

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

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S MOTION FOR THE
EXCLUSION OF KANG GUEK EAV'S ALIAS "DUCH"
STATEMENTS IN THE EVENT HE DOES NOT TESTIFY AND FOR THE FURTHER
IDENTIFICATION OF EXCULPATORY MATERIAL**

Filed by:
Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Distributed to:
Trial Chamber
Judge NIL Nonn. President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Copied to:
Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT PouV Seang
Diana ELLIS
SA Sovan
Jaques VERGES
Phillipe GRECIANO

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du dossier: Uch Arun

I. RESPONSE

1. On 26 April 2011, Ieng Sary, through his Defence (the “Defence”) filed his “Motion for All Statements of Kaing Guek Eav alias “Duch” Not to Be Admitted as Evidence Unless Duch Appears in Court as a Witness & for Disclosure by the OCP and Trial Chamber of Duch’s Untruthful Statements”¹ (the “Motion”). As the Co-Prosecutors on 28 January 2011² have requested the Trial Chamber to summon Duch as a witness at trial this Motion should be dismissed on the basis that it is premature.³
2. In the event, that Duch testifies at trial the Defence further requests that the Co-Prosecutors and the Trial Chamber provide a list of instances in which they found Duch to be untruthful in his prior statements in Case File 1.⁴ Over and above those statements and references indicated in public written and oral submissions and the questioning of Duch at his trial by the Co-Prosecutors, they confirm they maintain no such list of other statements of Duch they consider to be false. The references already provided give clear notice to the Defence of the Co-Prosecutor’s assessment of Duch’s credibility and of the source of the statements themselves. This will assist the Defence and other Parties in their preparation for his examination.
3. In any event, the issue of the Co-Prosecutors obligation to disclose exculpatory material has already been clarified by the Trial Chamber which in large part makes this Motion redundant in respect of the request to identify further exculpatory material. On 8 April 2011 the Trial Chamber confirmed this disclosure obligation as well as outlining its limits :

“Clarification as to whether the Co-Prosecutors are obliged to file both inculpatory and exculpatory material in their document/exhibit lists. The case-file contains documents which have been gathered during the judicial investigation and which may be exculpatory or inculpatory. These documents are accessible to all parties and to the Judges. The Co-Prosecutors need not indicate which among them they would consider to be exculpatory; rather, it is for the Defence to assess which material is relevant to the Accused.

¹ Document No. E78, “IENG Sary’s Motion for All Statements of Kaing Guek Eav alias “Duch” Not to be Admitted as Evidence Unless Duch Appears in Court as a Witness & for Disclosure by the OCP and Trial Chamber of Duch’s Untruthful Statements, 26 April 2011, ERN 00658712 – 00658722.

² See Annex 1 to Document No. E9/4, “Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5: Document No. E9/4.1, “Annex 1: Proposed Order of Witness Appearance at Trial”, 28 January 2011, ERN 00640705 – 00640713, at p.4.

³ As indicated by the Co-Prosecutors at the Trial Management Meeting on 5 April 2011 they will be filing a legal brief on the issue of the admissibility of statements where the maker of such statement does not appear at trial. See Document E1/2.1, “Transcript of Hearing of Trial Management Meeting – Closed Session in Case File 002/19-09-2007-ECCC/TC,” 5 April 2011, ERN 00664215-00664345 at pp 86-88.

⁴ Motion at page 1.

The Co-Prosecutors shall file their list of those documents / exhibits it considers relevant on 19 April, and need not specify if these documents are exculpatory or inculpatory. Nonetheless, where the Co-Prosecutors have in their possession documents which are not publically accessible and which are not on the case file, they have an obligation to include within their list of new documents all documents conducive to ascertaining the truth, whether inculpatory or exculpatory. Filing by Defence teams of their document / exhibit list also by 19 April, in accordance with earlier directives, would greatly assist the Chamber in its duty to adequately weigh all material they would allege to be exculpatory.”⁵

4. It is therefore clear and well accepted that the Co-Prosecutors have a duty to disclose exculpatory information that it has in its possession to the Defence but it does not go so far as to require the Co-Prosecutors to prepare witness examination questions for the Defence. Once potentially exculpatory information is in the possession of the Defence they are in the best position to determine what weight should be attached to it particularly when they have unique access to the Accused unlike the Co-Prosecutor.
5. In their Motion the Defence reminds the Co-Prosecutors that it must not offer evidence which it knows to be untruthful.⁶ Of course this is an obligation that applies to all parties to the trial including the Defence. It is clear this is both a legal and ethical obligation for all lawyers appearing before a court. To be clear, in this case the Co-Prosecutors are not requesting Duch to testify on matters that it believes Duch may be untruthful but only on matters it believes will assist the Trial Chamber to ascertain the truth in this case. The fact that Duch’s veracity as to his prior statements regarding his own role at S-21 has been questioned does not of itself create doubt as to the veracity of his statements as to the crimes committed, policies in place and roles played by Ieng Sary and the other Accused in this Indictment. Consequently, the Co-Prosecutors would only be seeking testimony from Duch and relying on the parts of his prior statements that they believe are truthful.
6. With the notice provided by the Co-Prosecutors to the Defence as to Duch’s credibility and the fact that the Defence have available to them the same information as the Co-Prosecutors and the Trial Chamber and significantly they have access to the Accused who played a leading role in the DK regime - the Defence - in fact are in a good position to determine the truthfulness of the prior statements made by Duch.

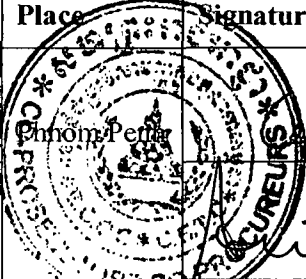


⁵ Document No. **E9/25.1.1** Trial Chamber’s Email entitled “Responses to Questions Posed During the Trial Management Meeting” 8 April 2011, at ERN 00665531.

⁶ Motion at page 7.

II. RELIEF REQUESTED

7. For the above reasons, the Co-Prosecutors request that the Motion be dismissed as premature, without legal basis or factual merit.

Respectfully submitted,

| Date | Name | Place | Signature |
|------------|--------------------------------------|---|--|
| 9 May 2011 | YET Chakriya Deputy Co-Prosecutor |  |  |
| | Andrew CAYLEY Co-Prosecutor | |  |