

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' REQUEST FOR LEAVE TO REPLY
AND
REPLY TO IENG SARY'S RESPONSE REGARDING THE INTENTIONS OF THE
ACCUSED WITH RESPECT TO TESTIFYING**

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I. INTRODUCTION AND REQUEST FOR LEAVE TO REPLY

1. The Co-Prosecutors seek leave to reply to “Ieng Sary’s Response to the Co-Prosecutors’ Additional Request for a Direction Regarding the Intentions of the Accused With Respect to Testifying,” filed on 22 September 2011 (‘Response’).¹ For the sake of judicial economy, the substantive reply is set out below. The Co-Prosecutors submit that a reply is necessary given that: 1) the issue before the Chamber goes to the heart of efficient preparations for trial; 2) the reply corrects Ieng Sary’s misrepresentations as to the state of the law; and 3) the reply also responds to Ieng Sary’s misrepresentations regarding repetitive filings. It is in the interests of justice to allow the filing of this brief reply.

II. PROCEDURAL BACKGROUND

2. On 17 June 2011 the Co-Prosecutors submitted “Co-Prosecutors’ Request for a Direction Regarding the Intentions of the Accused With Respect to Testifying”² (‘First Request’). In the First Request, the Co-Prosecutors noted that it is a feature of the civil law procedure applicable before the ECCC that accused are invited to testify at the start of the trial. They stressed the importance of the Chamber and other parties being informed of the Accused’s intentions with respect to testifying well before the start of the trial in Case 002. They asked that the Accused be directed to state their intentions within seven days.³
3. On 20 September 2011 the Co-Prosecutors filed “Co-Prosecutors’ Additional Request for a Direction Regarding the Intentions of the Accused With Respect to Testifying” (‘Follow-up Request’), in which they reiterated their First Request and asked the Chamber to issue an order directing the Accused to state whether they will testify or exercise their right to remain silent.⁴ In his Response, Ieng Sary argues that: 1) neither the Internal Rules nor the Cambodian Code of Criminal Procedure (CCPC) set out the order in which the Accused and witnesses should be questioned; 2) nothing prevents the Accused from testifying at any stage of the trial and stating their intentions at a later stage; and 3) the Follow-up Request is hypocritical in light of the Co-Prosecutors’ prior submissions against repetitive filings.⁵

¹ E101/2 Ieng Sary’s Response to the Co-Prosecutors’ Additional Request for a Direction Regarding the Intentions of the Accused With Respect to Testifying, 22 September 2011 (‘Response’).

² E101 Co-Prosecutors’ Request for a Direction Regarding the Intentions of the Accused with Respect to Testifying, 17 June 2011.

³ Ibid, at paras. 2, 3, 5, 6.

⁴ E101/1 Co-Prosecutors’ Additional Request for a Direction Regarding the Intentions of the Accused With Respect to Testifying.

⁵ Response, at paras. 2, 3, 4 and 5.

4. In reply, the Co-Prosecutors: 1) submit that the procedure applicable before the Court clearly envisages accused giving evidence at the start of the trial; 2) reiterate their request that the Accused be directed to state their intentions with respect to testifying now, as this will facilitate orderly trial preparations and an expeditious conduct of the trial; and 3) submit that the Follow-up Request was not a repetitious filing.

III. THE LAW

5. A brief survey of the jurisdictions which apply the civil law / inquisitorial criminal procedure makes it clear that the evidentiary proceedings before trial courts in those jurisdictions commence with the questioning of the accused. For example, in comparing the adversarial and inquisitorial models, one author comments:

Consider the defendant's position in the continental courtroom. As there is no requirement here that the prosecution establish a credible case before the defense introduces its evidence, there is no obstacle to beginning the proof-taking stage by the interrogation of the defendant, and this in fact is the rule in continental systems...[I]n all continental systems the defendant is used as an evidentiary source before any other evidence has been examined at the trial.⁶

6. Consistent with this, it has been commented that “civil law jurisdictions see the accused as the first and foremost evidentiary source, to be examined before any other form of evidence at the trial.”⁷
7. This approach builds on the premise that the accused has had access to a comprehensive judicial investigation, and, as such, is fully familiar with the evidence which has been placed on the dossier and which supports the charges against him/her. In these circumstances, the accused cannot claim to be prejudiced by the requirement that he/she give evidence at the start of the evidentiary proceedings:

“[T]he alleged disadvantage of French accused by being required to decide whether to testify before the prosecution has led its evidence is significantly reduced if not removed by the full disclosure of the dossier to the defence prior to trial containing as it does the thorough pretrial investigations.⁸

8. A 2007 worldwide survey of legal systems describes the criminal procedure in France, which has inspired the CCPC, in the following terms:

⁶ M. Damaska, ‘Evidentiary Barriers To Conviction And Two Models Of Criminal Procedure: A Comparative Study,’ *University of Pennsylvania Law Review* (1973), at pp 528-529 (footnote omitted).

⁷ J. K. Walker, ‘A Comparative Discussion of the Privilege Against Self-Incrimination,’ *New York Law School Journal of International and Comparative Law* (1993), at 4.

⁸ K van Dijkhorst, ‘The Right of Silence - Is The Game Worth The Candle ?’ (available online at <http://www.isrel.org/Papers/van%20Dijkhorst.pdf>), at p.23 (footnote omitted). The same approach is adopted in Germany and Norway: see pp. 26 and 31

The trial usually begins with the sequestration of the witnesses, after which the court interrogates the accused and receives his statements, if any. The parties and attorneys then have the right to question the accused. The accused is not put under oath, and cannot be legally compelled to answer any of the questions; but, he cannot prevent the questions from being asked, or prevent the court from drawing adverse inferences from his silence.⁹

9. ECCC Internal Rule 89 *bis*, which is entitled “Substantive hearing,” states:
 1. The President shall declare the substantive hearing open. The President shall order the Greffiers to read the counts against the Accused and may order the Greffier to read the factual analysis in the Indictment.
 2. Before any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly. (emphasis added)

10. The order of testimonies (accused, followed by witnesses) is further reflected in the sequence in which they are dealt with in the Internal Rules (90 and 91), and also in the wording of Rule 91*bis* (‘Order of proceedings at trial’) which states:

The President of the Trial Chamber shall determine the order in which the judges, the Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused, the witnesses, experts and Civil Parties. (emphasis added)

11. Similarly, the rules pertaining to the “interrogation of the accused” are contained in Article 325 of the CCPC, while Article 326 provides for “the examination of civil parties, civil defendants, victims, witnesses and experts in the order in which [the Presiding Judge] deems useful.” These Articles are contained in the Section entitled “Conduct of Trial Proceedings,” which lays out the provisions in an order that reflects the typical civil law proceeding. It is only logical to conclude that, in ordering the provisions in this manner, the drafters intended to follow the civil law sequencing described above.

IV. ARGUMENT

12. Ieng Sary’ assertion that the Internal Rules and the CCPC do not set out the order in which the Accused and witnesses should be questioned is plainly incorrect. As indicated above, both the Internal Rules and the CCPC reflect the order of proceedings found in civil law countries where the accused testifies at the start of the trial. Internal Rule 89*bis*(2) indicates that the accused will testify following any opening statements.

13. Furthermore, Ieng Sary’s argument regarding the placement of Rule 84 (“Appearance of Witnesses and Experts”) prior to the above rules is misplaced. Unlike Rules 89*bis* to

⁹ C. M. Bradley (ed), *Criminal Procedure, A Worldwide Study* (2nd ed), Carolina Academic Press (2007), at p.228 (footnotes omitted).

91bis, Rule 84 does not deal with the manner in which hearings are conducted, but rather with the right of the accused to summon certain witnesses.

14. The Co-Prosecutors take no issue with Ieng Sary's assertion that an accused may make statements at any point in the trial - although obviously this would be subject to the powers of the President of the Chamber with respect to the management of the trial.¹⁰ The Co-Prosecutors recall that in Case 001, while testifying at the start of the trial, the Accused made further statements during the course of the evidentiary proceedings.
15. It is not the Co-Prosecutors' position that, should the Accused decide to exercise their right to remain silent at the start of the trial, they are *necessarily* prevented from giving testimony at a later stage. However, the criminal procedure applicable before this Court clearly envisages that the Accused will be called upon to testify at the start of a trial; and given the size and complexity of this case, it is both necessary and appropriate for the Accused to state their position on this issue well before the start of the evidentiary proceedings. This will enable effective preparations by the Chamber and all parties, and facilitate an expeditious conduct of the trial.
16. The Trial Chamber is required to ensure that the trials are both fair *and* expeditious.¹¹ Ieng Sary's implicit suggestion that all of the Accused can simply inform the Chamber on the first day of the evidentiary proceedings whether they will testify at that point is untenable and clearly inconsistent with the concept of an orderly and expeditious trial. The Accused are entitled to a free exercise of their fair trial rights, but this should not make the Court and other parties hostages to their whim; nor does it entitle the Accused to delay and frustrate the proceedings by withholding crucial information. The decisions of the Accused with respect to testifying at the start of the trial will significantly affect preparations for the evidentiary proceedings by the Chamber and all the parties.

V. ISSUE OF REPETITIVE FILINGS

17. Ieng Sary argues that the Follow-up Request is hypocritical.¹² He asserts that this second request on a matter already pending before the Chamber cannot be reconciled with the Co-Prosecutors' position that raising the same legal issue in separate successive filings is repetitious and disrespectful of the Trial Chamber's decision-making process.¹³ This argument is misleading. In the filing to which Ieng Sary refers, the Co-Prosecutors

¹⁰ Including the powers set out in Internal Rules 85 and 91bis.

¹¹ Article 33 new of the ECCC Law.

¹² Response, at para. 5.

¹³ Ibid at para 4.

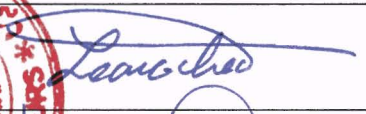
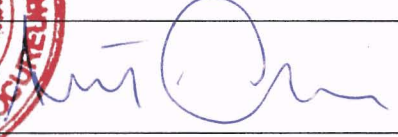
submitted that raising the same legal issues in separate successive pleadings places unnecessary burden on the Chamber and all the parties.¹⁴ The Trial Chamber has taken action to deal with unnecessary or repetitive filings by Ieng Sary.¹⁵

18. The Co-Prosecutors submit that there is a significant difference between, on the one hand, a request that a matter which is pending before the Chamber be expedited or ruled upon, and, on the other, a filing which recycles substantive legal arguments submitted in previous pleadings. The Follow-up Request clearly falls into the former category: it is a filing containing less than 2 pages of text, intended to facilitate trial preparations by seeking a ruling on a request which had remained pending for some three months. Ieng Sary's assertion that the Co-Prosecutors wish to be treated more favourably than the Defence is simply disingenuous.

VI. REQUEST

19. The Co-Prosecutors note that, since the filing of the Follow-up Request, the Chamber has taken further steps to facilitate preparations for the evidentiary proceedings and ensure their expeditious conduct.¹⁶ The first trial in this case can be expected to commence in the very near future. The Co-Prosecutors therefore respectfully reiterate their request that the Chamber issue an order as soon as possible, directing the Accused to state, within seven days of that order, whether they will testify or exercise their right to remain silent.

Respectfully submitted,

Date	Name	Place	Signature
3 October 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

¹⁴ E114/1, Co-Prosecutors' Response to "Ieng Sary's Objections to the Admissibility of Certain Categories of Documents," 16 September 2011, at para. 21.

¹⁵ E53/2/1 Trial Chamber's Memorandum entitled "Memorandum in response to request filed by Ieng Sary (E53/2)," 15 March 2011; E65/1 Trial Chamber's Memorandum entitled "Memorandum on Ieng Sary Request to file motion seeking "confirmation that he will be entitled to present oral arguments at the Initial Hearing concerning each of his Preliminary Objections,"" 16 March 2011; E69/1 Decision on Ieng Sary's Motions Regarding Judicial Notice of Adjudicated Facts From Case 001 and Facts of Common Knowledge Being Applied in Case 002, 4 April 2011; E71/1 Decision on Ieng Sary's Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011.

¹⁶ E124 Severance Order Pursuant to Internal Rule 89ter, 22 September 2011; E125 Trial Chamber's Memorandum entitled "Initial specification of the substance of reparations awards sought by the Civil Party Lead Co-Lawyers pursuant to Internal Rule 23quinquies (3)," 23 September 2011.