

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S REQUEST FOR
CLARIFICATION THAT NO ADVERSE INFERENCES CAN BE DRAWN
FROM AN ACCUSED'S SILENCE WHEN HE EXERCISES HIS RIGHT TO
REMAIN SILENT**

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I. INTRODUCTION

1. On 31 January 2012, the defence for IENG Sary (the “Defence”) filed a request entitled “Ieng Sary’s Request for Clarification That No Adverse Inferences Can Be Drawn From An Accused’s Silence When He Exercises His Right to Remain Silent”¹ (the “Request”), which was notified to the parties in Khmer on 1 February 2012.
2. Through that filing, the Defence “requests clarification from the Trial Chamber as to whether adverse inferences can and will be drawn from an Accused who exercises his right to remain silent”.² Such clarification is purportedly made necessary in light of the following:
 - (a) Comments made by International Senior Assistant Co-Prosecutor, Mr. Tarik Abdulhak. The Defence suggesting that through such comments the OCP invited the Chamber to draw adverse inferences from an Accused’s exercise of his right to silence;³ and
 - (b) Judge Lavergne’s invitation to the Accused, KHIEU Samphan to “clarify,” “comment on,” or “react” to questions and documents put to him following KHIEU Samphan’s invocation of his right to remain silent.”⁴
3. The Defence also note that IENG Sary has expressly invoked his right to remain silent before the Trial Chamber, adding to the perceived need for clarification of the Chamber’s position on this issue.⁵
4. The present Response is filed in order to clarify the OCP position regarding the Accused’s fundamental right to silence before the ECCC. The Co-Prosecutors particularly seek to rectify the mischaracterisation of that position by the Defence, which forms the premise of the Request.
5. The OCP position in regards to the right to silence, as distinguished from the form of oral testimony presented by KHIEU Samphan thus far before the Chamber, is detailed in a parallel filing (“OCP Request regarding weight of oral

¹ E164, “Ieng Sary’s Request for Clarification That No Adverse Inferences Can Be Drawn From An Accused’s Silence When He Exercises His Right to Remain Silent”, 18 March 2011.

² *Ibid.* at p. 1.

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

statements').⁶ That position, in summary, is that since Khieu Samphan has not exercised his right to remain silent and has elected to give evidence before the Chamber, it is not open to him to refuse to answer questions from the Judges and the parties.⁷ Refusal to respond to examination will mean his oral statements are unlikely to be accorded significant evidentiary weight and negative inferences may be drawn by the Chamber against him.

II. RESPONSE

6. The Accused's fundamental right to remain silent at trial before the ECCC has never been challenged by the OCP, nor has any position been intimated through a representative of the Office to suggest a negative inference should arise from the exercise of this right.
7. The Accused, IENG Sary, has clearly and unequivocally expressed his intention to exercise his right to remain silent throughout the present trial. This is notwithstanding his election to avail himself of the right to make an opening statement, which he read to the Chamber on 23 November 2011. The OCP duly notes this election and the Accused's right to suffer no adverse consequence as a result.
8. In contrast with the position adopted by IENG Sary, KHIEU Samphan has waived his right to remain silent, instead electing to make oral statements intermittently during the proceedings while thus far refusing to answer examination questions. The distinction between the oral statements made by KHIEU Samphan and the exercise of the right to silence is traversed in detail by the OCP Request regarding weight of oral statements.
9. The Defence has premised its Request in part on a significant misrepresentation of the OCP position on the right to silence as intimated by Senior Assistant Co-Prosecutor, Mr Abdulhak, on 12 January 2012.⁸ When read in isolation the short passage quoted in the Request may suggest, as presently argued by the Defence, that the OCP invites the Chamber to draw an adverse inference from the very

⁶ 'The Co-Prosecutors' Request for Advice to Khieu Samphan on the Evidentiary Weight of Oral statements', to be filed the week of 14 February 2012.

⁷ *Ibid.*, para 1-2

⁸ **E1/26.1**, Transcript, 12 January 2012, p. 60:7 - 61:7

exercise of the right to silence by any Accused. Were the submission quoted in full, it would be clear that the OCP distinguish the exercise of the right to silence from the position taken by KHIEU Samphan. The submission on behalf of the OCP was clearly premised on the fact that this KHIEU Samphan was not exercising his right to silence:

7 *MR. ABDULHAK:*

8 *Thank you, Mr. President. Good afternoon. If I may, just by way*
9 *of a brief clarification, I believe back in December Mr. Khieu*
10 *Samphan indicated that he was not exercising his right to remain*
11 *silent, as the President just indicated, but that at a later*
12 *point in the trial, once he has heard the evidence, he would*
13 *respond. We took that to mean "testify", answer questions both*
14 *from the Judges and from the parties.*

10. Thus, the OCP first noted that KHIEU Samphan had waived his right to silence, both expressly to the Chamber and signified by oral statements he had already made during the substantive hearings of the trial. Clarification was then sought as to his refusal to respond to questions from the parties. Such clarification was made pressing given the impending conclusion of the first segment of the trial. The OCP position was then carefully termed in the following way:

21 *But certainly we are nearing the end of this portion of the first*
22 *phase of the trial, and if Mr. Khieu Samphan's position is that*
23 *he will first hear the evidence and then respond, then we would*
24 *submit that the appropriate time, as regards to historical*
25 *background, is now or before the conclusion of this segment. And*
1 *so our position is that Mr. Khieu Samphan should be asked to*
2 *clarify.*
3 *Is he refusing to testify and simply taking the position that he*
4 *will make statements as the trial proceeds? If that is the case,*
5 *then the prosecution would make submissions in relation to the*
6 *negative inferences that may be drawn from such a position. Thank*
7 *you.*

11. When taken as a whole, it is clear that the OCP submission was intended to alert the Chamber and Accused to the *de minimis* evidentiary value of oral statements

of the Accused which are unable to be tested through examination. The weight to be assigned to such statements and any adverse inference to be drawn from the refusal to respond to examination, in no way relates to the exercise of an Accused's right to silence.

12. The OCP has consistently affirmed and endorsed the fundamental right of all Accused to remain silent before this Court and will continue to do so.⁹

Respectfully submitted,

Date	Name	Place	Signature
10 February 2012	CHEA Leang Co-Prosecutor	Phnom Penh	
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⁹ E101 Co-Prosecutors' Request for a Direction Regarding the Intentions of the Accused with Respect to Testifying, 17 June 2011, ERN 00708339-40, p. 3 ("The Accused clearly have a fundamental right to remain silent at trial."); E51/5/3/1, Co-Prosecutors' Joint Response to Defence Rule 89 Preliminary Objections, 21 March 2011, ERN 00655302-37, p. 35 ("The Preparation Order does not demand that Nuon Chea agree on facts with the Co-Prosecutors (which would be a clear violation of the right to silence)."); E101/3 Co-Prosecutors' Reply to Ieng Sary's Response Regarding the Intentions of the Accused with Respect to Testifying, 3 October 2011, ERN 00743973-78, p. 4 ("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.").