

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S MOTION AGAINST FACTS OF COMMON KNOWLEDGE BEING APPLIED IN CASE 002

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Mr. IENG Sary, through his Co-Lawyers, (“the Defence”) hereby moves the Trial Chamber not to take judicial notice of any facts of common knowledge in Case 002.¹ The Motion is made necessary in order to protect Mr. IENG Sary’s presumption of innocence and right to a defence. The ECCC Internal Rules (“Rules”) and the Cambodian Criminal Procedure Code (“CPC”) do not provide for facts of common knowledge to be applied at the ECCC. If the Trial Chamber combines a broad interpretation of facts of common knowledge while at the same time inferring specific intent, Mr. IENG Sary’s constitutionally protected right of being presumed innocent throughout the trial proceedings and right to a defence will be violated.

I. BACKGROUND

A. Facts of Common Knowledge

1. Facts of common knowledge are expressly provided for in the Rules at the *ad hoc* tribunals. Rule 94(A) of the ICTR Rules of Procedure and Evidence (“RPE”) and International Criminal Tribunal for the Former Yugoslavia (“ICTY”) RPE both state that “[a] Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.” Similarly, Article 94(A) of the Special Court for Sierra Leone (“SCSL”) Rules of Procedure and Evidence states, “A Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.”
2. The ICTR Trial Chamber expanded on the definition of Rule 94(A) of the ICTY RPE, in that facts of common knowledge encompass “those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature.”² Furthermore, “a court may generally take judicial notice of matters ‘...so notorious, or clearly established or susceptible to determination by reference to readily obtainable and authoritative source that evidence of their existence is unnecessary...’”³

II. APPLICABLE LAW

¹ The Trial Chamber at the International Criminal Tribunal for Rwanda (“ICTR”) defined facts of common knowledge as encompassing “those facts which are not subject to reasonable dispute including, common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature.” *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecution’s Motions for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 23, *citing* M. CHERIF BASSIOUNI & P. MANIKAS, *THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 952 (Transnational Publishers, 1996).

² *Id.*

³ *Id.*, para. 25, *citing* ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE, §10-71 (Sweet and Maxwell, 2000).

A. Presumption of innocence

3. Article 38 of the Cambodian Constitution states in pertinent part: “The accused shall be considered innocent until the court has judged finally on the case.”
4. Article 35 new of the Establishment Law states: “The accused shall be presumed innocent as long as the court has not given its definitive judgment.”
5. Rule 21(1)(d) states in pertinent part: “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established.”
6. Article 14(2) of the ICCPR states: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;”
7. Article 11(1) of the Universal Declaration of Human Rights (“UDHR”) states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

B. The right to a defence

8. Article 38 of the Cambodian Constitution states in pertinent part: “Every citizen shall enjoy the right to defense through judicial recourse.”
9. Article 35 new(b) of the Establishment Law states: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees ... to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.”
10. Article 14(3)(g) of the International Covenant on Civil and Political Rights (“ICCPR”) states: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.”

III. ARGUMENTS

A. Facts of common knowledge should not be permitted at the ECCC

11. Neither the Rules nor the CPC provide for facts of common knowledge to enter into cases at the ECCC. As such, facts of common knowledge should not be permitted at the ECCC.

Rule 87(2) states that “[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.” Facts of common knowledge have not been based on evidence which has been subjected to examination.

12. Rule 94(A) of the ICTY RPE was adopted on 11 February 1994, and was last amended on 10 July 1998.⁴ This predates the Agreement and the Establishment Law. Those drafting the Agreement and the Establishment Law would have been fully aware of the concept of facts of common knowledge. If the drafters of the Agreement and the Establishment Law wanted to permit facts of common knowledge at the ECCC, they would have made it explicit. The purpose of the Rules are “to consolidate applicable Cambodian procedure for proceedings before the ECCC and ... to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.”⁵ Even though the drafters of the Rules could have “adopt[ed] additional rules where these existing procedures do not deal with a particular matter,” in relation to facts of common knowledge, they chose not to.
13. Should the Trial Chamber deem facts of common knowledge are permitted at the ECCC; any fact of common knowledge must be specified by the Trial Chamber and agreed to by the parties – as stated in the Rules⁶ – before being accepted as facts of common knowledge.

B. Facts of common knowledge violate Mr. IENG Sary’s fair trial rights

14. The acceptance of adjudicated facts of a legal nature has the potential to severely prejudice an Accused. In *Semanza*, the ICTR Trial Chamber held that it was proper to take judicial notice of “factual elements constituting the crime of genocide, crimes against humanity and other violations of certain provisions of the Geneva Conventions with respect to the large number of deaths of civilians in Rwanda during 1994.”⁷ Subsequently, in *Karemera*, the ICTR Appeals Chamber found that “the fact that genocide occurred in Rwanda in 1994 should have been recognized by the Trial Chamber

⁴ ICTY RPE, Rev.44, 10 December 2009.

⁵ Rules, preamble.

⁶ Rule 80(3)(e).

⁷ *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecution’s Motions for Judicial Notice and Presumptions of Facts Pursuant to Rules 94 and 54, 3 November 2000, para. 30.





as a fact of common knowledge.”⁸ In effect, the ICTR Appeals Chamber has endorsed that the elements of a crime – *bar mens rea* – may be judicially noticed. The *Akayesu* Trial Judgement held that:

The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.⁹

15. Under the circumstances where genocide is recognized as a fact of common knowledge and specific intent being inferred, as stated by Kevin Jon Heller, “the prosecution will have ‘proved’ the defendant’s specific intent without introducing *any* evidence of that intent at all – an unacceptably prejudicial result.”¹⁰ Applied at the ECCC, Mr. IENG Sary’s presumption of innocence and right to a defence will be completely violated.

WHEREFORE, for all of the reasons stated herein, the IENG Sary Defence respectfully moves the Trial Chamber not to take judicial notice of any facts of common knowledge in Case 002.

Respectfully submitted,


ANG Udom Michael G. KARNAVAS
Co-Lawyers for Mr. IENG Sary

The signature block features two handwritten signatures. The first signature is in black ink and appears to be 'ANG Udom'. The second signature is in blue ink and appears to be 'Michael G. KARNAVAS'. Between the signatures is a circular official seal of the Kingdom of Cambodia. The seal contains the text 'ROYAUME DU CAMBODGE' at the top, 'ព្រះរាជាណាចក្រកម្ពុជា' in Khmer script, 'AVOCAT' and 'ATTORNEY AT LAW' in the center, and 'ROYAUME DU CAMBODGE' at the bottom.

Signed in Phnom Penh, Kingdom of Cambodia on this **28th** day of **March, 2011**

⁸ *Prosecutor v. Karemera*, ICTR-98-44-AR73(C), Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 35.

⁹ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 523.

¹⁰ Kevin Jon Heller, *International Decision: Prosecutor v. Karemera*, 101 AM. J. INT. L. 157, 159 (2007).