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ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

TRIAL CHAMBER

TO: All parties, Case 002

Date: 8 April 2011

FROM: Nil Nonn, President, Trial Chamber Chamber



CC: All Judges, Trial Chamber; Trial Chamber Senior Legal Officer

SUBJECT: Trial Chamber response to Motions E67, E57, E56, E58, E23, E59, E21, E33, E71 and E73 following Trial Management Meeting of 5 April 2011

Following oral statements made by the Trial Chamber at the Trial Management Meeting of 5 April 2011, the Chamber clarifies for the parties that the below constitutes the Trial Chamber's formal response to the following motions presently before the Trial Chamber:

IENG Sary's Request for a direction stating that time-limits do not commence until filings are notified in both working languages of the Defence (E67):

The revised practice Direction on Filing ... now permits, on an exceptional basis, filing in one language alone where translation constraints prevent the filing in both Khmer and/or English or French. Where this occurs, the Trial Chamber clarifies that deadlines commence to run only upon the filing of the Khmer version. Practices in regard to these and other issues will develop as the trial progresses (T, 5 April 2011, pp. 9-10).

In relation to IENG Sary's Motion for Civil Parties to testify under oath if they are permitted to testify as to their knowledge of the criminal case (E57):

The Trial Chamber ... notes the motion of the IENG Sary Defence regarding oaths where Civil Parties testify at trial (E57). Internal Rules 23(4), 24 and 31 indicate those parties before the ECCC for whom an oath must be administered under the ECCC legal framework and that Civil Parties are not required to take the oath. Nonetheless, if a Civil Party elects to do so, no procedural defect results. (T., 5 April 2011, p. 100 (with subsequent minor amendments)).

In response to IENG Sary's motion for KAING Guek Eav *alias* Duch to testify under oath if called as a witness (E56), the Chamber clarifies that the Chamber, should it decide to do so, would call KAING Guek Eav *alias* Duch as an ordinary witness in Case 002. Pursuant to Internal Rule 24(1), he would accordingly be required to swear an oath. The Chamber considers that Internal Rule 24(4) does not prevent a person convicted in Case

001 from testifying as a witness in Case 002. If appeal proceedings in Case 001 have not concluded by the time of such testimony, the Chamber would nevertheless still hear KAING Guek Eav as a witness under oath, following appropriate directions from the Chamber regarding his right against self-incrimination.

The IENG Sary Defence has also filed several motions challenging aspects of the judicial investigation (*see e.g.* Motion to strike portions of the Closing Order due to defects (E58) and Motion for a hearing on the conduct of the judicial investigation (E71)). At the Trial Management Meeting, the Chamber gave the following early guidelines to the parties in this area:

The Chamber is seized of various Motions concerning alleged deficiencies in the Indictment or in the Investigation. The Chamber will not set out the responses received. These motions can be summarised as follows:

- a) There were errors in the conduct of the Investigation which render parts of it invalid;
- b) There are errors in the Indictment, for example that it is not well-reasoned. Consequently parts of the Indictment should be struck out; and
- c) As certain charges in the Indictment have lacked precision, there is therefore an issue of fair trial.

It is clear from the Rules that the Chamber is bound by the scope of the Indictment. The Chamber refers to Rules 67(2), 76(7) and 89(1)(c) which read together result in there being no basis for the Trial Chamber to grant any amendments to the Indictment or to enable it to consider procedural defects in the Investigation. Should any ambiguity in the Indictment arise at trial, the Chamber will, on a case-by-case basis state its interpretation of the scope of the Indictment and will consider itself bound by this interpretation (T., 5 April 2011, pp. 97-98).

IENG Sary's Motion requesting guidelines for Civil Party participation (E23):

The Trial Chamber is seized of a motion by the IENG Sary Defence to issue guidelines for Civil Party participation, filed on 24 January 2011 (Document E23). The Chamber notes the amendments of the Internal Rules relating to Civil Party participation since Case 001.

Pursuant to Rule 23(3), which was introduced in February 2010 as part of Revision 5 of the Internal Rules, "Civil Parties at the trial stage and beyond shall comprise a single, consolidated group, whose interests are represented by the Civil Party Lead Co-Lawyers." This rule marks a shift from the pre-trial stage, in which the Civil Parties participated individually. The new legal framework establishes a system whereby the consolidated group of Civil Parties is instead represented in the proceedings by the Civil Party Lead Co-Lawyers, rather than individual Civil Party lawyers. The Lead Co-Lawyers may decide to designate particular Civil Party Lawyers to play specified roles at hearings. However, the amendments to the Rules now mean that individual Civil Party Lawyers have no automatic right of audience before the Trial Chamber.

The Chamber notes that many issues in relation to Civil Party participation are already dealt with in the Internal Rules, in particular Rules 21(1)(a) and (4), 85, 87(3) and (4) and 91(3). The Chamber considers that these rules are sufficient to address the Defence concerns and

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that no further guidelines are needed on these points. Having provided these clarifications, the Chamber therefore does not intend to issue a written decision in relation to this motion.

The Chamber refers the Parties to its decision in Case 001 issued orally on 27 August 2009 and its related written "Decision on Civil Party Co-Lawyers' Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character" (Document E72/3 in Case 001). The Trial Chamber jurisprudence remains unchanged. The consolidated group of Civil Parties may not therefore intervene on matters relating to sentencing (T., 5 April 2011, pp. 98-100).

IENG Sary's Motion against the use of all materials collected by the Documentation Center of Cambodia (E59) (and in relation generally to objections to questions asked in court):

Some of the parties have requested clarification on the Chamber's practice regarding objections. The Chamber recalls Rule 87, which reflects the general practice in civil law systems. The parties are reminded that under this Rule and Rule 85, the Chamber may reject a request for evidence where it finds that it is not conducive to ascertaining the truth, is irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, or intended to prolong proceedings or is frivolous. This applies also to oral testimony. Accordingly, the Chamber will deal with objections on a case by case basis, where they are reasoned (T., 5 April 2011, p. 94).

IENG Sary's Motion against the use of torture-tainted evidence at trial (E33):

The Chamber is in receipt of a Motion against the Use of Torture Tainted Evidence at Trial, filed by the Ieng Sary Defence (Document E33). The Defence requests the Chamber to declare that torture tainted evidence is in all forms and in every circumstance inadmissible, except against a person accused of torture as evidence that the statement was made. The Defence further requests that any party wishing to tender such evidence be first required to demonstrate that it is being introduced only for this purpose. The Motion requests no specific relief in relation to any identified material potentially relevant to Case 002. The Chamber therefore draws the parties' attention to the decision made in Case 001, specifically in hearings of 20 and 28 May 2009 concerning the use of confessions as evidence (T., 5 April 2011, pp. 96-97).

IENG Sary Motion to conduct trial through half-day sessions (E20):

Although seised of various requests from the parties to decide in advance the duration of trial sessions and daily sitting hours, the Chamber considers that it is premature at this stage to indicate the length of daily sessions. These decisions will instead follow from the expert medical advice provided. The parties will be provided with further information in due course (T., 5 April 2011, pp. 50-51).

The Chamber further notes the IENG Sary Defence's subsequent motion requesting clarification on whether orders signed by the President are made on behalf of the entire Chamber (E73). Whilst minor differences in the format of all decisions issued by the President to date can be observed, it is nonetheless clear from a reading of all such



decisions that they are issued on behalf of the entire Chamber. This is, moreover, a practice familiar before both Cambodian courts and other international tribunals.

The Chamber further clarifies that memoranda from the Trial Chamber Senior Legal Officer are also issued on the instructions of the Chamber and are intended guidelines for the parties which, if ignored, are likely to result in sanction by the Chamber. It further reminds the IENG Sary team of the below directions given to the parties at the Trial Management Meeting:

To alleviate translation and other constraints, and to ensure effective trial management, the parties are encouraged where possible to raise concerns or request information informally from the Trial Chamber Senior Legal Officer. This channel should be utilised, to the extent possible and appropriate, as an alternative to filing motions which do no more than seek information or raise questions. The Chamber has already had occasion to recommend the withholding of fees for a number of voluminous filings that it considers lack a legal basis and do little beyond add to the burdens of the Chamber and translation services. The Chamber reminds counsel of their obligations under Rule 22(4) ... (T., 5 April 2011, p. 10). *nm* *js*