

ANNEX 1

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 1979 Judgement condemned Mr. IENG Sary to death and confiscated all of his property.² As Mr. IENG Sary was not in custody before, during or after the trial, the sentence was not carried out.
2. On 15 July 1994, the Cambodian National Assembly promulgated the Law on the Outlawing of the “Democratic Kampuchea” Group (“1994 Law”).³ This Law declared, inter alia, that the “Democratic Kampuchea” group and its armed forces were outlaws and that membership in the group was illegal.⁴ The 1994 Law came about as a comprehensive attempt to end the war⁵ and begin the process of national reconciliation.
3. 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.”⁶

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. Doc. A/34/491, 19 August 1979, p. 3-21.

² *Id.*, p. 39.

³ Law on the Outlawing of the “Democratic Kampuchea” Group, Reach Kram No. 1, NS 94, 15 July 1994.

⁴ *Id.*, Arts. 1-2. This Law combined the threat of prosecution for membership in the outlawed Democratic Kampuchea group with the incentive of a 6 month stay in the enforcement of the 1994 Law, to permit members of the “Democratic Kampuchea” group to return to live under the control of the Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed. See 1994 Law, Art. 5.

⁵ “The National Assembly passed a Law on the Outlawing of the Democratic Kampuchea Group with a view to ending the war...” Human Rights Committee, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, 23/09/98. CCPR/C/81/Add.12, para. 105.

⁶ Ieng Sary, *Ieng Sary’s 1996 Declaration*, SEARCHING FOR THE TRUTH, DC-CAM, 15 August 1996.

4. 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 surrendering 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."⁷ He stated, "His decision is immeasurable as it helps end the fighting, saves the budget and avoids casualties" and stressed that it was only a matter of time before Mr. IENG Sary and his followers would be granted amnesty.⁸
5. On 8 September 1996, Mr. IENG Sary provided a document to the government entitled "The True Fact about Pol Pot's Dictatorial Regime" which detailed: **a.** the roles of the party and government; **b.** who wielded power; **c.** the economic regime; **d.** the educational system; **e.** foreign policy; and **f.** some noteworthy events which occurred during Pol Pot's regime.⁹
6. Further to the negotiations for surrender, the co-Prime Ministers, Samdech Akka Moha Sena Padei Techo Hun Sen and Prince Norodom Ranariddh, approached 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 would support it.¹⁰ The National Assembly supported the RPA proposed by the two Co-Prime Ministers.¹¹
7. On 14 September 1996, the King exercised his lawful authority under the Constitution and granted Mr. IENG Sary the RPA. The King granted the RPA "having taken into

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

⁸ *Id.*

⁹ The True Fact about Pol Pot's Dictatorial Regime, 1975-1978, 8 September 1996, ERN: 00081213-00081222.

¹⁰ His Majesty 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.

¹¹ 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...."

account” the 15 August Declaration by Mr. IENG Sary and the document he provided to the government in September.¹² The RPA states:

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.¹³

8. In return for the RPA, Mr. IENG Sary defected to the side of the Cambodian Government, which brought an end to the conflict between Government forces and those forces which had been under his control. Prime Minister Hun Sen explained that “without Ieng Sary leading 70 percent of the [Khmer Rouge] forces to integrate into government forces we could not have ended the war.”¹⁴ Until this point, the international community and in particular the UN had been unable to convince the Khmer Rouge to stop fighting and reintegrate into Cambodian society.¹⁵ The RPA achieved this.¹⁶ On 25 October 1996, just over a month after the RPA was granted, Asiaweek reported:

Hun Sen told Asiaweek that Ieng Sary’s departure would spark widespread defections and reduce the Khmer Rouge’s numbers by as much as 80%. But the unraveling seems to be occurring even faster than Hun Sen’s most optimistic

¹² The RPA gives the date of the document as 9 September 1996 rather than 8 September 1996, the actual date on the document.

¹³ 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/chronologies/royal-government-created-its-task-force-cooperation-foreign-legal-experts-and-preparat>. This translation is available in the ECCC Legal Compendium 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.

¹⁴ *Khmer Rouge Trial Law on Track for December Approval: Cambodian PM*, AGENCE FRANCE-PRESSE, 30 November 2000.

¹⁵ This had been attempted, for example, through the Paris Peace Accords, which provided the possibility that the Khmer Rouge could participate in the elections. See Paris Peace Accords, 23 October 1991, Annex 3(3).

¹⁶ Mr. IENG Sary’s “defection helped ignite political realignments everywhere. Ranariddh and Hun Sen saw the chance to break up the Khmer Rouge entirely and began separate negotiations with several top leaders around Pol Pot, including Son Sen, who had been Pol Pot’s target in 1978 just before the Vietnamese invasion.” ELIZABETH BECKER, *WHEN THE WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION* 515 (Public Affairs, 1998). See also PHILIP SHORT, *POL POT: ANATOMY OF A NIGHTMARE* 437 (Henry Holt and Company, 2004). “Ieng Sary’s defection was a body-blow from which the Khmers Rouges never recovered.”

estimate. Last week, eight divisions, totaling nearly 2,500 fighters by some counts, went over to the government side.¹⁷

9. Because of these results, the King's decision to grant the RPA was supported by a majority of the Cambodian public:

The public has not only acquiesced, but it even supports the government's amnesties. A survey by a local nongovernmental organization ... (SODECO), published in the January 28, 1997 Cambodia Daily, reported two-thirds of the 1,120 respondents 'satisfied' with the deal made with Ieng Sary, and a Phnom Penh Post street poll published in the August 23–September 5, 1996 edition had similar results. (SODECO is close to opposition leader Sam Rainsy.)¹⁸

10. In August 1998, following the arrest of former Khmer Rouge member Nuon Paet, Prime Minister Hun Sen sent Cambodian Defense Minister Tea Banh to reassure Mr. IENG Sary that the immunity given to him was not in jeopardy.¹⁹
11. On 12 November 2007, Mr. IENG Sary was placed into custody at the ECCC Detention facility.²⁰
12. On 14 November 2007, the OCIJ issued a Provisional Detention Order for Mr. IENG Sary.²¹ In this Order, the OCIJ addressed *proprio motu* the jurisdictional issues of *ne bis in idem* and the effect of the RPA without first giving the parties a chance to be heard on the matter. It determined that neither the RPA nor the principle of *ne bis in idem* would prevent Mr. IENG Sary's detention. It determined that the RPA would not bar prosecution based on the fact that it refers to the 1994 Law, and that the 1994 Law does not cover offenses within the jurisdiction of the ECCC. It based its determination that *ne bis in idem* does not bar prosecution on the fact that Mr. IENG Sary was not then charged with genocide, and further noted that cumulative convictions are allowed under international law and the 1979 trial did not cover all of the offenses coming within the jurisdiction of the ECCC.

¹⁷ Dominick Faulder, *Bleeding the Khmer Rouge*, ASIA WEEK, 25 October 1996.

¹⁸ Kassie Neou & Jeffrey C. Gallup in *Human Rights and the Cambodian Past: In Defense of Peace Before Justice*, HUM. RTS. DIALOGUE 1.8 (1997). See also Louise Mallinder, *Can Amnesties and International Justice be Reconciled?*, 1 INT'L J. TRANSITIONAL JUST. 208 (2007); Neou Vannarin & Julia Wallace, *Ieng Sary Support High in Malai as Trial Looms*, CAMBODIA DAILY, 15 September 2010.

¹⁹ 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).

²⁰ Police Custody Report, 15 November 2007, C14/I.

²¹ Provisional Detention Order, 14 November 2007, C22.

13. The Defence appealed the Provisional Detention Order, and on 7 April 2008, in accordance with the Pre-Trial Chamber's instructions, the Defence filed submissions on the issues of *ne bis in idem* and amnesty.²² The Defence submitted that Mr. IENG Sary's current prosecution was barred by the RPA and the principle of *ne bis in idem*. The Defence submitted three Annexes along with its arguments. Annex A compared the ECCC to domestic, hybrid and international courts. Annex B compared the elements of genocide, crimes against humanity and war crimes with offenses under the 1956 Penal Code. Annex C compared Mr. IENG Sary's 1979 Judgement with the Introductory Submission.
14. On 17 October 2008, the Pre-Trial Chamber issued a decision in which it found, concerning the principle of *ne bis in idem*, that "the characterisation given by the Co-Investigating Judges, although sufficient to inform the Charged Person of the charges against him, [was] too vague to allow proper consideration of whether the current prosecution is for the same 'acts' as those 'acts' upon which the charges brought in 1979 were based."²³ The Pre-Trial Chamber also noted that at the time, Mr. IENG Sary was not "charged specifically with genocide" and "the current prosecution might be for different 'offences.'"²⁴ Concerning the RPA, the Pre-Trial Chamber found that it contained two uses of the word "amnesty": "amnesty from sentence" and "amnesty from prosecution."²⁵ It found that the validity of the "amnesty from sentence" related to genocide was uncertain,²⁶ and that the "amnesty from prosecution" was irrelevant since the offenses listed in the 1994 Law were not within the jurisdiction of the ECCC.²⁷
15. On 15 September 2010, the OCIJ issued the Closing Order, in which it effectively embraced its initial conclusions, adding little, if any, fresh legal analysis as to why or how the RPA and the principle of *ne bis in idem* are inapplicable before the ECCC. The OCIJ stated:

The Co-Investigating Judges can only reaffirm their initial assessment. Accordingly, the amnesty has no effect, since it is limited to prosecution under the 15 July 1994 Law. Likewise, even if the Royal Pardon were applicable before the ECCC, it would have no effect on the proceedings as it only relates to the

²² 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.

²³ Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/74, para. 52.

²⁴ *Id.*, para. 51.

²⁵ *Id.*, para. 57.

²⁶ *Id.*, para. 58.

²⁷ *Id.*, para. 61.

annulment of the sentence [sic] imposed by the 1979 Trial... [E]ven assuming that the crimes prosecuted in 1979 overlap, in whole or in part, with those with which Ieng Sary now stands charged, the Co-Investigating Judges hold the view that the question as to whether the 1979 judgement still applies and prevents further prosecution of Ieng Sary for genocide warrants a public adversarial hearing before the Trial Chamber, this being the only way for the Charged Person, the Co-Prosecutors and the Civil Parties to each make their case in a comprehensive fashion.²⁸

16. On 25 October 2010, the Defence appealed the jurisdictional issues raised by the Closing Order.²⁹ The Defence asserted that the OCIJ erred in sending Mr. IENG Sary to trial since the conduct at issue in the present case is the same as was at issue in 1979 so the principle of *ne bis in idem* set out in applicable Cambodian and international law should bar his present prosecution. The Defence asserted that the RPA is legally valid in Cambodia and applicable at the ECCC, the scope of the Royal Amnesty protects Mr. IENG Sary from prosecution at the ECCC, and the Royal Pardon ensures Mr. IENG Sary cannot serve any sentence for a conviction based upon the acts at issue in the 1979 trial.
17. On 25 February 2011, the Defence filed a summary of its preliminary objections to the jurisdiction of the Trial Chamber.³⁰ The Defence was precluded from setting out its full arguments on *ne bis in idem* and the RPA.³¹ Instead, the summary referred to the Defence's past submissions on these issues. At the time the summary was filed, the Pre-Trial Chamber had not yet issued a reasoned decision on the Defence's appeal against the Closing Order.
18. On 11 April 2011, the Pre-Trial Chamber issued its reasoned decision on IENG Sary's Appeal against the Closing Order.³² It held that the principle of *ne bis in idem* did not prevent Mr. IENG Sary's present prosecution because: **a.** the principle as set out in the CPC only applies to bar new prosecutions in cases where the previous prosecution resulted in an acquittal;³³ **b.** the principle as expressed in the ICCPR has a solely domestic effect and does not apply at the ECCC, which it found to be an "internationalized"

²⁸ Closing Order, 15 September 2010, D427, paras. 1331, 1333.

²⁹ IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6.

³⁰ Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4.

³¹ For a discussion of this issue, *see id.*

³² Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30.

³³ *Id.*, paras. 119-24.

tribunal;³⁴ and **c.** procedural rules established at the international level contain an exception to the principle where the previous trial was not independent or impartial and Mr. IENG Sary's previous trial falls within this exception.³⁵ It held that the RPA does not bar Mr. IENG Sary's current prosecution because: **a.** the Royal Pardon is solely attached to the invalid sentence pronounced in 1979, it bears no effect on the jurisdiction of the ECCC to try Mr. IENG Sary for the crimes charged in the Closing Order;³⁶ **b.** the Royal Amnesty only prevented Mr. IENG Sary's prosecution for the offenses against State security set out in Article 4 of the 1994 Law and, arguably, for the offense of being a member of the Democratic Kampuchea group;³⁷ **c.** the grant of an amnesty, without any prosecution and punishment, would infringe upon Cambodia's treaty obligations to prosecute and punish the perpetrators of the crimes set out in the Genocide Convention, the Convention Against Torture and the Geneva Conventions;³⁸ and **d.** the grant of an amnesty would not have conformed with Cambodia's obligation under the ICCPR to prosecute and punish authors of serious violations of human rights or otherwise provide an effective remedy to the victims.³⁹

19. On 9 May 2011, the Defence filed a statement by Mr. IENG Sary in which he explained the scope of, intention behind and background to the RPA.⁴⁰ On the same date the Defence requested the Trial Chamber to summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh, and Samdech Chea Sim to give evidence as to the intended scope of the RPA.⁴¹
20. On 27 May 2011, the Defence filed a supplement to its preliminary objection based on the RPA and a supplementary submission to its preliminary objection based on *ne bis in idem*.⁴² These supplements explained the errors in the Pre-Trial Chamber's decision on

³⁴ *Id.*, paras. 127-31.

³⁵ *Id.*, paras. 132-75.

³⁶ *Id.*, para. 194.

³⁷ *Id.*, para. 200.

³⁸ *Id.*, para. 201.

³⁹ *Id.*

⁴⁰ IENG Sary's statement as to the scope of, intention behind and background to the Royal Amnesty and Pardon, 9 May 2011, E84.

⁴¹ IENG Sary's Motion to Summon King Father Norodom Sihanouk, Prime Minister Hun Sen, Prince Norodom Ranariddh and Samdech Chea Sim, 9 May 2011, E85.

⁴² IENG Sary's Supplement to his Rule 89 Preliminary Objection (*Ne Bis in Idem*), 27 May 2011, E51/11; IENG Sary's Supplement to his Rule 89 Preliminary Objection (Royal Pardon and Amnesty), 27 May 2011, E51/10.

IENG Sary's Appeal against the Closing Order and answered certain questions posed by the Trial Chamber.⁴³

21. On 27 June 2011, the Defence, the OCP and the Civil Parties presented oral arguments on the issues of the RPA and *ne bis in idem* at the Initial Hearing.⁴⁴

22. On 3 November 2011, the Trial Chamber issued the Impugned Decision.

⁴³ Trial Chamber Memorandum re: Additional preliminary objections submissions (amnesty and pardon), 12 May 2011, E51/8; Trial Chamber Memorandum re: Additional preliminary objections submissions (*ne bis in idem*), 12 May 2011, E51/9.

⁴⁴ Transcript, 27 June 2011, E1/4.1; Transcript, 28 June 2011, E1/5.1.