

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S MOTION TO SUMMON KING FATHER NORODOM SIHANOUK, PRIME MINISTER HUN SEN, PRINCE NORODOM RANARIDDH AND SAMDECH CHEA SIM

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves, pursuant to Rules 87(4) and 93 of the ECCC Internal Rules (“Rules”), the Trial Chamber to summon King Father Norodom Sihanouk, Samdech Akka Moha Sena Padei Techo Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim (“requested witnesses”) to testify at the Initial Hearing solely on the issue of Mr. IENG Sary’s preliminary objection to the ECCC’s jurisdiction based on his Royal Pardon and Amnesty (“RPA”). This Motion is made necessary in order for the ECCC to discern the background to, the scope of, and intention behind the RPA granted to Mr. IENG Sary in 1996. The scope of and intention behind the RPA must be known to determine whether the RPA bars Mr. IENG Sary’s prosecution at the ECCC. King Father Norodom Sihanouk, Prime Minister Hun Sen and Prince Norodom Ranariddh, along with Mr. IENG Sary, were all involved in the negotiation of the RPA. Two-thirds of the National Assembly agreed with the King Father’s decision to grant the RPA. Chea Sim was the President of the National Assembly and can testify as to what the National Assembly agreed to. Testimony from the requested witnesses is necessary to determine the background to, scope of, and intention behind the RPA.

I. BACKGROUND

1. In August 1979, Mr. IENG Sary was tried and convicted, *in absentia*, for having committed genocide, as well as many other crimes.¹ The Judgement condemned Mr.

¹ Mr. IENG Sary was tried and convicted, *in absentia*, for having committed genocide in addition to:

- I. Implementation of a plan of systematic massacre of many strata of the population on an increasingly ferocious scale; indiscriminate extermination of nearly all the officers, and soldiers of the former regime, liquidation of the intelligentsia, massacre of all persons and destruction of all organizations assumed to be opposing their regime;
- II. Massacre of religious priests and believers, eradication of religions; systematic extermination of national minorities without distinction between opponents and non-opponents, for the purpose of assimilation; extermination of foreign residents.
- III. Forcible evacuation of the population from Phnom Penh and other liberated towns and villages; breaking or upsetting of a family and social structures; mass killing and creation of lethal conditions.
- IV. Herding of people into ‘communes’ i.e. disguised concentration camps where they were forced to work and live in the conditions of physical and moral destruction, were massacred or died in large numbers.
- V. Massacre of small children, persecution and moral poisoning of the youth, transforming them into cruel thugs devoid of all human feeling.
- VI. Undermining the structures of the national economy; abolition of culture, education, and health service.
- VII. After their overthrow by the genuine revolutionary forces, the Pol Pot – Ieng Sary clique still persisted in opposing the revolution and committed new crimes in massacring those who refused to follow them. During their four years in power the Pol Pot – Ieng Sary clique have used the most barbarous methods of torture and killing.

See Judgement of the Revolutionary People’s Revolutionary Court, U.N. A/34/491, 19 August 1979, p. 3-21.

IENG Sary to death and confiscated all of his property.² Mr. IENG Sary was not in custody before, during or after the trial and so the sentence was not carried out.

2. On 15 August 1996, Mr. IENG Sary issued a declaration denouncing Pol Pot, Ta Mok, and Son Sen and announcing that he and his followers would “reunite the whole nation toward a genuine national reconciliation, which is the opposite to the irrational thoughts of bloodthirsty Pol Pot, Ta Mok, and Son Sen, who wage wars until death.”³
 3. In early September 1996, Mr. IENG Sary met with Cambodia’s two co-Defence Ministers Tea Banh and Tea Chamras in Bangkok to request an amnesty in exchange for defecting to the Cambodian government. General Tea Banh “praised Ieng Sary for his sincerity toward national reconciliation, saying his decision to end the decades-long armed struggle would eventually unite the country.”⁴ He stated, “[h]is decision is immeasurable as it helps end the fighting, saves the budget and avoids casualties”⁵ and stressed that it was only a matter of time before Mr. IENG Sary and his followers would be granted amnesty.⁶
 4. Further to the negotiations for defection, the then co-Prime Ministers, Samdech Hun Sen and Prince Norodom Ranariddh, approached the then King Norodom Sihanouk, requesting a pardon and amnesty be granted to Mr. IENG Sary. The King agreed to grant a pardon and amnesty as long as two-thirds of the National Assembly supported it.⁷ The National Assembly supported the RPA proposed by the two Co-Prime Ministers.⁸
 5. On 14 September 1996, the King exercised his lawful authority under the Constitution⁹ and granted Mr. IENG Sary a pardon for his 1979 sentence and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group (“1994 Law”).¹⁰
- The RPA states:

² *Id.*, p. 39.

³ Ieng Sary, *Ieng Sary’s 1996 Declaration*, SEARCHING FOR THE TRUTH, DC-CAM, 15 August 1996.

⁴ *Ieng Sary Bargains for Amnesty: Army Brokers Secret Talks with Ministers*, BANGKOK POST, 7 September 1996.

⁵ *Id.*

⁶ *Id.*

⁷ The King said at the time: “As a Constitutional King, who reign[s] but do[es] not govern, I will have to give satisfaction to the 2 Prime Ministers of the Royal Government of Cambodia regarding this issue of the amnesty to grant to Mister Ieng Sary and to his ‘ex’-Khmer Rouge supporters. But I will require the 2/3rd of the National Assembly members to support, in this serious ‘Ieng Sary issue’, our 2 Prime ministers before royal amnesty is formally granted to him.” Fax from H.R.H. Norodom Sihanouk, King of Cambodia, to Mr. Pierre Sané, Secretary-General of Amnesty International, 13 September 1996.

⁸ 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....”

⁹ Article 27 of the Constitution provides: “The King shall have the right to grant partial or complete amnesty.”

¹⁰ Royal Decree, NS/RKT/0996/72, 14 September 1996.

Article 1: 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;

Article 2: this Royal Decree will take effect on the day of its signature;

Article 3: the Council of Ministers, the Ministry of Interior and the Ministry of Justice shall fully implement this Royal Decree.

6. On 13 January 2011, the Pre-Trial Chamber issued its Decision on the Defence's Appeal Against the Closing Order, wherein it dismissed the Defence's submission that the RPA bars the current prosecution.¹¹ On 11 April 2011, the Pre-Trial Chamber issued its full reasoning, wherein it found that "[c]onsidering that the amnesty is solely attached to the invalid sentence pronounced in 1979, it bears no effect on the jurisdiction of ECCC to try Ieng Sary for the crimes charged in the Closing Order.¹² Furthermore, the Pre-Trial Chamber found that "the amnesty, in the case of Ieng Sary, only prevented his prosecution for the offences against State security set out in Article 4 and, arguably, for the offence of being a member of the Democratic Kampuchea group, assuming that such an offence was criminalised under Articles 1 and 2."¹³ The Pre-Trial Chamber found the RPA to be inapplicable to shield Mr. IENG Sary from prosecution at the ECCC.¹⁴
7. On 5 April 2011, the Trial Chamber informed the Defence that it will hear the issue of the RPA as a preliminary objection at the Initial Hearing.¹⁵

¹¹ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 75), Decision on IENG Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26, ERN: 00634887-00634891, p. 4.

¹² *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, ERN: 00661785-00661785, para. 194.

¹³ *Id.*, para. 200. Articles 1,2 and 4 of the 1994 Law state:

Article 1: To declare the "Democratic Kampuchea" group and its armed forces as outlaws.

Article 2: From the time this law comes into effect, all people who are members of the political organization or military forces of "Democratic Kampuchea" group shall be considered as offenders against the Constitution and offenders against the laws of the Kingdom of Cambodia.

Article 4: Members of the political organization or the military forces of the 'Democratic Kampuchea' group or any persons who commit

- secession,
- destruction against the Royal Government,
- destruction against organs of public authority, or
- incitement or forcing the taking up of arms against public authority shall be charged as criminals against the internal security of the country and sentenced to jail for 20 to 30 years or for life.

¹⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, ERN: 00661785-00661785, paras. 177-202.

¹⁵ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum from Judge Nil Nonn, President of the Trial Chamber, to All Parties, Case 002, 5 April 2011, E57/1, ERN: 00658620-00658622, p. 2.

II. APPLICABLE LAW

A. Authority of the Trial Chamber to summon witnesses

8. Rule 87(4) states in pertinent part: “During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth.”
9. Rule 93(1) states in pertinent part: “Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations.”

B. Compliance

10. Article 25 of the Agreement states that:

[t]he Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, including, but not limited to: a. identification and location of persons; b. service of documents; c. arrest or detention of persons; d. transfer of an indictee to the Extraordinary Chambers.

C. Enforcement Powers

11. Rule 93(3) states: “For the purposes of [Rule 93(1)] additional investigations, the judge(s) may issue Rogatory Letters to the Judicial Police.”
12. Article 315 of the Cambodian Criminal Procedure Code (“CPC”) states: “Witnesses shall appear before the court in compliance with the summons. The court may use public forces in order to force the witness to appear.”

D. Evidence

13. Rule 87(1) states in pertinent part: “Unless provided otherwise in these IRs, all evidence is admissible.”
14. Article 321 of the CPC states in pertinent part: “Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge’s intimate conviction.”¹⁶

E. Interpretation of law

¹⁶ Emphasis added.

15. Article 5 of the Cambodian Penal Code 2009 states: “In criminal matters, the law shall be strictly construed. A judge may neither extend its scope of application nor interpret it by analogy.”

III. ARGUMENT

A. The Trial Chamber must determine the scope of the RPA

16. The Agreement and the Establishment Law mandate that the Trial Chamber must determine the scope of the RPA.¹⁷ The Pre-Trial Chamber had limited competence in that it could only make determinations on what was submitted and could not investigate factual matters on its own.¹⁸ The Pre-Trial Chamber did not – as it could not – make any effort to take any evidence from the individuals responsible for drafting the RPA. Rather, the Pre-Trial Chamber relied upon suspect logic and reasoning in pronouncing what it believes the intent of the drafters to be. Unlike the Pre-Trial Chamber, the Trial Chamber is not limited in this way; it has the competence and means to summons the requested witnesses, take evidence and determine with more certainty, clarity and transparency, the intent of the drafters of the RPA.

17. In its Decision on Appeal Against Provisional Detention Order of IENG Sary, the Pre-Trial Chamber found that the validity of the Pardon “is uncertain,”¹⁹ and:

In the context of the inconsistent use of the word “amnesty”, the 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 Reach Kram No. 1, NS 94, dated 15 July 1994. **The Pre-Trial Chamber will address the issue from this perspective as this explanation** is the most in favour of the Charged Person.

Applying this interpretation, the Pre-Trial Chamber will now turn to consider the possible effect of this part of the Royal Decree.²⁰

¹⁷ Article 11(2) of the Agreement states: “This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. 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.” (Emphasis added). Article 40 of the Establishment Law states in pertinent part: “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.” (Emphasis added).

¹⁸ “[A] factual determination [] is not within the Pre-Trial Chamber’s jurisdiction.” *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, ERN: 00661785-00661785, para. 210.

¹⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 03), Decision on Appeal Against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, ERN: 00232830-00232861, para. 58.

²⁰ *Id.*, paras. 59-60.

18. In its Decision on IENG Sary's Appeal Against the Closing Order, the Pre-Trial Chamber applied "[l]ogic" to interpret the effect of the Pardon section of the RPA.²¹ The Pre-Trial Chamber found that the amnesty section of the RPA "**can be interpreted as meaning** that the Charged Person 'will not be proceeded against' in respect of the sentence given or breach of the [1994 Law]."²² Furthermore, the Pre-Trial Chamber found that "**[t]here is no indication** ... that the [amnesty section of the RPA] **intended** to cover acts of genocide, crimes against humanity and grave breaches of the Geneva Conventions."²³ Finally, the Pre-Trial Chamber found that "**[a]s there is no indication that the King (and others involved) intended** not to respect the international obligations of Cambodia when adopting the Decree, **the interpretation of this document** proposed by the Co-Lawyers is found to be without merit."²⁴
19. To date, the Pre-Trial Chamber has only been able to interpret what **it believes** the scope of and intention behind the RPA to be. Article 5 of the Cambodian Penal Code 2009 states: "In criminal matters, the law shall be strictly construed. A judge may neither extend its scope of application nor interpret it by analogy." In France, upon whose legal system Cambodia's is largely based, the method of statutory interpretation can be summarized as the following:
1. When a text is clear, it should be applied and not interpreted, unless an absurd result would follow.
 2. When 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.
 3. If this study is insufficient, courts often go to the travaux préparatoires to discover the legislature's thinking. The Cour de cassation agrees with this process, but also states that the travaux préparatoires never bind the court. René David, who calls this process the historical method of interpretation, cites its frequent use by the courts.
 4. When a text does not directly provide the solution for a dispute, judges need at least to start from a text to situate the rule that they will design. French judicial decisions almost always invoke a text, and it is exceptional for a court not to refer to a legal text. However, sometimes courts invoke general principles of law.

²¹ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 75), Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30, ERN: 00661785-00661785, para. 192.

²² *Id.*, para. 195 (emphasis added).

²³ *Id.*, para. 200 (emphasis added).

²⁴ *Id.*, para. 201 (emphasis added).

5. If the legislative history is confused, or the law is too old, the judge will look at other considerations and use what the scholarly writers call the teleological interpretation method. This approach is mostly used by the highest courts, the Cour de cassation and the Conseil d'État, rather than the lower courts.²⁵
20. The text of the RPA is sufficiently ambiguous to warrant the taking of evidence of those involved in the negotiating, drafting, granting and approving of it.²⁶ A strict construction can only be made through the testimony from those who negotiated it, those who agreed to it, and those who understood what was being agreed to. This is implied by the fact that the Agreement and Establishment Law mandate that the scope of the RPA be determined by the ECCC.²⁷ The attempted interpretation of the Pre-Trial Chamber as to what it *believes or conjectures* the scope of and intention behind the RPA to be is further indication that the text of the RPA requires clarification.
21. With respect to the Pardon, the Pre-Trial Chamber stated that it “adhere[ed] to the grammatical and ordinary sense of the word used in the Decree,”²⁸ and found there was “[a]bsent any inconsistency or absurd result.”²⁹ The Pre-Trial Chamber found that “the amnesty granted to Ieng Sary was confined to the specific sentence pronounced in 1979.”³⁰ The Pre-Trial Chamber further found that “[l]ogic dictates that a death sentence would be converted to a term in prison...”³¹ The Pre-Trial Chamber’s findings as to the scope of the Pardon, through use of logical interpretation and a grammatical and ordinary use of the wording, would lead to an absurd interpretation. If the Pre-Trial Chamber’s interpretation is followed, the Pardon is rendered useless as when the RPA was drafted the death penalty in Cambodia had been abolished.³² Furthermore, it is absurd to conclude that during negotiations for the RPA, Mr. IENG Sary would have negotiated a death penalty down to a life sentence; a logical interpretation would have seen Mr. IENG Sary negotiate a pardon which would protect him from exposure to any sanctions. As a grammatical and ordinary use of the wording would lead to an absurd result, the intention

²⁵ Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT’L L. 195, 201–02 (2003).

²⁶ Further submissions on this point will be forthcoming on the Defence’s additional submissions as directed by the Trial Chamber. *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum from Judge Nil Nonn, President of the Trial Chamber, to All Parties, Case 002, 5 April 2011, E57/1, ERN: 00658620-00658622, p. 2.

²⁷ Agreement, Art. 11(2), Establishment Law, Art. 40.

²⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC 75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, ERN: 00661785-00661785, para. 193.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*, para. 192.

³² Cambodia abolished the death penalty in 1993. Article 33 of the Cambodian Constitution 1993 states in pertinent part: “There shall be no capital punishment.”

of those who negotiated and drafted the RPA must be known. Testimony from the requested witnesses is necessary to determine the scope of and intention behind the RPA.

22. The scope of and intent behind the RPA is of such critical importance, that Mr. David Boyle, former Legal Officer of the Office of Co-Investigating Judges, felt, even prior to the creation of the ECCC, to publicly comment that:

The case of Ieng Sary is an example of the problems that will arise before the Cambodian court. Ieng Sary has been granted a constitutionally valid pardon and immunity for certain crimes and for prosecution under the 1994 law. To what extent is this constitutionally valid amnesty and pardon applicable before the Khmer Rouge trial? This has been left to the court to decide.³³

23. So fearful was Mr. Boyle of the scope of and intention behind the RPA, he opined that the RPA “problem”:

should be dealt with beforehand in order to avoid that talented lawyers will slow trials down so much that three years will not be enough to finish. There are two possible avenues for partially resolving these issues. One would be for the judges immediately after having been nominated by the SCM to get together with prosecutors and investigating judges and work out exactly what is the applicable procedure for the courts. They cannot change the law, but they can work out what the law means.³⁴

24. Leaving aside the insulting remarks that the Defence would have nothing to contribute and would only attempt to stall the proceedings, and that the Defence should not be involved in determining the meaning of the RPA, Mr. Boyle does raise a valid point in that the scope of and intention behind the RPA must be “work[ed] out.”³⁵

³³ Report from a conference held in Phnom Penh March 2-3, 2005 organized by FIDH, LICADHO and ADHOC, *International Criminal Court Programme: Articulation between the International Criminal Court and the Khmer Rouge Tribunal: the Place of Victims*, B. The Legal Framework of the Khmer Rouge Tribunal, p. 18 (emphasis added), available at: <http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf>.

³⁴ *Id.*

³⁵ Mr. IENG Sary filed the Request seeking information concerning Legal Officer David Boyle’s ethical and professional fitness to occupy his current position in the OCIJ, given that the OCIJ, as an independent office within the ECCC must carry out its investigative functions impartially. The information sought included, *inter alia*, a list of everything authored by Mr. Boyle, any conferences, training seminars, hearings, lectures, workshops and meetings attended by Mr. Boyle relating to the ECCC or the Khmer Rouge, a description of Mr. Boyle’s participation in the drafting of the Provisional Detention Order, and an explanation of what was known by the OCIJ concerning Mr. Boyle’s positions and writings at the time he was hired. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Apparent Bias & Potential Existence of a Conflict of Interest of OCIJ Legal Officer David Boyle, A162, ERN: 00165542-00165547. See also *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled “Request concerning the interview of Mr. IENG Sary on his conditions of detention on 2 May 2008,” 24 April 2008, A121/II, ERN: 00185454-00185456, p. 2-3. The OCIJ responded to the Defence Request in a Letter dated 27 May 2008 stating that “does not appear to be any legal basis for such repeated demands,” and that “[t]he ECCC Internal Rules do not provide for a party to request the disqualification of an investigator.” The OCIJ Letter displayed both a misunderstanding of the Request and a worrying refusal to provide the information requested. The Letter also appears to fetter the OCIJ’s discretion in forestalling any future attempt by the Defence to correct this misunderstanding. It also

25. The Trial Chamber must look to the RPA's intended scope as reflected by the will of those who led its negotiation and execution, i.e. Mr. IENG Sary, Prime Minister Hun Sen, Prince Ranariddh, King Father Norodom Sihanouk and Chea Sim. Testimony from the requested witnesses will do away with any need to interpret, speculate or rely upon hearsay.

B. The value of the available evidence must be considered when determining the scope of the RPA

26. To date, the scope of and intention behind the RPA has only been interpreted through hearsay and secondary sources. Article 321 of the CPC expressly states that "[t]he court has to consider the value of the evidence submitted for its examination." Neither the CPC nor the Rules provide any further guidance as to how evidence is to be valued.³⁶ Guidance is provided, and can be taken, from the *ad hoc* tribunals.³⁷ In *Kordić and Čerkez*, the ICTY Appeals Chamber set out guidelines to determine the "indicia of reliability" of hearsay evidence, which included whether the statement in question was: **a.** given under oath; **b.** subject to cross examination; **c.** first-hand or removed; **d.** made contemporaneously to the events; **e.** made through many levels of translation; [and][or] **f.** given under formal circumstances, such as before a judge.³⁸ In *Limaj et al.*, the ICTY Trial Chamber held that "[t]he Chamber has been required to weigh and evaluate the evidence presented by all parties. It would emphasise that the mere admission of evidence

prematurely rejects any possible future attempt to disqualify Mr. Boyle. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter titled "Request for information on 'the apparent bias and conflict of interest concerning MM S. Heder and D. Boyle,'" 26 May 2008, A121/III, ERN: 00193591-00193591. The Defence appealed the Letter of the OCIJ on 6 June 2008. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC08), Appeal of Mr. IENG Sary against the OCIJ's Decision on the *Defence Request for Information Concerning the Apparent Bias & Potential Existence of a Conflict of Interest of OCIJ Legal Officer David Boyle*, 6 June 2008, A162/III/1, ERN: 00195028-00195035. The Pre-Trial Chamber found the Appeal inadmissible as they had no jurisdiction to hear the matter. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC08), Decision on IENG Sary's Appeal against Letter Concerning Request for Information Concerning Legal Officer David Boyle, 28 August 2008, A162/III/6, ERN: 00221204-00221208. See also *Case of IENG Sary*, 002/08-07-2009-ECCC/PTC, IENG Sary's Application for Disqualification of OCIJ Investigator Stephen Heder and OCIJ Legal Officer David Boyle in the Office of the Co-Investigating Judges, 8 July 2009, 1, ERN: 00348412-00348440; *Case of IENG Sary*, 002/08-07-2009-ECCC-PTC, Decision on the Charged Person's Application for Disqualification of Drs. Stephen Heder and David Boyle, 22 September 2009, 3, ERN: 00378097-00378103.

³⁶ The Defence does note Rule 87(5) which states: "The Chamber shall give the same consideration to confessions as to other forms of evidence." However, the Rules are silent as to the value to be afforded to "other forms of evidence."

³⁷ Establishment Law, Art. 33 new states: "If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level."

³⁸ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of a Deceased Witness, 21 July 2000, para. 27.



in the course of the trial has no bearing on the weight which the Chamber subsequently attaches to it.”³⁹ Judge Sidhwa of the ICTY Trial Chamber in *Rajić* stated that “**No judicial tribunal charged with conducting a fair trial would accept indirect or circumstantial evidence if direct evidence was available and was not produced without valid reason.**”⁴⁰

27. There have been conflicting media reports regarding the scope of and intention behind granting the RPA. For example, Prime Minister Hun Sen is reported as saying: “For the sake of the nation we had to do it [i.e. 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.”⁴¹ The reported actions of Prime Minister Hun Sen further demonstrate that the scope of the RPA is wide. For example, 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 is reported to have sent Cambodian Defence Minister Tea Banh to reassure Mr. IENG Sary that the immunity given to him was not in jeopardy.⁴²
28. Contrary to his actions and previous statements, in October 2004, Prime Minister Hun Sen is reported to have expressed the opinion that “[i]f you study the wording of [the RPA], you will see that there is still the possibility to try the crimes committed by Ieng Sary... [W]e paid much attention to the wording of the pardon ... there are no words in it which ban the accusation of Ieng Sary in front of a court which may be formed in coming times.”⁴³
29. The conflicting content of these media reports is indicative that media reports cannot be relied upon to delimit the scope of and intention behind the RPA. More importantly, these reported statements and actions of Prime Minister Hun Sen are hearsay. Neither the media reports nor Prime Minister Hun Sen’s statements were given under oath. Neither the media reports nor Prime Minister Hun Sen’s statements have been subject to cross examination. There is a strong likelihood that the purported statements of Prime Minister

³⁹ *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005, para. 12.

⁴⁰ *Prosecutor v. Rajić*, IT-95-12-R61, Rule 61 Decision – Separate Opinion of Judge Sidhwa, 5 July 1996, para. 25 (emphasis added).

⁴¹ TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE: ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL*, 137 (Pluto Press 2004).

⁴² 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).

⁴³ TOM FAWTHROP & HELEN JARVIS, *GETTING AWAY WITH GENOCIDE? ELUSIVE JUSTICE AND THE KHMER ROUGE TRIBUNAL* 172 (University of New South Wales Press Ltd, 2005), citing *Hun Sen: Cambodia United at any Price*, PHNOM PENH POST, 4-16 October 1994.

Hun Sen were made in Khmer, yet they were published in English, having been translated. Neither the media reports nor Prime Minister Hun Sen's statements were made under formal circumstances, such as before a judge, and they certainly were not subject to in-court confrontation by the Defence.⁴⁴

30. King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Ranariddh and Chea Sim are all alive and available to give evidence. There is no valid reason preventing the requested witnesses from providing testimony. All will speak on the discrete issue of the scope of the RPA. None will be exposed to any criminal liability. None are suspects, Charged Persons or Accused, and as such, do not have any fair trial rights; they will simply be witnesses giving evidence as any other witness will do. In order for their testimony to hold more value, all should be subject to cross-examination. Direct evidence as to the scope of and intention behind the RPA is available. If the Trial Chamber does not summon the requested witnesses to testify, it must not give any value to uncorroborated hearsay evidence.

C. The Trial Chamber has the means to summon and enforce summonses

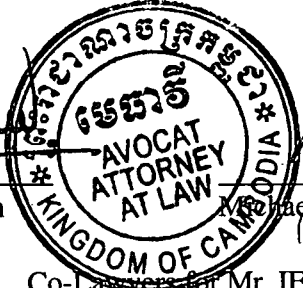
31. Under Rules 87(4) and 93(1), the Trial Chamber may summon or hear any person as a witness, admit any new evidence, or conduct a necessary new investigation which it deems conducive to ascertaining the truth. Under Rule 93(3) and Article 315 of the CPC, the Trial Chamber may use the judicial police if Prime Minister Hun Sen, Prince Ranariddh and Chea Sim do not comply with the summonses issued to them. Furthermore, under Article 25 of the Agreement, the Government of Cambodia – which includes Prime Minister Hun Sen and Chea Sim – shall assist the ECCC in any request for assistance. There is nothing preventing the Trial Chamber from requesting King Father Norodom Sihanouk to provide testimony.

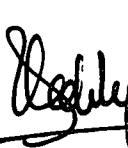

⁴⁴ Article 13(1) of the Agreement states: "The rights of the Accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall in particular, include ... to examine or have examined the witnesses against him or her." Article 35 new of the Establishment Law states: "In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights ... to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them." Rule 87(2) of the Rules states: "Any decision of the Chamber shall be based on evidence that has been put before the Chamber and subjected to examination." Article 14(3)(e) of the International Covenant on Civil and Political Rights states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

IV.RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully moves the Trial Chamber to SUMMON King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Chea Sim to testify in court on the background to, the scope of and intention behind the RPA at the Initial Hearing.

Respectfully submitted,



ANG Udom  MICHAEL G. KARNAVAS 
Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 9th day of **May**, 2011