sometimes even more effective in achieving key political goals than trials, as it is contended that trials can cause more violence, instability and in the worst case, can even reignite conflict.<sup>59</sup>

Reiter identifies three distinct periods of an internal armed conflict during which amnesties can be granted. This typology provides a useful tool for distinguishing between the merits and implications of amnesties and so each period will be further assessed below.

The first scenario encompasses the grant of amnesties where armed conflict is ongoing. These amnesties are usually extended to non-state actors who voluntarily surrender or

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<sup>52</sup> Ronald Slye, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violations of Human Rights' (2004) 22(1) Wisconsin International Law Journal p. 117.

<sup>53</sup> Andrew Reiter, 'Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict' (2014) 47(1) Israeli Law Review p. 136.

<sup>54</sup> William Schabas, *Unimaginable Atrocities* (Oxford University Press 2012) p. 183.

<sup>55</sup> Robin Perry, 'The Nature, Status and Future of Amnesties under International Criminal Law' (2011) 18 Australian International Law Journal p. 98.

<sup>56</sup> Reiter (n 53) p. 137.

<sup>57</sup> Schabas (n 54) p. 188.

<sup>58</sup> Reiter (n 53) p. 137.

<sup>59</sup> Mark Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 Human Rights Quarterly p. 118.

demobilise. Included in this category are amnesties granted in the form of prison release or a pardon. They are offered by the state as an effort to obtain peace and end bloodshed, and have thus been described as ‘carrot amnesties’.<sup>60</sup> These amnesties are intended by the state to demonstrate to the public and/or the opposition that the state is conciliatory and interested in peace.<sup>61</sup>

Secondly, are those are amnesties issued as part of a peace process. They have been described as the ‘most promising amnesties’.<sup>62</sup> States usually extend these amnesties to non-state actors coupled with an invitation to negotiate, thus their seriousness about negotiating.<sup>63</sup> Reiter notes that in 26 out of 48 amnesties he identified in this category, comprehensive peace agreements containing amnesties led to a permanently terminated conflict and lasting peace between the parties.<sup>64</sup>

The last category consists of amnesties granted post-conflict. These amnesties are granted by states mainly to demonstrate their forgiveness of former adversaries and symbolize a clear decision to move forward from a conflict era.<sup>65</sup> They have also been described by Reiter as ‘carrot amnesties’ in that they are extended to secure the demobilisation of holdout rebels.<sup>66</sup> Similarly to the first category, these amnesties include pardons and prisoner releases. These amnesties are usually granted for political purposes intended to increase public support for the government, but can also serve as important reconciliation efforts in divided societies.<sup>67</sup> As will be further discussed, the 1994 amnesties and 1996 royal pardon granted by the Cambodian government were both granted post-conflict. Whether these amnesties succeeded in achieving demobilisation and reconciliation will be questioned throughout this chapter.

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<sup>60</sup> Reiter (n 53) p. 141.

<sup>61</sup> *ibid* p. 143. Reiter also describes how the success rates of this category of amnesties are ‘very low.’

<sup>62</sup> *ibid* p. 144.

<sup>63</sup> *ibid*.

<sup>64</sup> *ibid*. This includes major civil wars such as in El Salvador, Guatemala and Mozambique.

<sup>65</sup> *ibid*.

<sup>66</sup> *ibid* p. 147.

<sup>67</sup> *ibid* p. 145.

### **3.2 Does international criminal law generally prohibit the granting of amnesties?**

In many instances international bodies or tribunals have considered amnesty laws incompatible with treaty provisions on human rights, particularly where amnesties are granted for international crimes.<sup>68</sup> Regardless, state practice is very divergent and some states have even concluded agreements providing amnesties for international crimes.<sup>69</sup> The Évian Agreements between France and Algeria that were signed on 18 March 1962 is such an example.<sup>70</sup> The Lomé Agreement of July 1999 between the Sierra Leone government and the Revolutionary United Front also provided for an all-encompassing amnesty, granting ‘free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives’.<sup>71</sup>

Generally speaking, international criminal law has been more lenient in its approach to amnesties than the human rights bodies. Article 6(5) of the Additional Protocol II to the Geneva Conventions is such an example and provides that:

“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

Schabas commends Article 6(5) as he believes that amnesties have often been a part of transitional justice mechanisms, which existed long before the modern term of “transitional justice” had been invented.<sup>72</sup> He contends that Article 6(5) therefore reflects the inherited wisdom derived from these peace processes.<sup>73</sup>

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<sup>68</sup> This approach has been taken mainly by the Inter-American Court of Human Rights, the European Court of Human Rights and the UN Human Rights Committee, as highlighted by Cassese (n 6) p. 310.

<sup>69</sup> *ibid.*

<sup>70</sup> *ibid* p. 311

<sup>71</sup> Article IX of the Lomé Agreement.

<sup>72</sup> Schabas (n 54) p. 178.

<sup>73</sup> *ibid.*

Surprisingly however, the Rome Statute is completely silent on this issue. Many have argued that this exclusion was deliberate and reflects the recognised, but exceptional, utility of amnesties in peace negotiations.<sup>74</sup> There is, however, a common fundamental misconception that amnesties preclude accountability and redress.<sup>75</sup> There have been some successful examples of amnesties being granted and accompanied by accountability mechanisms, most often in the form of truth and reconciliation commissions.<sup>76</sup> Both the East Timor and South African transitional justice systems are examples of this. Schabas argues that the matter is not black and white as often assumed and that one cannot make the comparison between charitable amnesties granted by a victim like Nelson Mandela on the one hand, and the self-indulgent amnesties granted by tyrants like Augusto Pinochet on the other.<sup>77</sup> The prevailing view among legal literature therefore seems to be that some narrowly tailored amnesties are accepted, namely where they are intended to end ongoing violence.<sup>78</sup>

Regardless of these benefits, there is a definite trend toward the limitation of amnesties.<sup>79</sup> As a direct response to the amnesties in the Lomé Agreement, Article 10 of Statute of the Special Court for Sierra Leone (SCSL) provides that an amnesty granted for crimes falling under the Court's jurisdiction 'shall not be a bar to prosecution'.<sup>80</sup> Article 10 of the Statute for the Special Tribunal for Lebanon (STL) contains the same language.<sup>81</sup> As will be discussed, Article 40 ECCC Law also addresses the issue of amnesties. As this

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<sup>74</sup> Perry (n 55) p. 80; Schabas (n 54) p. 175.

<sup>75</sup> *ibid* (Perry) p. 93.

<sup>76</sup> *ibid*.

<sup>77</sup> Schabas (n 54) p. 187.

<sup>78</sup> Slye (n 52) p. 103; Frank Selbmann, '1979 Trial of the People's Revolutionary Tribunal and Implications for ECCC' (2016) 6 International Criminal Justice Series p. 99.

<sup>79</sup> Schabas (n 54) p. 188.

<sup>80</sup> Statute of the Special Court for Sierra Leone (signed 16 January 2002, entered into force 12 April 2002) UNSC Resolution 1315 (2000).

<sup>81</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon (signed 3 November 1972, entered into force 23 March 1976) STL-11-01/1 16.

section has showed that there is no crystallised international norm prohibiting amnesties, the ECCC will be given a certain degree of lenience in its interpretation of the Cambodian amnesties.

### **3.3 Amnesties granted by the Cambodian government**

Amnesties were first granted to KR defectors through national legislation in 1994.<sup>82</sup> A subsequent royal pardon and was issued by the King Sihanouk to Ieng Sary in 1996.<sup>83</sup>

The 1994 legislation simultaneously banned the KR and granted amnesties to its lower-ranking officials. Article 1 thereof outlaws the KR and its armed forces. Article 5 contains the amnesty and states:

This law shall allow for an amnesty period of six months after coming into effect to permit the people who are members of the political organization or military forces of the "Democratic Kampuchea Group" [i.e. the Khmer Rouge] to return to live under the authority in the Royal Government of the Kingdom of Cambodia, without facing punishment for crimes which they have committed.<sup>84</sup>

Article 5 essentially issues amnesties only to KR guerrillas who defected to the government between 7 July 1994 (the date the legislation came into force) and 7 January 1995 (6 months later).<sup>85</sup> Article 6 importantly states that ‘for leaders of the Democratic Kampuchea Group the stay described above [in Article 5] does not apply’. Although Article 6 explicitly denies any offer of amnesties to KR leaders, Article 7 reiterates the King’s authority to ‘give partial or complete amnesty or pardon as stated in Article 27 of the Constitution’.<sup>86</sup>

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<sup>82</sup> Law on the Outlawing of the 'Democratic Kampuchea' Group, Reach Kram No.1, NS 94, 15 July 1994 (1994 legislation).

<sup>83</sup> Royal Decree, E5118.1, 14 September 1996 (Original Khmer version in D366/7.1.191).

<sup>84</sup> Article 5 of the 1994 legislation.

<sup>85</sup> Slye (n 52) p. 101.

<sup>86</sup> Article 27 of the 1993 Constitution states that ‘the King shall have the right to grant pardons or amnesties.’ Consequently, there exists no absolute prohibition of amnesties according to the laws of Cambodia.

Therefore, the King is accorded wide discretion under both the constitution and national legislation to decide whether amnesties should in fact be granted to KR leaders, or otherwise.

In exercise of this discretion, King Sihanouk issued a royal pardon to Sary in 1996 in return for his defection from the KR. This pardon states:

Amnesty is granted to Mr. Ieng Sary, former Deputy Prime Minister responsible for Foreign Affairs in the Government of Democratic Kampuchea, who was sentenced to death and confiscation of all property by order of the People's Revolutionary Court of Phnom Penh dated 19 August 1979 and with regard to penalties stipulated by the Law on the Outlawing of the Democratic Kampuchea Group which was promulgated by Royal Proclamation no. 01 BM 94 dated 15 July 1994.<sup>87</sup>

This pardon annuls the sentence arising from the PRT conviction and also grants him amnesty from prosecution arising from his KR membership that was outlawed under Article 1 of the 1994 legislation. The pardon does not, however, give him amnesty for criminal acts committed after the PRT conviction in 1979 or before his KR defection in 1996. Although this is commendable, he orchestrated the worst of his atrocities during his time in power in the KR regime between 1975 and 1979 and it would have been more preferable if the pardon spelled out that he should not be given amnesty for these crimes.<sup>88</sup> The next section will further assess this amnesty and subsequent pardon, what they purported to achieve and if they succeeded.

### **3.4 Context to the Cambodian amnesties and their merit**

#### **3.4.1 Context**

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<sup>87</sup> Royal decree (n 83).

<sup>88</sup> Slye (n 52) p. 102.

As was discussed in the introduction to this chapter, there are three different time periods during an internal armed conflict during which amnesties can be granted. The amnesties granted via the 1994 legislation falls into the third period, those that are granted post-conflict. To reiterate, the primary rationale behind states granting these amnesties post-conflict is either to demobilize rebels, to further reconciliation efforts or else is done with the political motive of increasing governmental support that is usually non-existent following a conflict era.

In 1994 when the amnesty legislation was passed, the government comprised of a coalition between Hun Sen and Prince Ranariddh, King Sihanouk's son. During the 1990s, the KR maintained effective autonomy over approximately 20% of Cambodian territory.<sup>89</sup> As the government evidently lacked control over the KR forces, they instead attempted to persuade the KR to leave the jungles voluntarily in return for the grant of amnesties. This has the effect of a 'carrot amnesty', as was previously described by Reiter, with demobilization of such groups helping to reconcile the community in a divided state and is also an attempt to promote peace and internal stability.<sup>90</sup>

It is, however, conceivable that there were multiple motives for granting these amnesties, as the 20% of KR controlled land was mainly comprised of the most valuable natural resource in Cambodia: timber.<sup>91</sup> Thus, it is conceded that a further effect of bringing the KR into the official power structures through the issuance of amnesty, and one which had little to do with peace and stability, was the redirection of profits from timber sales to the government.<sup>92</sup> It is also likely that political considerations inspired the legislation, as the

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<sup>89</sup> David Roberts, 'Cambodia Cofounds the Peacemakers' (2002) 96(1) American Political Science Review p. 251.

<sup>90</sup> Reiter (n 53) p. 140.

<sup>91</sup> Roberts (n 87).

<sup>92</sup> *ibid.*

amnesties were granted amidst a political rivalry between Hun Sen and Prince Ranariddh, where it has been contemplated that the two were in competition for KR cadre.<sup>93</sup>

Similarly to the 1994 legislation, the 1996 pardon also fell within the third category of post-conflict amnesties. As mentioned, this category usually includes the grant of pardons or political release. Although there is not as much supporting evidence as to why King Sihanouk granted this royal decree, the motives are somewhat discernible. At the time that the pardon was granted, Sary had control over approximately 3,000 troops.<sup>94</sup> Thus, the purpose of the 1994 legislation could not be achieved without the defection of Sary, a high-ranking KR official. To King Sihanouk's credit, upon granting the pardon he sent a public letter to Amnesty International where he stated that he would support the judgment of an international tribunal should one be convened in the future to try Ieng Sary or other KR leaders.<sup>95</sup> It may seem naïve to assume that the King did not possess the same political motivation as the coalition had, but there is not any available evidence that suggests otherwise.

### 3.4.2 Merit

The 1994 amnesties were initially instrumental in neutralizing the KR; during the 6 month amnesty period there were 7,000 defectors.<sup>96</sup> Of these defectors, however, 2,970 were given positions within the army and returned to the conflict.<sup>97</sup> It is highly probable that these former guerrillas, who were given amnesties only a few years prior to the 1997 coup,

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<sup>93</sup> Grant Curtis, *Cambodia Reborn? The Transition to Democracy and Development* (Washington: Brookings Institution Press and the United Nations Research Institute for Social Development (UNRISD) 1998) p.27. Curtis highlights how Prince Ranariddh had been in negotiations with KR leaders and had attempted to import a stockpile of heavy weaponry into the country. Hun Sen subsequently overthrew Ranariddh in a coup three years later.

<sup>94</sup> Beachler (n 25) p. 68.

<sup>95</sup> Letter, dated September 13, 1996, from King Norodom Sihanouk to M. Pierre Sané, Secretary-General of Amnesty International.

<sup>96</sup> Johanna Herman, 'Peacebuilding and Transitional Justice in Cambodia: Attempts at DDR and the Rise of Victim-Centred Justice' in Chandra Sriram et al. *Transitional Justice and Peacekeeping on the Ground: Victims and ex-Combatants* (Routledge 2013) p. 107.

<sup>97</sup> *ibid* p. 108.

participated in the fighting in 1997.<sup>98</sup> It seems that the actual effect of these amnesties were to further instability. The 1996 pardon was arguably much more successful in achieving its purpose. When Sary defected to the government, he brought with him some 3,000 troops and significantly weakened the KR.<sup>99</sup> This final collapse of the KR brought with it the integration of many KR officials into civil society.<sup>100</sup> As every KR guerrilla who re-entered civil society was one less soldier for fighting, the 1996 pardon was successful in furthering the purported aims of peace and stability. The government was also successful in reclaiming KR strongholds from resource-rich Pailin in 1996.<sup>101</sup>

Despite these benefits, there are several legal ramifications resulting from the 1994 amnesties in particular. Firstly, it raises the age-old confliction between peace and justice. Although the amnesties arguably achieved their purpose in ensuring peace, their effect was to allow those most immediately responsible for the atrocities committed to escape justice. The KR 'leaders' although responsible for the planning, ordering and orchestration of the atrocities, were not the ones who directly perpetrated the crimes as this was left to their lower-ranking officials.<sup>102</sup> This impunity accorded to subordinates therefore has two important consequences: 1) the perpetrators of these crimes can re-engage in society along with the victims, which can have long-term consequences such as additional fear and trauma; and 2) amnesties given to the perpetrators undercut the principle of deterrence and creates an incentive for wrongdoers.<sup>103</sup> It is this distinction between subordinates and superiors that has stirred the reaction that those responsible bear minimal accountability and no punishment.<sup>104</sup>

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<sup>98</sup> *ibid.*

<sup>99</sup> Beachler (n 25) p. 68.

<sup>100</sup> *ibid.*

<sup>101</sup> Roberts (n 87) p. 258.

<sup>102</sup> Cassese refers to the general trend whereby today, more so than ever it is senior officials that commit international crimes. Cassese (n 6) p. 246.

<sup>103</sup> Slye (n 52) p. 108.

<sup>104</sup> *ibid.*

The implications of the 1996 pardon are open to interpretation. Although it is clear that the decree pardons Sary for the PRT sentence, it is unclear for exactly which crimes he is granted amnesty. The pardon grants amnesty to ‘penalties stipulated by the Law on the Outlawing of the Democratic Kampuchea Group [1994 legislation]’.<sup>105</sup> As well as outlawing the KR in Article 1, the 1994 legislation also criminalises acts against the internal security of the state, murder, rape, robbery and destruction of state property under Articles 3 and 4. Whether or not the amnesty extends to include all the provisions of the 1994 legislation was afforded extensive debate during the ECCC cases, which will be assessed in this chapter.

### **3.4.3 The absence of a truth and reconciliation commission**

As was seen in Part 3.2, amnesties are usually only accepted by the international community where they are narrowly tailored and are accompanied by some degree of accountability. Unfortunately in the case of Cambodia, there was no truth or reconciliation commission established as had been done in many other transitional justice models.<sup>106</sup> As was seen in South Africa, the truth requirement provided testimony that was used to hold superiors accountable and also provided a great deal of forensic information about the atrocity.<sup>107</sup> The latter is often instrumental for victims, being interested in understanding why such gross violations were committed.<sup>108</sup> Slye goes so far as to contend that the Cambodian amnesties are amnesic, with their primary purpose to conceal and forget rather than to reveal and account.<sup>109</sup> Therefore, any merit that the 1994 amnesties and subsequent pardon possessed has been countered by this complete lack of accountability. The ECCC is therefore under pressure to ensure that the perpetrators of these atrocities do not enjoy impunity as a result of amnesties granted by the Cambodian government.

## **3.5 The relevant laws on amnesties pertaining to the ECCC**

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<sup>105</sup> Royal decree (n 83).

<sup>106</sup> See above (n 45).

<sup>107</sup> Slye (n 52)

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.* p. 121.

Sary was the only defendant who has, to date, raised the issue of amnesties as a bar to the ECCC jurisdiction. For this reason only Case 002/01 pertaining to Sary will be addressed. As mentioned, Article 33(1) ECCC Law requires the Court to first assess national procedural rules, and permits the Court only to assess the international procedural rules as ‘guidance’.

The national laws pertaining to amnesties are contained in the Cambodian Constitution of 1993. Article 90 therein states that the National Assembly has the authority to adopt any laws on general amnesties. Article 27 of the constitution states that ‘[t]he King shall have the right to grant partial or complete amnesty’.

The ECCC Law and UN Agreement also address this issue. Article 11 of the UN Agreement directly addresses the 1996 pardon and states that ‘[t]he United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers’. Article 11 also states that the Cambodian government is not permitted to request an amnesty or pardon for any persons who may be investigated for or convicted of crimes under the ECCC. These provisions are directly replicated and reaffirmed in Article 40 ECCC Law.

Unlike statute of limitations, which will be discussed in Part V, there is no international convention or treaty addressing the legality or applicability of amnesties. Therefore, the relevant international procedural rules concerning amnesties are contained in customary international law. As was already discussed, there is no clear customary international norm concerning amnesties and so the matter will be for the ECCC Chambers to decipher.

### **3.6 Pre-Trial Chamber decision on Sary’s appeal against the closing order Case 002/01**

The defence appealed the 2010 Closing Order issued against Sary that indicted him for crimes against humanity, genocide and grave breaches.<sup>110</sup> The defence argue that the 1996 pardon precludes ECCC jurisdiction over Sary as it grants Sary amnesty for all crimes covered in the indictment.<sup>111</sup> The PTC in addressing the effect of the 1996 Royal Decree issued to Sary on the current proceedings makes a sharp distinction between the amnesty and pardon contained therein. Nevertheless, the PTC held that pardons can have potentially the same effect as amnesties in constituting a “bar to proceedings”.<sup>112</sup> The PTC therefore continued in assessing whether either the pardon or the amnesty contained in the 1996 decree constituted a bar to ECCC proceedings being initiated against Sary.

Counsel for the defence first argued that the pardon contained in the royal decree ensures that Sary cannot serve any sentence for a conviction based upon the acts that were at issue before the PRT.<sup>113</sup> This interpretation is based upon the premise that the death penalty was already abolished by the time the pardon was granted, implying that King Sihanouk must have intended that Sary cannot serve any sentence in relation to the acts committed or else the decree would be redundant.<sup>114</sup> The PTC responded that logic would dictate that the death sentence would have been converted into a prison term; otherwise all of those sentenced to death for the most serious crimes would walk free.<sup>115</sup> The PTC held that the decree would also not be ‘redundant’ as the order for the confiscation of the personal property was still in force.<sup>116</sup> It was concluded that the sole effect of the pardon was to abolish and forget the PRT sentence and therefore did not have any effect on the possibility to institute further prosecutions as there was no reasonable relation to the ‘acts committed’.<sup>117</sup>

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<sup>110</sup> Closing Order (n 29).

<sup>111</sup> Pre-Trial Chamber Decision on Ieng Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011 p. 11 para. 21.

<sup>112</sup> *ibid* p. 33 para. 66.

<sup>113</sup> *ibid* p. 32 para. 64.

<sup>114</sup> *ibid* p. 80 para. 179.

<sup>115</sup> *ibid* p. 87 para. 192.

<sup>116</sup> *ibid*.

<sup>117</sup> *ibid* para. 193.

The second submission, and the one more important for the potential impact it could have on developing customary international law, relates to the amnesty contained within the 1996 royal decree. The defence argues that this amnesty protects Sary from prosecution for all crimes encapsulated in the 1994 legislation, which the defence believes covers any such crime committed by the KR.<sup>118</sup> The defence contends that domestic amnesties can apply to *jus cogens* crimes and that even according to international standards there is no such prohibition on amnesties for *jus cogens* crimes.<sup>119</sup> The PTC first looked to the wording of the 1994 legislation and held that the 1994 legislation did not purport to create an autonomous regime for all crimes committed by the KR.<sup>120</sup> Instead, the court provided that the 1994 legislation did create new offences and penalties to take into account the crimes committed by the KR, including crimes against the security of the state.<sup>121</sup> As these ‘new crimes’ did not include crimes of genocide, crimes against humanity or war crimes, they would instead continue to be prosecuted under existing national law.<sup>122</sup> Any such interpretation otherwise was held to be inconsistent with Cambodia’s treaty obligations to prosecute and punish these international crimes.<sup>123</sup> The PTC did not need to assess the last issue of whether an international prohibition exists on amnesties containing *jus cogens* crimes as the court had concluded that these crimes were not included in the scope of the 1994 legislation. Nevertheless, the PTC’s subtle referral to “Cambodia’s treaty obligations” seems to suggest that if such crimes were included in the amnesty’s scope that there would be basis under international law for its invalidation. This issue was expanded upon and debated more in-depth by the TC, as will be now discussed.

### **3.7 Trial Chamber’s decision on Sary’s preliminary objections Case 002/01**

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<sup>118</sup> *ibid* p. 76 para. 170.

<sup>119</sup> *ibid* p. 80 para. 178. *Jus cogens* crimes are crimes that have come to acquire the status of preemptory norms, Cassese (n 6) p. 312.

<sup>120</sup> *ibid* p. 89 para. 197.

<sup>121</sup> *ibid*.

<sup>122</sup> *ibid*.

<sup>123</sup> *ibid* p. 90 para. 201.

It should be noted from the outset that the TC is not an appellate body. Therefore the defence's submissions in this hearing included objections from the PTC's 2008 decision on the appeal of the provisional detention order against Sary and the above PTC 2010 decision on Sary's appeal against the closing order.

Firstly, the defence asserts that the TC only has jurisdiction to assess the scope of the 1996 decree and not its validity, as the decree was granted in accordance with the King's powers under the constitution.<sup>124</sup> This is in response to the PTC's statement in its 2008 decision, whereby the PTC considered "that the validity of the amnesty is uncertain".<sup>125</sup> The defence contends that as the ECCC is a domestic court considering a domestic amnesty and pardon, that Cambodia's international obligations do not affect the validity of the decree.<sup>126</sup> The TC agreed with the defence in that it is not in a position to determine the powers of the King and in consequence, the constitutional validity of the 1996 decree.<sup>127</sup> It reiterated the PTC's conclusion that the scope of the pardon is limited to the annulment of the sentence, as Article 147 of the Cambodian Penal Code 1956 (Penal Code) states that "[p]ardon within the meaning of Article 27 of the Constitution of the Kingdom of Cambodia shall exempt the offender from serving his or her sentence".<sup>128</sup> Although it did not have to declare the pardon invalid, the TC still reaches the conclusion that the pardon is inapplicable to Case 002/01 by effectively limiting its scope.

The TC then asked itself the question of "whether any of these [international] crimes must be excluded from the scope of the [amnesty] on the basis of a treaty or customary rule of international law".<sup>129</sup> In phrasing the question like this, the court is not actually assessing

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<sup>124</sup> Ieng Sary's Supplement to his Rule 89 Preliminary Objection (Royal Pardon and Amnesty), E51/10, 27 May 2011 p. 4 para. 9.

<sup>125</sup> Pre-Trial Chamber Decision on Appeal against Provisional Detention Order of Ieng Sary, C22/I/73, 17 October 2008 p. 16 para. 58.

<sup>126</sup> Amnesties supplement (n 124) p. 1 para. 2.

<sup>127</sup> Trial Chamber Decision on Ieng Sary's Rule 89 Preliminary Objections, E51/15, 3 November 2011 p. 13 para. 29.

<sup>128</sup> *ibid* p. 12 para. 25.

<sup>129</sup> *ibid* p. 17 para. 37.

the wording of the amnesty to discern whether it includes *jus cogens* crimes within its scope, as the PTC had done. As the national procedural rules do not address this issue, this is seemingly why the TC turned to international procedural rules for guidance. If this is not the reality, then perhaps the TC wanted to give its say on whether it believes any customary international rule exists on this matter, or else wanted its judgment to contribute to the argument in favour of a developing customary rule. Regardless, the Chamber found that Cambodia is under an absolute duty to prosecute and punish under both the Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (Genocide Convention).<sup>130</sup> The TC continued that the 1996 decree cannot relieve Cambodia of its duty to prosecute crimes of genocide and grave breaches.<sup>131</sup> This conclusion demonstrates that the defence was incorrect in its assertion that international norms cannot invalidate a domestic amnesty.

As there are no international treaties concerning crimes against humanity, the TC assessed relevant *opinio juris* and state practice to ascertain whether any customary norm requires their prosecution.<sup>132</sup> This discussion turned into a general assessment of whether international law prohibits granting amnesties for *jus cogens* crimes.<sup>133</sup> Through a thorough assessment of amnesties granted both during conflicts and post-conflicts, the TC concluded that state practice regards blanket amnesties for serious international crimes to be a breach of international norms.<sup>134</sup> It also concludes that while the practice of amnesties is commonplace, that limitation is the ‘new trend’.<sup>135</sup> The Chamber discerned from this state practice that there is a minimum right for states to set aside amnesties or limit their scope if they are deemed incompatible with international obligations.<sup>136</sup> This argument cleverly

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<sup>130</sup> *ibid* p. 18 para. 39. The Chamber highlights Articles 1, 4 and 6 of Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 2 January 1951) UNGA Resolution 260 (A) III and Article 146 of the Geneva Convention IV in particular.

<sup>131</sup> *ibid*.

<sup>132</sup> *ibid* p. 18 para. 40.

<sup>133</sup> *ibid* p. 19 para. 42.

<sup>134</sup> *ibid* p. 23 para. 49.

<sup>135</sup> *ibid* p. 25 para. 51.

<sup>136</sup> *ibid* p. 27 para. 53.

sidesteps the fact that the TC does not have the authority to determine the validity of the 1996 decree, similar to its above application of the pardon.

What is also commendable is that the TC did not narrow its discussion of customary international law to practice of other international criminal tribunals and treaties but assessed the matter under international law generally.<sup>137</sup> This included assessing the case law of the UN human rights treaty bodies and regional human rights courts.<sup>138</sup> The TC deduced a customary international norm where there is a clear obligation on states to hold perpetrators of serious international crimes accountable and to provide victims with an effective remedy.<sup>139</sup> This includes crimes against humanity and as there is now a general consensus against amnesties for international crimes based on the duty to punish and prosecute.<sup>140</sup> This duty is even more pronounced where the amnesties are unaccompanied by any form of accountability, as was the case with the 1994 and 1996 amnesties.<sup>141</sup> This is important as the TC recognised that the 1996 decree was a useful negotiation tool but that this lack of a truth or reconciliation process deprived victims of their right to an effective remedy.<sup>142</sup> The TC analysis is therefore compatible with the prevailing view of legal scholars, as seen in Part 3.3, that some narrowly tailored amnesties containing a degree of accountability can be beneficial in transitional justice systems.

This led the TC to conclude that in exercise of its obligation to hold perpetrators of serious international crimes accountable, it accordingly attributes no weight to the grant of such an amnesty that is contrary to ‘the direction in which customary international law is developing’.<sup>143</sup> The Chamber held that *consequently* the scope of the amnesty under the 1996 decree excludes the crimes of genocide, crimes against humanity and grave

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<sup>137</sup> *ibid* paras. 41-45.

<sup>138</sup> *ibid* p. 19 para. 42.

<sup>139</sup> *ibid* p. 26 para. 53.

<sup>140</sup> *ibid*.

<sup>141</sup> *ibid* p. 27 para. 54.

<sup>142</sup> *ibid*.

<sup>143</sup> *ibid*.

breaches.<sup>144</sup> In concluding that such crimes could not come within the scope of an amnesty, the TC released itself of any duty to study the wording of the amnesty and deliberate whether it did include amnesty for such crimes. This reasoning of the court is very progressive and as it is very recent it will serve as important guidance for future internationalised tribunals.

### **3.8 Concluding remarks: has the ECCC done enough?**

It is without doubt that the 1994 amnesties and subsequent royal pardon were useful in achieving their function at the time. They resulted in the reintegration of Sary and his fighters into society and contributed to the restoration of peace. Nevertheless, their functioning is not relevant today and the absence of any accompanying truth and reconciliation commission in particular serves as a major obstacle to ensuring perpetrators of international crimes are held accountable.<sup>145</sup> Even if the ECCC Law contained a truth requirement, as was seen in South African, it could have helped to ensure greater that accountability was provided.<sup>146</sup>

So while the approach of the Cambodian government is far from being commendable, the subsequent approach of the ECCC is. The ECCC has been the only tribunal to have considered the application of an amnesty in any detail.<sup>147</sup> So in this respect, the ECCC has already done more than has been expected of it. Whereas the PTC took a more literal approach and examined the wording of the 1996 decree, the TC took the time to address the legality of amnesties granted for *jus cogens* crimes. In addressing customary international law to evaluate the legality amnesties granted for crimes against humanity, the TC derived a general customary norm applicable to all international crimes whereby amnesties cannot be granted for crimes where it conflicts with the states' obligation to prosecute and punish some crimes. Cassese predicted that a customary rule concerning all international crimes

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<sup>144</sup> *ibid* para. 55 (emphasis added).

<sup>145</sup> Selbmann (n 78) p. 99.

<sup>146</sup> Slye (n 52) p. 108.

<sup>147</sup> Sarah Williams, *Hybrid and Internationalised Criminal Tribunals* (HART 2012) p. 353.

will only crystallise where a general customary rule emerges imposing upon states the obligation to prosecute and punish the alleged author of international crimes.<sup>148</sup> The TC decision is therefore instrumental in furthering the presupposition of such a general rule.

## **PART IV**

### ***Ne Bis In Idem***

#### **4.1 Theoretical background**

The principle of *ne bis in idem* that derives from civil law, is similar to the concept of double jeopardy that is more frequently used in common law.<sup>149</sup> The principle contains both internal and international elements and states that a court may not institute proceedings against a person for a crime that has already been the object of criminal proceedings in the same state (internal principle) or in another state or in an international court (international principle), and for which the person has already been convicted or acquitted.<sup>150</sup> The rationale for the principle is that it offers safeguards to the accused in protecting them from potential abuses of process and from being subjected to successive prosecutions.<sup>151</sup> It also ensures respect for the authority of a national court's decision and protects legal security.<sup>152</sup> The principle therefore reinforces the need for diligent prosecution.

The internal principle is well-established in customary international law, enshrined in many international treaties, including Article 14(7) of the International Covenant on Civil and Political Rights 1966 (ICCPR).<sup>153</sup> Contrastingly, there is no rule in international law that

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<sup>148</sup> Cassese (n 6) p. 312.

<sup>149</sup> Appeal against the provisional detention order (n 125) p. 12 para. 41.

<sup>150</sup> Cassese (n 6) p. 315.

<sup>151</sup> Diane Bernard, 'Ne bis in idem- Protector of Defendants' Rights or Jurisdictional Pointsman?' (2011) 9(4) Journal of International Criminal Justice p. 865.

<sup>152</sup> *ibid.*

<sup>153</sup> The internal principle is also stated in Article 86 of the 1949 Geneva Convention III; Article 117(3) of the 1949 Geneva Convention IV; Article 8 (4) of the American Convention on Human Rights and Article 4(1) of the ECHR.

incorporates the international principle and it is not addressed by any of the international conventions.<sup>154</sup> The European Union is the one regional exception that incorporates the international *ne bis in idem* principle, under both Article 50 of the Charter of Fundamental Rights of the European Union and Article 54 of the Schengen Convention.<sup>155</sup> Nevertheless, Article 55 of the Schengen Convention authorizes a contracting state to declare itself not bound by Article 54, where the facts envisaged in the foreign judgment have taken place in whole or in part on its territory.<sup>156</sup> Providing for such broad exceptions undermines the legitimacy of the rule and increases uncertainty about its status as a customary norm. The elements of *ne bis in idem* becomes even more confounded when applied before an internationalised tribunal.<sup>157</sup> Does a judgment of a national court preclude the exercise of jurisdiction by a hybrid or internationalised tribunal and is the internal or international principle the applicable standard? This question arose as an issue of contentious debate throughout the ECCC proceedings and will be addressed throughout the rest of this chapter.

#### **4.2 How *ne bis in idem* arose before the ECCC**

As was briefly discussed in Part 2.3, the PRT was established in 1979 and convicted Pol Pot and Ieng Sary *in absentia* of genocide, confiscated their property and sentenced them to death. Pol Pot died in 1988 without ever having served his sentence and Sary received a royal pardon for his sentence in 1996.<sup>158</sup> Despite the pardon, Sary was subjected to an arrest warrant and brought before the ECCC in 2007. The 2007 provisional detention order charged Sary with crimes against humanity and grave breaches of the Geneva Conventions, but excluded a charge of genocide. Notably, the 2010 closing order issued against him

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<sup>154</sup> Selbmann (n 78) p. 95.

<sup>155</sup> *ibid.*

<sup>156</sup> Casesse (n 6) p. 316.

<sup>157</sup> Williams (n 147) p. 384.

<sup>158</sup> Royal decree (n 83). The pardon was granted for both the death sentence and the confiscation of his property.

contained an indictment for the crime of genocide against the Muslim Cham and Vietnamese ethnic groups.<sup>159</sup>

During all stages of the ECCC proceedings, Sary argued that both his detention and the proceedings issued against him violated the principle of *ne bis in idem*, due to the PRT conviction and the 1996 pardon. The PTC issued its decision in 2011 on Sary's appeal against the closing order and held that the prosecution, conviction and sentencing of Sary by the PRT and subsequent pardon granted to Sary did not bar jurisdiction of the ECCC.<sup>160</sup> Later that year, the TC issued a holding on Sary's preliminary objections to ECCC jurisdiction and also held that neither *ne bis in idem* nor the 1996 pardon barred ECCC jurisdiction.<sup>161</sup> Sary died in March 2013, before he was ever tried for his crimes.<sup>162</sup>

As *ne bis in idem* is a procedural issue pertaining solely to Sary in Case 002/01, this case will be the central focus for the rest of this chapter. The differing standards will first be presented and explained and then the approach of the various Chambers will be evaluated in detail.

### **4.3 The relevant national and international standards**

As was previously highlighted, one of the most contentious issues surrounding the ECCC's hybrid nature was the determination of whether international or national procedural rules apply. Article 33(2) of the ECCC Law was an attempt to resolve this issue in stating that the proceedings should primarily be conducted in accordance with national procedural rules. It is only when these rules do not address a particular matter, there is uncertainty as to their interpretation or there is doubt on their inconsistency with international standards,

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<sup>159</sup> Closing Order (n 29) p. 10. The closing order also contained an indictment for crimes against humanity and grave breaches of the Geneva Conventions.

<sup>160</sup> Appeal against the closing order (n 111) p. 79 para. 175.

<sup>161</sup> TC decision (n 127) p. 28.

<sup>162</sup> He also died before the judgment in Case 002/01 was pronounced against him in August 2014.

that *guidance* may be sought in international procedural rules.<sup>163</sup> Before delving further into the Court’s interpretation of this provision, both the national and international procedural rules will first be laid out.

The Criminal Procedural Code of the Kingdom of Cambodia (CPC) contains the national procedural rules. Article 7 CPC lists the reasons for extinguishing criminal actions, including the death of the accused person and *res judicata*.<sup>164</sup> Article 12 CPC, entitled *res judicata*, states that any person who has been finally acquitted cannot be prosecuted again for the same act, even if such an act is subject to a different legal qualification.

The ECCC Law does not contain any provisions on *ne bis in idem*, unlike the statutes of the ICC, ICTY and ICTR. This is quite considerable, as it must have been predicted in 2003 during the drafting of the ECCC Law that the concerns and legitimacy of Sary’s previous conviction would arise. Nevertheless, the 2003 UN Agreement between the UN and the Cambodian government establishing the ECCC is also silent on the issue of *ne bis in idem*.

According to Article 13(1) UN Agreement and Article 33 (2) ECCC Law, the ECCC shall exercise their jurisdiction in accordance with the international standards contained in Articles 14 and 15 ICCPR and both articles shall be respected in the entire trial proceedings. Article 14(7) of the ICCPR states that no-one shall be tried or punished again for an offence which has already been finally convicted or acquitted for. Article 15 prohibits the imposition of retrospective criminal penalties.

The Chambers also looked to international customary law and the statutes of the ICC and *ad hoc* tribunals for guidance on application of the international procedural rules. Article 20 (3) of the Rome Statute states that ‘no person who has been tried by another

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<sup>163</sup> Article 33(1) ECCC Law states this (emphasis added).

<sup>164</sup> *Res judicata* is defined by the TC as “settled law”, applying where the first case resulted in a judicial decision issued in respect of the same parties and facts. TC decision (n 127) p. 12 para. 27.

court...shall be tried by the Court with respect to the *same conduct*' [emphasis added]. Article 20 (3) also lists two exceptions to this rule: a) unless the other proceedings were conducted for the purpose of shielding the accused from criminal responsibility; and b) the other proceedings were not conducted impartially or independently and were conducted in a manner which was inconsistent with the intent to bring the person to justice.<sup>165</sup> This rule and its exceptions are also enshrined in the statutes of the ICTY and ICTR. Both statutes however contain an additional exception that the Rome Statute does not; they state that 'a person who has already been tried by a national court (...) may be subsequently tried if (a) the act for which he or she was tried was characterised as an ordinary crime'.<sup>166</sup> This exception assesses whether the crime in the national proceedings were characterised as international crimes, over which the *ad hoc* tribunals have primary jurisdiction.

#### **4.3.1 Why the choice of standards is so significant**

The question of which procedural rules should be applied to Case 002/01 is such an important one because each standard imposes different implications on the accused. There are three main distinctions between these standards, which will be elaborated below.

Firstly, Article 12 CPC states that the legal qualification of the crime is irrelevant for the consideration of *ne bis in idem*. Conversely, under Article 14 (7) ICCPR the legal components of the offence are essential to the claim of *ne bis in idem*. This is substantial for the case of Sary as the crime of genocide entailed a different definition in the 1979 tribunal than that of the Genocide Convention.<sup>167</sup> The definition contained in the latter is enshrined in Article 4 of the ECCC Law and Article 9 of the UN Agreement. The PRT's definition of genocide,<sup>168</sup> however, departs from the protected groups listed in Article II of

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<sup>165</sup> These exceptions are contained in Article 20 (3) (a) and (b) of the Rome Statute.

<sup>166</sup> Article 10 of the ICTY Statute; Article 9 of the ICTR Statute.

<sup>167</sup> Genocide is defined in Article II of the Genocide Convention as 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.' These last four groups are therefore the protected groups of the Convention.

<sup>168</sup> As contained in Article 1 of the Decree Law No.1 of 15 July 1979 establishing the PRT.

the Genocide Convention and does not define such groups.<sup>169</sup> The definition also does not encompass the constitutive element of ‘intent to destroy’.<sup>170</sup> As both the ECCC Law and the UN Agreement adopted the definition of genocide from the Genocide Convention, this could potentially support the claim that Sary was tried for a separate offence before the PRT than before the ECCC. If Article 14 (7) ICCPR is employed, a closer assessment of the two genocide charges will be needed.

Secondly, Article 12 CPC specifies that an individual cannot be prosecuted again for a crime that has been finally acquitted. The ICCPR applies this rule to both acquittals and convictions. This means that if the national standards encompassed in the CPC were adopted by the Court, then Sary would not be barred from ECCC proceedings. His claim would be a lot stronger if Article 14 (7) ICCPR were applied. The statutes of the ICC and the *ad hoc* tribunals both exclude reference to acquittals or convictions, instead stating that an individual who has been tried by a national court cannot subsequently be tried at national level. Therefore, the only prerequisite is that the individual was tried by a national court, which also supports Sary’s claim.

Thirdly, the CPC and international procedural rules provide that an individual cannot be prosecuted again for the *same conduct* that formed the basis of a previous charge.<sup>171</sup> Article 14 (7) ICCPR does not mention conduct. Thus, both the CPC and international procedural rules afford Sary greater protection if it could be proved that the 1979 genocide conviction was based on the same acts that formed the basis of the charges before the ECCC. This criterion will require an in-depth factual assessment by the ECCC.

Despite which set of rules are adopted by the court, it is difficult to imagine that one of the world’s most notorious war criminals would be released from the ECCC’s custody because

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<sup>169</sup> Selbmann (n 78) p. 91.

<sup>170</sup> *ibid.*

<sup>171</sup> (emphasis added).

of a procedural rule. With the international community awaiting the results of these high-profile cases, perhaps it could be that the judges have their holdings pre-determined and simply endeavour to shape the applicable laws around their beliefs. The approaches of the various chambers will be discussed below before such an assertion could be made.

#### **4.4 Co-Investigating Judges Case 002/01**

In first looking to the 2007 provisional detention order, the Co-Investigating Judges cited Article 14 (7) ICCPR but continued that the principle contained therein is not absolute under international criminal law and gave it no further discussion.<sup>172</sup> This implies that the refusal to apply Article 14 (7) was based on its substance rather than its applicability to the case at hand. The Judges did therefore not address the requirement in Article 33(2) ECCC Law that the court exercises its jurisdiction *in accordance* with Articles 14 and 15 ICCPR.<sup>173</sup>

Interestingly, the Judges immediately continued their discussion by addressing only the international procedural rules. This is in stark contradiction to the standard laid out in Article 33(1) ECCC Law where international procedural rules should be addressed only for ‘guidance’. In addressing the case law of the international tribunals, the Judges determined that cumulative convictions for international crimes are possible in relation to the same act, as long as each offence has a materially distinct element to the other<sup>174</sup>. In applying this principle, they stated that there is therefore ‘no impediment to Sary’s prosecution for the acts covered by the 1979 trial *under an international legal characterisation other than genocide*’.<sup>175</sup> This is significant as it suggests that a charge of genocide could in fact have been considered a legal impediment to Sary’s prosecution, if it had been included in the 2007 order.

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<sup>172</sup> Provisional Detention Order for Ieng Sary, 14 November 2007, C22 p. 4 para. 7.

<sup>173</sup> This ‘in accordance with’ requirement was not stated in the UN Agreement but later inserted into the ECCC Law (emphasis added).

<sup>174</sup> Provisional detention order (n 172) para. 9. This means that a person may be prosecuted for genocide and war crimes based on the same act, providing both offences contain materially distinct elements.

<sup>175</sup> *ibid* p. 5 para. 9 (emphasis added).

Disappointingly, the 2010 closing order does not add much to this discussion as the Judges merely adopted their previous findings. Although a charge of genocide was included in this indictment, the Judges determined that it was unclear from the 1979 trial what the exact crimes were and what the legal elements of ‘genocide’ entailed.<sup>176</sup> They therefore referred the matter to the TC for adversarial hearing. This conclusion is quite unfortunate as Sary’s decease precluded the TC hearing.

#### **4.5 Pre-Trial Chamber decision on Sary’s appeal against the closing order**

The defence firstly argued that Article 12 CPC should be read in light of Article 7 CPC, which could be interpreted as applying to both acquittals and convictions. Secondly, the defence argue for the application of Article 14 (7) ICCPR, which combined with the CPC would protect Sary from prosecution.

Regarding the first submission, the PTC interpreted Article 12 CPC within the ordinary scope of its meaning and held that interpreting its protection to include convictions would conflict with other CPC provisions.<sup>177</sup> The PTC held that the CPC applies only to acquittals and therefore does not resolve the issue at hand.<sup>178</sup>

The PTC continued to the second submission and held that the effects of Article 14(7) ICCPR contained only an internal *ne bis in idem* protection limited to ‘proceedings within domestic legal orders’. Therefore, Article 14 (7) did not apply to the ECCC, an internationalised court functioning separately from the Cambodian court structure.<sup>179</sup> Williams believes that this conclusion was based on the PTC’s misunderstanding of the ECCC’s legal basis.<sup>180</sup> According to Article 33 ECCC Law, both the legal basis and source of ECCC authority is domestic in nature. The ECCC is therefore not separated from the

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<sup>176</sup> Closing order (n 29) p. 332 para. 1332.

<sup>177</sup> Articles 443-445, 365, 370 and 371 of the CPC all apply to ‘convicted persons’.

<sup>178</sup> Appeal against the closing order (n 111) p. 57 para. 127.

<sup>179</sup> *ibid* paras. 128 and 131.

<sup>180</sup> Williams (n 147) p. 389.

Cambodian court structure, as the PTC suggests, but is rather an internationalised tribunal effectively operating as a domestic institution.<sup>181</sup> The PTC, like the Co-Investigating Judges, alluded to the fact that the ECCC is required to exercise its jurisdiction in accordance with the standards contained in Articles 14 and 15 ICCPR. This provision would not be contained in both the ECCC Law and the UN Agreement if the Court did not in fact have the competence to implement the ICCPR's provisions.

To further confound the matter, the PTC attempted to justify its conclusion by stating that Article 14 (7) ICCPR is also inapplicable to proceedings before the *ad hoc* tribunals and the ICC.<sup>182</sup> In particular, the PTC cited *Prosecutor v. Tadić*, where the Trial Chamber of the ICTY concluded that Article 14(7) has 'not received broad recognition as a mandatory norm of transnational application'.<sup>183</sup> This analysis is flawed, however, as the present case does not involve the transnational application of Article 14 (7) as the ECCC is a court established in the existing court structure of Cambodia.<sup>184</sup>

As the PTC determined that both the CPC and ICCPR were incapable of resolving this issue, the PTC instead turned to the statutes of the *ad hoc* tribunals and the ICC. The PTC deduced an international customary rule that jurisdiction should not be exercised against an individual who has already been tried before a national court.<sup>185</sup> Despite variations in the formulation of exceptions to this rule, the PTC affirmed that all the statutes contained the same exception in conferring jurisdiction where national proceedings had not been conducted independently and impartially.<sup>186</sup> The PTC therefore proceeded to examine whether the PRT trials were independent and impartial in deciding if ECCC jurisdiction is triggered.

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<sup>181</sup> *ibid* p. 386.

<sup>182</sup> *ibid*.

<sup>183</sup> *Prosecutor v. Dusko Tadic (Appeal Judgement)* IT-94-1-A, ICTY 15 July 1999.

<sup>184</sup> Article 2 of the ECCC Law states that 'the Extraordinary Chambers shall be established in the existing court structure'.

<sup>185</sup> Appeal against the closing order (n 111) p. 70 para. 157.

<sup>186</sup> *ibid* para. 159.

The PTC firstly held that the PRT was not independent as it was founded on a questionable basis due to its establishment through the executive branch and not a legislative body.<sup>187</sup> It is generally recognised that tribunals should be established by law to ensure its independence.<sup>188</sup> The PTC also determined that PRT members were connected to the executive branch of the government, thus violating the separation of powers and preventing judicial independence.<sup>189</sup>

The PTC secondly determined that the PRT was not impartial as the judges were considered biased and having had a personal interest in the case. One of the judges provided evidence as a victim during the pre-trial stage<sup>190</sup> and another filed an expert report during the proceedings.<sup>191</sup> The PTC held that 20 day proceedings initiated against Pot and Sary also indicated that their guilt was predetermined.<sup>192</sup> The 31-page judgment was delivered only hours after the closing arguments, showing that there was no true deliberation process. Furthermore, the defence counsel made witness statements for the prosecution during investigation and at no stage provided any evidence or cross-examination on behalf of the accused.<sup>193</sup> Finally, the PTC found that witnesses were also allegedly ‘stage managed’ as all used similar jargon and the statements were written in the third person.<sup>194</sup> For these reasons, the PTC held that the ECCC had jurisdiction to try Sary

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<sup>187</sup> *ibid* p. 74 para. 165.

<sup>188</sup> *ibid*.

<sup>189</sup> *ibid* p. 75 para. 167.

<sup>190</sup> *Genocide in Cambodia* (n 17) paras. 335-337 and 50-51.

<sup>191</sup> *ibid* paras. 59-60.

<sup>192</sup> The trial was established by decree on 15 July 1979, and the indictments to Sary and Pot were issued by the PRT on 20 July 1979. Only a few weeks later, the judgments were delivered on 19 August. The proceedings consisted of 20 days from the opening of the investigation to the commencement of the trial, and 5 days for the trial and judgment delivery. Appeal against the closing order (n 111) p. 78 para. 173.

<sup>193</sup> The defence also stated that the accused had the specific intent to commit genocide. *Genocide in Cambodia* (n 17) p. 542.

<sup>194</sup> Suzannah Linton, ‘Putting Cambodia's Extraordinary Chambers into Context’ (2007) XI *The Singapore Year Book of International Law* p. 211.

as the national proceedings were not conducted in accordance with requirements of independence and impartiality.<sup>195</sup>

While this author agrees with the PTC's assessment of the PRT and the conclusion that such a fundamentally defective tribunal could not bar proceedings before the ECCC, the manner in which the court reaches this conclusion is not commendable. Williams suggests that the best practice for the PTC would have been to apply the provisions of Article 14 (7) ICCPR.<sup>196</sup> Initially it would appear that application of this principle would result in a bar to proceedings, but Article 14(7) strictly applies only to proceedings conducted 'in accordance with the law'. Therefore, the PTC could have made the same assessment as above as to the legal basis and establishment of the PRT to determine if the proceedings fit this requirement. From the facts surrounding the PRT, it seems that the PTC would have undoubtedly concluded that the proceedings were not conducted 'in accordance with the law' and would have reached the same conclusion. Unfortunately, as the UN Agreement, the ECCC Law and the internal court rules do not address the *ne bis in idem* principle, the PTC is given autonomy in determining the components of the principle and that standards that best fit their conception.

Although this in-depth analysis was given to the 1979 trial, neither the PTC nor the TC in their following decision ever gave an assessment of the legal constituents of the genocide charge, which was recommended by the Co-Investigating Judges and is also what required by Article 14 (7) ICCPR.<sup>197</sup> The resulting appeal to the TC will now be addressed to evaluate whether or not the TC corrected the fundamental defects in the PTC decision.

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<sup>195</sup> Appeal against the closing order (n 111) p. 79 para. 175.

<sup>196</sup> Williams (n 147) p. 387.

<sup>197</sup> The trial was established by decree on 15 July 1979, and the indictments to Sary and Pot were issued by the PRT on 20 July 1979. Only a few weeks later, the judgments were delivered on 19 August. The proceedings consisted of 20 days from the opening of the investigation to the commencement of the trial, and 5 days for the trial and judgment delivery. *ibid* p. 71 para. 162.

#### 4.6 Trial Chamber decision on Sary's preliminary objections

Concerning the applicability of the ICCPR, the defence criticised the PTC for its comparison of the ECCC to the ICTY, as the latter may not be bound to follow Article 14 (7) ICCPR but the ECCC is mandated to do so through the Cambodian constitution, the UN Agreement and the ECCC Law.<sup>198</sup> Selbmann agrees with this criticism as the PTC overlooks the fact that the ICTY, ICTR and the ICC are all bound by rules in their own statutes that protect the accused from arbitrary prosecution.<sup>199</sup> The situation can therefore not be comparable, as the ECCC Law contains no such *ne bis in idem* provision.

The TC disagrees with this reasoning and regrettably adopts the PTC's findings that Article 14 (7) ICCPR is inapplicable, holding that Article 14 (7) applies solely to proceedings within the domestic legal order and does not have transnational applicability.<sup>200</sup> The TC, in attempting to justify the inapplicability of Article 14 (7) to internationalised proceedings, several times refers to 'obligations of accountability' and the balancing of *ne bis in idem* against 'the interest of the international community and victims in ensuring that those responsible for the perpetration of international crimes are properly prosecuted'.<sup>201</sup> While the importance of these obligations is unquestionable, the TC cannot justify its limitation of the protected rights of the accused in favour of these general principles of international law, without giving a concrete legal basis for its argument.

The defence very validly points to differential treatment given by the PTC to Articles 15 and 14(7) ICCPR. When considering whether the principle of legality in Article 15 ICCPR should be applied to the proceedings, the PTC stated, "Given [the ECCC Law's] express reference to Article 15 of the ICCPR, there is no doubt that(...)the principle of legality

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<sup>198</sup> Ieng Sary's supplement to his rule 89 preliminary objection (*ne bis in idem*), E51/11, 27 May 2011 p. 6 para. 12.

<sup>199</sup> Selbmann (n 78) p. 96.

<sup>200</sup> TC decision (n 127) p. 15 para. 32.

<sup>201</sup> *ibid* para. 33.

envisaged by the ECCC Law is the international principle of legality".<sup>202</sup> However, the PTC does not consider itself bound to apply Article 14(7) even though, like Article 15, the ECCC Law mandates its application. In expressly limiting only the application of Article 14 (7) ICCPR to domestic proceedings, the TC affirms this arbitrary distinction constructed by the PTC.

The TC slightly redeems itself with its broad interpretation of CPC. It stated that *ne bis in idem* is reflected in the CPC in the principle of *res judicata*.<sup>203</sup> The TC continues that this principle does not distinguish between convictions or acquittals, as stipulated by Article 7 CPC. The only condition to *res judicata* is that the first case resulted in a 'final judicial decision issues in respect of the same parties and facts'.<sup>204</sup> The TC adopted the PTC's findings that the PRT was not conducted by an independent and impartial tribunal, in accordance with due process requirements.<sup>205</sup> For these reasons, the PRT decision cannot be considered as a genuine, enforceable and final judicial decision capable of forming the basis for the application of *res judicata*. This argument is a clever sidestep by the TC, and essentially applies the reasoning suggested by Williams in arguing that Article 14(7) does apply but the PRT decision was not issued 'in accordance with the law'. Although this approach is much better than the PTC and more legally sound, the TC still erred in its refusal to apply the ICCPR provisions.

Although the TC held that the CPC thus resolves the issue and does not constitute a bar to proceedings, it considered whether the international procedural rules 'nonetheless exclude trial of the Accused before the ECCC on the basis of the *ne bis in idem* principle'.<sup>206</sup> As mentioned in Part 4.3, Article 33 ECCC Law stipulates that international procedural rules can only be considered where national rules do not resolve the issue or raises questions as

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<sup>202</sup> Appeal against the closing order (n 111) p. 96 para. 213.

<sup>203</sup> TC decision (n 121) p. 12 para. 27.

<sup>204</sup> *ibid* p. 14 para. 30.

<sup>205</sup> *ibid*.

<sup>206</sup> *ibid* para. 32.

to their interpretation or consistency with international standards, neither of these criteria were identified by the TC. Therefore, international procedural rules cannot be considered or preferred over the existing applicable law.<sup>207</sup> Luckily, the TC reached the same conclusion under the international procedural rules as it did under the national procedural rules. Again, it seems that the TC, like the PTC, misunderstood the ECCC's legal basis.

#### **4.7 Concluding analysis of the ECCC approach**

It is evident that the Co-Investigating Judges, PTC and TC gave strikingly different arguments for the inapplicability of the *ne bis in idem* principle. This principle does vary within numerous jurisdictions and can give rise to multiple variations and interpretations. However, the varied responses which the Chambers gave perhaps illustrates their panic in imagining a situation where one of the world's most notorious war criminals was released from the ECCC's jurisdiction based merely on a procedural rule. A well-thought out, structured response would have served as better guidance for the international community and other internationalised tribunals that are likely to follow.

What is perhaps most disappointing, is that Case 002/02 against Sary for crimes of genocide never proceeded. This author agrees with the interpretation of the Co-Investigating Judges that *ne bis in idem* would only have been relevant at all if Sary were convicted for genocide. As the Supreme Court Chamber never got the chance to render a decision on the merits of the appeal from the TC decision, then it seems that the Co-Investigating Judges request for a closer look to the legal elements of the 'genocide' charge was never fulfilled.

It is widely known that the PRT has long been regarded by the international community as a show trial, which becomes immediately apparent to anyone who considers the facts surrounding the PRT's establishment and its proceedings. In practical terms, considering

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<sup>207</sup> *Ne bis in idem* supplement (n 198) p. 11 para. 27.

the PRT capable of constituting a successful claim to *ne bis in idem* before the ECCC sounds absurd. Both the PTC and TC failed, however, to adequately justify this in legal terms. The fault here is arguably with the drafters of the ECCC for excluding a *ne bis in idem* provision. This unfortunately resulted in much confusion concerning the applicable governing rules and elements of the principle. Designers of future hybrid and internationalised tribunals should provide for this situation expressly, particularly where there is a previous decision affecting an individual likely to fall within the tribunal's personal jurisdiction.<sup>208</sup> It may be a lesson learned, but at the expense of the Cambodian people. If these procedural issues were originally and clearly stated in the ECCC Law, then proceedings would not be further delayed, the implications of which will be discussed in the following chapter.

## **PART V**

### **Statute of limitations**

#### **5.1 Theoretical introduction**

In many states the passage of a certain period of time constitutes a bar to criminal prosecution.<sup>209</sup> In some states, where a final sentence pronounced for a crime has not been served after a certain number of years then the sentence will no longer be valid.<sup>210</sup> The rationale behind this principle is that the passage of time renders the collection of evidence very difficult.<sup>211</sup> It is also believed that sometimes it is better for society to just forget and not to dwell in the past. Additionally, the deterrent effect of criminalisation usually dwindles with passing time until it reaches naught.<sup>212</sup> In practical terms, victims and their

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<sup>208</sup> Williams (n 147) p. 390.

<sup>209</sup> Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford University Press 2007) p. 516 .

<sup>210</sup> Cassese (n 6) p. 313. Every statute of limitation will specify the time frame within which it operates and list the crimes to which it applies.

<sup>211</sup> Zahar and Sluiter (n 209) p. 517.

<sup>212</sup> Cassese (n 6) p. 313.

relatives will also be less inclined over time to demand the prosecution and punishment of crimes.<sup>213</sup>

Statute of limitations essentially only applies within civil law systems, and even within these systems the rules governing statutory limitations for international crimes varies greatly.<sup>214</sup> Where many civil law states provide that international crimes should not be subject to statutory limitations<sup>215</sup>, Colombia provides a 30-year statute of limitation for torture, genocide and enforced disappearance.<sup>216</sup> Italy also provides for a 20-year statutory limitation to war crimes, crimes against humanity and genocide.<sup>217</sup> Other civil law systems provide for arbitrary distinctions between the core international crimes that are subject to statutory limitations. France, for example, provides statutory limitations to war crimes but not to crimes against humanity or genocide.<sup>218</sup> Both the Albanian and Estonian legal systems provide for the imprescriptibility of war crimes and crimes against humanity, but not for genocide.<sup>219</sup> Similarly, the Armenian and Chilean legal systems provide for the imprescriptibility of genocide and war crimes, excluding crimes against humanity.<sup>220</sup> These wide discrepancies in state practice exemplify how a customary rule has yet to emerge providing for the imprescriptibility of international crimes.

This inconsistent state practice can also be attributed to the scarcity of international treaties or regulations standardizing statutory limitations for international crimes. The few international treaties that do exist have an extremely low ratification rate. These treaties are

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<sup>213</sup> *ibid.*

<sup>214</sup> Zahar and Sluiter (n 209) p. 517. It should be remembered for the purpose of this discussion that Cambodia is a civil law system.

<sup>215</sup> Civil law states that have provided for the non-applicability of statutory limitations to crimes against humanity, genocide and war crimes in their national legislation include: Argentina (Article 11 of the Law on the Implementation of the ICC Statute 2006); Bosnia and Herzegovina (Article 19 of the 2003 Criminal Code) and; the Republic of Korea (Article 6 of the ICC Act 2007).

<sup>216</sup> Zahar and Sluiter (n 209) p. 158.

<sup>217</sup> Cassese (n 6) p. 313.

<sup>218</sup> Article 213(5) of the 1994 French Penal Code.

<sup>219</sup> Article 67 of the 1995 Military Penal Code of Albania; Article 81(1)(5) of the 1992 Penal Code of Estonia.

<sup>220</sup> Article 75(6) of the 2003 Penal Code of Armenia; Article 250 of the 2000 Code of Criminal Procedure of Chile.

limited to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968 Convention) and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. The former is ratified by only 48 states, and the latter pertaining to European member states is ratified by only 3. Since the codification of the imprescriptibility of international crimes in Article 29 of the Rome Statute, some states have implemented national rules to reflect this Article.<sup>221</sup> It is hoped that this development will continue a more uniform national practice will ensue in the following years.

As well as this, very few international courts or tribunals have addressed this issue. The statutes of the ICTY, ICTR, SCSL and STL have all excluded provisions pertaining to statutory limitations. It is only the statutes of the ECCC, the Iraqi High Tribunal (IHT) and the East Timor tribunal that have included provisions on statutory limitations for war crimes. That the ECCC and IHT statutes contain rules governing statutory limitations is unsurprising as both have temporal jurisdiction that extends back over 30 years.<sup>222</sup> The East Timor tribunal, however, was established in less than one year after the atrocities commenced and its inclusion of statutory limitations is therefore both very progressive and commendable.<sup>223</sup> Far from the ECCC being credited for its inclusion of statutory limitations within the ECCC Law, the relevant provisions raises more questions than it addresses. These ECCC Law provisions and the cases that addressed the provisions will be discussed in the following section.

## **5.2 Statute of limitations and the ECCC**

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<sup>221</sup> See Argentina and the Republic of Korea above (n 195).

<sup>222</sup> Article 1(b) of the Law of the Supreme Iraqi Criminal Tribunal No. 10 of 2005 gives the tribunal jurisdiction over crimes that were committed since 17 July 1968 up until, and including, 1 May 2003. For the temporal jurisdiction of the ECCC see Part 2.3 of this thesis.

<sup>223</sup> Section 16 of the Regulation no. 2000/15 adopted by the UN Transitional Administration in East Timor provides that genocide, war crimes, crimes against humanity and torture 'shall not be subject to any statute of limitation.' Other crimes under the panel's jurisdiction, such as murder and sexual offences, remain subject to the applicable law.

Most of the disputes arising before the ECCC concerning rules on statutory limitations pertained to their application to national ordinary crimes. As this is outside the scope of this thesis, only the claims pertaining to international crimes will be discussed.

Article 4 of the ECCC Law provides the non-applicability of statutory limitations to the crime of genocide;<sup>224</sup> Article 5 provides the same for crimes against humanity. Similar to the inconsistency seen above regarding statutory rules for international crimes within different civil law systems, the ECCC Law does not contain any provision providing for the imprescriptibility of war crimes. Article 6 therein outlines the court's subject-matter jurisdiction over grave breaches of the Geneva Conventions, but intentionally excludes any reference to their imprescriptibility, or otherwise. What was this intention of the drafters and why did they seemingly arbitrarily provide that crimes against humanity and genocide are imprescriptible but not war crimes? Unfortunately, there seems no clear answer to this. The UN Agreement, although addressing the issue of amnesties, provides no mention of statutory limitations. Again, similar to the absence of any provision on *ne bis in idem*, it is perplexing that the ECCC expressly excludes statutory limitations from Article 6 as the issue was also certain to arise during proceedings with most of those accused indicted for war crimes.

As was anticipated, counsel for the defence in Case 002 raised this matter as a preliminary objection to the ECCC's subject-matter jurisdiction for war crimes.<sup>225</sup> The defence argued that the omission of statutory limitations from Article 6, and its inclusion in Articles 4 and 5, denotes the application of statutory limitations to war crimes.<sup>226</sup> They further submit that the domestic time period of 10 years applicable for felonies under Article 109 of the Penal

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<sup>224</sup> The preamble to the 1994 legislation also provides that 'the crime of genocide has no statute of limitations.'

<sup>225</sup> Sary's defence raised this objection but he died before the TC could consider the issue. Chea and Samphan subsequently filed submissions adhering to Sary's objections. Trial Chamber decision on Defence Preliminary Objection Regarding a Statute of Limitations for Grave Breaches of the Geneva Conventions of 12 August 1949, E406/6, 31 October 2014.

<sup>226</sup> *ibid* p. 3 para. 3.

Code should also apply to grave breaches, and that this time period has expired and jurisdiction is barred.<sup>227</sup> The defence finally submit that the Cambodian legal system was drafted to model the French legal system, which also expressly excludes statutory limitations for war crimes.<sup>228</sup>

The TC began its discussion by noting that the Penal Code does not address war crimes and nor does it limit their prosecution.<sup>229</sup> The Chamber continued that grave breaches cannot be equated with national felonies as international crimes exist outside the domestic framework of crime classification.<sup>230</sup> Therefore, prosecutions of war crimes must be based exclusively on international law. The TC held that the absence of a reference to statutory limitations in Article 6 does not necessitate the conclusion that statutory limitations should apply.<sup>231</sup> The Chamber instead turned to customary law and the Geneva Conventions, where it held that no such temporal limitation existed for the prosecution of grave breaches.<sup>232</sup> For this reason, jurisdiction for the prosecution of grave breaches was held not to be statutorily barred. The TC additionally commented that the argument about the French legal system unconvincing but failed to offer any alternative suggestions.<sup>233</sup> It therefore remains unknown the reasons for this deliberate exclusion in the ECCC Law.

What is quite surprising is that the TC, in assessing relevant customary international law, did not refer to Cambodia's treaty obligations under Article 29 of the Rome Statute to refrain from imposing statutory limitations to war crimes.<sup>234</sup> This positive obligation would seem more convincing than simply arguing that the court cannot find anywhere that statutory limitations are applicable to war crimes and for this sole reason that their prosecution is not statutorily barred. What is most surprising, however, is that throughout

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<sup>227</sup> *ibid.*

<sup>228</sup> *ibid.* See discussion on the French Penal Code above (n 198).

<sup>229</sup> *ibid.* p. 5 para. 8.

<sup>230</sup> *ibid.* p. 7 para. 10.

<sup>231</sup> *ibid.* p. 6 para. 9.

<sup>232</sup> *ibid.* para. 8.

<sup>233</sup> *ibid.* p. 7 para. 11.

<sup>234</sup> Cambodia ratified the ICC on 7 January 2002.

this TC decision neither the defence nor the prosecution referred to the relevant CPC provisions. Article 9 CPC entitled ‘imprescriptible crimes’ provides that ‘a crime of genocide, a crime against humanity and war crime has no statute of limitations.’ The reason for the inapplicability of the Penal Code, that it did not address that grave breaches, clearly does not apply for the CPC. This author cannot see any other reason why this relevant provision has not arisen throughout the arguments, as direct application of Article 9 CPC would seem to resolve the matter and allow for the prosecution of grave breaches. As was seen in Part IV of this thesis, both the PTC and TC centred most of their discussion on the CPC provisions and their application.

Unfortunately for the purpose of this thesis, there has been no further discussion on this as the TC severed all discussion of grave breaches into Case 002/02, where it is likely the issue will resurface.<sup>235</sup> This issue has already arisen in Case 003, where the defence has filed an *amicus curiae* brief concerning statutory limitations for grave breaches.<sup>236</sup> Case 004 is also likely to discuss the matter as the introductory submissions also allege the commission of grave breaches.

It therefore remains to be seen whether either the ICC or CPC provisions will be argued in Cases 003 and 004. It can only be hoped that the TC will put forward a more convincing argument for why it should pursue the prosecution of such serious crimes that could carry potential life sentences. Otherwise, this arbitrary distinction between the core international crimes could serve against the development of a customary international rule providing for the imprescriptibility of all international crimes.

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<sup>235</sup> As mentioned in Part 2.2.2, evidence is still being testified for Case 002/02 with no mention of when proceedings will begin.

<sup>236</sup> Trial Chamber, *Amicus Curiae* Brief Concerning the Statute of Limitations for Grave Breaches of the Geneva Conventions, E306/3, 14 May 2014.

### **5.3 Effect of the delay on proceedings and efforts to ensure accountability**

In summary, rules on statutory limitation exist because prolonged delay in proceedings is thought to affect the quality of evidence, reduces the likelihood of deterrence and inhibits society's reconciliation efforts. Overall, this delay is believed to hinder any attempts at ensuring accountability for the perpetration of crimes. As has been shown above, so far the ECCC Chambers has ruled out the possibility that any of the crimes falling under its jurisdiction are time-barred. What then is the effect that this delay has had on proceedings? Would the imposition of statutory limitations have better served the interests of justice or has the ECCC successfully managed to counter any implications arising from this delay?

The biggest implication has arguably been the effect on evidence, as the aging of former KR leaders has proved to be a major obstacle for the court. Sary is one of four that has died before being tried by the ECCC.<sup>237</sup> There remains a justifiable fear that the two accused in Case 002/02 may also not survive to be tried and hear the verdict.<sup>238</sup> Most worrisome, however, are Cases 003 and 004 where the closing orders have not even been issued yet and it will presumably take a few more years until the cases are finally settled. Not only is the aging of those accused problematic for the court, but so too is the aging of the victims and witnesses as this renders the collection of evidence even more difficult. Although this has been challenging for the ECCC, proceedings have not yet been inhibited purely because of evidentiary difficulties.

Not only was there a delay in the establishment of the ECCC but as this thesis has demonstrated, deliberations over procedural claims were also drawn out over a number of years. Although these claims were not successful, it was time consuming for the claims to be heard and contested. It was not only these claims pertaining to international crimes that

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<sup>237</sup> Pol Pot is the most notorious of these examples. Ta Mok, a high-ranking KR official, died in pre-trial detention in 2006. Sou Met from case 003 died in 2014. Additionally, Thirith was deemed unfit to stand trial in Case 002 due to dementia, a disease caused by old age.

<sup>238</sup> Lambourne (n 14) p. 32.

were so lengthy to conclude, but so too were the procedural claims pertaining to the domestic crimes under the ECCC's jurisdiction. In particular, deliberations over procedural claims in the case of Sary expanded over four years.<sup>239</sup> Had this process not taken as long, perhaps Sary could have lived to hear a determination of his guilt before the TC. Two judges of the Supreme Court Chamber even took the time to specifically address the issue of delay.<sup>240</sup> They reflected that proceedings have proved to be lengthy and that 'Case 001 lasted for eight months, with a further nine months before issuance of the trial judgement' and 'Case 002(...) concerns a far broader scope of factual allegations [and] is estimated to last for at least another four years'.<sup>241</sup> This resulted in months of case preparation for solely procedural issues, which is time that should have been spent developing the substantive arguments.

As it is difficult to quantify, as of yet, whether these proceedings has served as a deterrence to potential criminals or whether it has slowed the reconciliation process, the answers to the above questions are therefore subjective. Some argue that justice delayed is justice denied, with Menzel arguing that full justice is an impossible goal with the time gap of 30 years.<sup>242</sup> It is also this author's belief that the drafters of the ECCC Law could have prevented the ensuing procedural delays. As concerns regarding *ne bis in idem* and statutory limitations were almost certain to arise, the drafters should have included provisions in the ECCC Law delineating these procedural rules as they had done with amnesties. This has given rise to the contention that although the approach of the ECCC is not much, it is probably better than nothing.<sup>243</sup> Nevertheless, it is this author's firm belief that those arguing that the ECCC is a wasted effort underestimate the value of allowing victims to tell their story,

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<sup>239</sup> The pre-trial detention order was issued against him in 2007 and the TC issued its decision on Sary's preliminary objections on the issues of *ne bis in idem* and amnesties in November 2011.

<sup>240</sup> Dissenting Opinion of Judges Klonowiecka-Milart and Jayasinghe in the Supreme Court Chamber Decision on Ieng Sary's Appeal Against Trial Chamber's Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne bis in idem* and Amnesty and Pardon), E51/15/1/2.1, 20 March 2012.

<sup>241</sup> *ibid* p. 1 para. 2.

<sup>242</sup> Menzel (n 46) p. 224.

<sup>243</sup> *ibid*.

creating a historical record and having a guilty record to at least counter the prevailing sense of impunity.

#### **5.4 Concluding observations**

As the drafters of the ECCC intentionally did not address whether statutory limitations apply to grave breaches, they instead left the problem in the hands of the Chambers. The TC's response to this preliminary objection was brief and seemed to presuppose an attitude that statutory limitations to grave breaches was implausible. The TC could have substantiated its arguments by incorporating both provisions of the CPC and the Rome Statute and perhaps these provisions will be addressed by the Chambers in ongoing cases.

The answer to whether the imposition of statutory limitations would have better served the interests of justice is a subjective one. It is without doubt that the ECCC faces significant evidentiary hurdles resulting from the 30 year delay in the court's establishment. As now most of the procedural issues have already been addressed and deliberated, it can only be hoped that the remaining cases will be conducted in a speedier fashion. It is hoped above all that the defendants will all survive a determination of their guilt.

## **PART VI**

### **CONCLUSION**

This thesis has attempted to show and explore the legal impediments to jurisdiction with which the ECCC was faced. In attempting to answer earlier questions of whether the ECCC has successfully managed to overcome these hurdles, the review is mixed. Many of the procedural challenges that arose before the court could have been rectified by the drafters of the ECCC Law. It has been seen from Parts IV and V particularly that this statutory ambiguity led to time consuming debates and uncertainty from all the parties. What was arguably most contested was whether the national or procedural rules contained the applicable standards. Although this is perhaps a challenge pertaining to all internationalised

tribunals, again the drafters could have made the distinctions between the two standards more explicit. They did have over 10 years during negotiations to deliberate these issues.

Nevertheless, despite the many hurdles that the Chambers faced, their response is overall commendable as have done the best with what little guidance they were given. The Chambers succeeded in preventing these challenges from according impunity to perpetrators of some of the worst crimes in recorded history. Many of the Court's arguments were progressive and valuable for their contribution toward customary international law and helpful for future internationalised tribunals that are likely to arise. It can only be hoped that the drafters of these future tribunals will also learn from the careless mistakes that could have been avoided at the ECCC. Although none of these challenges were successful, they were extremely time-consuming. This resulted in the death of several KR leaders before the substantive arguments were ever reached. It could be argued that this in itself has resulted in their impunity but it should be remembered that these leaders died in detention where some of them had been for over a decade. It is evident that the ECCC will continue to face these procedural issues, as they are already resurfacing in subsequent cases. The strict, relentless and adamant approach adopted by the various court chambers leads this author to believe that accountability will be achieved regardless of what barriers the ECCC faces next.

## Table of reference

### International treaties and conventions:

APII to the Geneva Conventions	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.
East Timor Statute	UN Transitional Administration for East Timor (UNTAET) Regulation No.2000/15 of 6 June 2000 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, UNTAET/REG/2000/15.
ECCC Agreement	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, signed June 6 2003, entered into force 29 April 2005, (draft Agreement annexed to GA Res. 57/228B).
ECCC Law	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, dated 27 October 2004.
ICJ	Statute for the International Court of Justice (ICJ) (adopted 26 June 1945, entered into force 24 October 1945).
ICCPR	International Covenant on Civil and Political Rights 1966, 999 UNTS.
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia, May 23rd 1993, Annexed to SC Res. 827(1993) (with later amendments).
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda, November 8th 1994, Annexed to SC Res. 955(1994) (with later amendments).

IHT Statute	Law of the Supreme Iraqi Criminal Tribunal No.10 of 2005.
Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135.
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Times of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 2 January 1951) UNGA Resolution 260 (A) III.
SCSL Statute	Statute of the Special Court for Sierra Leone, 16 January 2002. UNSC Resolution 1315 (2000).
STL Statute	Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, Special Tribunal for Lebanon, 16 February 2011.
Nuremberg Charter	Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 82 UNTS 279.
Rome Statute	Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 38544.

### **ECCC judicial decisions and documents**

Closing Order, Nuon Chea and others (002/19-09-2007/ECCC-D427), Office of the Co-Investigating Judges, 15 September 2010

ECCC Internal Rules, adopted on 12 June 2007

Ieng Sary's Supplement to his rule 89 preliminary objection (*ne bis in idem*), E51/11, 27 May 2011

Ieng Sary's Supplement to his Rule 89 Preliminary Objection (Royal Pardon and Amnesty), E51/10, 27 May 2011

Pre-Trial Chamber Decision on Appeal against Provisional Detention Order of Ieng Sary, C22/I/73, 17 October 2008

Pre-Trial Chamber Decision on Ieng Sary's Appeal against the Closing Order, D427/1/30, 11 April 2011

Provisional Detention Order for Ieng Sary, 14 November 2007, C22

Trial Chamber, *Amicus Curiae* Brief Concerning the Statute of Limitations for Grave Breaches of the Geneva Conventions, E306/3, 14 May 2014

Trial Chamber Decision on Ieng Sary's Rule 89 Preliminary Objections, E51/15, 3 November 2011

Cambodian documents

Constitution of the Kingdom of Cambodia, 21 September 1993

The Criminal Procedural Code of the Kingdom of Cambodia 6 August 2007

Decree Law No.1 of 15 July 1979 establishing the PRT

Law on the Outlawing of the 'Democratic Kampuchea' Group, Reach Kram No.1, NS 94, 15 July 1994

Royal Decree, E5118.1, 14 September 1996 (Original Khmer version in D366/7.1.191).

### **Other cases**

Prosecutor v. Tadić IT-94-1, Trial judgement of the ICTY May 7th 1999

### **Books**

Amer Ramses, *The Sino-Vietnamese Approach to Managing Boundary Disputes* (International Boundaries Research Unit 2002)

Cassese Antonio, *International Criminal Law* (3rd edn., Oxford University Press 2013)

Curtis Grant, *Cambodia Reborn? The Transition to Democracy and Development* (Washington: Brookings Institution Press and the United Nations Research Institute for Social Development (UNRISD) 1998)

De Nike Howard, Quigley John and Robinson Kenneth, *Genocide in Cambodia, Documents from the Trial of Pol Pot and Ieng Sary* (University of Pennsylvania Press 2000)

Fleck Dieter, *The Handbook of International Humanitarian Law* (3rd edn., Oxford University Press 2013)

Evan Gottesman, *Cambodia After the Khmer Rouges; Inside the Politics of Nation Building* (New Haven: Yale University Press 2003).

Schabas William, *Unimaginable Atrocities* (Oxford University Press 2012)

Shawcross William, *Sideshow: Kissinger, Nixon and the Destruction of Cambodia* (Simon and Schuster 1986)

Williams Sarah, *Hybrid and Internationalised Criminal Tribunals* (HART 2012)

Zahar Alexander and Sluiter Göran, *International Criminal Law: A Critical Introduction* (Oxford University Press 2007)

### Book Chapters

Etcheson Craig, 'The Politics of Genocide Justice in Cambodia' in Cesare Romano, André Nollkaemper and Jann Kleffner, *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia* (Oxford University Press 2004)

Herman Johanna, 'Peacebuilding and Transitional Justice in Cambodia: Attempts at DDR and the Rise of Victim-Centred Justice' in Chandra Sriram et al. *Transitional Justice and Peacekeeping on the Ground: Victims and ex-Combatants* (Routledge 2013)

Damien Vandermeersch, 'Droit Belge' in Antonio Cassese and Mireille Delmas-Marty, *Juridictions Nationales et Crimes Internationaux* ( Presses Universitaires de France 2003)

### **Articles**

Beachler Donald, 'The Quest for Justice in Cambodia: Power, Politics and the Khmer Rouge Tribunal' (2014) 8 *Genocide Studies and Prevention: An International Journal*

Bernard Diane, 'Ne bis in idem- Protector of Defendants' Rights or Jurisdictional Pointsman?' (2011) 9(4) *Journal of International Criminal Justice*

Form Wolfgang, 'Justice 30 Years Later? The Cambodian Special Tribunal for the Punishment of Crimes against Humanity by the Khmer Rouge' (2009) 37(6) *Routledge*

Glaspay Padraic, 'Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia' (2008) 21 (1) *Harvard Human Rights Journal*

Horsington Helen, 'The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal' (2004) 5(2) *Melbourne Journal of Internatioanl Law*

Lambourne Wendy, 'Justice After Genocide: Impunity and the Extraordinary Chambers in the Courts of Cambodia' (2014) 8 *Genocide Studies and Prevention: An International Journal*

Linton Suzannah, 'Putting Cambodia's Extraordinary Chambers into Context' (2007) XI *The Singapore Year Book of International Law*

Menzel Jörg, 'Justice Delayed or Too Late for Justice? The Khmer Rouge Tribunal and the Cambodian "Genocide" 1975-79' (2007) 9(2) *Journal of Genocide Research*

Naqvi Yasmin, 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 *International Committee of the Red Cross*

Osiel Mark, 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 *Human Rights Quarterly*

Pedretti Ramona, 'Immunity of Heads of State and State Officials for International Crimes' (2014) 69 *BRILL*

Perry Robin, 'The Nature, Status and Future of Amnesties under International Criminal Law' (2011) 18 *Australian International Law Journal*

Reiter Andrew, 'Examining the Use of Amnesties and Pardons as a Response to Internal Armed Conflict' (2014) 47(1) *Israeli Law Review*

Roberts David, 'Cambodia Cofounds the Peacemakers' (2002) 96(1) *American Political Science Review*

Selbmann Frank, '1979 Trial of the People's Revolutionary Tribunal and Implications for ECCC' (2016) 6 International Criminal Justice Series

Slye Ronald, 'The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violations of Human Rights' (2004) 22(1) Wisconsin International Law Journal

### **UN documents**

UNSC Res 827 (25 May 1993) UN Document S/RES/827

UNSC Res 955 (8 November 1994) UN Document S/RES/955

UNSC (28 February 1992) Resolution S/RES/745

UNGA Resolution 52/135 (16 March 1999) 52nd session, UN Document A/RES/52/217

### **Internet Resources**

ICRC website [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule160](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule160)  
(last accessed 7 November 2016)

ECCC website <https://www.eccc.gov.kh/en> (last accessed 30 November 2016)

ICC press release <https://www.icc-cpi.int/Pages/item.aspx?name=ma206> (last accessed 28 November 2016)

ECCC press release <https://www.eccc.gov.kh/en/articles/supreme-court-chamber-quashes-part-convictions-affirms-life-imprisonment-nuon-chea-and-khie> (last accessed 20 November 2016)