

**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 31 January 2012**CLASSIFICATION****Classification of the document  
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**IENG SARY'S REQUEST FOR CLARIFICATION THAT NO ADVERSE  
INFERENCES CAN BE DRAWN FROM AN ACCUSED'S SILENCE WHEN HE  
EXERCISES HIS RIGHT TO REMAIN SILENT**

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**All Defence Teams****All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests clarification from the Trial Chamber as to whether any adverse inferences can and will be drawn from an Accused who exercises his right to remain silent. Clarification is made necessary in light of **a.** comments made by the international Senior Assistant Co-Prosecutor, Mr. Tarik Abdulhak, during trial on 12 January 2012 in which he intimated that adverse inferences may be drawn from an Accused who refuses to testify;<sup>1</sup> and **b.** Judge Lavergne’s invitation to Mr. KHIEU Samphan to “clarify,” “comment on,” or “react” to questions and documents put to him following Mr. KHIEU Samphan’s invocation of his right to remain silent.<sup>2</sup> Clarification is further deemed necessary because Mr. IENG Sary has expressly invoked his right to remain silent before the Trial Chamber.<sup>3</sup> It is respectfully submitted that based upon the applicable ECCC jurisprudence an Accused has a constitutionally protected right to remain silent and a right not to incriminate himself, and that no adverse inferences can be drawn if an Accused exercises his right to remain silent.

## I. BACKGROUND

1. On 24 October 2012, Mr. IENG Sary gave notice that he has been informed of his rights and “voluntarily, knowingly and unequivocally put[s] the Trial Chamber on notice that [he] will not testify, including answering any questions..., during any trial or mini-trial in Case 002.”<sup>4</sup>
2. On 17 November 2011, the Trial Chamber Senior Legal Officer stated in a memorandum that “Case 002 is now severed and questioning at trial should follow the topics indicated to the parties in Annex E124/7 to ensure that there is a logical sequence to the examination of all Accused, witnesses, Experts and Civil Parties. Questioning of the Accused will commence with the first segment of the trial in Case 002/01, namely, historical background.”<sup>5</sup> The Trial Chamber Senior Legal Officer has indicated that following the completion of questioning of the Accused on historical background, the

<sup>1</sup> [MR. ABDULHAK:] Is [Mr. KHIEU Samphan] refusing to testify and simply taking the position that he will make statements as the Trial proceeds? If that is the case, then the prosecution would make submissions in relation to the negative inferences that may be drawn from such a position.” Transcript, 12 January 2012, E1/26.1, p. 61, ln: 3-6.

<sup>2</sup> The exchange between the Trial Chamber and Mr. KHIEU Samphan continued for approximately an hour. See Transcript, 12 January 2012, E1/26.1, p. 54 – 75.

<sup>3</sup> Mr. IENG Sary’s Notice to the Trial Chamber that he will not testify, 24 October 2011, E101/4.1.

<sup>4</sup> *Id.*

<sup>5</sup> Memorandum from Trial Chamber Senior Legal Officer to all parties in Case 002, re: 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.

Trial Chamber will question the Accused on the next topics, namely administrative structures and communications structure.<sup>6</sup>

3. In the afternoon of 12 January 2012, upon summoning Mr. KHIEU Samphan to the dock, Presiding Judge Nil Nonn stated: “[W]ith regard to Mr. Khieu Samphan, we have already informed him about his rights and he has not indicated clearly yet whether he would like to exercise his right to remain silent although we have been informed by the accused person that whenever any inculpatory evidence being presented in the courtroom against him, it is the moment that he would be responding to the questions to challenge such evidence.”<sup>7</sup> In response, MR. KONG Sam Onn, Mr. KHIEU Samphan’s National Co-Lawyer stated: “*Thank you, Mr. President. Through me, Mr. Khieu Samphan has maintained his position that he would not respond to the questions as he’s already did -- said so on the 13 of December 2011.*”<sup>8</sup>
4. Following this indication, Presiding Judge Nil Nonn handed over to Judge Lavergne to put questions to Mr. KHIEU Samphan.<sup>9</sup> Prior to Judge Lavergne asking any questions, Mr. KHIEU Samphan restated his position to the Trial Chamber: “*I made it clear already that I would not be responding to questions.*”<sup>10</sup> Presiding Judge Nil Nonn confirmed that Mr. KHIEU Samphan had been clear regarding his position,<sup>11</sup> yet contradicted his understanding of Mr. KHIEU Samphan by asking “whether Judge Lavergne still wishes to put any further questions to Mr. Khieu Samphan at this time.”<sup>12</sup> Judge Lavergne, also after acknowledging Mr. KHIEU Samphan’s position,<sup>13</sup> did request “some clarification in relation to the comments that you made in December. Then ... we will give you the opportunity to provide comments [to documents].”<sup>14</sup>

<sup>6</sup> “Once this segment is concluded, the Chamber will then move to the next trial segments described in Annex E124/7.2 (list of paragraphs and portions of the Closing Order relevant to Case 002/01), namely administrative structures and communications structure (Closing Order paragraphs 33-112). It will first question the Accused on these topics, before proceeding to the witnesses listed below.” Memorandum from Trial Chamber Senior Legal Officer to all parties in Case 002, re: Next group of witnesses and experts to be heard in Case 002/01, 15 December 2011, E155.

<sup>7</sup> Transcript, 12 January 2012, E1/26.1, p. 54, ln: 17-23.

<sup>8</sup> *Id.*, p. 55, ln: 6-10.

<sup>9</sup> “I would like to hand over to Judge Lavergne to proceed -- or to put questions to the accused person, Mr. Khieu Samphan.” *Id.*, p. 55, ln: 23-24.

<sup>10</sup> *Id.*, p. 56, ln: 5-6.

<sup>11</sup> “Thank you, Mr. Khieu Samphan, for your current position which clarifies things. We have noted that you have been clear with regard to your position that you would not respond to questions relevant to the historical background of the Democratic Kampuchea.” *Id.*, p. 57, ln: 2-6.

<sup>12</sup> *Id.*, p. 57, ln: 7-8.

<sup>13</sup> “Mr. Khieu Samphan, I believe everyone has understood your position.” *Id.*, p. 58, ln: 11-12.

<sup>14</sup> *Id.*, p. 58, ln: 23-25; *Id.*, p. 59, ln: 5-6.

Again, Mr. KONG Sam Onn restated Mr. KHIEU Samphan's position that he will not answer any questions.<sup>15</sup>

5. Following this exchange between the Trial Chamber and Mr. KHIEU Samphan and Mr. KONG Sam Onn, the OCP, through Mr. Abdulkhak, stated: "Is [Mr. KHIEU Samphan] refusing to testify and simply taking the position that he will make statements as the Trial proceeds? If that is the case, then the prosecution would make submissions in relation to the negative inferences that may be drawn from such a position."<sup>16</sup>
6. Throughout the course of the next hour, the exchange between Judge Lavergne and Mr. KHIEU Samphan and Mr. KONG Sam Onn continued. Judge Lavergne invited Mr. KHIEU Samphan to "clarify," "comment on," or "react" to questions and documents put to him on no fewer than eight occasions, namely:
  - "First of all, having heard your comments, we would like to obtain some clarification in relation to the comments that you made in December;"<sup>17</sup>
  - "This is why these documents will be tendered to you and maybe there will be -- maybe excerpts will be read to you and we will give you the opportunity to provide comments;"<sup>18</sup>
  - "Right. Here we're talking about making explanations. Right now I'm not going to be asking any questions. What I do want to point out is that the Chamber, whatever the case, is going to be looking at a certain number of documents that are in the file. Those documents are ones that the Chamber believes may be relevant. They are going to be aired in the hearing, they are going to be presented to Mr. Khieu Samphan. [14.02.55] Mr. Khieu Samphan has an opportunity to react to them, and, if he wishes, to make comments on them."<sup>19</sup>

<sup>15</sup> "Thank you, Mr. President. After having observed the remarks made by Judge Lavergne, I have two points to raise in my request. First, we would like to confirm that Mr. Khieu Samphan has waived his rights to respond to any questions relevant to the historical background and it has been made clear; and Judge Lavergne has already indicated that he has fully understood this. So, my suggestion is that we shall not have any further questions to be put to Mr. Khieu Samphan with regard to historical background." *Id.*, p. 59, ln: 17-24.

<sup>16</sup> *Id.*, p. 61, ln: 3-6.

<sup>17</sup> *Id.*, p. 58, ln: 23-25.

<sup>18</sup> *Id.*, p. 59, ln: 4-6.

<sup>19</sup> *Id.*, p. 64, ln: 14-23.

- “Thank you, Mr. President. Perhaps what is to be read out will give Mr. Khieu Samphan a chance to change his mind and to understand the purpose of this session.”<sup>20</sup>
- “I think what would be useful if you responded to requests for clarification that may be put to you.”<sup>21</sup>
- “I don't know, Mr. President, if I can ask Mr. Khieu Samphan if he is indeed the author of this excerpt, if he has any comments about it, or if I have to withhold from asking any questions at all.”<sup>22</sup>
- “So I'm not asking any questions here again. I just would like to ask if Mr. Khieu Samphan wishes to comment on that text.”<sup>23</sup>
- “So it's the same question: Do you wish to react?”<sup>24</sup>

7. In response, on each occasion, Mr. KHIEU Samphan and Mr. KONG Sam Onn restated the position that Mr. KHIEU Samphan will not speak:

- “[Mr. KONG SAM ONN:] Thank you, Mr. President. After having observed the remarks made by Judge Lavergne, I have two points to raise in my request. First, we would like to confirm that Mr. Khieu Samphan has waived his rights to respond to any questions relevant to the historical background and it has been made clear; and Judge Lavergne has already indicated that he has fully understood this. So, my suggestion is that we shall not have any further questions to be put to Mr. Khieu Samphan with regard to historical background.”<sup>25</sup>
- “MR. KHIEU SAMPHAN: Mr. President, I indicated on the 13 of December clearly this position that I would not yet respond to any questions and I would not have anything else to add on top of my statement that I made on

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<sup>20</sup> *Id.*, p. 65, ln: 19-21.

<sup>21</sup> *Id.*, p. 68, ln: 7-8.

<sup>22</sup> *Id.*, p. 71, ln: 13-16.

<sup>23</sup> *Id.*, p. 73, ln: 18-19.

<sup>24</sup> *Id.*, p. 74, ln: 23.

<sup>25</sup> *Id.*, p. 59, ln: 17-24.

the 13 of December. I hope this latest position is clear to the Bench and to Judge Lavergne.”<sup>26</sup>

- “MR. KONG SAM ONN: Thank you, Mr. President. (Short pause) [14.07.21] Thank you, Mr. President. Upon my consultation with my client, he indicated to me that he will not answer any questions regarding the historical background. Thank you, Mr. President.”<sup>27</sup>
- “MR. KONG SAM ONN: Thank you, Mr. President. May I reiterate Mr. Khieu Samphan's position? He indicated that he will not answer any question, and he just indicated just now that he will not answer any further questions.”<sup>28</sup>
- “[Mr. KONG SAM ONN:] May I clarify that the reason why we are requesting for the questions is that Mr. Khieu Samphan indicated already that he would not answer any questions, and if questions are kept being put before him, this could be considered as disturbance or intrusion to his rights.”<sup>29</sup>
- “MR. KONG SAM ONN: Thank you, Mr. President. If it pleases the Court, may I request that Judge Lavergne not put any other questions to Mr. Khieu Samphan as he already indicated that he would not answer any questions. Therefore any attempt to put questions to him may confuse him and will infringe his rights. Thank you.”<sup>30</sup>
- “MR. KHIEU SAMPHAN: A. Mr. President, Your Honours. I do not wish to make any further comments on top of that.”<sup>31</sup>
- “MR. KONG SAM ONN: Thank you, Mr. President. Once again, may I reiterate that Mr. Khieu Samphan is exercising his right to remain silent and this right shall be respected since it is set forth in the Rules.”<sup>32</sup>

<sup>26</sup> *Id.*, p. 61, ln: 25 – p. 62, ln: 4.

<sup>27</sup> *Id.*, p. 65, ln: 11-17.

<sup>28</sup> *Id.*, p. 68, ln: 17-21.

<sup>29</sup> *Id.*, p. 69, ln: 22 – p. 70, ln: 1.

<sup>30</sup> *Id.*, p. 72, ln: 2-7.

<sup>31</sup> *Id.*, p. 73, ln: 21-23.

<sup>32</sup> *Id.*, p. 75, ln: 1-5.

## II. ARGUMENT AND APPLICABLE LAW

### A. An Accused has the Right to Remain Silent and the Right Not to Incriminate Himself

8. In accordance with Article 31 of the Cambodian Constitution, “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.”<sup>33</sup> The International Covenant on Civil and Political Rights (“ICCPR”) provides the guarantee that an individual will “[n]ot to be compelled to testify against himself or to confess guilt.”<sup>34</sup> In accordance with the Agreement, the ECCC shall exercise its jurisdiction in accordance with Articles 14 and 15 of the ICCPR.<sup>35</sup> This position is reiterated in the Establishment Law.<sup>36</sup> Rule 21(1)(d) of the ECCC Internal Rules (“Rules”) provides that an Accused has the right to remain silent during every stage of the proceedings.<sup>37</sup>
9. An Accused’s right to remain silent and right not to incriminate himself is expressly guaranteed at the ECCC by the Cambodian Constitution, the ICCPR, the Agreement, the Establishment Law and the Rules. A request to “clarify,” “comment on” or “react” to questions or documents is a request to speak as an Accused cannot “clarify,” “comment on” or “react” without speaking. The Defence submits that where an Accused has explicitly exercised his right to remain silent, any request to “clarify,” “comment on,” or “react” to questions or documents is a violation of the Accused’s constitutionally protected fundamental right to remain silent and right not to incriminate himself.

### B. No Adverse Inferences can be Drawn from an Accused’s Silence

10. The Defence submits that where an Accused invokes his right to remain silent, no adverse inferences can be drawn from an Accused’s silence. An Accused’s right to remain silent cannot be meaningful where, if it is invoked, it is used to his detriment.

<sup>33</sup> Constitution of the Kingdom of Cambodia, as amended 4 March 1999 (“Cambodian Constitution”).

<sup>34</sup> ICCPR, Art. 14(3)(g).

<sup>35</sup> Agreement Between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, 6 June 2003 (“Agreement”), Art. 13.

<sup>36</sup> Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, 27 October 2004 (“Establishment Law”), Arts. 33 new, 35 new.

<sup>37</sup> Rule 21(1)(d) states: “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent.”

Drawing an adverse inference where an Accused has invoked his right to remain silent violates the presumption of innocence and shifts the burden of proof from the OCP to the Defence.<sup>38</sup>

11. At the ECCC, an Accused has a constitutionally protected right to be presumed innocent until proven guilty.<sup>39</sup> The burden of proof is upon the OCP to prove the guilt of an Accused beyond reasonable doubt.<sup>40</sup> If an adverse inference is drawn from an Accused who remains silent, the Accused may feel compelled to speak to merely maintain any presumption of innocence. Put differently, it would appear that the OCP suggests that any silence from the Accused or any reiteration from the Accused exercising his right to remain silent may shift the burden of proof onto the Accused.
12. The Cambodian Constitution, the Cambodian Code of Criminal Procedure (“CPC”), the Agreement, the Establishment Law and the Rules do not provide that any adverse inference can be drawn from an Accused’s silence. No jurisprudence on this issue exists from Case 001 as Duch did not invoke his right to remain silent. Guidance on this issue can be taken from the Statute of the International Criminal Court (“ICC”) and jurisprudence from International Criminal Tribunal for the Former Yugoslavia (“ICTY”). Article 67(1)(g) of the ICC Statute provides that that an accused shall have the right: “[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt of innocence.” In the *Čelebići* case, the ICTY Appeals Chamber held that:

<sup>38</sup> “To permit an adverse inference to be drawn from the right to silence of an accused person appears to constitute compulsion which has the effect of shifting the burden of proof from the prosecution to the accused and is, therefore, inconsistent with this right.” NIHAL JAYAWICKRAMA, *THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL, REGIONAL AND INTERNATIONAL JURISPRUDENCE* 581 (CAMBRIDGE UNIVERSITY PRESS, 2002).

<sup>39</sup> Cambodian Constitution, Art. 38 states in pertinent part: “The accused shall be considered innocent until the court has judged finally on the case;” UDHR, Art. 11(1): “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence;” ICCPR, Art. 14(2): “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law;” Agreement, Art. 13(1) states in pertinent part: “The 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 be presumed innocent until proved guilty;” Establishment Law, Art. 35 new states in pertinent part: “The accused shall be presumed innocent as long as the court has not given its definitive judgment.” Rule 21(d) states in pertinent part: “Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established.”

<sup>40</sup> Rule 87(1) states in pertinent part: “The onus is on the Co-Prosecutors to prove the guilt of the accused. In order to convict the accused, the Chamber must be convinced of the guilt of the accused beyond reasonable doubt.”



Neither the Statute nor the Rules of this Tribunal expressly provide that an inference can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not ‘be a consideration in the determination of guilt or innocence.’ Should it have been intended that such adverse consequences could result, ... an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore ... an absolute prohibition against consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules....<sup>41</sup>

13. In Case 002/01, the Trial Chamber has informed the parties that it will question the Accused on one topic area at a time. The testimony of the Accused is segregated into self-contained topics. For example, the first topic area is “Historical Background;”<sup>42</sup> the second topic area is “Administrative Structure and Communications Structure.”<sup>43</sup> An Accused may wish to testify on one topic, but not another. The Defence submits that were an Accused to testify on one topic but not to another, no adverse inferences can be drawn on the topics upon which he remains silent.

### III. CONCLUSION

14. Given the OCP’s position – as previously echoed by the OCP<sup>44</sup> and Civil Parties<sup>45</sup> – that adverse inferences may be drawn through the exercise of a waiver – it behooves the

<sup>41</sup> *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 783.

<sup>42</sup> Memorandum from Trial Chamber Senior Legal Officer to all parties in Case 002, re: 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.

<sup>43</sup> Memorandum from Trial Chamber Senior Legal Officer to all parties in Case 002, re: Next group of witnesses and experts to be heard in Case 002/01, 15 December 2011, E155.

<sup>44</sup> “[MR. CHAN DARARASMEY:] With respect to the expeditious trial and in the interest of justice, presence of the accused person Ieng Thirith in the proceeding is essential, and we anticipate or expect that, in the upcoming hearings, there will times when questions are put and that it is -- Ieng Thirith is needed to respond to those questions to ascertain the truth, so her presence is vital to the proceedings, Your Honours.” Transcript, 20 October 2011, E1/12.1, p. 120, ln: 20 – p. 121, ln: 1; “[MR. CHAN DARARASMEY:] Your Honours, the prosecution submits that, having examined or heard from the expert, Ieng Thirith recognizes people she met, although she cannot name those people. This suggests that she can help explain to the Court about the testimonies of witnesses and those whom she has known.” *Id.*, p. 121, ln: 24 – p. 122, ln: 3; “[MR. CHAN DARARASMEY:] In the future trials, there will be questions raised by parties that need response from Ieng Thirith. Her responses may link to the other Accused Persons or other Accused Persons may raise questions that may be relevant to Ieng Thirith to respond.” *Id.*, p. 124, ln: 24 – p. 125, ln: 3.

<sup>45</sup> “MS. SIMONNEAU-FORT: Thank you, Mr. President. We wanted to hear the views of the defence before we expressed our position, and if silence is a right for each one of the Accused, I believe that the civil parties believe that, out of respect for all of those who are attending this trial, out of respect for the people of Cambodia, who they claim they love ‘beaucoup’ -- very much, the least, I think, we could receive is a few explanations at the outset of the trial. Those explanations would be the very least we could hope for. If they could actually tell the truth, that will be even better. Thank you.” Transcript, 23 November 2011, E1/15.1, p. 49, ln: 4-15; “MR. PICH ANG: Thank you, Mr. President, Your Honours. During the evidence session and as Elisabeth -- Ms. Elisabeth Simonneau-Fort already indicated, it is really important that the Accused Person testifies, because civil parties and victims have been waiting to hear from the Accused what they have to say. And if they choose not to respond, it perhaps presumes that they have admitted the guilt already. Indeed, it is the right of the Accused. And given the fact that the civil party and victim have been waiting for long, they should respond.” *Id.*, p. 49, ln: 19 – p. 50, Ln: 3.

Defence to seek clarification as to whether an Accused at the ECCC has the right to remain silent and the right not to incriminate himself, and that in invoking these rights no adverse inferences be drawn. Clarification is sought from the Trial Chamber to confirm whether the Defence's position as set out by the Cambodian Constitution, the CPC, the UDHR, the ICCPR, the Agreement, the Establishment Law and the Rules is correct.

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to CLARIFY whether:

- a. An Accused has the right to remain silent and the right not to incriminate himself;
- b. No adverse inferences can be drawn from an Accused who exercises his right to remain silent; and
- c. No adverse inferences can be drawn from an Accused who exercises his right to remain silent when questioned about one subject area but testifies on another subject area.

Respectfully submitted,

  
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 ANG Udom



  
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 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 31<sup>st</sup> day of **January, 2012**