

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 FOR THE TRIAL CHAMBER TO CONDUCT THE TRIAL IN CASE 002 BY FOLLOWING A PROPOSED REVISED PROCEDURE & REQUEST FOR AN EXPEDITED STAY ON THE ORDER TO FILE MATERIALS IN PREPARATION FOR TRIAL

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E9/3/2

Mr. IENG Sary, through his Co-Lawyers (“the Defence”) hereby replies to the Office of the Co-Prosecutors’ (“OCP”) Response to the Defence’s Motion (“Motion”)¹ moving to revise the conduct of the trial procedure at the ECCC and stay the Trial Chamber’s Order² to File Materials in Preparation for Trial (“Response”).³

I. REPLY

1. In paragraph 2(a), the OCP states that “the Trial Chamber is not the proper forum to seek a revision of the Rules; the Motion is therefore inadmissible.”⁴ The proposed revised procedure is within the Rules.⁵ The OCP proposes that the Defence should have proposed any Rule change at the Plenary through the Defence Support Section (“DSS”). First, the Defence cannot directly participate in the Plenary, unlike the OCP. It can only participate in the Plenary through the DSS. The DSS must balance the competing interests of all the defence teams. The OCP has no such competing interests. Second, the OCP appears to lump all the defence teams together as one entity. It appears that the OCP has pre-judged the four Accused as one monolithic group, while the Trial Chamber also seems to be suggesting that the four Accused should act as a group in filing submissions.⁶ This is antithetical to the well established precept that each Accused enjoys the right to be treated as an individual. While it may be convenient for the OCP and the Trial Chamber if the four Accused file joint submissions, the fact remains that each Accused has his or her own defence, his or her own instructions and his or her own approach. Treating an Accused as an individual is required by the Cambodian Constitution which states that Khmer citizens must be treated as individuals before the

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Motion for the Trial Chamber to Conduct the Trial in Case 002 by Following a Proposed Revised Procedure & Request for an Expedited Stay on the Order to File Materials in Preparation for Trial, 4 February 2011, E9/3, ERN: 00640920-00640935.

² *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Order to File Material in Preparation for Trial, 17 January 2011, E9, ERN: 00635754-00635759 (“Order”).

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Co-Prosecutors’ Response to IENG Sary’s Motion for the Trial Chamber to Conduct the Trial in Case 002 by Following a Proposed Revised Procedure & Request for an Expedited Stay on the Order to File Materials in Preparation for Trial, 4 February 2011, E9/3/1, ERN: 00641756-00641760.

⁴ *Id.*, para. 2(a).

⁵ Motion, para. 32.

⁶ “[T]he Chamber encourages Defence teams to coordinate their requests wherever possible and, where strategies are common, to file consolidated motions before the Chamber.” *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Interoffice Memorandum from Susan Lamb, Senior Legal Officer – Trial Chamber – to all Parties in Case 002, Advance Notification of Chamber’s disposition of Motions E14, E15, E9/2, E9/3, E/24 and E27, 3 February 2011, E35, ERN: 00642291-00642292 (“Interoffice Memorandum”).



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law, and not as collectives.⁷ The Universal Declaration of Human Rights (“UDHR”), which must be respected in Cambodia in accordance with the Cambodian Constitution,⁸ also states that a person must be treated as an individual before the law and not in a collective.⁹ Further guidance can be taken from the ICTY, where it was held that: “In determining the role of the accused, the Trial Chamber has kept at the forefront of its consideration the ... principle that the case against each accused must be considered separately. The fact that the accused have been tried together does not mean that their cases should not receive separate consideration. Accordingly the Trial Chamber has given separate consideration to the case of each accused.”¹⁰

2. In paragraph 2(c), the OCP states that the Motion is flawed due to the Defence’s misconceptions about the Civil Law system. The ECCC has become procedurally hybrid by shifting the burden of proof on to the OCP. This is exemplified by the changes to the Rules.¹¹
3. In paragraph 2(c)(i), the OCP states that as a consequence of the presumption of innocence, the prosecutor in Civil Law countries bears the burden of proof. The OCP is confusing the Civil Law procedural system with the hybrid procedure at the ECCC. The ECCC is a *sui generis* court within the Cambodian court system. The ECCC has adopted elements from the Common Law (adversarial) procedure such as the OCP having the burden of proof, the right afforded to the OCP and Defence to make opening statements¹² and to put evidence before the Trial Chamber.¹³
4. In paragraph 2(c)(i), the OCP states that there is no tension between the OCP’s role to bear the burden of proof and the Trial Chamber’s role to ascertain the truth. The Defence

⁷ Article 31 of the Cambodian Constitution, as amended in 1999, states in pertinent part: “Every Khmer citizen shall be equal before the law.” (Emphasis added).

⁸ Article 31 of the Cambodian Constitution, as amended in 1999, states in pertinent part: “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”

⁹ Article 6 of the UDHR states: “Everyone has the right to recognition everywhere as a person before the law.”

¹⁰ *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 339(b).

¹¹ Motion, paras. 11-12.

¹² Rule 89bis(2) states: “Before any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly.”

¹³ Rule 80. *See also*, Motion, paras. 11-12.



acknowledged this in its Motion.¹⁴ The Defence simply noted that the Trial Chamber's and OCP's roles "must be considered in light of the shifting of the burden onto the OCP – as opposed to the Trial Chamber ascertaining the truth – and the modalities of adversarial trial procedure which the Rules quite plainly envisage."¹⁵

5. In paragraph 2(c)(ii), the OCP states that the Defence confuses "adversarial" proceedings with an "accusatorial system," and that the inquisitorial system would respect the adversarial character of the proceedings, as confirmed by Rule 21(1)(a). The proceedings at the ECCC are a hybrid between inquisitorial and adversarial proceedings, as is indicated by the ECCC rules departing from the CPC and incorporating more adversarial traits into the ECCC.¹⁶ The confusion appears to lie with the OCP, which has previously described an accusatorial system as adversarial: "Rule 21(1)(a) of the Rules describes the proceedings before the ECCC as adversarial which is the classic description of a common law criminal law trial."¹⁷
6. In paragraphs 2(e) and 2(f), the OCP responds to the application to Stay the Trial Chamber Order to File Materials in Preparation for Trial ("Order").¹⁸ Seeing as though the Trial Chamber has already informed the parties that it is not going to stay the Order,¹⁹ the point is moot.

WHEREFORE, for all the reasons stated herein, the Defence respectfully MOVES for the Trial Chamber to:

- a. CONDUCT the trial in Case 002 by following the proposed revised procedure;
- b. CONVENE a hearing to address the issues raised in this motion.

¹⁴ *Id.*, para 14.

¹⁵ *Id.*

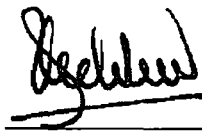
¹⁶ *See* Motion, para. 12.

¹⁷ Interoffice memorandum from OCP to Susan Lamb, Judicial Coordinator, "Two Rule Amendment Proposals to ensure More Efficient Trial Procedures Relating to (1) the Tendering of Evidence at Trial and (2) the Questioning of Accused and Witnesses," 20 April 2010, p. 5-6.

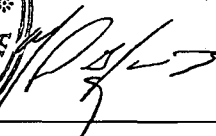
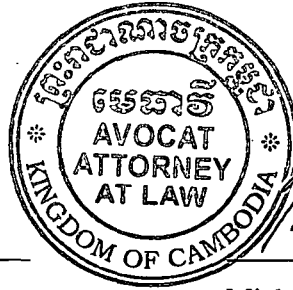
¹⁸ Order.

¹⁹ Interoffice Memorandum.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 8th day of February, 2011

