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Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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

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**RESPONSE TO THE "CO-PROSECUTORS' REQUEST FOR NOTICE TO BE
GIVEN TO ACCUSED KHIEU SAMPHAN ON THE CONSEQUENCES OF A
REFUSAL TO RESPOND TO QUESTIONS AT TRIAL"**

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Before:

The Trial Chamber
Judge NIL Nonn
Judge Silvia CARTWRIGHT
Judge YOU Ottara
Judge Jean-Marc LAVERGNE
Judge YA Sokhan

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

All Civil Party Lawyers

All Defence Teams

MAY IT PLEASE THE TRIAL CHAMBER

1. In an application entitled, “Co-Prosecutor’s Request for Notice to be Given to Accused KHIEU Samphan on the Consequences of a Refusal to Respond to Questions at Trial”, dated 17 February 2012, which was notified in French on 27 February (the “Request”), the Co-Prosecutors’ request the Chamber to:

26. (...) notify the Accused that, should he refuse to answer questions at trial:

(a) His oral statements before the Chamber are unlikely to be accorded significant evidentiary weight; and

(b) The Chamber may draw negative inferences from such a refusal in assessing the evidence on the issue of his involvement in, and responsibility for, the crimes alleged in the Closing Order.

27. Finally, in the interest of orderly trial management and fairness to all parties, the Co-Prosecutors respectfully request the Chamber to direct Khieu Samphan to state now: 1) whether he intends to answer questions at all; and 2) if he does intend to answer questions, whether he will do so during each segment, or only at the end of proceedings, once evidence has been presented on all the segments and phases of the trial.¹

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FUNDAMENTAL PRINCIPLES

2. According to the Co-Prosecutors, the Accused has, through his ~~actions~~conduct during the proceedings, waived his right to remain silent.² The position of the Co-Prosecutors amounts to considering any statements made by the Accused during the trial as an express waiver of his right to remain silent. This view is wrong, as it is entirely at odds with the principle set out in the Internal Rules.

3. ~~It~~Indeed, it bears recalling that Internal Rule 21 provides as follows:

Rule 21. Fundamental Principles

1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and Agreement. In this respect:

¹ Co-Prosecutors’ Request for Notice to be Given to Accused KHIEU Samphan on the Consequences of a Refusal to Respond to Questions at Trial, 17 February 2012, E174.

² Request, para. 13.

- a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication;
- b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according the same rules;
- c) The ECCC shall ensure that victims are kept informed and that their rights are respected throughout the proceedings; and.
- d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent. (Emphasis added.)

4. The aforementioned sub-rule 21(1)(d) is further echoed in Internal Rule 90: Questioning of the Accused.

5. ~~Therefore~~ Thus, the right of the Accused against self-incrimination, which is the cornerstone of the right to remain silent, is a fundamental principle that is unequivocally enshrined in the ECCC Internal Rules. It is on this basis that ~~whenever~~ questions were put to Mr KHIEU Samphan and to the other Accused, or where documents were put to them, they were asked whether they wanted to respond or to refrain from commenting. Whenever they did not wish to comment, their right to remain silent was respected.

6. ~~At~~ Thus, at the hearing ~~on~~ of 13 December 2011, after Mr KHIEU Samphan had stated his position, President NIL Nonn stated:³

~~Mr-President: So now~~ [TRANSLATION] Q. Therefore you are now exercising your rights not to respond to our question now, but questions, and you want to make your statement responding in response to the various paragraphs of the Closing Order that were read out by the gCrefifiers on Monday the 3rd of December 2011; is that your suggestion? what you are suggesting?
 If so, your request is granted. You, and you may now proceed as you proposed.
 (Emphasis added.)

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7. At the hearing ~~on~~ of 12 January 2012, as Judge LAVERGNE invited the Accused to make their comments, he also repeatedly recalled the right to remain silent on several occasions:

~~This is~~ [TRANSLATION] Therefore, this is the reason why these documents will be tendered to you and maybe there will be maybe, eventually, excerpts will be read to, and you and

³ Transcript of Proceedings, 13 December 2011, E1/21.1, p. 7476, L. 6-14, 16-22. [French].

~~we will give you the opportunity to provide comments. But if comment. If you intend do not wish not to answer or respond to these documents that will be put to you, you will be entirely free to do so as well. But you. However, it should understand today be very clear that you are being given an opportunity today.~~⁴

~~(...) These documents are ones that which the Chamber believes may be considered as possibly being potentially relevant. They are going to be aired in the hearing, they are going to be presented in court, will be put to Mr Khieu Samphan, and ... and eventually, ... Mr Khieu Samphan has an will have the opportunity to react to them, and if he wishes, to make comments on them, respond and comment. That is what we are planning to do is contemplated now.~~⁵

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8. At that same hearing, the President of the Chamber clearly took note of the Accused's position:

~~[TRANSLATION] Judge Lavergne, you have ... you may now proceed and the The Chamber has noted takes note of the position by of the Accused and his Counsel for the Accused with regard ... with respect to the documents the questionings. But even when it comes to documents being put before the Chamber, Mr. questioning. However, Khieu Samphan also shows that he is does not willing ... that he does not wish to respond to the filing to the answer, even questions regarding documents being put here. So may already on the case file.~~

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~~I suggest therefore that Judge Lavergne proceed with only providing the identification of the documents and, but that no further questions are being put to the accused person to clarify on it because we Accused.~~

~~We clearly understand clearly that the accused person at the very: since the beginning, the Accused has said that he would not respond to answering questions. But~~

~~He is now he has even gone going further to say that he would will not even respond to any requests asking him for clarifications or explanations on the questions ... concerning documents being put before on the Chamber case file.~~⁶

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9. Also, when Judge LAVERGNE again invited the Accused to comment on documents at the hearing of 8 February 2012, it was always with due respect for their right to remain silent:

~~[TRANSLATION] (...) I don't intend to put any questions to Mr. understand eventually that the Accused Nuon Chea, but I would like him and as well as the other Accused to react may eventually respond, if they so wish, to the documents I will intend to present before the Chamber.~~⁷

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~~Very well Well, I do not know whether accused the Accused Khieu Samphan would like to react. If wishes to respond, I simply want to tell him that he has a means of doing so, would the opportunity to do so if he be ready to react so wishes.~~⁸

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~~I do not know whether either Mr. Khieu Samphan and/or Mr. Ieng Sary ... since he has been following the proceedings should be able to hear from the holding his cell don't know ... whether either one of the other Accused will have anything to say in light intend~~

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⁴ Transcript of Proceedings, 12 January 2012, E1/26.1, p. 58, L. 21-25 and p. 59, L. 4-10; 1-2 [French].

⁵ *Ibid.*, p. 63, L. 23-25 and p. 64, L. 48-24; 1-3 [French].

⁶ *Ibid.*, p. 7576, L. 19-25 and p. 7677, L. 1-5-6 [French].

⁷ Transcript of Proceedings, 8 February 2012, E1/40.1, p. 47-4, 23-25 and p. 18, L. 4-9-12 [French].

⁸ *Ibid.*, p. 2223, L. 40-42-2-4 [French].

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~~to react to the reading of the documents I have just presented. Would or if they be in a position wish to make any remarks/observations (...)~~

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10. Lastly, at the hearing of 9 February 2012, President NIL Nonn recalled, in no uncertain terms, the right of the Accused to remain silent:

~~[[TRANSLATION] Before we proceed beginning, the Chamber would like to remind the Accused, in particular Mr Ieng Sary and Mr Khieu Samphan, that the Chamber is wellfully aware of your right to remain silent.~~

~~As for the proceedings, at this stage. And... Mr Ieng Sary, in particular, seems appears to always continue to exercise the his right to remain silent.~~

~~The Accused is/was, of course, entitled to give comments to comment on the documents that Chamber would like to... intends to be put before the Chamber or by the parties before the Chamber: that produced at the hearings.~~

~~That is your right.⁹~~

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11. The Chamber has therefore very clearly recognised the Accused's right to remain silent. In this context, the Co-Prosecutors' request amounts to asking Mr Khieu Samphan to reverse his position, and, moreover, it is based upon a misinterpretation of the jurisprudence.

MISINTERPRETATION OF THE JURISPRUDENCE BY THE CO-PROSECUTORS

12. In the absence of specific rules governing statements by the Accused, with the exception of opening statements, the Co-Prosecutors invoke international jurisprudence. However, the parallels they draw relate to situations that are not comparable.

13. The ICC and the ICTY have provisions that distinguish statements made by an accused depending on whether or not he or she is a witness. The jurisprudence of these two jurisdictions, as cited by the Co-Prosecutors, cannot apply to Mr KHIEU Samphan's position.

14. Indeed, in order to properly understand the scope of the 13 September 2011 decision in *The Prosecutor v. KATANGA*, which is cited by the Co-Prosecutors,¹⁰ one must first read Article 67 of the Rome Statute of the International Criminal Court.¹¹

⁹ Transcript of Proceedings, 9 February 2012, E1/41.1, p.1. L. 9-16-7-14 [French].

¹⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Decision on the request for the Defence for Mathieu Ngudjolo to obtain assurances with respect to self-incrimination for the

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Response to the "Co-Prosecutors' Request for Notice to be Given to Accused KHIEU Samphan on the Consequences of a Refusal to Respond to Questions at Trial"

Article 67 – Rights of the Accused

1. *In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:*

[...]

g) *Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.*

h) ***To make an unsworn oral or written statement in his or her defence; and***

i) *Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.* (Emphasis added)

15. The ICC Trial Chamber decision, which is cited by the Co-Prosecutors, makes specific reference to the case of an Accused who has voluntarily elected to testify under oath, thereby waving Article 67(1)(g). However, there is no provision for the accused to make sworn statements at the ECCC, and so Mr KHIEU Samphan has not made any.

16. Only Article 67(1)(h) of the ICC Statute would be useful in understanding the position of Mr KHIEU Samphan, as he has elected to make oral statements in his defence without making sworn statements. Therefore, the Co-Prosecutors' interpretation of the ICC jurisprudence does not apply in the matter at hand.

17. Additionally, the Co-Prosecutors wrongly rely upon the ICTY decision in *Prosecutor v. Gotovina et al* in their attempt to draw a parallel with Mr KHIEU Samphan's situation.¹² Here again, it is necessary to reread the ICTY Rules. Rule 84 *bis* of the ICTY Rules of Procedure and Evidence specifically provides for statements made by the accused after the opening statements of the parties:

Rule 84 bis – Statement of the Accused

- A) *After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chambers so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.*

accused, 13 September 2011.

¹¹ Article 67 of the Rome Statute of the International Criminal Court.

¹² Request, para. 23.

B) The Trial Chamber shall decide on the probative value, if any, of the statement.

18. However, this statement has no bearing on the election of the accused to testify as a witness under Rule 85(C) of the Rules of Procedure and Evidence¹³ (also found in the ICTR Rules of Procedure and Evidence), which provides:

If the accused so desires, the accused may appear as a witness in his or her own defence.

19. Therefore, the International Tribunals and the ICC make a clear distinction between the statements the accused make in court and the statements they make when they appear as witnesses in their own defence. This distinction is laid down in the rules and fits in a purely adversarial system where an accused may choose to appear in court as a witness, just like any other witnesses.

AN ACCUSED BEFORE THE ECCC CANNOT BE LIKENED TO A WITNESS UNDER OATH

20. The rules governing the status of witnesses before the ECCC derive directly from the civil law system and Cambodian law, where some witnesses are afforded a special status because of their close relationship with the accused. It is in light of this that Internal Rule 24 provides:

[...]

2. The following witness shall make a statement without having taken an oath:

- a) The father, mother and ascendants of the Charged Person, Accused or Civil Party;*
- b) The sons, daughters and descendants of the Charged Person, Accused or Civil Party;*
- c) The brothers and sisters of the Charged Person, Accused or Civil Party;*
- d) The brother-in-laws and sister-in-laws of the Charged Person, Accused or Civil Party;*
- e) The husband or wife of the Charged Person, Accused or Civil Party, even if they have been divorced; and*
- f) Any child who is less than 14 (fourteen) years old*

21. If the relatives of an accused do not have to make an oath, it is only logical that the accused does not have to either. Therefore, the Co-Prosecutors were wrong in requesting that the statements made by an accused before the ECCC be likened to *“that of an accused who has voluntarily elected to testify and taken an oath before the*

¹³ Rule 85 of the ICTY Rules of Procedure and Evidence.

ICTY/ICC."¹⁴ The status of an accused before the ECCC can never be likened to that of a witness, much less to a witness under oath.

22. Lastly, with regard to the weight that the Chamber will attach to Mr KHIEU Samphan's statements, his Defence submits that it is not for the Co-Prosecutors to dictate to the Chamber what weight it will attach thereto. The rules of evidence are clear, "*[t]he onus is on the Co-Prosecutors to prove the guilt of the accused*" and it is based on the evidence adduced that the Chamber will form its opinion beyond reasonable doubt.¹⁵

23. To request the Chamber at this stage of the proceedings to draw negative inferences from the Accused's silence is a breach both of the spirit and the letter of the Internal Rules and an attempt to reverse the burden of proof.

¹⁴ Request, para. 24.

¹⁵ ECCC Internal Rule 87.

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FOR THESE REASONS

24. Pursuant to Internal Rule 21, the Trial Chamber is requested to:

- RECALL that the right to remain silent is a fundamental principle guaranteed to the Accused at all stages of the proceedings,
- Accordingly, REJECT all of the measures requested by the Co-Prosecutors in their Request E174.

	KONG Sam Onn	Phnom Penh	[Signed]
	Arthur VERCKEN	Paris	for [Signed]
	Jacques VERGÈS	Paris	for [Signed]
Date	Name	Place	Signature