

**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**IENG SARY'S REPLY TO THE CO-PROSECUTORS' RESPONSE TO IENG SARY'S MOTION AGAINST THE USE OF TORTURE TAINTED EVIDENCE AT TRIAL**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby replies to the Co-Prosecutors’ Response<sup>1</sup> to IENG Sary’s Motion against the Use of Torture Tainted Evidence at Trial (“Motion”).<sup>2</sup> This Reply is made necessary to correct certain misstatements made by the Office of the Co-Prosecutors (“OCP”). The Defence submits, however, that this matter would be most appropriately addressed at the upcoming Trial Management meeting, where all parties may share their views on this issue with the Trial Chamber.<sup>3</sup>

## I. REPLY

1. The OCP asserts that the Motion is untimely.<sup>4</sup> The OCP asserts that this is because Rule 87 only allows the Trial Chamber to reject evidence “*provided* the evidence has been put before the Trial Chamber by a party (Rule 87-3).”<sup>5</sup> Rule 87 does not say this. Rule 87(3) allows the Trial Chamber to reject requests for evidence on certain grounds and states that the Chamber may only base its decision on evidence from the Case File provided it has been put before it by a party. Nothing in this Rule restricts the Trial Chamber’s ability to reject evidence at this stage.
2. The OCP asserts that “rulings as to whether evidence should be admitted or excluded can only usefully be made once the Trial Chamber has had the opportunity to examine the evidence and hear the parties.”<sup>6</sup> This is incorrect. The Defence requested the Trial Chamber to order the parties not to tender any torture tainted evidence unless the party can first demonstrate that it is being introduced against a person accused of torture as evidence that the statement was made. Torture tainted evidence is impermissible for any other purpose.<sup>7</sup> There is no reason to examine the evidence to determine whether or not it must be excluded if it is not introduced for this sole permissible purpose. It will be much more useful and efficient to rule at the outset that torture tainted evidence will be

<sup>1</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Response to IENG Sary’s Motion against the Use of Torture Tainted Evidence at Trial, 21 February 2011, E33/1, ERN: 00645751-00645753.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Motion against the Use of Torture Tainted Evidence at Trial, 4 February 2011, E33, ERN: 00640260-00640275.

<sup>3</sup> The IENG Thirith Defence has also requested that this matter be addressed at the Trial Management meeting. See *Case of IENG Thirith*, 002/19-09-2007-ECCC/TC, Defence Request to the Trial Chamber to Rules on Issues Crucial to all Defendants at the Trial Management Meeting, 10 February 2011, E39, ERN: 00643391-00643396.

<sup>4</sup> Response, para. 1.

<sup>5</sup> *Id.*, para. 2.

<sup>6</sup> *Id.*, para. 3.

<sup>7</sup> See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC31), Decision on Admissibility of IENG Sary’s Appeal against the OCIJ’s Constructive Denial of IENG Sary’s Requests Concerning the OCIJ’s Identification of and Reliance on Evidence Obtained through Torture, 10 May 2010, D130/7/3/5, ERN: 00512912-00512924, para. 38, “Article 15 of the [Torture Convention] is to be strictly applied. There is no room for a determination of the truth or for use otherwise of any statement obtained through torture.”



excluded unless it is for this sole permissible purpose and to require the parties to demonstrate that they wish to introduce this evidence for this sole purpose.

3. The OCP asserts that in Case 001, the practice of admitting or excluding evidence was done after the parties had requested admission of the evidence.<sup>8</sup> This may be true, but this does not prevent the Trial Chamber from issuing an order before the start of trial. The Rules do not prohibit the Trial Chamber from taking this action, and considering that Case 002 will be much larger and more complicated than Case 001, it would be best to have this matter resolved at the outset.
4. The OCP notes that the Trial Chamber has ordered the parties to file a list of documents and exhibits they request to be admitted at trial by 13 April 2011 and that Rule 80(4) then allows for the Trial Chamber to order that the parties file any objections within a prescribed time.<sup>9</sup> The OCP requests the Trial Chamber to dismiss the Motion as premature and issue the order envisaged by Rule 80(4) to allow the parties to raise objections to evidence proposed by other parties within a prescribed time period after the Initial Hearing.<sup>10</sup> The Defence agrees that the Trial Chamber should allow the parties to file objections to the lists of documents and exhibits the other parties file on 13 April 2011. However, this will not resolve this issue. Objections to torture tainted evidence will not be possible without knowing the purpose for which the evidence was requested to be admitted. The parties must be ordered not to introduce torture tainted evidence unless they can demonstrate that it is being introduced against a person accused of torture as evidence that the statement was made.

## II. RELIEF REQUESTED

**WHEREFORE**, for all the reasons stated in the Motion and clarified herein, the Defence respectfully requests the Trial Chamber not to consider torture tainted evidence except against a person accused of torture as evidence that the statement was made and to ORDER the parties not to tender any such evidence unless they demonstrate that it is being introduced for this sole purpose.

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<sup>8</sup> Response, para. 3.

<sup>9</sup> *Id.*, para. 4.

<sup>10</sup> *Id.*, para. 5.



Respectfully submitted,

  
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ANG Udom

  
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Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 24<sup>th</sup> day of February, 2011