

BEFORE THE SUPREME COURT CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/SC**Party Filing:** The Defence for IENG Sary**Filed to:** The Supreme Court Chamber**Original language:** ENGLISH**Date of document:** 20 January 2012**CLASSIFICATION****Classification of the document
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**IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S DECISION
REFUSING HIS REQUEST FOR THE TRIAL CHAMBER TO DIRECT ITS SENIOR
LEGAL OFFICER TO MAINTAIN OPEN AND TRANSPARENT
COMMUNICATION WITH ALL THE PARTIES**

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Michael G. KARNAVAS**The Supreme Court Chamber Judges:**
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Judge SOM Sereyvuth
Judge MONG Monichariya
Judge YA Narin
Judge MOTOO Noguchi
Judge Agnieszka KLONOWIECKA-MILART
Judge Chandra Nihal JAYASINGHE
Reserve Judge SIN Rith
Reserve Judge Florence MUMBA**Co-Prosecutors:**
CHEA Leang
Andrew CAYLEY**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 104 and 21 of the ECCC Internal Rules (“Rules”), hereby appeals the Trial Chamber’s memorandum entitled “IENG Sary Request that the Trial Chamber direct the Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues (E154) [(“Request”)¹]” (“Impugned Decision”).² This Appeal is made necessary because the Trial Chamber Senior Legal Officer, Ms. Susan Lamb, at the behest of the Trial Chamber, has been engaging in *ex parte* communications with certain parties concerning important trial management issues. When the Defence requested the Trial Chamber to direct its Senior Legal Officer to cease her inappropriate conduct, the Trial Chamber directed the parties not to respond to the Request and summarily denied it in an unreasoned memorandum. The Trial Chamber’s actions violate Mr. IENG Sary’s constitutional fair trial rights to: equality of arms, adversarial proceedings, transparent proceedings (infringing on his right to appellate review), equal treatment and trial by an impartial tribunal. Its actions constitute a knowing and willful interference with the administration of justice. The Defence incorporates by reference its previous submissions argued in this matter and its previous submissions dealing with the issue of *ex parte* communications.³

I. GROUNDS OF APPEAL

A. *The Cambodian Code of Judicial Ethics, as well as other codes of ethics by which the Trial Chamber Judges are bound, prohibits ex parte communications. The Trial Chamber Senior Legal Officer, at the behest of the Trial Chamber, engaged in ex parte communications with certain parties by informing only certain parties which witnesses the Trial Chamber was considering calling. Did the Trial Chamber err by directing its Senior Legal Officer to engage in ex parte communications?*

¹ IENG Sary’s Request for the Trial Chamber to direct the Trial Chamber Senior Legal Officer to Maintain Open and Transparent Communication with All Parties Concerning Trial Management Issues, 14 December 2011, E154.

² Trial Chamber Memorandum entitled “IENG Sary Request that the Trial Chamber direct the Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues (E154),” 20 December 2011, E154/1.

³ Request; IENG Sary’s Appeal Against the Trial Chamber’s Decision on Motions for Disqualification of Judge Cartwright, 5 January 2012, E137/5/1/1; IENG Sary’s Request for Investigation Concerning Ex Parte Communications between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3; IENG Sary’s Second Rule 34 Application to Disqualify Judge Marcel LEMONDE and Joinder to the IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing, 14 December 2009, 1.

B. *ECCC law and jurisprudence mandate that parties have the fair trial right to be heard in response to submissions by other parties. The Trial Chamber directed the parties not to respond to the Request. Did the Trial Chamber err by directing the parties not to respond?*

C. *ECCC rules and jurisprudence require judicial decisions to be reasoned. The Trial Chamber decided on the Request by issuing an unreasoned memorandum. Did the Trial Chamber err in deciding in this manner?*

II. PRELIMINARY MATTERS

A. Admissibility of the Appeal

1. Memoranda constitute decisions for purposes of Rule 104

1. Pursuant to Rule 104(1), the Supreme Court Chamber shall decide an appeal against a judgement or *a decision* of the Trial Chamber. The Impugned Decision, although issued as a memorandum, acts as a decision of the Chamber which may be appealed pursuant to Rule 104.⁴
2. Form does not prevail over substance. Rules reflect the subjective intentions of their drafters, rather than objective truths, and as such it is axiomatic that they must be construed so as to render that intention effective. The Pre-Trial Chamber has recognized a party's appellate rights may not be abridged by placing form over substance. For example, it has previously admitted an appeal which was based on a decision taken in a Greffier's Notice of Deficient Filing, although the Rules do not specifically provide for appeals against notices of deficient filing. It found:

Although the applicable law does not specifically grant the Charged Persons the right to appeal against a Notice of Deficient Filing, the Pre-Trial Chamber has determined that, as submitted by the Co-Lawyers, Internal Rule 21 requires that the Pre-Trial Chamber adopt a broader interpretation of the Charged Person's right to appeal in order to ensure that the fair trial rights of the Charged Person are safeguarded in this particular instance. As this is a matter involving the principles of 'equal treatment before the law' and 'equality of arms', taking into account the Chamber's duty as prescribed under Internal Rule 21, and the particular

⁴ The Trial Chamber regularly issues decisions in this form. When the Defence requested clarification as to whether, *inter alia*, memoranda signed by Presiding Judge Nil Nonn constitute decisions of the Chamber, the Chamber explained (in a memorandum): "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." *See* Trial Chamber Response to Motions E67, E57, E58, E23, E59, E20, E33, E71, and E73 following the Trial Management Meeting of 5 April 2011, 8 April 2011, E74, p. 3-4.

circumstances of this Appeal, the Pre-Trial Chamber found this Appeal admissible.⁵

To find the present Appeal inadmissible because the Impugned Decision was issued in the form of a memorandum would allow the Trial Chamber deliberately to frustrate the parties' ability to appeal what are effectively decisions by issuing controversial decisions in the form of memoranda.

2. The Appeal is admissible pursuant to Rules 104 and 21

3. Pursuant to Rule 104(1), the Supreme Court Chamber "shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds: a) an error on a question of law invalidating the judgment or decision; or b) an error of fact which has occasioned a miscarriage of justice. Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant."
4. If there is any doubt as to this Appeal's admissibility under Rule 104, Rule 21 – which requires the Rules to be interpreted so as to always safeguard the interests of the Accused⁶ – would require that this Appeal be found admissible. The Pre-Trial Chamber has recognized this application of Rule 21 and has stated that "[c]onsidering the fair trial rights of the Appellant ... the Pre-Trial Chamber finds that Rule 21 requires it to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21."⁷ The Supreme Court Chamber should affirm a broad interpretation of the right to an immediate appeal.

a. Rule 104(1) error of law

5. This Appeal is admissible pursuant to Rule 104(1) because the Trial Chamber erred in law by failing to issue a reasoned decision on the Request and by directing the other parties not to respond to the Request. Mr. IENG Sary has a right to receive reasoned

⁵ Decision on IENG Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filing of the OCP's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13.

⁶ Rule 21(1) states: "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement."

⁷ Decision on IENG Sary's Appeal against the Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, para. 18.

decisions and the parties have a right to respond to requests. These errors of law render the decision invalid.

b. Rule 104(1) error of fact

6. This Appeal is admissible pursuant to Rule 104(1) because the Trial Chamber erred in fact by treating the Request simply as a request to be provided with notice of which party the Trial Chamber is considering assigning to lead the examination of each witness. This occasioned a miscarriage of justice because it allowed the Trial Chamber to overlook the violation of fair trial rights that *ex parte* communications cause and focus instead on why it considers that the parties do not need to be provided with advance notice of which parties will be assigned to lead the examination of witnesses.

c. Rule 104(1) abuse of discretion

7. This Appeal is admissible because the Trial Chamber abused its discretion by directing its Senior Legal Officer to engage in *ex parte* communications. The Trial Chamber has an obligation to ensure that members of its staff do not violate a party's rights to equal treatment and to a fair trial or the Judges' ethical obligations, including the obligation to refrain from *ex parte* communications.

d. Rule 104(4) interference with the administration of justice

8. This Appeal is immediately admissible because it concerns an interference with the administration of justice under Rule 35(6).⁸ Pursuant to Rule 104(4)(d), decisions on interference with the administration of justice under Rule 35(6) are subject to immediate appeal. Rule 35 lists ways in which a person may knowingly and willfully interfere with the administration of justice, but this list is not exhaustive.⁹
9. The Supreme Court Chamber recently held that "neither an error of fact or law nor an abuse of discretion on the part of the Trial Chamber can, by itself, constitute a knowing and wilful interference with the administration of justice within the meaning of Rule

⁸ For discussion as to whether judges may be subject to Rule 35(6), see IENG Sary's Appeal against the Trial Chamber's Decision on Motions for Disqualification of Judge Silvia Cartwright, 5 January 2012, E137/5/1/1, paras. 7-10, which the Defence incorporates by reference.

⁹ See 002/14-12-2009-ECCC/PTC(08), where the Pre-Trial Chamber investigated possible interference with the administration of justice involving conduct not set out explicitly in Rule 35(1)(a) through (g).

35.”¹⁰ In the present case, the Trial Chamber did not merely err in fact or law or abuse its discretion, it knowingly and willfully interfered with the administration of justice by directing its Senior Legal Officer to engage in impermissible *ex parte* communications. This unconscionable conduct is analogous with and equal in gravity to the examples of interference with the administration of justice enumerated in Rule 35;¹¹ i.e. it demonstrates the requisite malfeasance to violate the Rule.

10. The Trial Chamber’s actions further constitute a knowing and willful interference with the administration of justice because the Trial Chamber, by directing its Senior Legal Officer to engage in *ex parte* communications, knowingly and willfully violated: **a.** Mr. IENG Sary’s right to be provided with a reasoned decision (protecting his right to transparency and to appellate review); **b.** Mr. IENG Sary’s and the other parties’ right to respond to applications which affect them (protected by their rights to equality of arms and an adversarial proceeding); and **c.** Mr. IENG Sary’s right to a fair trial which is not marred by *ex parte* communications (and thus his rights to equal treatment and to be tried by an impartial tribunal).

3. The Appeal is admissible pursuant to Rule 21 alone

11. This Appeal is immediately admissible pursuant to Rule 21 alone. Rule 21 requires the Chambers to always safeguard Mr. IENG Sary’s interests. The Pre-Trial Chamber has previously determined that Rule 21 required it to find appeals admissible in order to ensure that fair trial rights were safeguarded where there was otherwise no Rule granting

¹⁰ Decision on IENG Sary’s Appeal against Trial Chamber’s Order Requiring his Presence in Court, 13 January 2012, E130/4/3, p. 1.

¹¹ Rule 35(1) states:

The ECCC may sanction or refer to the appropriate authorities, any person who knowingly and wilfully interferes with the administration of justice, including any person who:

- a) discloses confidential information in violation of an order of the Co-Investigating Judges or the Chambers;
- b) without just excuse, fails to comply with an order to attend, or produce documents or other evidence before the Co-Investigating Judges or the Chambers;
- c) destroys or otherwise tampers in any way with any documents, exhibits or other evidence in a case before the ECCC;
- d) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with a witness, or potential witness, who is giving, has given, or may give evidence in proceedings before the Co-Investigating Judges or a Chamber;
- e) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an order of the Co-Investigating Judges or the Chambers;
- f) knowingly assists a Charged Person or Accused to evade the jurisdiction of the ECCC; or
- g) incites or attempts to commit any of the acts set out above.

an express right to appeal.¹² If this Appeal is not accepted, Mr. IENG Sary's fundamental fair trial rights will be violated. Article 2(3) of the International Covenant on Civil and Political Rights, which the Chambers of the ECCC must respect and uphold pursuant to the Constitution,¹³ requires that "[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." Mr. IENG Sary will not have an effective remedy if this Appeal is not accepted at this stage because the Trial Chamber is likely – if its past conduct is illustrative¹⁴ – to continue to direct the parties not to respond to certain requests, continue to issue unreasoned memoranda, and, most importantly, continue to direct the Trial Chamber Senior Legal Officer to engage in *ex parte* communications and provide advance notice of important trial management information only to other parties, prejudicing Mr. IENG Sary.

B. Request for a Public, Oral Hearing

12. The Defence requests a public, oral hearing to address the issues raised in this Appeal. Rule 109(1) indicates that appeal hearings should generally be conducted in public.¹⁵ This Appeal affects Mr. IENG Sary's fundamental fair trial rights. The issues raised are not confidential.

¹² See Decision on IENG Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filings of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, para. 13.

¹³ Article 31 of the 1993 Cambodian Constitution, as amended in 1999, states that 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.

¹⁴ See, e.g., Trial Chamber Response to IENG Sary's 'Observations' of 14 October 2011 (E130), 28 October 2011, E130/3 (issued in the form of a memorandum and directing the parties not to respond); Trial Chamber Response to Lead Co-Lawyers and Civil Party Lawyers Request to Make a [sic] Brief Preliminary Remarks on Behalf of Civil Parties (E131/4), 15 November 2011, E131/4/1 (issued in the form of a memorandum and directing the parties not to respond); Memorandum in response to request filed by IENG Sary (E53/2), 16 March 2011, E53/2/1 (issued in the form of a memorandum and directing the parties not to respond); Memorandum on IENG Sary request to file motion seeking "confirmation that he will be entitled to present oral arguments at the initial hearing concerning each of his preliminary objections", 16 March 2011, E65/1 (issued in the form of a memorandum and directing the parties not to respond); Decision on NUON Chea Defence Request for Internal Rule 35 Investigation following Unauthorized Disclosure of Confidential Documents, 20 December 2011, E147/1 (issued in the form of a decision and directing the parties not to respond); Decision on IENG Sary's Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, E71/1 (issued in the form of a decision and directing the parties not to respond); Decision on IENG Sary's Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge being applied in Case 002, 4 April 2011, E69/1 (issued in the form of a decision and directing the parties not to respond).

¹⁵ Rule 109(1) states: "Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only."

III. BACKGROUND

13. On 7 December 2011, the Defence was notified informally by one of the other Defence teams that the Trial Chamber Senior Legal Officer had contacted the NUON Chea and KHIEU Samphan Defence teams and informed them of the next batch of experts and witnesses the Trial Chamber was considering calling to give evidence and had asked these teams if they had any interest in taking the lead on questioning the witnesses. Immediately upon learning this information, the Defence emailed the Trial Chamber Senior Legal Officer, copying all the parties, to question whether this information was accurate and specifically whether she could inform the parties if a certain expert witness had agreed to give evidence.¹⁶

14. On 8 December 2011, the Trial Chamber Senior Legal Officer responded:

The below witnesses are under consideration by the Chamber for the next segment of the trial. They have been called variously by the OCP and the NUON Chea and KHIEU Samphan Defence. I had contacted the latter two Defence teams to enquire as to whether they had any interest in leading any of these witnesses.

The Chamber will make decisions as to which witnesses and experts will be called next, and who to delegate their questioning to, very shortly. All parties will be informed of these decisions as soon as possible.¹⁷

15. The Defence responded:

Mr. Ang Udom and Mr. Karnavas wish to stress and reiterate¹⁸ (please refer to Mr. Karnavas's email to you of 17 October 2011) how disconcerting it is to learn

¹⁶ Email from Tanya Pettay to Trial Chamber Senior Legal Officer, copied to all parties, entitled "Next Batch of Trial Chamber Witnesses," 7 December 2011.

¹⁷ Email from the Trial Chamber Senior Legal Officer to Ms. Pettay, copied to all parties, entitled "Re: Next Batch of Trial Chamber Witnesses," 8 December 2011.

¹⁸ The Defence found it necessary to "reiterate" this point to the Trial Chamber Senior Legal Officer because this was not the first occasion in which she communicated important trial management information to only certain select parties. The first such instance known to the Defence occurred when the Defence learned, on 17 October 2011, that the Trial Chamber Senior Legal Officer had orally informed one of the other Defence teams of the start date of the substantive trial. Immediately upon learning this, Defence International Co-Lawyer Michael G. Karnavas sent an email to the Trial Chamber Senior Legal Officer, copied to all parties, stating:

We understand that you have indicated to some that we will be receiving a scheduling order shortly which will indicate the start date of the substantive trial to be 28 November 2011. We have since also heard rumors that opening statements are likely to begin on 21 November 2011. For the sake of transparency, especially in light of the ongoing criticism this tribunal is enduring (much of which is the by-product of what would appear to be leaked insider information), we would most appreciate a proper scheduling order, signed by the Presiding Judge, or at least a courtesy email from you in which all parties are informed. Dispensing information to some in a casual and informal manner is not, in my opinion, conducive to fostering confidence in the proceedings. My apologies for the sharpness of tone. In light of the numerous outstanding issues in this case that need to be resolved prior to the commencement of trial, and because of my personal distaste for ex parte communications, I trust you will understand my concerns.

Email from Mr. Karnavas to the Trial Chamber Senior Legal Officer, copied to all parties, entitled "Start Date of Trial", 17 October 2011. Shortly after this email was sent, the Trial Chamber Senior Legal Officer sent an

from others that there are communications between you and other teams concerning witnesses and future scheduling matters. Everyone must be notified, not a select few, regardless of whether they may take the lead with questioning. If there is a particular reason that you consider it necessary to continue communicating with only certain parties, please be explicit as to why you believe this must occur, so that we may file something to the Trial Chamber concerning this opaque practice. At no other tribunal do these sorts of communications occur on a selective, ex-parte basis.¹⁹

16. The Trial Chamber Senior Legal Officer responded:

Let me be very clear. The communication to which you referred had no relevance to the IENG Sary Defence or any other party beyond its addresses. The Trial Chamber has a discretion to delegate responsibility for questioning to an appropriate party and the potential witnesses under consideration were included only on the witness lists of the OCP, and two Defence teams. A natural first step in the exercise of that discretion is to ascertain whether these two Defence teams or OCP might be willing to take on this burden. The IENG Sary Defence or any other party could have no legitimate comment to make on whether or not the NUON Chea or KHIEU Samphan Defence wished to lead witnesses appearing on their own witness lists.

email to all parties informing them of the start date of trial. Email from the Trial Chamber Senior Legal Officer to all parties entitled "Communication to parties in Case 002 regarding scheduling of opening statements and the hearing of the substance in Case 002, and information in advance of hearing on 19-20 October 2011," 17 October 2011. She separately responded to Mr. Karnavas by email on the same date:

An email providing a comprehensive summary of all matters relevant to preparation of the early trial phases was this morning circulated to all parties. Shortly prior to the issuance of this communication, some features of the information it contained had been selectively shared with a limited number of persons (for instance, to the Acting Head of the DSS, the Witness and Expert Support Unit, and other key units or personnel) where conducive to effective trial management.

I have previously indicated that I am the point of contact for communication between the parties and the Trial Chamber. Accordingly please desist from ccing the Trial Chamber judges into emails of this sort.

Email from the Trial Chamber Senior Legal Officer to Mr. Karnavas, copied to all parties, entitled "Re: Start Date of Trial," 17 October 2011. Mr. Karnavas replied:

Thank you for your prompt response. The operative word in your message is 'selective.' Mr. Ang Udom and I represent Mr. Ieng Sary. In other words, we are a party. While DSS plays an extremely important function, it does not, cannot and will not represent Mr. Ieng Sary – nor do the other 'selectively' chosen 'limited number of persons'; hence, my concerns.

My apologies for troubling the Trial Chamber on this matter, though, in my opinion, it is of sufficient consequence to warrant their awareness.

Email from Mr. Karnavas to the Trial Chamber Senior Legal Officer, copied to all parties, entitled "Re: Start Date of Trial," 17 October 2011. The Trial Chamber Senior Legal Officer responded to this email: "I can assure you that all parties were informed of all pertinent matters at the first available opportunity, and none were prejudiced by the extremely limited earlier disclosure to which I referred (which occurred in any case on the eve of the general mail going out)." Second email from the Trial Chamber Senior Legal Officer to Mr. Karnavas, copied to all parties, entitled "Re: Start Date of Trial," 17 October 2011.

¹⁹ Email from Tanya Pettay to Trial Chamber Senior Legal Officer, copied to all parties, entitled "Re: Next Batch of Trial Chamber Witnesses," 7 December 2011.

You are correct that not all persons in my position at other tribunals are as proactive at trial management as I am. This bears dividends in terms of effective organisation and is purely to the benefit of the parties.²⁰

17. The Civil Party Lead Co-Lawyers responded to this email chain to inform the Trial Chamber Senior Legal Officer that they would appreciate being informed of such communications “in order to understand the criteria used by the Chamber to give the primary responsibility to a party for the lead questioning and for transparency issues.”²¹
18. On 9 December 2011, the Trial Chamber Senior Legal Officer held an informal trial management meeting with the parties. At this meeting, the Civil Party Lead Co-Lawyer requested the Trial Chamber Senior Legal Officer to copy all parties into her communications concerning trial management matters. The Trial Chamber Senior Legal Officer stated that she would not do this, but would only copy parties that she considered relevant for particular issues. The Trial Chamber Senior Legal Officer stated that copying all parties would create too much work for her, because when she sends general emails to all parties, she receives many email responses.
19. On 9 December 2011, the Defence circulated a courtesy copy of the Request, which requested the Trial Chamber to direct its Senior Legal Officer to maintain open and transparent communication with all parties concerning trial management issues. The Request explained that it was made because the Trial Chamber Senior Legal Officer engaged in *ex parte* communication with certain select parties concerning matters which are of importance to all parties. It described the communications set out *supra* as well as one earlier known instance of the Trial Chamber Senior Legal Officer’s *ex parte* communication.²²
20. On 14 December 2011, the Defence filed the Request. The filing version was identical to the courtesy copy, with the sole exception that the courtesy copy indicated a filing date of 13 December 2011, but due to an unexpected delay in receiving the Khmer translation, the Request was actually filed one day later.
21. On 20 December 2011, the Trial Chamber issued the Impugned Decision, stating that:

²⁰ Second email from the Trial Chamber Senior Legal Officer to Ms. Pettay, copies to all parties, entitled “Re: Next Batch of Trial Chamber Witnesses,” 8 December 2011.

²¹ Email from Civil Party Legal Officer Jeanne Sulzer to Trial Chamber Senior Legal Officer, copied to all parties, entitled “Re: Next Batch of Trial Chamber Witnesses,” 7 December 2011.

²² See *supra* note 18.

[the Request] followed an email sent by the Trial Chamber Senior Legal Officer to two Defence teams who had requested that prospective witnesses be heard, in order to ascertain whether they would be willing to lead the questioning of these witnesses in the event the Chamber decided to call them. The motion objects to the limited circulation of this mail on grounds that '[o]ther parties may wish to voice their opinions on which parties are scheduled to lead certain witnesses or on other such matters' (paragraph 12).²³

The Trial Chamber explained that it "has an established practice which is to direct the Senior Legal Officer to draft a memorandum for its consideration or will approve a draft prepared by her. In accordance with this practice, the Trial Chamber had authorised the email from the Senior Legal Officer in question at the time it was sent."²⁴ It then stated that the Trial Chamber Senior Legal Officer's email "was appropriately directed to the relevant addressees"²⁵ and "motions of this type will not in future receive a response from the Chamber and may be considered to constitute a deliberate attempt to delay proceedings."²⁶ It directed the parties not to respond to the Request.²⁷ Finally, the Trial Chamber stated that the Request was non-urgent and should not have been sent as an advance courtesy copy. It noted that "on occasion, advance courtesy copies of motions filed in one language (due to translation constraints) have often differed substantially from the version later filed. This has not resulted in enhanced efficiency for the other parties or Chamber. Parties who continue to abuse this practice shall be denied the opportunity to file advance courtesy copies of motions to the Chamber..."²⁸

²³ Impugned Decision, p. 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*, p. 2.

²⁷ *Id.*

²⁸ *Id.*

IV. ARGUMENT AND LAW

“Sunlight is said to be the best of disinfectants.”

– Justice Louis D. Brandeis, United States Supreme Court²⁹

A. The Trial Chamber abused its discretion and interfered with the administration of justice by instructing its Senior Legal Officer to engage in *ex parte* communications

22. Mr. IENG Sary has a fundamental fair trial right to be treated equally to the other Accused and be tried by an impartial tribunal.³⁰ Article 31 of the Constitution provides that “[e]very Khmer citizen shall be equal before the law...” Article 3 of the Cambodian Code of Criminal Procedure provides: “Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other status.” Article 7 of the Universal Declaration of Human Rights, expressly incorporated in the Constitution,³¹ provides: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”) provides: “All persons shall be equal before the courts and tribunals.” Article 26 provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

23. *Ex parte* communications violate these rights to be treated equally and to be tried by an impartial tribunal. *Ex parte* communications cause the parties to be treated unequally,

²⁹ LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY, Chapter 5 (1913), available at <http://www.law.louisville.edu/library/collections/brandeis/node/191>.

³⁰ According to Article 13(1) of the Agreement: “[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing...” Article 33 new of the Establishment Law contains a substantially similar provision. Article 14(1) of the International Convention on Civil and Political Rights provides in relevant part, “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” The fundamental human right of an accused to be tried before an independent and impartial tribunal is also recognized in other major human rights treaties. The 1948 Universal Declaration of Human Rights provides in Art. 10 that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the full determination of his rights and obligations of any criminal charge against him.”

³¹ Constitution, Art. 31.

because through *ex parte* communications, some parties will be privy to information (and possibly gain influence) not available to the other parties. *Ex parte* communications demonstrate bias, or at a minimum create an appearance of bias, which violates the right to be tried by an impartial tribunal. When communications occur between the Trial Chamber – through its representatives or subordinates – and one party without the other parties being informed of what was discussed, the other parties naturally become apprehensive that important information may have been discussed or decisions may have been made without their participation.³² *Ex parte* communications undermine the confidence of the parties in the proceedings, foster suspicions, and give the impression that the Trial Chamber is favoring one party over another. This runs contrary to the accepted principle that justice must be seen to be done.³³ While in this instance, there may not have been actual bias, whether bias exists cannot be the measuring stick for whether *ex parte* communication is acceptable and permissible. The result cannot determine whether the conduct is forbidden. To suggest otherwise would universalize a maxim that an error of law is only manifest if the result yields actual prejudice. This would pervert the course of justice.

24. Judges have an obligation not to engage in *ex parte* communications and to prevent their staff from engaging in such communications.³⁴ The 2002 Bangalore Principles of Judicial Conduct, which were developed in order to strengthen the 1985 United Nations Basic Principles on the Independence of the Judiciary and are intended to apply to judges

³² For example, the director of the American Judicature Society's Center for Judicial Ethics, Cynthia Gray, discusses a case in which a judge was alleged to have had *ex parte* communications with lawyers who were appearing before him, but he claimed that these attorneys sometimes came into his chambers for social visits on days when they were appearing before him in court, and denied that they ever discussed cases in which he was acting as judge. She states: "an actual impropriety in *Kennick v. Commission on Judicial Performance* would have been proven if one of the attorneys with whom the judge met alone in chambers admitted that they had had *ex parte* communications about the case in which they were appearing that day on the judge's calendar. Even absent that direct evidence of *ex parte* communications, however, the California Supreme Court found that the judge's practice of having social visits with two favored attorneys on days when they were appearing in his court gave rise to an appearance of impropriety, in other words, an appearance of *ex parte* communications." Cynthia Gray, *The Ben J. Alheimer Symposium: Courtroom with a View: Perspectives on Judicial Independence: In Honor of Judge Richard Sheppard Arnold: Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 89 (2005).

³³ In the words of Lord Hewart C.J.: "Justice must not only be done, but should manifestly and undoubtedly be seen to be done." *R v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER 233.

³⁴ For the law concerning a judge's obligation to refrain from *ex parte* communications, see IENG Sary's Request for Investigation Concerning Ex Parte Communications between the International Co-Prosecutor, Judge Cartwright and Others, 24 November 2011, E137/3; IENG Sary's Second Rule 34 Application to Disqualify Judge Marcel LEMONDE and Joinder to the IENG Thirith Defence Application for Disqualification of Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing, 14 December 2009, 1.

the world over,³⁵ state that “[a] judge shall not knowingly permit court staff or others subject to the judge’s influence, direction or control to differentiate between persons concerned in a matter before the judge on any irrelevant ground.”³⁶ Similarly, although not expressed in such clear terms, Article 32 of the Cambodian Code of Ethics states: “At present, judges perform both judicial and some administrative duties. Hence some tasks are carried out by judicial or prosecutorial staff under the monitoring and instruction of judges. In this context judges shall monitor those judicial or prosecutorial staff to perform their responsible tasks with diligence.”

25. The judicial obligation to ensure that a judge’s staff members do not violate that judge’s ethical obligations is common in many jurisdictions. Rule 2.9 of the American Bar Association Model Code of Judicial Conduct, for example, states: “[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter... A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge’s direction and control.” The commentary to this Rule provides that “to the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.”³⁷
26. In the present case, far from ensuring that the Trial Chamber Senior Legal Officer avoided *ex parte* communications, the Trial Chamber expressly authorized her to send an email to certain parties informing them of the next witnesses and experts the Chamber intended to call and to inquire whether they would wish to take the lead in questioning these witnesses. It also ignored another instance of its Senior Legal Officer’s engagement in *ex parte* communication³⁸ and failed to direct her to stop this practice, thus tacitly condoning such communication and institutionalizing a procedure in which the Trial

³⁵ See Working Group on Judicial Conduct, European Network of Councils of Justice, Consiglio Superiore Della Magistratura, p. 25. The Bangalore Principles have been reviewed and revised in accordance with commentary from a large number of civil law and common law jurisdictions. For a description of this process, see The Judicial Integrity Group, Commentary on the Bangalore Principles of Judicial Conduct, March 2007, p. 9-18, available at <http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF>.

³⁶ Bangalore Principles, Value 5, Application 5.4.

³⁷ Available at

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_mcje_final.authcheckdam.pdf. See also American Bar Association Model Code of Judicial Conduct, Rule 2.3(A)-(B); Rule 12.2(A).

³⁸ See *supra* note 18.

Chamber Senior Legal Officer can freely engage in *ex parte* communications with any party at any time concerning important trial management issues.

27. The fact that the Trial Chamber Senior Legal Officer informed certain parties of which witnesses would likely be appearing next gave the parties who *were* informed an unfair advantage and may have led the parties who *were not* informed to consider that the Trial Chamber may harbor a bias against them.³⁹ Knowing which witnesses are likely to appear next allows the parties who possess this information to prepare in advance for these witnesses. Because some parties were informed of these witnesses earlier than others, they had more time to prepare for the witnesses than the parties who *were not* so informed. The Trial Chamber Senior Legal Officer also asked the parties she contacted in advance whether they wished to take the lead in cross-examining the witnesses. The other parties were not informed and were therefore unable to express their views on which party should take the lead. The Trial Chamber has failed to recognize the harmful effect that directing its Senior Legal Officer to engage in *ex parte* communications has had and could continue to have. This is clear from the Impugned Decision: it not only condones the Trial Chamber Senior Legal Officer's actions, but suggests that the Request may be a deliberate attempt to delay the proceedings and that it is non-urgent.⁴⁰ Put differently, the Trial Chamber just does not get the point or is callously indifferent.

28. The Trial Chamber should employ its Greffier to deal with matters concerning witnesses. Rule 84(2) states that "*the Greffier of the Chamber shall summon all the approved witnesses and experts, who shall respond to such summons and appear during the proceedings before the Chamber in accordance with these IRs.*"⁴¹ Greffiers, unlike Legal Officers, are required to be certified by the Ministry of Justice.⁴² Such certification

³⁹ Similarly, the fact that the Trial Chamber Senior Legal Officer told certain parties when the trial would start, but did not inform other parties, gave the parties who *were* informed an unfair advantage and may have led the parties who *were not* informed to consider that the Trial Chamber may harbor a bias against them. Knowing the start date of trial allows the parties to plan their schedules and ensure that they are prepared for the start of trial. Because some parties were informed earlier than others, they were able to have more time to prepare for the trial's start.

⁴⁰ See Impugned Decision, p. 2.

⁴¹ Emphasis added. Furthermore, instead of allowing its Senior Legal Officer to inform only certain "selective" parties of the start date of trial, the Trial Chamber should have ordered its Greffier to communicate the start date of trial to the parties in accordance with Rule 80(6), which states that "[t]he parties shall be notified in writing of the trial date by *the Greffier of the Chamber*, as soon as possible. Such notification shall be deemed valid summons." (Emphasis added).

⁴² Rule 16*bis* states: "In order to exercise their functions within the ECCC as provided in these IRs, ECCC Greffiers shall be accredited by the Ministry of Justice. The Office of the Administration shall forward the list of Greffiers immediately to the Ministry of Justice for accreditation."

presumably entails some sort of qualifications check by the Ministry of Justice and a swearing in process. This would act to impress upon Greffiers the need to act in accordance with the Judges' ethical obligations, as well as their own.

29. The Trial Chamber's direction to its Senior Legal Officer to engage in *ex parte* communication is an interference with the administration of justice. The violation of Mr. IENG Sary's rights to be tried by an impartial tribunal and to be treated equally to the other Accused constitutes further interference with the administration of justice – the Trial Chamber's actions have the direct effect of interfering with the Mr. IENG Sary's rights.

B. The Trial Chamber erred in law and interfered with the administration of justice by directing the parties not to file any responses to the Request

30. The parties have a fundamental fair trial right to respond to motions filed by other parties. The right to respond is vital in order to make a record, and because “[u]nchallenged evidence or arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion.”⁴³ The right to respond flows from their rights to equality of arms and to adversarial proceedings. The principle of equality of arms mandates that “the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair.”⁴⁴ This principle is fundamental to various international human rights instruments, including the ICCPR,⁴⁵ which the ECCC must respect in accordance with Article 31 of the Constitution, Article 33 new of the Establishment Law and Article 13(1) of the Agreement. It is also required by Rule 21(1)(a), which provides that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties...”

⁴³ John R. Allison, *Combinations of Decision-Making Functions, ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135, 1197 (1993).

⁴⁴ *Case of KAIING Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary's Request to Make Submission in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, para. 4.

⁴⁵ According to Article 14(1): “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...” *See also Fei v. Colombia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995), para. 8.4: “The concept of a ‘fair trial’ within the meaning of article 14, paragraph 1... also includes other elements. Among these, the Committee has had the opportunity to point out ... are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings.”

31. The Pre-Trial Chamber was faced with the issue of whether the parties have a right to respond, after the OCIJ refused to accept a response by the Defence to the OCP's Final Submission. The Pre-Trial Chamber found that the right to respond is linked to the right to equality of arms and that the OCIJ violated this right by accepting a filing by the OCP while denying the Defence the right to respond. It overturned the decision by the OCIJ and ordered the OCIJ to place the Response on the Case File.⁴⁶ It stated that "it is certainly understandable that a charged person may wish to have his or her submissions in response to those offered by the Co-Prosecutors in the Final Submission taken into consideration by the Co-Investigating Judges before they issue the Closing Order, which determines whether or not the charged person faces trial and on what charges. Furthermore, before this key step in the ECCC proceedings, the Co-Investigating Judges can only benefit from receiving submissions both of the OCP and of the Co-Lawyers."⁴⁷
32. The right to respond to motions filed by other parties is also linked to the right to adversarial proceedings, guaranteed by Rule 21(1)(a).⁴⁸ The right to adversarial proceedings "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision."⁴⁹ According to the European Court of Human Rights ("ECtHR"):

Various ways are conceivable in which national law may meet this requirement. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed *and will get a real opportunity to comment on them.*⁵⁰

⁴⁶ See Decision on IENG Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filing of the OCP's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4.

⁴⁷ *Id.*, para. 18.

⁴⁸ Rule 21 (1)(a) states, in pertinent part: "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties."

⁴⁹ *Lobo Machado v. Portugal*, Eur. Ct. H. R. App. no. 15764/89 (1996) para. 31.

⁵⁰ *Öcalan v. Turkey*, Eur. Ct. H.R., App. no. 46221/99 (2005), para. 146 (emphasis added). See also *Brandstetter v. Austria*, Eur. Ct. H.R. App. no. 11170/84; 12876/87; 13468/87 (1991), para. 67. Similarly, the ECtHR has found fair trial rights to have been violated when an applicant was denied an opportunity to reply to written submissions filed by State Counsel. In *Ruiz-Mateos v. Spain*, the Applicants alleged a violation of the principle of equality of arms on the basis that Counsel for the Government of Spain, their opponent in civil proceedings, was able to submit to the Constitutional Court written observations on the lawfulness of a statute, whereas they were not allowed to do so because they were held to lack *locus standi*. The court held that "persons must as a rule be guaranteed free access to the observations of the other participants in these proceedings and a genuine opportunity to comment on those observations." *Ruiz-Mateos v. Spain*, 16 Eur. H. R. Rep. 505, App. No. 12952/87 (1993), para. 63.

33. In the present case, the Trial Chamber directed the parties not to respond to the Request, violating Mr. IENG Sary's and the other parties' rights to equality of arms and adversarial proceedings. The Trial Chamber's direction to its Senior Legal Officer's to inform only certain parties of important trial management issues has the potential to affect negatively any party she does not inform.
34. The Trial Chamber's violation of the parties' rights to equality of arms and adversarial proceedings constitutes knowing and willful interference with the administration of justice – the Trial Chamber's actions have the direct effect of interfering with the parties' rights. Although in this instance, the Defence, as the moving party, would not have a right to respond, Mr. IENG Sary is harmed by the Trial Chamber's direction not to respond. First, the Trial Chamber has a history of denying the parties this right.⁵¹ The Defence has, on other occasions, been prohibited by the Trial Chamber from exercising its right to respond to submissions made by the other parties, which harms Mr. IENG Sary because his rights to equality of arms and adversarial proceedings are violated and he is prevented from making a record. Second, it appears – especially considering the Civil Parties' stated position regarding being informed of such matters – that other parties would have supported the Request, yet they were prohibited from doing so.

C. The Trial Chamber erred in law and knowingly and willfully interfered with the administration of justice by failing to issue a reasoned decision on the Request

35. Mr. IENG Sary has a fundamental fair trial right to receive reasoned decisions. Reasoned decisions are necessary in order to protect an Accused's right to transparent proceedings and to preserve an Accused's right to appeal. Regrettably, the Trial Chamber has a regular practice of issuing its decisions in the form of unreasoned memoranda.⁵²

⁵¹ See *supra* note 14.

⁵² As just one example, the Defence filed a motion to the Trial Chamber to stay the proceedings until a final judicial determination had been made as to whether the ECCC may exercise jurisdiction over Mr. IENG Sary or whether it is barred due to his Royal Pardon and Amnesty and the issue of *ne bis in idem*. Having received no response, and with the trial due to start imminently, the Defence sent a letter to the Trial Chamber Senior Legal Officer. In a memorandum, the Trial Chamber Senior Legal Officer stated: "As the Trial Chamber rendered its decision on the IENG Sary Defence preliminary objection concerning amnesty and *ne bis in idem* on 3 November 2011 (E51/15), the IENG Sary Defence's request to stay the commencement of trial until the final determination of this preliminary objection (E 135) is moot. The Chamber has prioritized and since issued all preliminary objections with implications for trial management, and disposition of the small number of remaining preliminary objections was not considered by the Chamber to constitute a barrier to the commencement of the trial of the substance in Case 002 on 21 November 2011. The Chamber does not intend to stay proceedings in

36. Concerning Mr. IENG Sary's right to transparent proceedings, Rule 21(1) requires that "[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings..." Transparency entails knowing what decisions a Chamber has taken and the reasons for those decisions. By issuing unreasoned decisions, the Trial Chamber obscures its reasoning, leaving Mr. IENG Sary, the parties and the public with no indication as to how it reaches its decisions.
37. The right to receive reasoned decisions is linked to the right to appellate review. The right to appellate review is provided for in Article 14(5) of the ICCPR,⁵³ which must be respected in accordance with Article 31 of the Constitution. As the Pre-Trial Chamber found: "It is a fundamental right that parties know the reasons for a decision. This permits a party to know the basis of a decision, placing an aggrieved party in a position to be able to determine whether to appeal, and upon what grounds."⁵⁴
38. Although the right to receive reasoned Judgements is set out explicitly in the Rules,⁵⁵ and international jurisprudence often discusses the right to reasoned decisions in the context

the event any of its preliminary objections decisions are appealed to the Supreme Court Chamber. *This constitutes the Chamber's official response to the IENG Sary Defence's letter to the Senior Legal Officer of 4 November 2011 requesting information concerning outstanding preliminary objections.*" Trial Chamber memorandum entitled Response to issues raised by parties in advance of trial and scheduling of informal meeting with Senior Legal Officer on 18 November 2011, 17 November 2011, E141, p. 6 (emphasis added). After the Defence questioned at the next informal Trial Management Meeting whether an official reasoned decision coming from the Trial Chamber would be forthcoming, on 29 November 2011, the Trial Chamber issued a memorandum stating: "This memorandum confirms that document E141 of 18 November 2011 constitutes the Trial Chamber's official response to the above motions, all of which raised questions concerning ongoing trial management." Notice of Trial Chamber's disposition of remaining pre-trial motions (E20, E132, E134, E135, E124/8, E124/9, E124110, E136 and E139) and further guidance to the Civil Party Lead Co-Lawyers, 29 November 2011, E145, p. 1.

⁵³ Article 14(5) states that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

⁵⁴ Decision on Co-Prosecutors' Appeal against the Co-Investigating Judges Order on Request to Place Additional Evidentiary Material on the Case File which Assists in Proving the Charged Persons' Knowledge of Crimes, 15 June 2010, D365/2/10. Article 30 of the Cambodian Code of Ethics for Judges also supports a conclusion that all judicial decisions should be reasoned. It states: "ARTICLE 30 – Basic priority or reasoning for decision: The preparation of the fundamental or reasoning for decision is a difficult and time consuming process. In this context judges shall have sufficient time to conduct research, discussion and write that basic or reasoning decision. However, judges shall not delay the time whereby the administration of justice is diminished."

⁵⁵ Rule 101(4) and (5) states: "4. The findings in the judgment shall respond to the written submissions filed by all of the parties. 5. The disposition by the Chamber shall set out each crime committed by an Accused, the applicable law, the sentence and any reparations."

of a lack of a reasoned judgement, the Pre-Trial Chamber, considering the Rules,⁵⁶ the ICTY Statute,⁵⁷ ICTY Rules of Procedure and Evidence,⁵⁸ ICTY jurisprudence,⁵⁹ and the European Court of Human Rights (“ECtHR”) *Taxquet v. Belgium* case⁶⁰ as well as guidance from the Human Rights Committee,⁶¹ concluded that the right applies to other decisions as well:

Although this case law of the European Court of Human Rights and the ICTY relates to verdicts on guilt, their import is relevant to the pre-trial context at the ECCC. Both the party whose request is rejected by the Co-Investigating Judges and the Pre-Trial Chamber need to know the reasons for rejection in sufficient detail in order to permit an appellant to decide whether or not to appeal and on what basis such appeal should be founded, and for the Pre-Trial Chamber to be able to determine whether or not the Co-Investigating Judges erred.⁶²

⁵⁶ The Pre-Trial Chamber stated: “First, for the Charged Person’s right to appeal under Rule 74(3)(b) to be meaningful, s/he must know why the Co-Investigating Judges rejected his/her request. This requires the Co-Investigating Judges to reason their rejection with sufficient detail to disclose the basis of a decision and thus place the Charged Person in a position to be able to decide whether and against which of the Co-Investigating Judges’ reasons an appeal may be brought and to draw appropriate submissions in support of any appeal. Second, Rule 77(14) requires the Pre-Trial Chamber to issue a ‘reasoned’ decision on an appeal against the Co-Investigating Judges’ exercise of discretion under Rule 55(10). The Pre-Trial Chamber is prevented from affirming the Co-Investigating Judges’ exercise of discretion to reject a request if the Pre-Trial Chamber does not know why the Co-Investigating Judges rejected it.” Decision on the IENG Thirith Defence Appeal Against ‘Order on Requests for Investigative Action by the Defence for IENG Thirith’ of 15 March 2010, 14 June 2010, D353/2/3, para. 23.

⁵⁷ Article 23(2) of the ICTY Statute states: “The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.”

⁵⁸ Rule 98 *ter* (C) of the ICTY Rules of Procedure and Evidence states: “The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.”

⁵⁹ The Pre-Trial Chamber failed to give the name or case number of the ICTY Appeals Judgement it analyzed and quoted.

⁶⁰ In *Taxquet v. Belgium*, the ECtHR considered a case in which an applicant was convicted by the Liege Assize Court, sitting with a jury, of murder and attempted murder. Belgian law did not require the Assize Court or the jury to give reasons for the verdict and they did not do so. The applicant appealed to the Court of Cassation, but his appeal was dismissed. He argued to the ECtHR that his right to a fair trial (Article 6(1) of the ECHR) was violated because he was not provided with reasons for his conviction. The ECtHR concluded that this right was violated, stating that:

according to its settled case-law, judgments of courts and tribunals should adequately state the reasons on which they are based.... In its case-law the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness.

It further noted that because of the lack of a reasoned decision, “the Court of Cassation was prevented from carrying out an effective review and from identifying, for example, any insufficiency or inconsistency in the reasoning.” Decision on the IENG Thirith Defence Appeal Against ‘Order on Requests for Investigative Action by the Defence for IENG Thirith’ of 15 March 2010, 14 June 2010, D353/2/3, paras. 24-26, *discussing and quoting Taxquet v. Belgium*, Eur. Ct. H.R. Application no. 926/05 (2009).

⁶¹ *Id.*, n. 34, citing United Nations Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, para. 49, UN Doc. CCPR/C/GC/32 (23 August 2007), and *Smith v. Jamaica*, Views of the United Nations Human Rights Committee, para. 10.5, UN Doc.

⁶² Decision on the IENG Thirith Defence Appeal Against ‘Order on Requests for Investigative Action by the Defence for IENG Thirith’ of 15 March 2010, 14 June 2010, D353/2/3, para. 28. The Pre-Trial Chamber found

Indeed, in a different decision, the Pre-Trial Chamber stated that “*all* decisions of judicial bodies are required to be reasoned as this is an international standard.”⁶³

39. Jurisprudence from the *ad hoc* tribunals also supports an Accused’s right to receive reasoned decisions.⁶⁴ In *Prosecutor v. Prlić et al.*, for example, the Appeals Chamber was faced with an appeal by the prosecution alleging that the Trial Chamber had failed to provide sufficient reasoning for its decision to reduce the time allotted to the prosecution to present its case. The Appeals Chamber noted that “a Trial Chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision,” and held that to meet its obligation to provide a reasoned decision, it is sufficient “that the Trial Chamber indicated what documents and information it had taken into account and the factors it considered in assessing what remains to be covered against the backdrop of the Amended Indictment, while making clear in its assessment that it duly balanced the sometimes competing interests at stake in carrying out its duty to ensure the fairness and expeditiousness of the proceedings.”⁶⁵

40. The Impugned Decision lacks reasoning. It fails to explain why the Trial Chamber denied the request to direct its Senior Legal Officer to communicate openly and transparently with the parties. The only reasoning contained in the Impugned Decision concerns whether the parties may comment on which party may lead the questioning of a

that lack of a reasoned decision prevented the Pre-Trial Chamber from discharging its duty to carry out an effective review of the decision and prevented it from identifying whether the OCIJ had properly exercised its discretion. *Id.*, para. 29.

⁶³ Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 21 (emphasis added).

⁶⁴ See, e.g., *Prosecutor v. Prlić et al.*, IT-04-74-AR73.13, Decision on Jadranko Prlić’s Consolidated Interlocutory Appeal against the Trial Chamber’s Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009, para. 18: “The Appeals Chamber recalls that a Trial Chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision”; *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 16: “The Appeals Chamber recalls that a Trial Chamber must, at a minimum, provide reasoning in support of its findings on substantive considerations relevant for a decision...”; *Prosecutor v. Haradinaj et al.*, IT-04-84-AR65.2, Decision on Lahi Braimaj’s Interlocutory Appeals Against the Trial Chamber’s Decision Denying his Provisional Release, 9 March 2006, para. 10: “at a minimum, [a Chamber] must provide reasoning to support its findings regarding the substantive considerations relevant to its decision.”; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-AR73, Decision on Joseph Kanyabashi’s Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007, para. 180; *Prosecutor v. Sesay et al.*, SCSL-04-15-A, Judgement, 26 October 2009, para. 344: “The fair trial requirements of the Statute include the right of the accused to a reasoned opinion by the Trial Chamber under Article 18 of the Statute and Rule 88(C) of the Rules. The Appeals Chamber finds the well-established jurisprudence of the ICTY and ICTR which interpret their identical provisions persuasive as to the law in this regard.”

⁶⁵ *Prosecutor v. Prlić et al.*, IT-04-74-AR73.4, Decision on Prosecution Appeal Following Trial Chamber’s Decision on Remand and Further Certification, 11 May 2007, para. 25.

witness. The Trial Chamber reasoned that since the allocation of responsibility for questioning is a discretionary decision, not open for adversarial argument, “the communication in question was appropriately directed to the relevant addressees.”⁶⁶

41. The Trial Chamber ignored the violation of rights that occurs whenever the Trial Chamber Senior Legal Officer provides information to some parties but not to others and did not explain why it considers such behavior permissible. The Trial Chamber erred by failing to issue a reasoned decision as it was required to do. In doing so, it deliberately frustrated the parties’ rights to potentially appeal by not providing, with any degree of specificity, the legal reasoning for permitting, and in this case encouraging and directing, impermissible *ex parte* communications. This error invalidates the decision and amounts to an interference with the administration of justice since it causes a violation of Mr. IENG Sary’s fair trial right to transparent proceedings and interferes with his right to appellate review.

V. CONCLUSION AND RELIEF REQUESTED

42. In issuing a non-reasoned decision, the Trial Chamber attempts to cement a process of non-transparency where it, through its non-accountable Senior Legal Officer, legitimizes the disparate treatment of parties through the use of *ex parte* communications on matters of substance, contrary to the letter and spirit of the ECCC governing laws founded upon and supported by the Constitution. To suggest that *ex parte* communications are necessary and reasonable in dealing with matters that directly and expressly impact on the fair trial rights of the Accused, or any other party for that matter, is sheer folly, if not utterly abhorrent. As a model court,⁶⁷ the practices of which are expected to be emulated

⁶⁶ Impugned Decision, p. 1.

⁶⁷ “The ECCC is designed to be a model for the Cambodian legal and judicial reform; therefore, the ECCC should not be a model for unnecessary limitation on free expression and access to information.” Recommendations Regarding Additional Transparency at the Extraordinary Chambers of the Courts of Cambodia (ECCC) Submitted by members of Civil Society and Members of the Cambodian Press March 24, 2008, available at

<http://www.cambodiatribunal.org/CTM/Recommendations%20Regarding%20Additional%20Transparency.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e>. See also Holly Telerant & Pen Rany, *Must Justice be Seen to be Done? Public Scrutiny and Participation in the KRT*, VOICE OF JUSTICE RESEARCH BULLETIN, Year 14, Issue 136, March-April 2007, p. 15-18 (emphasis added). “The KRT was established for the Cambodians for a variety of well-considered reasons. Not only was it established to bring the perpetrators to justice, but also so that justice could be seen to be done. It was established to set the historical record straight, to stimulate a national discussion, and to begin a long-overdue process of national reconciliation. It is difficult to achieve these goals if the important pre-trial process is conducted completely in private.”

by all other courts in Cambodia and provide a lasting legacy,⁶⁸ the Trial Chamber – and, if this matter is not corrected, the Supreme Court Chamber – will be further weakening the rule of law in Cambodia, which precariously hangs in the balance as it is, by fostering and promoting practices which are antithetical to the fair and transparent trials guaranteed by the Constitution. The Trial Chamber should not willy-nilly ride roughshod over the rights of the parties through the use of *ex parte* communications, by denying parties an opportunity to be heard and for a proper judicial record to be made, by rendering decisions by way of unreasoned memoranda, and by engaging in conduct that intentionally or unintentionally has the effect of circumventing the safeguards placed within the Cambodian judicial system to ensure justice and fair trials – the very safeguards which the judges themselves have sworn to uphold in carrying out their judicial functions.

⁶⁸ The Office of the United Nations High Commissioner for Human Rights has issued a Report which defines “legacy” in the context of courts such as the ECCC as a “lasting impact on bolstering the rule of law in a particular society, by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity. The aim is for this impact to continue even after the work of the hybrid court is complete. The need to leave a legacy is now firmly accepted as part of United Nations policy.” *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*, Office of the United Nations High Commission for Human Rights, 2008, p. 4-5, available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>. This Report states that *how* the prosecution of massive violations of human rights is done is as important as *what* is done. *Id.*, p. 5. It notes that:

[w]hat is important is that hybrid courts tend to be closely scrutinized and must uphold high standards across all areas of practice to maximize their demonstration effect. Briefly, these are some examples:

- *Fair trial standards.* A strong approach to issues of fair trial and equality of arms potentially leads to the recognition of the important role of the defence. As such a culture shift would require proper resourcing of the defence, it may lead, for example, to improved legal assistance for indigent defendants in domestic courts.

[...]

- *Transparency of public institutions and levels of professionalism.* A hybrid institution must be perceived as accessible and transparent to be successful. Access to senior officials of the court and to clear information will have a positive effect on how the court is perceived, setting realistic expectations on what the court can achieve. Financial propriety is also an important consideration, as are standards of professional ethics and codes of conduct.

Id., p. 17-18 (emphasis added).

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to:

- A. FIND this Appeal admissible;
- B. GRANT a public, oral hearing on the issues raised in this Appeal;
- C. HOLD that the Trial Chamber erred in directing its Senior Legal Officer to engage in *ex parte* communications, in directing the parties not to respond to the Request, and in failing to issue a reasoned decision; and
- D. ANNUL the Impugned Decision; and
- E. DIRECT the Trial Chamber to cease and desist from instructing its Senior Legal Officer to engage in *ex parte* communications on matters that impact or touch upon issues relevant to Case 002 trial proceedings.

Respectfully submitted,



ANG Udom





Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 20th day of **January, 2011**