E51/13

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' COMBINED RESPONSE TO IENG SARY'S SUPPLEMENTS TO HIS RULE 89 OBJECTION (*NE BIS IN IDEM* AND ROYAL PARDON AND AMNESTY)

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I. INTRODUCTION

1. On 27 May 2011, Ieng Sary through his Defence (the "Defence") filed two supplements to his Rule 89 objection, on the issues of his "Royal Pardon and Amnesty"[1] ("RPA") and "*Ne Bis In Idem.*"[2] In this combined Response, the Co-Prosecutors maintain their position that both Preliminary Objections be dismissed.

II. NE BIS IN IDEM

A. Introduction

2. On 12 May 2011 the Trial Chamber invited the Defence to file supplementary submissions in relation to their preliminary objection concerning the prohibition against multiple prosecutions for the same offence (*ne bis in idem*). The Chamber indicated two areas for the Defence to consider : (1) the issue of whether the 1979 trial by the People's Revolutionary Tribunal ("PRT") was conducted in conformity with basic fair trial standards;[3] and (2) the *ne bis in idem* principle limited to addressing the Pre-Trial Chamber's ("PTC") Decision on Ieng Sary's Appeal Against the Closing Order[4] ("Appeal Decision") if it gave rise to new arguments.

B. Conformity of the 1979 Trial with Basic Fair Trial Standards

3. In their submission the Defence took no position as to whether the 1979 trial was in conformity with basic fair trial standards other than stating they "never claimed it was a model trial" and it was not relevant for the Trial Chamber to consider on a proper application of the Cambodian Criminal Procedure Code ("CCPC") and the International Covenant on Civil and Political Rights ("ICCPR"). In response, the Co-Prosecutors adopt their previous submissions[5] and the findings of the PTC.[6]

4. The 1979 trial was not a "trial" in the legal sense: the Peoples Revolutionary Tribunal was not established by law, but rather by executive decree, nor one capable of rendering "judicial" decisions. It was not presided over by judges and was manifestly neither

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1 Document **E51/10**, Ieng Sary's Supplement to His Rule 89 Objection (Royal Pardon and Amnesty), 27 May 2011, ERN 00700406-00700421 ("RPA Submission")

2 Document **E51/11,** Ieng Sary's Supplement to His Rule 89 Objection (*Ne Bis In Idem*), 27 May 2011, ERN 00700489-00700502, ("*Ne bis in idem* Submission")

3 Document **E51/9**, Additional Preliminary Objections Submissions (*Ne bis in idem)* Memorandum, 12 May 2011, ERN 00687381.

4 Document **D427/1/30**, Decision on Ieng Sary's Appeal Against the Closing Order, 11 April 2011, ERN 00661785-00661994, ("Appeal Decision")

5 Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, D427/1/17 at ERN 00626572–3, [77]–[79].

6 Appeal Decision at ERN 00661855–63.

independent nor impartial.[7] It therefore does not fall within the scope of the *ne bis in idem* rule as enunciated by the PTC, nor any other formulation of that rule.

5. Although the Defence did not take a position on the 1979 trial's conformity to basic fair trial standards they made some observations. They noted that the issue of fair trial was not raised at the time of Ieng Sary's pardon in 1996; that, to the extent that there were issues with that trial, they are issues which exist in the ECCC today (particularly in relation to judicial independence); and that the non-separation of powers is a feature of communist governments that still exist today. In the Co-Prosecutor's submission these issues are irrelevant.

6. Whether or not King Sihanouk or the 1996 Cambodian Government recognised that the trial was unfair, or even turned their minds to it, does not change the trial's legal status. The Defence has adduced no evidence that anyone thought the trial to be fair, and even if they did, this does not throw any doubt on the objective evidence considered by the PTC.

7. The Defence notations regarding the separation of powers cover but one small part of what made the 1979 trial unfair. The Defence does not contest the findings that the Accused's guilt was pre-determined by the Decree law, the President of the Tribunal and that the length of the trial supports this view of pre-determination; witnesses were "stage managed"; the appointed Defence counsel showed bias and acted improperly; and no evidence was offered in defence. These factors in and of themselves show that the trial was not independent or impartial.

8. As to the standard of separation of powers required, neither the standards in the ECCC nor China are relevant to this determination. The PTC evaluated the lack of independence of the 1979 Judges and People's Assessors on the basis of their statements as to the Accused's guilt; their positions as Government ministers; and their testimony against the Accused as victims or witnesses. They additionally found that the tribunal was not set up according to law, but rather by executive decree. They made this evaluation against standards established by the Human Rights Committee, the UN General Assembly, the International Criminal Tribunal of the Former Yugoslavia, the European Court of Human Rights and this Court. The fact that these standards are not universally observed does not lessen their status.

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[7] Appeal Decision at ERN 00661863

9. Moreover, it is a chimera to attempt to equate the 1979 trial with the ECCC. Given that the 1979 PRT was not a court established "by law", the President and People's Assessors were Government ministers, experts and victims, who publically proclaimed the Accused's guilt. These and the other PTC findings on the nature of the 1979 trial make it clear that the situation in that "court" in no way resembles the ECCC.

C. The Principle of *Ne Bis In Idem*

10. Contrary to the position taken by the PTC the Defence submits that the provisions of the CCPC, ICCPR and the international rules of procedure relating to the *ne bis in idem* principle prevents the prosecution of Ieng Sary.

CCPC Provisions

11. It is clear that contrary to the submissions of the Defence, Article 12 of the CCPC, which defines Article 7 *res judicata*, applies only to acquitted and not convicted persons. The PTC adopted the correct approach as it is in accordance with the ordinary meanings of each of the Articles and the CCPC as a whole. As has been accepted by the PTC[8] and the Defence in their previous submissions,[9] Article 12 defines the term "*res judicata*" as used in Article 7. This can be seen from the title of the article "*Res Judicata*", the absence of any other defining provisions, the placement of the two articles in the same chapter, and the words "In applying the principle" suggesting that this is the sole way in which the principle should be applied. The Defence has given no alternate reasons why their new interpretation to include convicted persons could be correct[10] particularly in light of the PTC's findings that other sections of the CCPC and the ICCPR protect a convicted person from being tried again for the same crimes.[11]

12. The Defence attempts to avoid this textual hurdle by arguing that *res judicata* would apply in all cases *except* where the defendant desired it not to do so,[12] an argument which has no basis in Cambodian law or logic. There is no reason to interpret the meaning of Article 12 contrary to what is provided for in the text, particularly as in this case the Accused has not undergone "the psychological, emotional, physical and monetary stress

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8 Appeal Decision, para.120.

9 Document **C22/I/26,** Ieng Sary's Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, ERN 00177270–1, nn 24, 28; Document **D427/1/6**, Ieng Sary's Appeal against the Closing Order, 25 October 2010, ERN 00617504, para.30. ("Ieng Sary Appeal")

10 *Ne bis in idem* Submission, para.6.

11 Appeal Decision, para.123.

12 *Ne bis in idem* Submission, para. 8.

associated with a criminal prosecution twice,"[13] and "adhering to the rule of law and the principle of legality"[14] would be undermined by improperly interpreting Cambodian law.

13. However, even if Article 7 stands alone, it is insufficiently specific to be capable of application. As such, in accordance with Article 12 of the Agreement and Article 33 new of the ECCC Law, recourse would still need to be had to international principles. These international principles stand ahead of dictionary definitions in interpretation, as they ensure that the trials "are conducted in accordance with existing procedures in force"[15] and "international standards of justice, fairness and due process of law."[16]

14. The alternate definition supplied by the Defence is first, an interpretation of United States law, not Cambodian law, and second, sets a standard that is not met in this case. Even if the Defence definition were accepted, it requires that the issue had been "definitively settled by judicial decision." As the Co-Prosecutors have previously submitted, the 1979 trial was not established by law or adjudicated by "judges" and moreover is not settled or final.

ICCPR Provisions

15. The Defence argument that the PTC erred in finding that the protection offered by Article 14(7) of the ICCPR has solely a domestic effect and therefore does not prevent the prosecution of Ieng Sary fails to fully take into account (1) the effect of the internationalized nature of the ECCC and (2) accepted methods of interpretation of international conventions.

16. It is clear that the ECCC although not an international court is an internationalized court which has already been confirmed by the PTC and Trial Chamber on numerous occasions.[17] The PTC has affirmed that the ECCC is 'distinct from other Cambodian

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13 *Ne bis in idem* Submission, para. 10.

14 *Ne bis in idem* Submission, para.9.

15 Art 33 new, Law on the Establishment of the Extraordinary Chambers. ("ECCC Law")

16 Art 12(2), 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. ("UN Agreement")

17 On the status of the ECCC as a domestic court, the Defence had already made lengthy submissions in their original appeal against the Closing Order (Ieng Sary Appeal, at ERN 00617494–500). The PTC found, however, that it is an "internationalised" court (Appeal Decision at ERN 00661842, 00661884–7). See also Document **CF001 C5/45,** PTC Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 4 December 2007, ERN 00154284-00154302, paras.18–20; Document **C11/29,** PTC Decision on Nuon Chea's Co-Lawyers' Application for the Disqualification of Judge Ney Thol, 4 February 2008, ERN 00160734-00160742, para.30; Document **CF002**, PTC JCE Decision, 20 May 2010, ERN 00486521-00486589, para.10; Document **CF001 E39/5,** TC Decision on Request for Release, 15 June 2009, ERN 00338831-00338846, para.11.

courts,'[18] and that it is a 'separate and independent Court with no institutional connection to any other court in Cambodia,'[19] Consequently the Co-Prosecutor's agree with the PTC that there are 'no compelling reasons...to reconsider such conclusions.'[20] The PTC has already affirmatively ruled that the ECCC is 'entirely self contained,'[21] describing the unique distinctions in the ECCC which equate it to other *ad hoc* tribunals. Consequently the unique distinctions of the ECCC from the national court system of Cambodia, already recognised by the PTC prohibit the application of the principle in Article 14(7) at the ECCC.

17. The Defence challenges the PTC's reliance on the General Comment on Article 14(7) issued by the Human Rights Committee ("HRC") which has held that the provision does not guarantee *ne bis in idem* with respect to the national jurisdictions of two or more states but only prohibits double jeopardy with regard to an offence adjudicated in a given State.[22] The Co-Prosecutors support the PTC's use of the HRC General Comments on the basis that the Vienna Convention on the Law of Treaties allows for supplementary means of interpretation in determining the meaning of an ambiguous or obscure provision in an international convention.[23] Courts have considered the use of HRC's General Comments in determining the meaning of provisions in the ICCPR.[24] In using such comments for interpretation purposes Courts have held that Article 14(7) does not apply across different jurisdictions in two determinations.[25] Consequently the PTC's reliance on the persuasive value of HRC General Comments is justified and in accordance with international law and custom.

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18 Document **CF001 C5/45**, PTC Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 4 December 2007, paras.18–20.

19 Document **C11/29**, PTC Decision on Nuon Chea's Co-Lawyers' Application for the Disqualification of Judge Ney Thol, 4 February 2008, ERN 00160734-00160742, para. 30.

20 Appeal Decision at ERN 00661886.

21 Document **CF001 C5/45**, PTC Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias "Duch", 4 December 2007, ERN 00154284-00154302, para 18.

22 Appeal Decision, para.128.

23 Art. 32(a), Vienna Convention on the Law of Treaties, 23 May 1969. Art 32 of the Vienna Convention is also deemed customary international law by the International Court of Justice, *Case Concerning Sovereignty Over Pulau Ligitan And Pulau Sipadan*, International Court of Justice, 17 December 2002, at 645, para 37.

24 *The Queen* v. *Sin Yau-Ming* (1992) 1 HKCLR 127 at 141, (1991) 1 HKPLR 89 at para 3 (Hong Kong domestic jurisprudence); *Cristián Daniel Sahli Vera et al.* v. *Chile*, Case 12.219, Report No. 43/05, Inter-Am. C.H.R., OEA/Ser.L/V/II.124 Doc. 5 (2005) at para.39-40; *Nicaragua* v. *Costa Rica,* Case 1-06, Report No. 11/07, Inter-Am. C.H.R., OEA/Ser.L/V/II.130 Doc. 22, rev. 1 (2007) at para 201; *Media Rights Agenda* v. *Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 224/98 (2000) at para 51.

25 Human Rights Committee, *General Comment No 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial*, 23 August 2007, CCPR/C/GC/32; *AP v Italy*, Communication no 204/1986, 2 November 1987; *ARJ v Australia*, Communication no 692/96, 11 August 1997.

18. In any case, the Co Prosecutors adopt by reference their previous submissions that the substantive requirements of Article 14(7) of the ICCPR — that there be a final conviction or acquittal in accordance with the law and penal procedure of the country — have not been met.[26]

International Rules of Procedure

19. At the very least, as is indicated by the HRC,[27] there is controversy over the meaning of Article 14(7) which means that it is not a properly settled principle capable of application in this case. As such, the PTC was correct in finding that the CCPC and ICCPR did not settle the issue, and a further review of the rules of procedure established at an international level was required. In doing so, the Co-Prosecutors agree that the overwhelming majority of sources cited by the PTC create a "sufficiently uniform" rule that where a fundamental defects exist in a national proceeding the *ne bis in idem* rule does not apply.[28]

III. ROYAL PARDON AND AMNESTY

A. Introduction

20. On 12 May 2011, the Trial Chamber invited the Defence to file submissions on the three following areas:[29] (1) The various translations of the Royal Pardon and Amnesty("RPA"); (2) [T]he question of whether the pardon/amnesty granted to Ieng Sary is in conformity with the Constitution; and (3) the Appeal Decision if it gives rise to new arguments.

B. Translation of the RPA

21. Having been asked by the Trial Chamber to comment on various translations of the RPA which have been either relied upon or referred to by the Parties, the Pre-Trial Chamber and the Trial Chamber - the Defence submit that the translation they have previously relied upon must be used as it is most favourable to the Accused. It is submitted by the Co-Prosecutors that although there are a number of translations, the context of the RPA provision does not vary depending on the particular translation used. Thus the exact wording of the separate translations has no overall effect on the arguments previously presented by all parties, nor on the Decisions previously rendered by the PTC. The Co-

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26 Document **D427/1/17**, Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, ERN 00626569.

27 Rights Committee, *General Comment No 32: Article 14, Right to Equality before Courts and Tribunals and to a Fair Trial*, 23 August 2007, CCPR/C/GC/32, para.19.

28 Appeal Decision, para.158.

29 Document **E51/8**, Additional Preliminary Objections Submissions (Amnesty and Pardon) Memorandum, 12 May 2011, ERN 00687378.

Prosecutors therefore maintain their previous arguments made in relation to this section of the RPA.[30] The reasoning for this position is set out below.

22. In the PTC's Appeal Decision, they noted that they relied upon a different translation to that of the Defence which used an unofficial translation published on the ECCC website.[31] The PTC stated that their translation was completed by an official translator from the Interpretation and Translation Unit ("ITU").[32] Further, the Trial Chamber attached a third version which was also translated by the ITU. The translation relied on by the Defence states in Article 1 that;

> [A] **pardon** to Mr Ieng Sary, former Deputy Prime Minister in charge of Foreign Affairs in the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and an **amnesty** for prosecution under the Law to Outlaw the Democratice Kampuchea Group, promulgated by Reach Kram No.1, NS 94, dated 14 July…[33] [Emphasis added]

23. The first difference noted by the Defence is that the PTC translation uses the word amnesty, as opposed to pardon, in the first sentence. The PTC has previously noted that in the original Khmer version, the word "amnesty" is used in both the first sentence and the second part of the Decree. The second difference relates to the Trial Chamber's translation which does not use the word amnesty at all, only pardon.

24. The Defence, as well as the PTC, Royal Government of Cambodia and the ITU,[34] have all stated that the Khmer word 'loekaentoh' means both amnesty and pardon. According to the Defence, this ambiguity could lead to an "inconsistency or absurd result."[35] The Co-Prosecutors submit that, regardless of whether the word amnesty or pardon is used the context of the RPA remains the same. In Black's Law Dictionary, the term Amnesty is defined as 'a pardon extended by the government to a group or class of persons, usually for a political offence; the act of a sovereign power officially forgiving certain classes of persons who are subject to trial but have not yet been convicted,' and the term Pardon as

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30 See, Document **E51/5/3/1**, Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, ERN 00655302-00655337; Document **D427/1/17**, Co-Prosecutors Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, ERN 00626531-00626650

31 Appeal Decision, para.188.

32 Appeal Decision, see Footnote 383.

33 RPA Submission, p.2.

34 RPA Submission.

35 RPA Submission, para.5.

'the act or an instance of officially nullifying punishment or other legal consequences of a crime.'[36]

25. The effect of the first difference raised by the Defence regards the part of the RPA which issues either a Pardon or Amnesty (depending on the translation) to Ieng Sary for his sentence of death and confiscation of all his property. The Defence submit that 'loekaentoh', which means "to lift guilt", encompasses more than a "sentence" as a sentence may be lifted without affecting a conviction of guilt. Therefore, Pardon should be preferred as it can be read more broadly than amnesty. However, they do not illustrate how Pardon can be read more broadly.

26. Such an imputed meaning would be inconsistent with the context of this section of the RPA as the section relates such Amnesty or Pardon for the sole purpose for lifting the sentence of death and confiscation of all his property imposed by the order of the PRT. The interpretation of this sentence as a whole has already been discussed by the Defence, Prosecution and decided on by the PTC.

27. The second difference the Defence raises is that by applying the translation "a pardon...for any penalty provided for" in the 1994 Law on the Outlawing of the Kampuchea Group, as applied in the Trial Chamber translation, rather than "an amnesty for prosecution under the 1994 Law" which was applied in both the Defence and PTC translations, it would lead to an absurd result.[37] It would require that there had been a trial and penalty imposed in order for the Article to take effect. While the Co-Prosecutors agree that this translation is notably different to the previous translations of the RPA, they do not consider the effect to be different. They have previously submitted that this section of the RPA relates only to any future prosecution for violation of the 1994 Law, if applicable.[38]

28. For the benefit of consistency, the Co-Prosecutors do agree that one of the translations should be accepted as official and used from this point onwards. It is submitted that the use of the word pardon in the first part of the Decree and the word amnesty in the second part reflects in English the Khmer meaning 'loekaentoh' "to lift guilt" in the most contextually accurate way. In relation to the Defence's submission that the interpretation

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36 Black's Law Dictionary, 8th Edition, Garner, B, pp. 93 & 1144

37 RPA Submission, para.6.

38 Document No. **E51/5/3/1**, "Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections", 21 March 2011, ERN 00655302-00655337, para. 42.

must be one which is most favourable to the accused it is submitted that either of the words used taken in their context of the Decree carry the same legal effect.

C. Conformity of the RPA with the Constitution

29. The Co-Prosecutors submit that whether or not the RPA is in conformity with the Constitution should not impact on their duty to determine the validity of the RPA under Article 40 new of the ECCC Law. The Co-Prosecutors refer back to their previous submissions regarding the scope of the RPA and submit that it does not prevent his prosecution before this Court.[39] As previously stated the pardon was limited to the non – enforcement of the death sentence and confiscation of property order issued by the PRT. Further the amnesty from prosecution of crimes referred to in the 1994 Law provides no bar to the prosecution of crimes that are included within the jurisdiction of this Court.[40]

30. That said, if the RPA was interpreted in such a way that it was intended to encompass the crimes Ieng Sary is charged with before this Court, this would render the RPA as invalid, due to the *jus cogens* status of these types of crimes - norms from which no derogation is permitted.[41] Consequently, any amnesty or pardon for them would be invalid under international law and would not bind this court.[42] As previously stated, the Co-Prosecutors consider that, as an internationalized Court, bound by international law and therefore required to exercise their jurisdiction in accordance with international standards of justice,[43] a domestic pardon (even if validly granted) shall not apply in respect of the prosecution of an international *jus cogens* crime before this Court.[44]

D. New Arguments Regarding PTC Decision on Appeal against the Closing Order

31. Thirdly, on the Trial Chamber's invitation to submit any "new arguments" relating to the PTC's Decision the Defence stated that the PTC erred in determining that the scope of the RPA did not protect Ieng Sary from prosecution at the ECCC. However, the Defence made this point by raising arguments that had already been presented in their Appeal against the Closing Order.[45] The PTC have already assessed these arguments and, by raising them again and stating that the PTC were wrong in their Decision, the Defence

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39 Document **D427/1/17**, Co-Prosecutors Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order, 19 November 2010, ERN 00626531-00626650, paras.61-67

40 Appeal Decision, at para. 62.

41 Article 53 Vienna Convention on the Law of Treaties, 1969

42 Document **E51/5/3/1**, Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, ERN 00655302-00655337, para. 42.

43 ECCC Agreement, article 12; Law on the Establishment of ECCC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, article 33new.

44 Appeal Decision, para.216.

45 Ieng Sary Appeal, pp.36-42

have not established any "new argument", as required by the Trial Chamber.[46] To avoid repetitive pleadings should these arguments be taken into account, the Co-Prosecutor's request that their previous submissions in respect of these arguments[47] be incorporated in this combined response.

IV. RELIEF REQUESTED

32. In view of the above reasoning, the PTC Appeal Decision and the previous Co-Prosecutors submissions on these issues it is respectfully requested that the Defence preliminary objections to the Indictment on the basis of Ieng Sary's RPA and *Ne Bis In Idem* be dismissed.

Respectfully submitted,

Date	Name	Place / Signature
7 June 2011	CHEA Leang Co-Prosecutor	Phnom Penh
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[46] Document No. **E51/8**, Additional Preliminary Objections Submissions (Amnesty and Pardon) Memorandum, 12 May 2011, ERN 00687378

[47] Document No. **E51/5/3/1**, "Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections", 21 March 2011, ERN 00655302-00655337; Document No. **D427/1/17**, "Co-Prosecutors Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals against the Closing Order", 19 November 2010, ERN 00626531-00626650