

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 16 November 2011**CLASSIFICATION****Classification of the document
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**IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' REQUEST FOR
CLARIFICATION OF THE SCOPE OF THE FIRST TRIAL**

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ Request for Clarification of the Scope of the First Trial (“Request”).¹ This Response is made necessary because the Co-Prosecutors have used the Request as a vehicle to effectively request a second reconsideration of the Severance Order.² The Co-Prosecutors’ initial Request for Reconsideration was denied by the Trial Chamber.³ This is an abuse of process.

I. RESPONSE

A. Preliminary Observations

1. Before discussing the substance of the Request, a preliminary matter merits highlighting. As early as the Trial Management Meeting on 5 April 2011, the parties have been “encouraged where possible to raise concerns or request information informally from the Trial Chamber Senior Legal Officer [(“SLO”)]. This channel should be utilised, to the extent possible and appropriate, as an alternative to filing motions which do no more than seek information or raise questions.”⁴ This “encouragement” comes coupled with a warning: “The Chamber has already had occasion to recommend the withholding of fees for a number of voluminous filings that it considers lack a legal basis and do little beyond add to the burdens of the Chamber and translation services. The Chamber reminds counsel of their obligations under Rule 22(4).”⁵ The Defence views encouragement coupled with a warning with sanctions to follow as tantamount to a mandatory directive (order) from the Trial Chamber. This encouragement has been reiterated by the Trial Chamber on several further occasions.⁶ Judge Cartwright has

¹ Co-Prosecutors’ Request for Clarification of the Scope of the First Trial, 4 November 2011, E124/9.

² Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124 (“Severance Order”). The Co-Prosecutors’ have already requested a reconsideration of the Severance Order. Co-Prosecutors’ Request for Reconsideration of “Severance Order Pursuant to Rule 89ter,” 3 October 2011, E124/1 (“Request for Reconsideration of the Severance Order”).

³ Decision on the Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7.

⁴ Transcript, Trial Management Meeting, 5 April 2011, E1/2.1, p. 10.

⁵ *Id.*

⁶ “It further reminds the IENG Sary team of the below directions given to the parties at the Trial Management Meeting: ‘To alleviate translation and other constraints, and to ensure effective trial management, the parties are encouraged where possible to raise concerns or request information informally from the Trial Chamber Senior Legal Officer. This channel should be utilised, to the extent possible and appropriate, as an alternative to filing motions which do no more than seek information or raise questions. The Chamber has already had occasion to recommend the withholding of fees for a number of voluminous filings that it considers lack a legal basis and do little beyond add to the burdens of the Chamber and translation services. The Chamber reminds counsel of their obligations under Rule 22(4).’” Memorandum from Trial Chamber President, Judge Nil Nonn, to all parties in Case 002, entitled “Trial Chamber Response to Motions E67, E57, E56, E58, E23, E59, E20, E33, E71 and E73 following the Trial Management Meeting of 5 April 2011, E74. “The parties are

personally encouraged Mr. IENG Sary's International Co-Lawyer, Michael G. Karnavas, to communicate informally with the SLO,⁷ when it was brought to the Trial Chamber's attention (by way of copying the Trial Chamber to an email) that the SLO informally imparted information to some of the parties and non-parties (as opposed to all parties) information concerning the commencement of the trial.⁸

2. Although the Defence considers informal communications with the SLO concerning procedural and legal issues to be inappropriate and lacking transparency, it has acceded to the Trial Chamber's encouragement. In the interests of equality and transparency, the Defence renews its previous requests to the Trial Chamber⁹ to place all its letters,¹⁰ including emails, concerning issues which would impede the efficiency of the early

encouraged to raise any remaining issues that they consider may impede the efficiency of the early portion of the hearing of the substance informally with the Trial Chamber Senior Legal Officer as soon as possible and in any event no later than Tuesday 1 November 2011." Email from SLO to all parties in Case 002, entitled "Communications to parties in Case 002 regarding scheduling of opening statements and the hearing of the substance in Case 002, and information in advance of hearing on 19-20 October 2011," 17 October 2011 (emphasis added). *See also*, "You are also requested to remove the judges' names from future correspondence of this sort, which is in clear breach of earlier directions given to the parties." Email from SLO to Co-Prosecutors, entitled "Co-Prosecutors Leave to Reply to Ieng Sary and Nuon Chea's Responses to the Co-Prosecutors Motion for Reconsideration of the Terms of the Severance Order with Khmer translation," 18 October 2011; "I have previously indicated that I am the point of contact for communication between the parties and the Trial Chamber. Accordingly please desist from ccing the Trial Chamber judges into emails of this sort." Email from SLO to Michael G. Karnavas, entitled "start date of trial," 17 October 2011.

⁷ "Please advise Mr Karnavas that the judges are concerned that he continues to include them in his communications, justifying this by saying that it is important. It is inappropriate for him to use this means of direct communication when it is clear that you have been asked to communicate informally with the parties by the TC itself. Or at least that is my view!" Email from Judge Cartwright to Michael G. Karnavas, entitled "start date of trial," 17 October 2011.

⁸ Email from Michael G. Karnavas to SLO, entitled "start date of trial," 17 October 2011.

⁹ *See* Letter from Ieng Sary Defence Team to SLO, entitled "Scheduling of the substantive trial," 17 October 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Request for Clarification Concerning Objections to OCP and Civil Party Document Lists," 3 November 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Request for information concerning outstanding preliminary objections," 4 November 2011.

¹⁰ The Defence requests the Trial Chamber to place the following letters on the Case File: Letter from Ieng Sary Defence Team to SLO, entitled "Scheduling of the substantive trial," 17 October 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Request for clarification of Trial Chamber Memorandum entitled 'Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5'," 21 October 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Request for Courtesy Copies of Authorities cited in the Trial Chamber's Decision on the Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity," 31 October 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Issues which impede the efficiency of the early portion of the substantive hearing", 1 November 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Request for Clarification Concerning Objections to OCP and Civil Party Document Lists," 3 November 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Notice Concerning Ieng Sary's Objections to OCP and Civil Party Documents for the initial three weeks of trial," 4 November 2011; Letter from Ieng Sary Defence Team to SLO, entitled "Request for information concerning outstanding preliminary objections," 4 November 2011; and Letter from Ieng Sary Defence Team to SLO, entitled "Courtesy Copies of Authorities cited in the Trial Chamber's Decision on the Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity," 14 November 2011.

portion of the trial and any other matters sent to the SLO to be placed on the Case File so there is an accurate, complete and transparent record.

B. The Response is a Second Reconsideration Submission

3. The Request is a thinly veiled attempt by the Co-Prosecutors in seeking a second reconsideration of the Severance Order.¹¹ The Co-Prosecutors are using the Request as a vehicle to extend the scope of the first trial to encompass virtually the entire Closing Order,¹² thereby making the severance moot. Similarly, in their Request to Reconsider the Severance Order, the Co-Prosecutors requested to extend the scope of the first trial.¹³
4. The Trial Chamber has already decided upon the Request to Reconsider the Severance Order.¹⁴ Second reconsiderations are not envisaged within the ECCC legal framework. While the Defence concurs with the Co-Prosecutors that several important issues concerning trial management require immediate clarification, it is an abuse of process to seek such clarification by filing a submission which also attempts to have the Trial Chamber re-consider issues which have been decided upon.
5. The Defence requested trial management meetings to address unresolved issues.¹⁵ Regrettably the Trial Chamber chose not to avail itself to the expertise and knowledge that some of the parties have accrued over a considerable amount of time and practice before international tribunals while handling large and complex cases such as Case 002.
6. At this stage of the proceedings, rather than filing inappropriate requests for second reconsideration or even appropriate requests for clarification, the Co-Prosecutors are well advised to continue to press the Trial Chamber,¹⁶ as the Defence continues to do so,

¹¹ The Trial Chamber appears to acknowledge that the Request is related to the Severance Order as the document number of the Request is within the same family of documents as the Severance Order, E124.

¹² Request, para. 14.

¹³ Request for Reconsideration of the Severance Order, paras. 36-44.

¹⁴ Decision on the Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order (E124/2) and Related Motions and Annexes, 18 October 2011, E124/7.

¹⁵ See IENG Sary's Support to the Co-Prosecutors' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002, 24 October 2011, E132/1; Letter from Ieng Sary Defence Team to SLO, entitled "Request for clarification of Trial Chamber Memorandum entitled 'Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5'," 21 October 2011; and Letter from Ieng Sary Defence Team to SLO, entitled "Scheduling of the substantive trial," 17 October 2011.

¹⁶ Co-prosecutors' request for a trial management meeting and regular trial status meetings for case 002, 21 October 2011, E132.

in holding a meaningful trial management meeting where unresolved or unclear issues could be fully vetted and resolved, hopefully, with clarity and specificity.

II. CONCLUSION

7. Had the Defence sought a second reconsideration in this manner, it is likely that sanctions would have been sought.¹⁷ Should the Trial Chamber be inclined to grant the relief sought by the Co-Prosecutors, the actions of the Trial Chamber would demonstrate a more favorable disposition towards the Co-Prosecutors than the Defence. The Defence sees no profit in responding to the substance of the Request as the Trial Chamber has already decided upon the Co-Prosecutors' request for reconsideration of the Severance Order. Should the Trial Chamber be inclined to grant the relief sought by the Co-Prosecutors, it is respectfully requested that the Trial Chamber dispense with the severance and try Case 002 as per the Closing Order *in toto*.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to:

- a. REJECT the Request as a second reconsideration of the Severance Order;
- b. SCHEDULE a fully recorded trial management meeting with all members of the Trial Chamber in attendance; and
- c. PLACE its abovementioned letters and emails to the SLO on the Case File.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 16th day of **November**, 2011

¹⁷ On the one occasion where the Defence filed observations to a reply, the Trial Chamber found such a filing to be a "sur-reply" and "Future filings of this sort, when filed without leave, will be removed from the case file, with directions to the Defence Support Section that such work should not be remunerated." Memorandum from the President of the Trial Chamber, Nil Nonn, to all parties in Case 002, entitled "Trial Chamber's disposition of Motions E91/2, E95/7, E99/1/1, E100/4/1, E101/3, E114/2, E119 and response to general direction on replies (E112), 5 October 2011, E126.