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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S SUPPLEMENT TO HIS RULE 89 PRELIMINARY OBJECTION (ROYAL PARDON AND AMNESTY)

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to the Trial Chamber's memorandum,[1] this supplement to his preliminary objection to the ECCC's jurisdiction based on Mr. IENG Sary's Royal Pardon and Amnesty ("RPA"). This supplement incorporates by reference all previous arguments concerning these issues.[2]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Trial Chamber has invited the Defence to file submissions in three areas:
   a. The various translations of the RPA which have been relied upon by the Defence and the Pre-Trial Chamber and a new translation provided by the Trial Chamber;
   b. "[T]he question of whether the pardon/amnesty granted to Ieng Sary are in conformity with the Constitution (articles 27 and 90new of the Constitution)"; and
   c. The Pre-Trial Chamber's Decision on IENG Sary's Appeal Against the Closing Order[3] if it gives rise to new arguments.[4]
2. Accordingly, the Defence makes the following submissions:

A. The translation of the RPA used by the Defence is correct and it must be interpreted in the light most favorable to Mr. IENG Sary;

B. The RPA is in conformity with the Constitution;

1. The RPA was granted in accordance with the Constitution;
2. The Constitution places no limit on crimes which may be amnestied or pardoned;
3. As a domestic court considering a domestic amnesty and pardon, Cambodia's international obligations do not affect the validity of the RPA;
4. Even if the ECCC is considered an internationalized court, the RPA is valid;

C. The Pre-Trial Chamber erred in determining that the scope of the RPA did not protect Mr. IENG Sary from prosecution at the ECCC;

1. The Pre-Trial Chamber erred in finding that the sole effect of the Pardon is to abolish the sentence Mr. IENG Sary received in 1979; and
2. The Pre-Trial Chamber erred in finding that the Amnesty does not prevent the prosecution of Mr. IENG Sary at the ECCC.

[1] Trial Chamber Memorandum re: Additional preliminary objections submissions (amnesty and pardon), 12 May 2011, E51/8 ("Trial Chamber Memorandum").
[2] *See* 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, C/22/I/26; Transcript – Provisional Detention Hearing – Days 1-4, 30 June 2008 - 3 July 2008; IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, paras. 160-69; IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 42-102 ("IENG Sary's Appeal"); IENG Sary's Reply to the Co-Prosecutors' Joint Response to NUON Chea, IENG Sary, and IENG Thirith's Appeals Against the Closing Order, 6 December 2010, D427/1/23, paras. 26-32; IENG Sary's Reply to the Combined Response by *Advocats Sans Frontières* France Co-Lawyers for the Civil Parties to the Appeals by IENG Sary, IENG Thirith's and NUON Chea Against the Closing Order, D427/1/24, paras. 28-29.
[3] Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30 ("PTC Decision").
[4] Trial Chamber Memorandum.

II. ARGUMENT

A. The translation of the RPA used by the Defence is correct and it must be interpreted in the light most favorable to Mr. IENG Sary

3. There are now at least three English translations of the RPA:
   a. The translation used by the Defence, which is the version in the ECCC Legal Compendium,[5] translated by the Royal Government of Cambodia ("RGC");[6]
   b. The translation provided by the Pre-Trial Chamber;[7] and
   c. The translation provided by the Trial Chamber.[8]
4. The major differences between these translations of Article 1[9] are:
   a. The Defence and Trial Chamber translations refer to "pardon" in the first clause of the Article, while the Pre-Trial Chamber translation refers to "amnesty,"[10] and
   b. The Defence and Pre-Trial Chamber translations refer to "an amnesty for prosecution under the [1994 Law]," while the Trial Chamber translation refers to "a pardon ... for any penalty provided for in the [1994 Law]."
5. The Defence recognizes that the Khmer version of the RPA is authoritative. There is ambiguity in the Khmer text. For example, the word "loekaentoh" has been interpreted to

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[5] The ECCC Legal Compendium is on the "G Drive," which is accessible by all parties and Chambers of the ECCC. This translation was also the first translation to be placed on the Case File. *See* D366/7.1.191.

[6] This translation was used by the Royal Government of Cambodia's Task Force for Cooperation with Foreign Legal Experts and Preparation of the Proceedings for the Trial of Senior Khmer Rouge Leaders, which worked with the international community on drafting of the law and instruments to be used at the ECCC. *See* http://www.eccc.gov.kh/en/chronlologies/royal-government-created-its-task-force-cooperation-foreign-legal-experts-and-preparat. This translation of Article 1 states:

> [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 Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994...

[7] *See* Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, ("PTC Provisional Detention Decision"), para. 27; PTC Decision, para. 185. This translation of Article 1 (translated by the Interpretation and Translation Unit ("ITU")), states:

> An amnesty 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 Democratic Kampuchea Group, promulgated by Reach Kram No.1, NS 94, dated 14 July 1994...

[8] *See* Trial Chamber Memorandum, Annex. This translation of Article 1 (also translated by the ITU) states:

> A pardon is granted to Mr. IENG Sary, former Deputy Prime Minister in charge of Foreign Affairs of the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by judgement of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979, and for any penalty provided for in the Law to Outlaw the Democratic Kampuchea Group, promulgated by Royal Kram No. 01/NS/94, dated 15 July 1994...

[9] There are minor variations in the translations of the preamble and in other articles that need not be addressed.

[10] The Pre-Trial Chamber has interpreted this as "amnesty from sentence." PTC Provisional Detention Decision, paras. 57-59.

mean both amnesty and pardon.[11] Applying certain interpretations and translations would lead to an inconsistency or absurd result.[12] In order to determine the proper interpretation and appropriate English translation of a term, it is thus necessary to consider the intent of the negotiators and drafters of the Khmer text.[13] Regardless of which translation is used, any doubt as to interpretation of any portion of the RPA must be resolved in favor of Mr. IENG Sary as mandated by the Constitution.[14]

6. Concerning the first difference, applying the translation "amnesty from sentence" in the first line of Article 1 would lead to an inconsistency with the Khmer term "loekaentoh," which means "to lift guilt." The term "guilt" in its ordinary meaning encompasses more than simply a "sentence." A sentence may be lifted without affecting a conviction of guilt. "Pardon" is the term which should be preferred as this term can be read more broadly than "amnesty from sentence."
7. Concerning the second difference, applying the translation "a pardon ... for any penalty provided for" in the 1994 Law rather than "an amnesty for prosecution under the 1994 Law" would lead to an absurd result. It would be illogical to interpret Article 1 as providing a pardon for any penalty provided for in the 1994 Law, as this would require a trial to occur and a penalty to be imposed before the Article would have any effect.
8. Since there are conflicting translations and inconsistent or absurd results would follow from applying certain translations, the intent of the negotiators and drafters of the RPA must be considered. The Defence has supplied the Trial Chamber with Mr. IENG Sary's statement explaining his understanding of the drafters' intent and his own intent.[15] It is absurd to suggest that Mr. IENG Sary intended that his sentence be pardoned if he could

[11] The Pre-Trial Chamber has determined that the term "loekaentoh" may refer to both amnesties and pardons. *See* PTC Provisional Detention Decision, para. 59. The RGC and the ITU also have translated this term has having both meanings.

[12] The Pre-Trial Chamber has previously stated that it would adhere to the grammatical and ordinary sense of the words used if this would not lead to any inconsistency or absurd result. PTC Decision, para. 193.

[13] In France, upon whose legal system Cambodia's is largely based, "[w]hen a [statutory] text is clear, it should be applied and not interpreted, unless an absurd result would follow. When a text is ambiguous or obscure [or an absurd result follows], courts look for the will of the legislature." Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195, 201–02 (2003) ("Germain, *Statutory Interpretation*"). The Defence requested the Trial Chamber to call the drafters and negotiators of the RPA in order for the Trial Chamber to determine their intent through oral testimony under oath. *See* [redacted], 9 May 2011, E85.

[14] "Any case of doubt shall be resolved in favor of the accused." Constitution, Art. 38. As the Pre-Trial Chamber explained when interpreting the RPA: "[T]he Pre-Trial Chamber finds that the second 'amnesty' in the Royal Decree can be interpreted as meaning that the Charged Person 'will not be proceeded against' in respect of the sentence given or breaches of [the 1994 Law]. The Pre-Trial Chamber will address the issue from this perspective as this explanation is the most in favour of the Charged Person." PTC Provisional Detention Decision, para. 59 (emphasis added).

[15] IENG Sary's Statement as to the Scope of, Intention behind and Background to the Royal Amnesty and Pardon, 9 May 2011, E84, Annex A ("IENG Sary's Statement").

still be re-prosecuted for the same acts. It is equally absurd to suggest that he intended to be required to undergo a second trial before he could benefit from the Amnesty granted in the RPA.

B. The RPA is in conformity with the Constitution

1. The RPA was granted in accordance with the Constitution

9. The Defence respectfully submits at the outset that the Trial Chamber does not have jurisdiction to consider the RPA's conformity with the Constitution, i.e. whether the RPA is valid. The validity of laws promulgated by the King may be reviewed for constitutionality by the Constitutional Council.[16] Other acts of the King may not be challenged by State organs. This flows from Article 7 of the Cambodian Constitution, which states that the King shall be inviolable. The Agreement and Establishment Law authorize the ECCC to determine the scope of the Amnesty, but are silent as to jurisdiction to determine validity.[17] Nonetheless, as the Defence has been invited by the Trial Chamber to address this matter, it will do so in the following paragraphs.

10. Article 27 of the Constitution places no limits on the authority of the King to grant amnesties or pardons. Nor does it place any limits on the scope of any amnesty or pardon granted. It simply states: "The King shall have the right to grant partial or complete amnesty." Article 90 (and Article 90 New) of the Constitution states that "The National Assembly shall adopt the law on the general amnesty."[18] The King granted the Amnesty[19] and the National Assembly approved the RPA by two thirds of the members;[20] the RPA was thus validly granted pursuant to the Constitution.

[16] *See* Constitution, Arts. 136 New – 144 New.

[17] *See* Agreement, Art. 11(2): "The 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"; Establishment Law, Art. 40 new: "The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."

[18] The Cambodian term used in Article 27 and Article 90 New is "loekaentoh" which may refer to both amnesties and pardons, as discussed *supra*.

[19] The King issued the RPA as a Royal Decree stating that it would take effect on the day of its signature and that it shall be fully implemented by the Council of Ministers, the Ministry of the Interior, and the Ministry of Justice. RPA, Arts. 2-3. The RPA was signed by the King on 14 September 1996 and at that time became valid law. The King never indicated that he exceeded his Constitutional authority in granting the Amnesty. If His Majesty held the belief that the RPA was invalid, he had the opportunity to clarify this when he was requested to participate in the OCIJ's investigation, an opportunity he declined. *See* Letter from International Co-Investigating Judge Lemonde to Samdech Chauvea Veang Kong Sam Ol, Vice Prime Minister of the Royal Palace, requesting to interview His Majesty the King-Father Norodom Sihanouk of Cambodia as a witness, 15 July 2009, D122/5; Second Decision on NUON Chea's and IENG Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses, 9 September 2010, D314/1/12.

[20] Clarification from H.R.H. Norodom Sihanouk, King of Cambodia, 17 September 1996. *See also Sihanouk Pardons Ieng Sary*, BANGKOK POST, 15 September 1996: "His majesty the king signed the amnesty ... with the support of two thirds of (the members of) parliament,' Second Prime Minister Hun Sen told Reuters.... Hun Sen said it had been easy to collect the signatures from MPs in the 120-member national assembly as he and First Prime Minister Prince Norodom Ranariddh were leaders of the two main parties."

11. The 1994 Law, adopted by the National Assembly, demonstrates that the National Assembly recognizes the King's right to grant amnesties to Khmer Rouge who reintegrate. Article 7 of the 1994 Law states: "The King shall have the right to give partial or complete amnesty or pardon as stated in Article 27 of the Constitution."
12. The National Assembly has approved a law which would grant absolute immunity[21] to those who may be implicated in serious crimes which occurred during the Khmer Rouge regime. For example, in 2004, the National Assembly passed a law[22] providing King Father Norodom Sihanouk life-long immunity.[23] This further indicates that the National Assembly considers such laws valid, particularly since – to the Defence's knowledge – no discernible constitutional challenges have ever arisen from the adoption of this law.

2. The Constitution places no limit on crimes which may be amnestied or pardoned

13. Nothing in the Constitution explicitly places any limit whatsoever on the crimes which may be amnestied or pardoned pursuant to Articles 27 and 90 New. No article of the Constitution may implicitly be considered to limit the crimes which may be amnestied pursuant to Articles 27 and 90 New. Article 31 of the Constitution requires Cambodia to "recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights."[24] This Article, which does not refer to amnesty, is not specific enough to be considered a limit to Article 27 or 90 New.[25]
14. The Pre-Trial Chamber found that "Cambodia, which has ratified the [International Covenant on Civil and Political Rights ("ICCPR")], also had and continues to have an obligation to ensure that victims of crimes against humanity which, by definition, cause serious violations of human rights, were and are afforded an effective remedy."[26] This

[21] Immunity is defined as: "Any exemption from a duty, liability or service of process; esp., such an exemption granted to a public official." BLACK'S LAW DICTIONARY 752 (7th ed. 1999).
[22] Law on the Arrangement for the Royal Title and the Royal Immunity to be Granted to the Former King and Queen of the Kingdom of Cambodia, promulgated 29 October 2004. Article 3 states that "King Norodom Sihanouk ... and Queen Monineath Sihanouk ... are preserved their full immunity and shall remain inviolable as during their reign." (unofficial translation).
[23] King Father Norodom Sihanouk has been linked to crimes committed in the 1950s and 1960s as well as during the Khmer Rouge regime. *See* DAVID CHANDLER, TRAGEDY OF CAMBODIAN HISTORY 112-13, 129-30, 133-34, 183, 244 (4th ed.).
[24] In 1996 when the RPA was granted, as well as today, there was nothing in these instruments which would prohibit the grant of an amnesty for international crimes, as there was no crystallized duty to prosecute international crimes. *See infra* paras. 20-23.
[25] This principle of statutory interpretation is known as *Generalia specialibus non derogant* which may be translated as "things general do not restrict (or detract from) things specific." BLACK'S LAW DICTIONARY 1639 (7th ed. 1999).
[26] PTC Decision, para. 201, *citing* ICCPR, Art. 2(3)(a): "[e]ach State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."

may be true but cannot mean that the King did not have constitutional authority to grant the RPA. A State has and must have discretion in how it affords an effective remedy to victims. An effective remedy does not necessarily require a prosecution. Even if it did, the victims of the "Democratic Kampuchea" group have not been precluded from receiving such a remedy. The RPA only protects Mr. IENG Sary from prosecution. The prosecution of other Khmer Rouge leaders is still possible.

15. Amnesties are an important tool which States may employ to promote peace; their usefulness has been noted by many scholars.[27] Professor William Schabas, for example, states that "[p]eace and reconciliation are both legitimate values that should have their place in human rights law. They need to be balanced against the importance of prosecution rather than simply discarded."[28]

3. As a domestic court considering a domestic amnesty and pardon, Cambodia's international obligations do not affect the validity of the RPA

16. The ECCC is a Cambodian court bound by the laws of Cambodia.[29] The validity of a domestic amnesty in the State where granted is purely a matter of that State's domestic law.[30] The international obligations of Cambodia, a sovereign State, are extraneous when determining the validity of the RPA in a Cambodian court.[31]

17. The Genocide Convention, the Convention Against Torture and the Geneva Conventions each oblige States to implement national legislation in order to provide for penal sanctions for persons who have committed the crimes specified in each convention.[32] Cambodia undertook this obligation by becoming a party to these conventions. A distinction must be made, however, between Cambodia's international obligations and Cambodia's obligations towards its citizens. These are two distinct legal regimes. If

[27] *See, e.g.*, William A. Schabas, *Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U. C. DAVIS J. INT'L L. & POL'Y, 145, 163-68 (2004); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 314 (2008); Louise Mallinder, *Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa*, Working Paper No. 2 from *Beyond Legalism: Amnesties, Transition and Conflict Transformation* 79 (February 2009).

[28] Schabas, *The Sierra Leone TRC and the SCSL* at 165-68.

[29] For further submissions on this issue please refer to the forthcoming supplementary submissions the Defence intends to make on this issue in its supplementary submission on the applicability of international law.

[30] As the Special Court for Sierra Leone ("SCSL") Appeals Chamber explained, "The grant of an amnesty or pardon is undoubtedly an exercise of sovereign power, which essentially is closely linked, as far as a crime is concerned, to the criminal jurisdiction of the State exercising such sovereign power." *Prosecutor v. Kallon*, SCSL-04-15-AR72(E), *and Kamara*, SCSL-04-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 ("SCSL Decision on Lomé Accord"), para. 67.

[31] This is enshrined in the Charter of the United Nations, 26 June 1945, Art. 2(7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. (emphasis added).

[32] Geneva Convention I, Art. 49; Geneva Convention II Art. 50; Geneva Convention III Art. 129; and Geneva Convention IV Art. 146; Genocide Convention, Art. 5; Convention Against Torture, Art. 4.

Cambodia has not fully performed its international obligations, this is a matter between Cambodia and the international community.[33] It does not affect Cambodia's rights or obligations towards its own people. Within the domestic legal regime, Mr. IENG Sary's RPA is valid and cannot be invalidated by any of Cambodia's international obligations. The *jus cogens* status of international crimes does not alter this analysis.[34] National jurisdictions have authority to grant amnesties and pardons for *jus cogens* crimes; such a grant of amnesty or pardon is a matter of national sovereignty and domestic law.[35]

18. The Pre-Trial Chamber stated that an amnesty for all crimes charged in the Closing Order would be inconsistent with Cambodia's international obligations to prosecute and punish the authors of such crimes. It did not find that inconsistency with international obligations would render the Amnesty invalid. Rather, it found that the King would not have intended to be inconsistent with Cambodia's international obligations.[36] The error of this analysis is addressed in the section below dealing with the PTC Decision.

4. Even if the ECCC is considered an internationalized court, the RPA is valid

19. The Pre-Trial Chamber has found the ECCC to be an "internationalised court."[37] Even if the ECCC could be considered "internationalized"[38] because of the international technical

[33] The proper course of action in this instance would be for a State to bring a case against Cambodia at the International Court of Justice. Such a case must be brought against Cambodia, as a party to the Genocide Convention, by another State party. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948, Entry into force: 12 January 1951, Article IX.

[34] Apart from the issue of Cambodia's compliance with its international obligations, the OCP has previously argued that the Establishment Law requires the ECCC to take into account certain "international standards" which it asserts would require the RPA not to be applied to *jus cogens* crimes. For a discussion of the error of this argument, *see* IENG Sary's Appeal, paras. 71-72.

[35] The Abidjan Agreement, for example, was an agreement granted within the national jurisdiction of Sierra Leone which provided a blanket amnesty for all crimes committed by the Revolutionary United Front of Sierra Leone ("RUF"). The negotiations which led to this Agreement were assisted by the Special Envoy of the UN Secretary-General for Sierra Leone, who, along with representatives of the Organization of African Unity and the Commonwealth, signed the Agreement as a moral guarantor. The international community accepted at that time that the Sierra Leonean government had the authority to grant an amnesty for purportedly *jus cogens* crimes. *See* UN Mission in Sierra Leone's website, background section, *available at* http://www.un.org/en/peacekeeping/missions/past/unamsil/background.html; Abidjan Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996, Art. 28. "The Government of Cote d'Ivoire, the United Nations, the OAU and the Commonwealth shall stand as moral guarantors that this Peace Agreement is implemented with integrity and in good faith by both parties."

[36] PTC Decision, para. 201.

[37] *Id.*, paras. 215-22.

[38] In finding the ECCC to be an internationalized court, the Pre-Trial Chamber took "guidance from the jurisprudence of other internationalised courts." *Id.*, para. 215. The Pre-Trial Chamber erred in seeking guidance from internationalized courts. Guidance as to whether the ECCC is a national, "internationalized" or an international court may be obtained from the Agreement between the RGC and the UN. Neither the RGC nor the UN intended to establish the ECCC as an international court. Reflecting the intent and results of the negotiations, the Agreement is clear that the ECCC is to be a Cambodian court. Likewise, the Establishment Law confirms that the "Extraordinary Chambers shall be established in the existing court structure..." Establishment Law, Article 2 new. For a discussion on the status of the ECCC as a domestic court and the

assistance it receives, this does not make the ECCC an international court which may apply customary international law directly.[39] The ECCC, whatever "extraordinary" structure it may possess or technical assistance it may receive, remains a Cambodian court which must apply only the law which is within its competence.[40]

20. Even if the ECCC *could* act as an international court and directly apply customary international law, this does not mean that the ECCC may hold the RPA to be invalid. There is no crystallized norm of customary international law which an international court could apply to invalidate a validly granted amnesty or pardon.[41] In 2004, the SCSL found that a norm forbidding amnesty for serious violations of international law is "developing under international law."[42] Such a norm has yet to crystallize.[43]

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implications of such status, *see* IENG Sary's Appeal, paras. 8-20. *See also* the forthcoming submissions the Defence intends to make on this issue in its supplementary submission on the applicability of international law.

[39] For a discussion of the direct application of customary law in a domestic Cambodian court, *see* IENG Sary's Appeal, paras. 111-14, 121-25.

[40] The ECCC has not been established to prosecute crimes on the basis of universal jurisdiction. It is clear from the Agreement and Establishment Law that it is a domestic Cambodian court which obtains its jurisdiction in the same way as other Cambodian courts. *See* Agreement, Art. 2; Establishment Law, Art. 2 new. *See also* Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS (July/August 2001): "Such a system [universal jurisdiction] goes far beyond the explicit and limited mandates established by the U.N. Security Council for the tribunals covering war crimes in the former Yugoslavia and Rwanda as well as the one being negotiated for Cambodia" (emphasis added). This differs from the SCSL, which was explicitly established to exercise universal jurisdiction. *See* SCSL Decision on Lomé Accord, para. 88. It was set up in this manner because following the Lomé Agreement, there were violations of the Agreement by those who had benefited from the amnesty contained within it: the fighting continued. *Prosecutor v. Sesay et al.*, SCSL-04-15-T, Judgement, 2 March 2009, paras. 908-14. Due to the continuation of the fighting, the Sierra Leonean government decided to lobby for the creation of an international tribunal. *See* UN Security Council Resolution 1315, UN Doc. No. S/RES/1315 (2000), 14 August 2000, preamble. An international tribunal would create a way around the amnesty granted in the Lomé Agreement due to the UN's caveat that it did not accept that the amnesty would apply to genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. *See* SCSL Decision on Lomé Accord, para. 89.

[41] *See, e.g.*, John Dugard, *Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?*, 12 LEIDEN J. INT'L L. 1001 (1999) ("Dugard, *Dealing with Crimes of a Past Regime*"); *Leila Nadya Sadat, Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1022 (2006) ("Sadat, *Amnesty and International Law*"). Professor Dugard states, "[S]uccessor regimes are now told by the high priests of public opinion – NGOs and scholars – not only that they *ought* to prosecute but that they are *obliged* under international law to prosecute.... The implication of this argument is that international law prohibits amnesty. This is clearly spelt out by the Trial Chamber of the ICTY in *Prosecutor v. Furundžija* which held that amnesties for torture are null and void and will not receive foreign recognition. It is, however, doubtful, whether international law has reached this stage. State practice hardly supports such a rule as modern history is replete with examples of cases in which successor regimes have granted amnesty to officials of the previous regime guilty of torture and crimes against humanity, rather than prosecute them. In many of these cases, notably that of South Africa, the United Nations has welcomed such a solution. The decisions of national courts may also provide evidence of state practice. And here it must be stressed that national constitutional courts have generally upheld the validity of amnesty laws; sometimes, as in the case of the courts of South Africa and El Salvador, expressing the view that international law not only fails prohibit amnesty but rather encourages it." Dugard, *Dealing with Crimes of a Past Regime*, at 1002-04 (emphasis added). Professor Sadat states, "The International Criminal Court Statute is explicit on certain challenges to accountability such as superior orders, head of state immunity, and statute of limitations, but is silent both as to any duty to prosecute and with regard to amnesties. Although the issue was raised during the Rome Conference at which the Statute was adopted, no clear consensus developed among the delegates as to how the question should be resolved. This too suggests that customary international law had not crystallized on this point, at least not in 1998" Sadat, *Amnesty and International Law*, at 1022 (emphasis added).

[42] SCSL Decision on Lomé Accord, para. 82 (emphasis added).

21. If crime is referred to as *jus cogens*, this status requires States not to engage in it, but does not necessarily require States to punish its commission. There is currently no norm of customary international law which requires states to punish the commission of *jus cogens* crimes.[44] If the punishment of such crimes has not attained customary international law status, the invalidity of amnesties for such crimes cannot have obtained such status. Even Dutch Prosecutor Ward Ferdinandusse, who believes that "customary international law today does impose a duty on States to prosecute all core crimes committed within their jurisdiction,"[45] has concluded that amnesty laws may be considered an exception to this duty, rather than a violation of the duty.[46]
22. The fact that the UN has never stated that the RPA is invalid and did not question its validity when it was granted or when the Agreement was negotiated is evidence that there is no crystallized norm of customary international law prohibiting amnesties for international crimes. Had the UN taken the position that the RPA was invalid, the Agreement would reflect this. The UN could have appended a caveat to the Agreement, as it did to the Lomé Agreement.[47] It did not.
23. Amnesties for international crimes have been endorsed by the UN, further demonstrating that there is no crystallized norm of customary international law against such amnesties. In 1996 – the same year as the RPA was granted – the government of Sierra Leone signed an agreement with the Revolutionary United Front of Sierra Leone ("RUF") in Abidjan

[43] *Id.* For a discussion of why the SCSL must be distinguished from the ECCC and why the SCSL's decision not to recognize an amnesty for *jus cogens* crimes does not demonstrate that amnesties for such crimes are invalid, *see* IENG Sary's Appeal, paras. 75-82. Although some States have invalidated amnesties previously granted, there is no general and consistent State practice in this regard coupled by *opinio juris*, which is necessary to form customary international law.

[44] "Besides there being no customary rule with a general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 302 (Oxford University Press 2003). For further analysis on this point, *see* IENG Sary's Appeal, paras. 126-29.

[45] WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 202 (T.M.C. Asser Press 2006) (emphasis added). He does not, however, believe this has been firmly established as a a general duty to prosecute or extradite all core crimes perpetrators. *Id.*

[46] *Id.*, at 200. Ferdinandusse notes that amnesties may be reconciled with a duty to prosecute provided the conditions of the amnesty reflect a proper balance of the different interests involved. He states that "[t]his fact is aptly demonstrated by the ICC Statute, which in a general sense recognizes the necessity to prosecute but at the same time allows for prosecutorial discretion, and is silent on the legality and effects of amnesties because the negotiating States could not reach agreement on that point." *Id.*, at 201.

[47] Following the Lomé Agreement the UN appended a handwritten caveat whereby the UN stated that it held "the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law." Security Council Resolution 1315, S/RES/1315 (2000), 14 August 2000, preamble. After having appended this caveat, the UN adopted a Resolution welcoming the Lomé Agreement and made barely any mention of its caveat. For a further discussion of the UN's attitude toward the Lomé Agreement, *see* IENG Sary's Appeal, paras. 77-79.

which provided a blanket amnesty for all crimes committed by the RUF, both national and international.[48] The UN signed this agreement as a moral guarantor.[49]

C. The Pre-Trial Chamber erred in determining that the scope of the RPA did not protect Mr. IENG Sary from prosecution at the ECCC

1. The Pre-Trial Chamber erred in finding that the sole effect of the Pardon is to abolish the sentence Mr. IENG Sary received in 1979

24. The Pre-Trial Chamber found that there is no indication the Pardon covered any sentence arising out of the acts at issue in the 1979 trial.[50] It found that reading the Pardon as an amnesty from prosecution for all acts tried in 1979 is not what the RPA intended, since the RPA is clear in referring to the 1994 Law when discussing amnesty from prosecution.[51]

25. As explained *supra*,[52] the Pre-Trial Chamber's interpretation of the Pardon as covering only the sentence is too narrow and is inconsistent with the Khmer text. The Pardon must be interpreted as lifting any guilt for the acts at issue in the 1979 trial. If the Trial Chamber determines that the interpretation of the Pardon is unclear, the intent of those who negotiated and drafted the RPA must be considered. In his statement, Mr. IENG Sary stated that "[i]t was emphasized that I must have a pardon from the 1979 sentence ... **for any acts** committed by myself, including any acts which I was tried for in the 1979 trial."[53] Mr. IENG Sary's statement provides the Trial Chamber with the clearest indication of the intent of the RPA's negotiators and drafters, in that the Pardon covered any sentence related to a conviction based on the acts at issue in the 1979 trial. Furthermore, the co-Prime Ministers, Hun Sen and Prince Ranariddh would have known that Mr. IENG Sary would not reintegrate without the proper safeguards.[54]

2. The Pre-Trial Chamber erred in finding that the Amnesty does not prevent the prosecution of Mr. IENG Sary at the ECCC

a. The Pre-Trial Chamber erred in finding that the 1994 Law does not cover all crimes in the Indictment

[48] The Abidjan Agreement ensured "that no official or judicial action is taken against any member of the RUF in respect of anything done by them in pursuit of their objectives as members of that organization up to the time of the signing of this Agreement." Abidjan Peace Agreement between the Government of the Republic of Sierra Leone and the Revolutionary United Front of Sierra Leone, 30 November 1996, Art. 14, *available at* http://www.sierra-leone.org/abidjanaccord.html.

[49] *Id.*, Art. 14.

[50] PTC Decision, para. 191.

[51] *Id.*

[52] *See supra* paras. 3-8.

[53] IENG Sary's Statement (emphasis added).

[54] It is reported that "Mr. Ieng Sary, in his press conference, said that his main goal is getting an amnesty. Only if he gets it will he be willing to continue with the talks." Amnesty for Ieng Sary, UNOSGR0690, 9-15 September 1996, para. 2.

26. The Pre-Trial Chamber found that the 1994 Law criminalizes certain offenses, such as offenses against internal security, and may also criminalize membership in the "Democratic Kampuchea" group.[55] It found that "there is no indication that prosecution for other crimes would cease to be conducted under existing criminal law, as notably confirmed by Article 3."[56] It concluded that the crimes charged in the Closing Order were not criminalized under the 1994 Law and would have continued to be prosecuted under existing law.[57]

1994 Law – Preamble

27. The 1994 Law must be considered in its entirety.[58] The Pre-Trial Chamber provides no support for its finding that "[t]he crimes charged in the Closing Order, namely genocide, crimes against humanity, grave breaches of the Geneva Conventions, and homicide, torture and religious persecution as national crimes, are not criminalized under the 1994 Law."[59] On the contrary, the preamble to the 1994 Law specifically states that the Law was enacted "[r]ealizing that the leadership of the 'Democratic Kampuchea' group can not ... conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78. The crime of genocide has no statute of limitations."[60]

28. The preamble to the 1994 Law also explains that members of the Khmer Rouge have continually committed "criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in April 1975 – forcible movement, abduction, killing and subsequently also robbery and banditry, laying mines

[55] PTC Decision, paras. 196-97, 200.

[56] *Id.*, para. 197. It also found that the Chhouk Rin judgement did not support a different interpretation. *Id.*, para. 198. The Defence will not address this point as it agrees that the Chhouk Rin judgement is most useful in determining the temporal scope of the 1994 Law. The temporal scope of the 1994 Law is not addressed herein because the Pre-Trial Chamber did not address this issue and appears to have recognized that the temporal scope of the 1994 Law includes 1975-79. The Defence is prepared to address this issue at the Initial Hearing, should the Trial Chamber find that this would be of assistance. As further evidence that the 1994 Law is intended to cover the 1975-79 period, however, it is reported that in 2000, Sam Rainsy, who had been Finance Minister in 1994 and had participated in the National Assembly debate on the 1994 Law, provided his personal assessment of the intent of the legislature when it adopted the amnesty provision. He argued that the law was intended to grant amnesty only for those crimes committed before the law was promulgated, and that the National Assembly had specifically had in mind crimes that had taken place during the period of Khmer Rouge rule from 1975 to 1979. Gina Chon & Van Roeun, *Chhouk Rin Verdict Sets Uncertain Precedent for Other KR*, CAMBODIA DAILY, 20 July 2000.

[57] PTC Decision, paras. 199-200.

[58] The 1994 Law must be considered in whole if a provision or provisions of the Law were considered unclear. The general rule is that "[w]hen a text is ambiguous or obscure, courts look for the will of the legislature. For that, a judge first examines the text itself with care, and considers commentaries written about the text. This is not limited to the provision to be applied but includes the chapter or the entire law. Often a provision is obscure only if separated from its context." Germain, *Statutory Interpretation*, at 201-02. For further explanation as to how this necessitates considering the 1994 Law's preamble, *see* IENG Sary's Appeal, para. 87.

[59] PTC Decision, para. 199.

[60] 1994 Law, preamble (emphasis added).

indiscriminately throughout the plains and forests, destroying public and private property, leading the killing of civilians, forcibly taking and illegally occupying national territory, and selling natural resources by violating the sovereignty of the Kingdom of Cambodia."[61] The crimes referred to in the 1994 Law are very wide and include the underlying acts of genocide, crimes against humanity, and grave breaches.[62]

1994 Law – Article 3

29. Article 3 of the 1994 Law states:

> Members of the political organization or the military forces of the "Democratic Kampuchea" group or any persons who commit crimes of murder, rape, robbery of people's property, the destruction of public and private property, etc. shall be sentenced according to existing criminal law.[63]

30. This Article does not limit the crimes which may be punished pursuant to the 1994 Law. It refers only to sentencing, not to prosecution. It is perfectly feasible for there to be a *lex specialis* law for prosecution, with reversion to general law for sentencing. The Pre-Trial Chamber's interpretation of this Article would make it redundant. There would be no purpose in including this provision in the 1994 Law if it simply stated something which would be true without its inclusion.[64] The Pre-Trial Chamber's interpretation would also not have been consistent with the RPA drafters' intentions, as will be more fully discussed *infra*. Mr. IENG Sary would not have intended to accept an amnesty for crimes listed in the 1994 Law if he were still liable to face punishment for crimes set out in other existing criminal law.

1994 Law – Article 5

31. Article 5 of the 1994 Law states:

> Article 5: This Law shall grant a stay of six months after coming into effect to permit people who are members of the political organization of military forces of the 'Democratic Kampuchea' group to return to live under the control of the

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[61] *Id.*

[62] This interpretation is also held by Professor Stan Starygin, who, discussing the amnesty offered in Article 5 of the 1994 Law, states: "the 1994 Law offers a broad subject matter clemency by providing that the latter will be extended to include 'crimes which they [members of the political and military organization of DK] have committed' without limiting this clause temporally or restricting it to any substantive conditions... Although there is no question that 'genocidal acts' and other crimes against humanity listed in the Preamble to the 1994 Law are classified as *jus cogens* and are punishable under customary international law, they cannot be punished in this jurisdiction [due to the amnesty given in Article 5]." Stan Starygin, *Should the Rudolph Höss of Cambodia be Entitled to the Minimum Procedural Guarantees?*, CAMBODIAN L. REV. 1, 5-6 (2007). For further discussion on the scope of the crimes covered, *see* 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, C22/I/26, paras. 26-30; IENG Sary's Appeal, paras. 40-44.

[63] Emphasis added.

[64] In the United States, the principle that a law must not be interpreted in such a way as to render it meaningless has been expressed: "Every part of an act is presumed to be of some effect and is not to be treated as meaningless unless absolutely necessary." *Raven Coal Corp. v. Absher*, 153 Va. 332, 335, (1929).

Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed.[65]

32. Article 5 of the 1994 Law allows a six month period for any Khmer Rouge members to reintegrate with the RGC without facing punishment for crimes which they have committed. Article 5 of the 1994 Law does not limit these crimes to those set out in Articles 1, 2, and 4 of the 1994 Law, but grants amnesty generally for all "crimes which they have committed." This is clear when considering the language used in Article 5 as compared to Article 4 (Article 4 refers to "commits" rather than "have committed"). Article 4 is a prospective provision which "criminalizes a specific category of offences, namely offences against the internal security of the country, characterized as 'secession', destruction against the Royal Government, destruction against organs of public authority, or incitement or forcing the taking up of arms against public authority, for which it provides specific penalties."[66] Article 5, in contrast, is retrospective, covering all crimes which members of the "Democratic Kampuchea" group may have committed in the past.

33. In support of this reading of Article 5 of the 1994 Law, to date, no one who reintegrated under Article 5 of the 1994 Law has been punished for any crimes committed when they were members of the "Democratic Kampuchea" group. If those who returned to live under the control of the government pursuant to Article 5 could still be prosecuted under existing criminal law, as the Pre-Trial Chamber has interpreted Article 3, no one would have accepted this amnesty. That could never have been the intent of these provisions.

1994 Law – Article 6

34. Article 6 of the 1994 Law states that the amnesty provided for under Article 5 is not applicable to the leaders of Democratic Kampuchea. The effect of the RPA, by referring specifically to the 1994 Law in granting the Amnesty, is to provide Mr. IENG Sary with the amnesty granted to members of the "Democratic Kampuchea" group either "under" or "imposed by"[67] Article 5 of the 1994 Law. In essence, it exempted Mr. IENG Sary from the prohibition set out in Article 6. This provided Mr. IENG Sary with amnesty from prosecution for any crime which he may have committed, as stated by Article 5 of the 1994 Law.

b. The Pre-Trial Chamber erred in its analysis of the drafters' intent

35. The Pre-Trial Chamber found that the Defence's interpretation of the Amnesty as covering all crimes which may have been committed during the "Khmer Rouge era" would infringe upon Cambodia's international obligations to prosecute and punish

[65] Emphasis added.
[66] PTC Decision, para. 196.
[67] Depending on the translation used.

perpetrators and that there is no indication that the King and others involved would not have intended to respect Cambodia's international obligations.[68]

36. The Pre-Trial Chamber erred by making this determination as to the intent of the drafters and negotiators in the abstract. It failed to consider the actual situation which led to the RPA being drafted and agreed upon. The Cambodian government had been struggling to end a lengthy civil war. This overriding domestic concern would have outweighed any abstract and theoretical debates as to whether Cambodia may possibly violate its international obligations in granting this RPA – a matter not settled in international law.[69] Prime Minister Hun Sen is reported as saying: "For the sake of the nation we had to [grant the RPA to Mr. IENG Sary]. To destroy 70% of the KR forces, we needed to pay a price too – that was the amnesty provided to Ieng Sary."[70]

37. The intent of the negotiators and drafters was that the RPA cover prosecution for all crimes allegedly committed during the Khmer Rouge period. It certainly was not Mr. IENG Sary's intent to negotiate for an amnesty that would exempt him from prosecution under certain articles of the 1994 Law, if he could still be prosecuted under other existing domestic law. The RPA made Mr. IENG Sary immune from any possible future prosecutions for any of his acts during the Khmer Rouge period.[71] It must be assumed that the King granted the RPA with the intent that the government would follow through with its agreement not to prosecute Mr. IENG Sary. Evidence of this is the fact that in August 1998, following the arrest of former Khmer Rouge member Nuon Paet for his actions as part of the Khmer Rouge, Prime Minister Hun Sen, one of the negotiators and drafters of the RPA, is reported to dispatched Cambodian Defence Minister Tea Banh to meet with Mr. IENG Sary and to reassure him that the RPA was not in jeopardy.[72]

[68] *Id.*, para. 201.

[69] *See* Argument B *supra*, for a discussion of whether granting an amnesty would violate a State's international obligations. The King, were he worried about Cambodia's international obligations, would have ensured that the government enacted implementing legislation to punish these crimes. At that time, there was no general implementing legislation which would allow for the prosecution of those who committed international crimes such as genocide and crimes against humanity. The 1994 Law could be considered implementing legislation to criminalize these crimes, but it only applied to "members of the 'Democratic Kampuchea' group."

[70] TOM FAWTHROP & HELEN JARVIS, GETTING AWAY WITH GENOCIDE: ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL 137 (Pluto Press 2004), *citing* Helen Jarvis, *Who Helped the Khmer Rouge to Survive?*, GREEN LEFT WEEKLY, No. 349, 17 February 1999.

[71] IENG Sary's Statement.

[72] John A. Hall, *In the Shadow of the Khmer Rouge Tribunal: The Domestic Trials of Nuon Paet, Chhouk Rin and Sam Bith, and the Search for Judicial Legitimacy in Cambodia*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 425 (2006).

38. An analogy can be drawn between the negotiating and drafting of the RPA and a contractual obligation.[73] This analogy would extend to a contract between the RGC (including the King) and Mr. IENG Sary. In return for Mr. IENG Sary's performance of his obligation to reintegrate himself and numerous former Khmer Rouge members with the RGC, the RGC was obliged to grant Mr. IENG Sary amnesty from any possible future prosecutions for any acts he allegedly committed or otherwise participated in as a member of the "Democratic Kampuchea" group. The RGC drafted its obligation in the form of the RPA. In contract law, where the parties attach the same meaning to the terms used in their agreement, the interpretation of the agreement should be in accord with that meaning even if a third party might interpret the language differently.[74] The negotiators of Mr. IENG Sary's Amnesty understood the term "amnesty" to protect Mr. IENG Sary from any prosecution arising from crimes which may have been committed in 1975-79.[75]

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to FIND that the Royal Pardon and Amnesty prevent the prosecution of Mr. IENG Sary at the ECCC.

Respectfully submitted,

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Signed in Phnom Penh, Kingdom of Cambodia on this **27th** day of **May**, 2011

[73] Mahnoush Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC'Y INT'L L. PROC. 65, 67 (1999).
[74] Restatement (Second) of Contracts § 201(1) (1979).
[75] The Defence has requested the Trial Chamber to call the RPA's drafters and those with knowledge of the negotiations in order to explain their actual intent. In the absence of this testimony, the Trial Chamber must rely on Mr. IENG Sary's statement and Prime Minister Hun Sen's actions in reassuring Mr. IENG Sary that his amnesty was valid. *See* [redacted] 9 May 2011, E85.