

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:** 14 December 2011**CLASSIFICATION****Classification of the document
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**IENG SARY'S REQUEST FOR THE TRIAL CHAMBER TO DIRECT THE TRIAL
CHAMBER SENIOR LEGAL OFFICER TO MAINTAIN OPEN AND
TRANSPARENT COMMUNICATION WITH ALL PARTIES CONCERNING TRIAL
MANAGEMENT ISSUES**

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Distribution to:**The Trial Chamber Judges:**

Judge NIL Nonn

Judge YOU Ottara

Judge YA Sokhan

Judge Silvia CARTWRIGHT

Judge Jean-Marc LAVERGNE

Reserve Judge THOU Mony

Reserve Judge Claudia FENZ

Co-Prosecutors:

CHEA Leang

Andrew CAYLEY

All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests the Trial Chamber to direct the Trial Chamber’s Senior Legal Officer Susan Lamb to maintain open and transparent communication with all parties concerning trial management issues. This Request is made necessary because the Trial Chamber Senior Legal Officer has been engaging in *ex parte* communication with certain select parties concerning matters which are of importance to all parties.

I. BACKGROUND

1. On 17 October 2011, Defence International Co-Lawyer Michael G. Karnavas sent an email to Trial Chamber Senior Legal Officer, copied to all parties, stating:

We understand that you have indicated to some that we will be receiving a scheduling order shortly which will indicate the start date of the substantive trial to be 28 November 2011. We have since also heard rumors that opening statements are likely to begin on 21 November 2011. For the sake of transparency, especially in light of the ongoing criticism this tribunal is enduring (much of which is the by-product of what would appear to be leaked insider information), we would most appreciate a proper scheduling order, signed by the Presiding Judge, or at least a courtesy email from you in which all parties are informed. Dispensing information to some in a casual and informal manner is not, in my opinion, conducive to fostering confidence in the proceedings. My apologies for the sharpness of tone. In light of the numerous outstanding issues in this case that need to be resolved prior to the commencement of trial, and because of my personal distaste for *ex parte* communications, I trust you will understand my concerns.¹

2. Shortly after this email was sent, the Trial Chamber Senior Legal Officer sent an email to all parties informing them of the start date of trial.² She separately responded to Mr. Karnavas by email on the same date:

An email providing a comprehensive summary of all matters relevant to preparation of the early trial phases was this morning circulated to all parties. Shortly prior to the issuance of this communication, some features of the information it contained had been selectively shared with a limited number of persons (for instance, to the Acting Head of the DSS, the Witness and Expert Support Unit, and other key units or personnel) where conducive to effective trial management.

¹ Email from Mr. Karnavas to the Trial Chamber Senior Legal Officer, copied to all parties, entitled “Start Date of Trial”, 17 October 2011.

² Email from the Trial Chamber Senior Legal Officer to all parties entitled “Communication 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.

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.³

3. Mr. Karnavas replied:

Thank you for your prompt response. The operative word in your message is 'selective.' Mr. Ang Udom and I represent Mr. Ieng Sary. In other words, we are a party. While DSS plays an extremely important function, it does not, cannot and will not represent Mr. Ieng Sary – nor do the other 'selectively' chosen 'limited number of persons'; hence, my concerns.

My apologies for troubling the Trial Chamber on this matter, though, in my opinion, it is of sufficient consequence to warrant their awareness.⁴

4. On 7 December 2011, the Defence was informed informally by one of the Defence teams that the Trial Chamber Senior Legal Officer had contacted the NUON Chea and KHIEU Samphan Defence teams and informed them of the next batch of experts and witnesses the Trial Chamber is considering calling. Immediately upon learning this information, the Defence emailed the Trial Chamber Senior Legal Officer, copying all the parties, to question whether this information was accurate and specifically whether she could inform the parties if TCE 38 had agreed to give evidence.⁵

5. On 8 December 2011, the Trial Chamber Senior Legal Officer responded:

The below witnesses are under consideration by the Chamber for the next segment of the trial. They have been called variously by the OCP and the NUON Chea and KHIEU Samphan Defence. I had contacted the latter two Defence teams to enquire as to whether they had any interest in leading any of these witnesses.

The Chamber will make decisions as to which witnesses and experts will be called next, and who to delegate their questioning to, very shortly. All parties will be informed of these decisions as soon as possible.⁶

6. The Defence responded:

³ Email from the Trial Chamber Senior Legal Officer to Mr. Karnavas, copied to all parties, entitled "Re: Start Date of Trial", 17 October 2011.

⁴ Email from Mr. Karnavas to the Trial Chamber Senior Legal Officer, copied to all parties, entitled "Re: Start Date of Trial", 17 October 2011. The Trial Chamber Senior Legal Officer responded to this email: "I can assure you that all parties were informed of all pertinent matters at the first available opportunity, and none were prejudiced by the extremely limited earlier disclosure to which I referred (which occurred in any case on the eve of the general mail going out)." Second email from the Trial Chamber Senior Legal Officer to Mr. Karnavas, copied to all parties, entitled "Re: Start Date of Trial", 17 October 2011.

⁵ Email from Tanya Pettay to Trial Chamber Senior Legal Officer, copied to all parties, entitled "Next Batch of Trial Chamber Witnesses", 7 December 2011.

⁶ Email from the Trial Chamber Senior Legal Officer to Ms. Pettay, copies to all parties, entitled "Re: Next Batch of Trial Chamber Witnesses", 8 December 2011.

Mr. Ang Udom and Mr. Karnavas wish to stress and reiterate (please refer to Mr. Karnavas's email to you of 17 October 2011) how disconcerting it is to learn from others that there are communications between you and other teams concerning witnesses and future scheduling matters. Everyone must be notified, not a select few, regardless of whether they may take the lead with questioning. If there is a particular reason that you consider it necessary to continue communicating with only certain parties, please be explicit as to why you believe this must occur, so that we may file something to the Trial Chamber concerning this opaque practice. At no other tribunal do these sorts of communications occur on a selective, ex-parte basis.⁷

7. The Trial Chamber Senior Legal Officer responded:

Let me be very clear. The communication to which you referred had no relevance to the IENG Sary Defence or any other party beyond its addresses. The Trial Chamber has a discretion to delegate responsibility for questioning to an appropriate party and the potential witnesses under consideration were included only on the witness lists of the OCP, and two Defence teams. A natural first step in the exercise of that discretion is to ascertain whether these two Defence teams or OCP might be willing to take on this burden. The IENG Sary Defence or any other party could have no legitimate comment to make on whether or not the NUON Chea or KHIEU Samphan Defence wished to lead witnesses appearing on their own witness lists.

You are correct that not all persons in my position at other tribunals are as proactive at trial management as I am. This bears dividends in terms of effective organisation and is purely to the benefit of the parties.⁸

8. The Civil Party Lead Co-Lawyers responded to this email chain to inform the Trial Chamber Senior Legal Officer that they would appreciate being informed of such communications "in order to understand the criteria used by the Chamber to give the primary responsibility to a party for the lead questioning and for transparency issues."⁹

9. On 9 December 2011, the Trial Chamber Senior Legal Officer held an informal trial management meeting with the parties. At this meeting, the Civil Party Lead Co-Lawyer requested the Trial Chamber Senior Legal Officer to copy all parties into her communications concerning trial management matters. The Trial Chamber Senior Legal Officer stated that she would not do this, but would only copy parties that she considered relevant for particular issues. The Trial Chamber Senior Legal Officer stated that

⁷ Email from Tanya Pettay to Trial Chamber Senior Legal Officer, copied to all parties, entitled "Re: Next Batch of Trial Chamber Witnesses", 7 December 2011.

⁸ Second email from the Trial Chamber Senior Legal Officer to Ms. Pettay, copies to all parties, entitled "Re: Next Batch of Trial Chamber Witnesses", 8 December 2011.

⁹ Email from Civil Party Legal Officer Jeanne Sulzer to Trial Chamber Senior Legal Officer, copied to all parties, entitled "Re: Next Batch of Trial Chamber Witnesses", 7 December 2011.

copying all parties would create too much work for her, because when she sends general emails to all parties, she gets many email responses and this creates too much work.

II. LAW

10. For the applicable law and codes of conduct concerning *ex parte* communications, please refer to IENG Sary's Request for Investigation Concerning Ex Parte Communications between the International Co-Prosecutor, Judge Cartwright and Others¹⁰ and IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel LEMONDE and Joinder to the IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing.¹¹

III. REQUEST

11. In order to advance transparency, the Defence respectfully requests the Trial Chamber to direct the Trial Chamber Senior Legal Officer to copy all parties into her informal communications concerning trial management issues. This would advance transparency and help to ensure that all parties receive equal treatment. Moreover, it would not cause prejudice to any party.
12. The *ex parte* communication the Trial Chamber Senior Legal Officer has engaged in, even if not designed to give advantage or disadvantage to any party, has the effect of treating the parties unequally. It also raises, rightly or wrongly, suspicion and fosters discontent. All parties have an equal interest in trial scheduling and in learning what witnesses the Trial Chamber is considering hearing next, even if a final determination has not yet been made. There is no reason why the information the Trial Chamber Senior Legal Officer has provided to some parties could not have been made available to all parties. Other parties may wish to voice their opinions on which parties are scheduled to lead certain witnesses or on other such matters.
13. Because the Defence's requests for communications to be equally sent to all parties have fallen on deaf ears, and, because the Trial Chamber Senior Legal Officer has obdurately refused to understand or appreciate the Defence's (and apparently Civil Parties') requests

¹⁰ IENG Sary's Request for Investigation Concerning Ex Parte Communications between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3.

¹¹ IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel LEMONDE and Joinder to the IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing, 14 December 2009, 1.

for greater transparency, the Defence has no option but to seek appropriate relief by raising this matter before the Trial Chamber.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to DIRECT the Trial Chamber Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues.

Respectfully submitted,



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 14th day of **December, 2011**