

**ក្រុមបេធាវីការពារក្តី អៀង សារី**  
**IENG SARY DEFENCE TEAM**  
**EQUIPE DE DEFENSE DE IENG SARY**

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Co-Lawyers for IENG Sary

10 August 2012



To: **Susan LAMB**  
 Trial Chamber Senior Legal Officer

Copy: **Defence Teams**

**Office of the Co-Prosecutors**

**Civil Party Lead Co-Lawyers**

Re: Upcoming Trial Management Meeting

Dear Ms. Lamb,

In response to the Trial Chamber's memorandum E218 dated 3 August 2012 concerning the upcoming trial management meeting, we raise the following issues:

**Whether the Trial Management Meeting is Conducted in Public or Closed Session**

The Trial Chamber's memorandum states that the upcoming trial management meeting will be held in closed session "given its technical focus."<sup>1</sup> We respectfully request the Trial Chamber to reconsider this decision in order to promote transparency. The matters to be addressed at this meeting are certainly of interest to the general public and are most certainly not of such a hyper-technical nature that the public could not follow or appreciate the discussion. Any matters relating to specific witnesses may be addressed by referring to the witnesses' pseudonyms. Referring to the benefits of openness and transparency, United States Justice Louis Brandeis famously noted, "sunlight is ... the best of disinfectants."<sup>2</sup> While Justice Brandeis was referring to the banking business, the argument fits for courts, and especially the ECCC. Not only does transparency lend a better understanding of what the Trial Chamber / ECCC is doing, but it encourages those who are engaged by and with the Trial Chamber / ECCC (judges, prosecutors, lawyers) to better meet their obligations to the Cambodian public – the primary stakeholder in the ECCC proceedings. With the image of the ECCC having been marred with all sorts of scandals and behind-the-scene intrigues that continually come to light (despite concerted efforts to conceal or contain them), and considering that closed sessions where significant non-confidential matters are debated and

<sup>1</sup> Trial Chamber Memorandum "Scheduling of Trial Management Meeting to Enable Planning of the Remaining Trial Phases in Case 002/01 and Implementation of Further Measures Designed to Promote Trial Efficiency," 3 August 2012, E218 ("Trial Chamber Memorandum"), p. 6.

<sup>2</sup> Louis D. Brandeis, *Other People's Money*, Harper Weekly, 29 November 1913.

decided upon engender public mistrust, it behooves the Trial Chamber to hold this and all future trial management meetings in public. The donors, court monitors and civil society organizations would also benefit from this transparency, which would unquestionably afford them the opportunity to appreciate the challenges involved in conducting the trial of Case 002/01 in accordance with international principles and standards embraced by the Agreement, the Establishment Law and the Internal Rules.

### **Issues Requested to be Added to the Agenda of the Trial Management Meeting**

We have only one issue we request to add to the agenda of the trial management meeting: the issue of the fairness of the proceedings thus far. Several incidents have occurred in the course of trial that raise concern that our client's fair trial rights may not be fully protected. We are prepared to detail each of these instances during the trial management meeting. Examples include: **a.** the frequent cutting-off of the microphones while Defence counsel are speaking; **b.** the Judges' failure to ask questions which might adduce exculpatory evidence; **c.** the Judges' use of leading questions or questions otherwise prohibited to the parties based on oral rulings; **d.** the Judges' failure to provide a basis for oral rulings; **e.** the fact that oral rulings affecting the hearing of evidence cannot be appealed until the Judgement is issued, which is far too late to cure any errors; **e.** the fact that many oral decisions appear to be made by the Presiding Judge alone without any input by the rest of the Bench; and **f.** the prohibition of asking a witness questions which might lead him to contradict himself or "lose confidence."<sup>3</sup> In the alternative, we propose a separate public hearing on this matter, with the parties having an opportunity to preface their oral presentations with written submissions.

### **The Trial Chamber's Intention to Reduce the List of Experts, Witnesses and Civil Parties for Case 002/01**

Although this matter will be addressed more fully during the trial management meeting, in order to make our position clear from the outset, we support the Trial Chamber's decision to reduce the number of experts, witnesses and Civil Parties heard orally. We consider that this will assist the expeditiousness of the proceedings. We propose that the Trial Chamber additionally consider whether it is still necessary to hear designated "experts" TCE-80 and TCE-65. We submit that their testimony is unlikely to assist the Trial Chamber in ascertaining the truth, particularly since they are not *real* experts, and their testimony will amount to a waste of time simply to secure redundant and extraneous – not to mention non-expert – testimony. If the objective is to streamline the proceedings, then the Trial Chamber must wisely exercise its judicial discretion by eliminating all witness testimony that has no added value to Case 002/01.

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<sup>3</sup> See Transcript, 1 August 2012, E1/10.1, p. 54, and Judge Cartwright's clarification p. 62: "It may have been misunderstood this morning when the President commented on the manner in which you, Mr. Karnavas, was [sic] questioning this witness. The Chamber wishes to make it clear that you are entitled to ask probing and challenging questions, indeed, it's your duty to do so. But the concern that the Trial Chamber has is that as a group of professional judges, there's no need to use the sort of emotion that sometimes we see on American television dramas. There's no need for that in the courtroom and we would appreciate if you would bear that in mind. Thank you." Judge Cartwright's clarification appears to go to style, rather than scope of questioning. See also Transcript, 31 July 2012, E1/99.1, p. 95.

### **Proposing New Witnesses Concerning Population Movement Phases 1 and 2**

The Trial Chamber has invited all parties to identify at the trial management meeting a limited number of experts, witnesses and Civil Parties considered essential to examine during the population movement (phases 1 and 2) segments of the trial. For the sake of transparency (should the trial management meeting be held in closed session) and efficiency, we take this opportunity to advise the Chamber that we will not seek to call any experts, witnesses or Civil Parties on this issue.

### **The Possibility Raised by the Trial Chamber of Holding Trial Sessions on Fridays Instead of Wednesdays**

Although the issue of sitting on Wednesdays rather than Fridays will be addressed at the trial management meeting, to provide advance notice and expedite the proceedings we take this opportunity to provide our position on this issue. Having spoken to our client, we consider that the current schedule of sitting on Wednesdays rather than Fridays is preferable. The current schedule allows an additional half hour of courtroom time per week. It also allows the parties to have all of one week's transcripts prior to the weekend, whereas if we have court on Fridays we will not receive the transcripts from those hearings until the following Monday. Moreover, to streamline the questioning of witnesses, and in light of not having remote access to the S-Drive, it is essential to have Fridays free for preparation and other essential matters that cannot be dealt with while the proceedings are ongoing in court (the Defence does not have the human resources of the OCP).

### **Amount of Time and Pages Envisaged for Closing Briefs**

The Trial Chamber's memorandum states that the Chamber is considering limiting the page length of Closing Briefs and requiring these Briefs to be due within one calendar month of the conclusion of proceedings in Case 002/01. We do not consider that 50 pages will be sufficient to address all of the important legal and factual issues necessary to assist the Trial Chamber in its deliberations. The normal page limit under Article 5.3 of the Practice Direction on the Filing of Documents before the ECCC is 100 pages in English or French and 200 pages in Khmer. We respectfully submit that considering the importance of the Closing Brief, this page limit should be increased rather than decreased and that 100 pages may be an appropriate limit.

We further do not consider a one-month deadline for the Closing Brief to be sufficient, especially when considering the complexity of the case, the amount of evidence involved, the limited resources available, the enormous amount of time it takes to prepare for the proceedings on a daily basis, and the as yet unknown length of the trial record and amount of admitted evidence. If, as usual, the Interpretation and Translation Unit is *only* able to translate five pages per day, then, effectively, the one-month allotted *actually* results in ten working days (half the calendar month) being devoted to translation, leaving *only* two weeks to draft what we consider to be a submission of major importance. We consider that three calendar months would be a more appropriate deadline. Obviously, if the page limit is

increased as requested, the time limit may, although not necessarily, need to be increased to provide sufficient time for translation. We submit that if the parties are to submit a comprehensive, concise and constructive Closing Brief, then three months should be allotted, with an additional subsequent month to prepare for Closing Arguments. This proposed time frame is in keeping with the standards and time allotments provided at the *ad hoc* and international tribunals for cases of the size and magnitude of Case 002/01.

### **Request for Remote Access to the Shared Drive**

The Trial Chamber's memorandum seems to insinuate that the Trial Chamber does not have control over whether the parties are granted remote access to the S-Drive. From our informal talks with the Office of Administration, this is not the case. Indeed, we have been informed that due to perceived security reasons, the Office of Administration will *only* provide for remote access *if* the Trial Chamber *orders* remote access to be granted to the parties. Hence, the resolution of this matter is obvious: the Trial Chamber needs to issue such an order, assuming it wishes to enable the parties to have remote access to the S-Drive. Directing the parties to deal with the Office of Administration amounts to artificial gesture.

For the sake of the record, it also merits highlighting, regrettably, that the Trial Chamber's memorandum appears to blame the Defence for the fact that Judge Cartwright is no longer meeting regularly with the Deputy Director of the Office of Administration – presumably because of the *ex parte* issues raised by the Defence and the attendant submissions for disqualification. As we made quite clear in our submissions, the problem with these meetings was that Judge Cartwright was meeting with the Deputy Director of Administration *and the International Co-Prosecutor*, to supposedly deal with administrative matters (*supposedly*, because we were never provided with any information as to what was actually being discussed) at the explicit and deliberate exclusion of the Defence or DSS – the administrative organ within the ECCC that deals with matters that impact the defence teams (and accused), individually and collectively. To put it bluntly, nothing prevents the Trial Chamber or its representative, be it Judge Cartwright or any other Judge(s), from consulting with the Deputy Director of Administration concerning the issue of remote access to the S-Drive. Were the OCP to be included in such contacts, then obviously we think it only fair and prudent that DSS (or a representative of the Defence teams) and Civil Parties also be included. Such an approach would avoid any appearance of impropriety, and would further allow all parties to be heard and participate in finding a satisfactory solution. Of course, as noted above, it appears that no amount of further negotiations or consultations with the Office of Administration will have traction; the issue now rests squarely and exclusively with the Trial Chamber. Short of issuing an order to the Office of Administration, nothing will be done. It is for this reason that the Defence made written submissions calling for a hearing where representatives of the Office of Administration could go on public record to explain their reasons for not providing remote access, and to explain under what circumstances they were prepared to do so.<sup>4</sup> This is yet another example of why transparency is essential to the

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<sup>4</sup> IENG Sary's Request for a Formal Trial Management Meeting to Discuss the Possibility of Implementing Remote Access to the S-Drive, 14 June 2012, E207. *See also* Co-Prosecutors' Response to IENG Sary's

proceedings: it provides a forum for seeking solutions while exposing spurious assertions and flawed arguments.

### Newly Imposed Deadline to Admit New Documents

We are concerned by the Trial Chamber's newly imposed deadline to submit requests to admit new documents.<sup>5</sup> The Trial Chamber's memorandum states that "[i]n order to be considered timely, applications to place new documents before the Chamber relevant to a witness, Expert or Civil Party scheduled to be heard before the Chamber must be lodged at least two weeks in advance of that individual's testimony. Internal Rule 87(4) requests filed at the last minute will be rejected."<sup>6</sup> Such a strict rule may prevent the Trial Chamber from considering relevant and probative evidence in its search for the truth. If evidence is relevant, probative and allowed under the law, it will assist the Trial Chamber and should be admitted.



### The Daily Trial Documents Interface

We agree with the Chamber that some parties have been abusing the use of the Daily Trial Documents Interface by listing an enormous quantity of documents. This makes the Daily Trial Documents Interface practically useless. We do hope, however, that the Trial Chamber will be lenient in allowing the parties to upload more than 5-10 documents per witness when it comes to expert witnesses.

We would also suggest that the Daily Trial Documents Interface could be made more user-friendly by providing a distinction between witnesses. It is not currently possible to tell which documents are intended for which witnesses when multiple witnesses are expected to appear on the same day.

We hope that the information presented herein and the issues raised will be of assistance when finalizing the agenda of the upcoming trial management meeting.

Respectfully submitted,



  
 ANG Udom                      Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

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Request for a Formal Trial Management Meeting to Discuss the Possibility of Implementing Remote Access to the S-Drive, 20 June 2012, E207/1, in which the OCP agreed with and supported our Request. Suffice it say, the issue of remote access was initially raised informally before the Trial Chamber over seven months ago and was raised formally nearly two months ago. It would appear that for almost a year the supposed issue of security (which does not exist at the ICTY or ICTR, which utilize the same technology as the ECCC) has been *the* exclusive stumbling block.

<sup>5</sup> Trial Chamber Memorandum, p. 6.

<sup>6</sup> *Id.* (emphasis added).