

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:** 20 June 2012**CLASSIFICATION****Classification of the document
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**IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' REQUEST FOR LEAVE
TO PROVIDE ASSURANCES WITH RESPECT TO NON-PROSECUTION FOR
WITNESSES**

Filed by:**Distribution to:****The Co-Lawyers:**

ANG Udom

Michael G. KARNAVAS

The Trial Chamber Judges:

Judge NIL Nonn

Judge YOU Ottara

Judge YA Sokhan

Judge Silvia CARTWRIGHT

Judge Jean-Marc LAVERGNE

Reserve Judge THOU Mony

Reserve Judge Claudia FENZ

Co-Prosecutors:

CHEA Leang

Andrew CAYLEY QC

All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses (“Request”).¹ This Response is made necessary because through the Request, the Co-Prosecutors seek to improperly communicate with selective witnesses/potential suspects to falsely provide non-prosecution assurances, and in so doing, further assure the witnesses/potential suspects that the Trial Chamber condones, authorizes and guarantees that the legislative bodies of Cambodia (the National Assembly and Senate) will not, under any circumstances, exercise their constitutionally granted authority to amend the law – as they have done in lawfully establishing the ECCC – for the purpose of prosecuting individuals that may have committed crimes during the temporal jurisdiction of the ECCC. The Request should be denied. The Trial Chamber has only addressed the Request insofar as stating that it “considers it inappropriate given the ECCC’s role and legal framework to provide assurances of non-prosecution before other Cambodian courts.”² The Defence relied on the representations of the Trial Chamber Senior Legal Officer – and the principle of equality of arms – that it would have a right to respond the request.³ Accordingly, the Defence will respond to the Request in its entirety.

Your Honour, in relation to S-21, I mean, this witness has given significant evidence of his criminal involvement in this – in his testimony to date, so I think it may be appropriate on those questions that he answer, but certainly, in relation to M-13, there has been no conviction for this – for this witness, and there always remains a possibility of a prosecution, however unlikely.

Deputy International Co-Prosecutor William Smith⁴

Witness is now instructed not to respond to these questions because these questions are not relevant to the facts and they are self-incriminating in nature.

President Judge Nil Nonn⁵

¹ Co-Prosecutors’ Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses, 30 May 2012, E200.

² Memorandum from President Judge Nil Nonn to All Parties in Case 002, “Trial Chamber response to Co-Prosecutors’ Request for Leave to Provide Assurances with respect to Non-Prosecution for Witnesses (E200),” 19 June 2012, E200/3.

³ Email from Trial Chamber Senior Legal Officer to All Parties in Case 002, “Re: Motion E200 and requests for extension of time to file responses (E200/1 and E200/2),” 6 June 2012: “We acknowledge that now that one is filed, rights of response are usually entailed. The Chamber simply wishes to have more time to consider its own position. At this stage, we are likely to provide the Defence with a right to respond and I will be in touch again then.”

⁴ Transcript, 3 April 2012, E1/58.1, p. 74, ln: 19 – 25. Deputy International Co-Prosecutor William Smith was objecting to questions being put to Kaing Guek Eav alias Duch. *See also* p. 72, ln: 10 – p. 74, ln: 25.

1. In paragraph 1, the Co-Prosecutors seek leave to provide assurances/guarantees set out in the Assurances Regarding Non-Prosecution (“ARNP”)⁶ to witnesses due to testify. The Co-Prosecutors cannot provide such assurances/guarantees without violating the Constitution, the Agreement, the Establishment Law, the ECCC Internal Rules (“Rules”) and the Cambodian Code of Criminal Procedure (“CPC”). Equally, the Trial Chamber cannot authorize the Co-Prosecutors to make assurances to witnesses who are under the exclusive protection of the Trial Chamber⁷ without violating the Constitution, the Agreement, the Establishment Law, the Rules and the CPC. Leave must be denied.
2. In paragraph 2, the Co-Prosecutors acknowledge that the Trial Chamber has addressed the issue of self-incrimination in a recent set of directions.⁸ The Request is superfluous. The Trial Chamber acted pursuant to Article 38 of the Constitution,⁹ Article 14(3)(g) of the International Covenant on Civil and Political Rights (“ICCPR”)¹⁰ (which must be respected at the ECCC in accordance with Article 31 of the Constitution),¹¹ Article 13(1)

⁵ Transcript, 4 April 2012, E1/59.1, p. 10, ln: 5 – 7. For Presiding Judge Nil Nonn’s ruling on behalf of the Trial Chamber that Kaing Guek Eav alias Duch can invoke his right not to incriminate himself when answering questions despite the fact that Duch has been convicted and exhausted all legal remedies at the ECCC, *see id.*, p. 9, ln: 4 – p. 12, ln: 6.

⁶ Co-Prosecutors’ Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses – Annex A, 30 May 2012, E200.1.

⁷ Article 9 of the Cambodian Code of Ethics for Judges (2005) states: “Judges shall not conduct investigation or examination of fact of the case unilaterally and directly, in or outside the court, except where the law permits.” In the Cambodian legal system, prosecutors are considered part of the judiciary. Article 1 of the Cambodian Code of Ethics for Judges (2005) states: “In this Code of Ethics ‘judges’ refers to sitting judge and prosecutors.” When the Defence requested the Trial Chamber to contact witnesses, the Trial Chamber rejected the request. Memorandum from President Judge Nil Nonn to All Parties in Case 002, “Trial Chamber Decision in relation to IENG Sary Defence Motions,” 7 June 2011, E87/3, p. 2, wherein the Trial Chamber decided: “The request that the IENG Sary Defence be permitted to contact either witnesses contained on other parties’ witness lists or others viewed by the IENG Sary Defence as potential new witnesses is accordingly rejected.” The Trial Chamber has permitted parties to contact witnesses for limited purposes. For example, the Trial Chamber authorized the Co-Prosecutors to contact experts TCE-38 and TCE-44 for the “limited purpose of determining their availability and assist the Chamber in planning and scheduling the hearing of their evidence [and] ... to copy all email communications with TCE-38 and TCE-44 to WESU.” Trial Chamber Memorandum: “Hearing of TCE-38 and TCE-44,” 6 February 2012, E166.

⁸ Memorandum from President Judge Nil Nonn to All Parties in Case 002, “Directions pursuant to Internal Rule 28 (right against self-incrimination),” 10 May 2012, E193.

⁹ Article 38 of the Constitution states: “The prosecution, arrest, or detention of any person shall not be done except in accordance with the law.”

¹⁰ Article 14(3)(g) of the ICCPR states: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: Not to be compelled to testify against himself or to confess guilt.”

¹¹ Article 31 of the Constitution states: “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.”

of the Agreement,¹² Articles 33 new and 35 new of the Establishment Law¹³ and Rule 28.¹⁴ The Co-Prosecutors further assert that “[t]he purpose of these assurances is to ... encourage open and truthful testimony from witnesses.” This assertion fails to account for the already existing mechanisms at the Trial Chamber’s disposal to encourage open and truthful testimonies from witnesses.

First, witnesses are compelled to take an oath, which, when considered in the religious and cultural context, is stimulative in inducing the truth. The witnesses must swear:

I will answer only the truth, in accordance with what I have personally seen, heard, know, and remember. If I answer falsely on any issue, may all the guardian angels, forest guardians and powerful sacred spirits destroy me, may my material possessions be destroyed, and may I die a miserable and violent death. But, if I answer truthfully, may the sacred spirits assist me in having abundant material possessions and living in peace and happiness along with my family and relatives forever, in all my reincarnations.¹⁵

Second, Rule 36(2) enables the Trial Chamber to take applicable measures under Rule 35(2)¹⁶ where there are “grounds for believing that a witness may have knowingly and willfully given false testimony.”

Third, witnesses can be prosecuted for perjury. Article 545 of the 2009 Cambodian Penal Code states: “False testimony made under oath before any court of law or

¹² Article 13(1) of the Agreement 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.”

¹³ Article 33 new of the Establishment Law states in pertinent part: “The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.” Article 35 new of the Establishment Law states in pertinent part: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights ... not to be compelled to testify against themselves or to confess guilt.”

¹⁴ Rule 28(1) states: “A witness may object to making any statement that might tend to incriminate him or her. The right against self-incrimination applies to all stages of the proceedings, including preliminary investigations by the Co-Prosecutor, investigations by the Co-Investigating Judges, and proceedings before the Chambers.” *See also* Rule 28(3), which states: “Where the Co-Investigating Judges or the Chambers determine that a witness should be required to answer a question or questions, they may assure such witness, if possible in advance, that the evidence provided in response to the questions: a) will be kept confidential and will not be disclosed to the public; and/or b) will not be used either directly or indirectly against that person in any subsequent prosecution by the ECCC.”

¹⁵ CPC, Annex.

¹⁶ Rule 35(2) states: “When the Co-Investigating Judges or the Chambers have reason to believe that a person may have committed any of the acts set out in sub-rule 1 above, they may: a) deal with the matter summarily; b) conduct further investigations to ascertain whether there are sufficient grounds for instigating proceedings; or c) refer the matter to the appropriate authorities of the Kingdom of Cambodia or the United Nations.”

before a judicial police officer acting under the authority of a rogatory letter shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels.”

3. In paragraph 3, the Co-Prosecutors assert that the ARNP informs witnesses that with respect to events which took place in the 1975-79 period they will not be prosecuted at the ECCC or in any other Cambodian court under current Cambodian law. This assertion is deceptive: the ARNP cannot be made with any degree of intellectual honesty and judicial integrity if its purpose is to assure witnesses that there “remains [no] possibility of a prosecution, however unlikely.” The Co-Prosecutors cannot provide these assurances even with the Trial Chamber’s imprimatur. Neither the Co-Prosecutors nor the Trial Chamber can legislate;¹⁷ nor can they interfere with the constitutional prerogatives entrusted to the National Assembly¹⁸ and the Senate.¹⁹ Effectively, the ARNP amounts to an amnesty: it serves as a guarantee against future prosecution for past criminal conduct. Only the King and National Assembly are constitutionally permitted to provide amnesties.²⁰ Should the Request be granted, the Co-Prosecutors – and the Trial Chamber through its authorization of the Request – will effectively be engaging in a constitutional *coup d’état*: usurping the constitutional authority of the King, National Assembly and Senate. The Co-Prosecutors also propose to have the ARNP delivered to witnesses by the Witness and Expert Support Unit. This is unsound and contrary to the existing practice and procedure: it amounts to communication between the Co-Prosecutors and the witnesses.²¹ Moreover, by allowing the Co-Prosecutors to communicate with witnesses prior to testifying, the Trial Chamber would be permitting the Co-Prosecutors to usurp its authority.

4. In paragraph 4, the Co-Prosecutors assert that “the witnesses who are able to provide the most probative testimonies are often the ones most likely to have had a degree of

¹⁷ Article 51 of the Constitution states in pertinent part: “The Legislative, Executive, and the Judicial powers shall be separate.”

¹⁸ Article 90 of the Constitution states in pertinent part: “The National Assembly shall be the only organ to hold legislative power. This power is not transferable to any other organ or any individual.”

¹⁹ Article 113 new of the Constitution states in pertinent part: “The Senate shall examine and give out opinion within no longer than one month, on draft laws and proposed bills which have already been firstly adopted by the National Assembly and on various issues submitted to it by the National Assembly.”

²⁰ Article 27 of the Constitution states: “The King shall have the right to grant partial or complete amnesty.” Article 90 of the Constitution states in pertinent part: “The National Assembly shall adopt the law on the general amnesty.” For further information regarding the right to grant amnesties, see IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 63-65.

²¹ See *supra*, n. 7.

involvement in, or proximity to, the crimes.” Irrespective of the merit of this assertion – a matter on which the Defence declines to engage – it is not a justification for allowing the Co-Prosecutors to communicate false information to witnesses.

5. In paragraph 5, the Co-Prosecutors assert that Rule 28 only partly addresses the concern of potential suspects that they will incriminate themselves, and that it does not fully encourage witnesses to provide full and honest testimonies.²² These assertions are absurd and fail to account for the already existing mechanisms – in addition to Rule 28 – at the Trial Chamber’s disposal to encourage open and truthful testimonies from witnesses.²³ Rule 28(1) permits witnesses to refuse to answer a question, or make a statement, where the possibility of self-incrimination – however remote – exists. Rule 28(3) empowers the Trial Chamber to compel witnesses to answer questions, and in doing so, the Trial Chamber may give assurances that the witnesses’ responses “will be kept confidential and will not be disclosed to the public, and/or will not be used either directly or indirectly against that person in any subsequent prosecution by the ECCC.” It is chimerical to think that the ARNP will act as a truth serum.
6. In paragraph 6, the Co-Prosecutors assert that the ARNP “complements the mechanisms provided by Rule 28.” This assertion is misleading. The ARNP overrides rather than complements the assurances provided under Rule 28(3) by incorrectly informing witnesses that future prosecution based on their testimonies is not possible.
7. In paragraph 7, the Co-Prosecutors assert that “[r]ules applicable at the international level provide a precedent for the provision of assurances against prosecution to witnesses who may fear self-incrimination.” This assertion is vacuous when considering the express limitations of the various international tribunals to give non-prosecution assurances to witnesses in national courts. The Co-Prosecutors only provide the example of the International Criminal Court (“ICC”), which in itself demonstrates that

²² The Co-Prosecutors continue the assertion with an example: “For example, Rule 28 may not address a situation in which a witness gives an untruthful answer and / or withholds probative information in a way that is not immediately apparent, or simply feigns memory loss. In circumstances where neither the Chamber nor any of the parties meet with the witnesses before they testify, it is extremely difficult to determine during trial whether a witness is unable to provide evidence because of a legitimate memory loss / lack of knowledge, or is consciously withholding evidence because of a fear of prosecution. The ARNP aims to address this gap.” Request, para. 6.

²³ See *supra*, para. 2.

the ICC can only give an assurance that a prosecution will not be initiated at *the ICC*.²⁴ Similarly, the International Criminal Tribunal for the former Yugoslavia (“ICTY”),²⁵ the International Criminal Tribunal for Rwanda (“ICTR”),²⁶ the Special Court for Sierra Leone (“SCSL”) ²⁷ and the Special Tribunal for Lebanon (“STL”) ²⁸ can only give assurances that prosecutions will not take place at *that particular tribunal*.²⁹ National prosecutions are possible for witnesses who are not prosecuted at international tribunals.³⁰ An assurance that a prosecution will not be initiated at national courts will violate State sovereignty. The ARNP, in contrast to assurances which may be provided at the international tribunals, seeks to provide an assurance that cannot be guaranteed by the ECCC, namely that witnesses will not be prosecuted in *any* Cambodian court.

²⁴ Article 93(2) of the ICC Statute states: “The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.”

²⁵ Rule 90(E) of the ICTY Rules of Procedure and Evidence (“RPE”) permits the ICTY only to assure witnesses that they will not be prosecuted at the ICTY: “Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony.” In accordance with Rule 37(A) of the ICTY RPE, “The Prosecutor shall perform all the functions provided by the Statute...” Article 1 of the ICTY Statute only permits the prosecutor to carry out prosecutions at the ICTY: “The *International Tribunal* shall have the power to prosecute ... in accordance with the provisions of the present Statute.” (emphasis added).

²⁶ Rule 90(E) of the ICTR RPE permits the ICTR only to assure witnesses that they will not be prosecuted at the ICTR: “Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.” In accordance with Rule 37(A) of the ICTR RPE, “The Prosecutor shall perform all the functions provided by the Statute...” Article 1 of the ICTR Statute only permits the prosecutor to carry out prosecutions at the ICTR: “The *International Tribunal for Rwanda* shall have the power to prosecute ... in accordance with the provisions of the present Statute.” (emphasis added).

²⁷ Rule 90(E) of the SCSL RPE permits the SCSL only to assure witnesses that they will not be prosecuted at the SCSL: “Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony under solemn declaration.” In accordance with Rule 37(A) of the SCSL RPE, “The Prosecutor shall perform all the functions provided by the Statute...” Article 1 of the SCSL Statute only permits the prosecutor to carry out prosecutions at the SCSL: “*The Special Court* shall... have the power to prosecute.” (emphasis added).

²⁸ Rule 150(F) of the STL RPE permits the STL only to assure witnesses that they will not be prosecuted at the STL: “Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than contempt or false testimony.” In accordance with Rule 55(B) of the STL RPE, “The Prosecutor shall perform all the functions provided in the Statute...” Article 1 of the STL Statute only permits the prosecutor to carry out prosecutions at the STL: “*The Special Tribunal* shall have jurisdiction over persons...” (emphasis added).

²⁹ Assurances are not given at the Special Panels of the Dili District Court. Rule 35.4 of the Transitional Rules of Criminal Procedure states: “No witness may be compelled to incriminate himself or herself. If it appears to the Presiding Judge that a question asked of a witness is likely to elicit a response that might incriminate the witness, the Judge shall advise the witness of his or her right not to answer the question.” Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, UNTAET/REG/2000/30, 25 September 2000.

³⁰ For example, a witness at the ICTY, Milos Stupar, was later prosecuted in a national court in Bosnia and Herzegovina. See *Prosecutor v. Blagojević & Jokić*, IT-02-60-T, Transcript, 28-29 April 2004; *Prosecutor’s Office of Bosnia and Herzegovina v. Stupar et al.* (First Instance Judgment) X-KR-05/24 (Published 13 January 2009).

8. In paragraph 8, the Co-Prosecutors assert that they “have no objection to witnesses being consulted prior to receiving the ARNP.” This assertion is frivolous. Consultation will do nothing to remedy false guarantees made in the ARNP. Moreover, this may have a coercive effect in pressuring witnesses to forsake their constitutional protections.
9. In paragraph 9, the Co-Prosecutors assert that the existence of the “above mechanism” and the Trial Chamber’s power to compel witnesses to answer questions reflect the need to address witnesses’ fear of prosecution. This assertion is vague and confusing. It is unclear what the Co-Prosecutors refer to as the “above mechanism.” Suffice it to say, witnesses *must* be given full disclosure of the possible effects of their testimonies, including prosecution.
10. In paragraph 10, the Co-Prosecutors introduce the terms of the ARNP. The terms of the ARNP are in direct contradiction to the representations made by International Deputy Co-Prosecutor William Smith, when he intervened on behalf of Kaing Guek Eav alias Duch in Case 002 and represented – despite Duch’s conviction and exhaustion of his appeal remedies – that “there always remains a possibility of a prosecution, however unlikely.”³¹ Presumably, International Deputy Co-Prosecutor Smith, as an officer of the Court, was neither misleading the Trial Chamber in his representations nor speaking out of ignorance.³²
11. In paragraph 11, the Co-Prosecutors assert that Part 1 of the ARNP is an assurance to witnesses that the Co-Prosecutors will not initiate any prosecutions against them for any events that took place during the 1975-79 period.³³ This assertion is meaningless and misleading. While the Co-Prosecutors have discretion to determine whom to prosecute, nothing prevents the National Assembly and Senate – with or without the assistance of the international community – from amending the Establishment Law to expand the

³¹ Transcript, 3 April 2012, E1/58.1, p. 74, ln: 19 – 25.

³² By knowingly providing false information to, and/or withholding important information from, witnesses, the Co-Prosecutors will violate Article 6(2) of the Agreement (“The co-prosecutors shall be of high moral character”), Article 19 of the Establishment Law (prosecutors shall: “have high moral character”) and their ethical codes of conduct: (Rule 5(c) of the South Australian Barristers’ Conduct Rules states that: “barristers as specialist advocates in the administration of justice, must act honestly, fairly, skillfully and with competence and diligence”; Article 1 of the Cambodian Code of Ethics for Judges (2005) notes that the Code of Ethics for Judges applies equally to prosecutors. Article 18 states: “a judge shall be an honest person.”)

³³ Part 1 of the ARNP states: “We will not initiate any prosecutions against you for any event which took place in Cambodia during the period of 17 April 1975 to 6 January 1979.” Co-Prosecutors’ Request for Leave to Provide Assurances with Respect to Non-Prosecution for Witnesses – Annex A, 30 May 2012, E200.1.

jurisdiction of the ECCC to encompass a wider range of persons, or to remove or limit this discretion.³⁴

12. In paragraph 12, the Co-Prosecutors assert that Part 2 of the ARNP informs witnesses that they cannot be prosecuted under current Cambodian law for any event which took place in Cambodia in the 1975-79 period.³⁵ This assertion is equally meaningless and misleading. As acknowledged by the Co-Prosecutors in paragraph 17, “it is always possible for the Cambodian parliament to enact legislation to enable domestic prosecutions.” Furthermore, the Establishment Law may be amended so that the substantive law incorporated therein is applicable at other Cambodian courts. For example, in 2001, the National Assembly passed the Establishment Law that not only permitted the ECCC to try international crimes which allegedly occurred prior to its promulgation,³⁶ but also extended the statute of limitations so that crimes from the 1956 Penal Code could still be tried.³⁷ According to the Pre-Trial Chamber, Cambodia has an obligation to prosecute international crimes that occurred in its territorial jurisdiction.³⁸ Through authorizing the ARNP, the Co-Prosecutors – along with the Trial Chamber – will send the message that victims cannot expect justice in any judicial setting in Cambodia. The Cambodian Human Rights Action Committee (“CHRAC”) and the United Nations (“UN”) recently highlighted the lack of justice for victims. CHRAC has called for the ECCC’s legacy to include domestic trials for crimes committed during the Khmer Rouge period.³⁹ The UN has expressed concern that victims of sexual violence during the Khmer Rouge period cannot find justice:

³⁴ The current jurisdiction of the Establishment Law is set out in Article 1 of the Establishment Law: “[S]enior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.”

³⁵ Similarly, in paragraphs 14 and 15, the Co-Prosecutors assert that the Establishment Law vests jurisdiction only in the ECCC and not in ordinary domestic courts.

³⁶ The chronology of the creation of the ECCC is available at <http://www.eccc.gov.kh/en/chronologies>. The Law on the Establishment of the ECCC was promulgated on 10 August 2001. “The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.” Establishment Law, Art. 1.

³⁷ For background, see IENG Sary’s Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382, paras. 13-24.

³⁸ Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 213.

³⁹ “CHRAC also believes that the ECCC is meant to play a role broader than simply conducting a handful of criminal trials. It should initiate a wider discussion about the Khmer Rouge period and how to come to terms with the past. Now is the time to start thinking about the Court’s legacy, domestic trials against all those most responsible and other measures, such as truth commissions, for dealing with the past.” CHRAC Press Release,

The ECCC's contribution is to ensure that crimes of sexual violence under the Khmer Rouge are appropriately investigated and prosecuted. The Government of Cambodia has the important role of ensuring survivors are provided the support they need, and that laws are enforced and policies implemented to stop the continuum of violence against women in post-conflict Cambodia. It is only then that justice will be served.⁴⁰

The Co-Prosecutors further assert in paragraph 12 that Part 2 of the ARNP supports the objective of obtaining the full cooperation of witnesses and enabling the court to ascertain the truth. This assertion is fanciful. Providing false information to witnesses can never assist in ascertaining the truth.

13. In paragraph 13, the Co-Prosecutors assert that “international crimes are not subject to statutes of limitations [and that] perpetrators of such crimes can be brought before domestic courts at any time, provided that domestic legislation is enacted to enable prosecutions within the domestic legal system.” While this assertion does not fully comport with the Defence’s interpretation of the law,⁴¹ for purposes of this Response the Defence notes that this assertion is an admission by the Co-Prosecutors that the ARNP is not entirely truthful.

14. In paragraphs 14 and 15, the Co-Prosecutors assert that the 2009 Criminal Code is “prospective in operation” and “does not vest jurisdiction in ordinary domestic courts with respect to crimes committed during the 1975-1979 period.” This assertion is disingenuous. The 2009 Criminal Code can be amended to apply retroactively to witnesses who received an ARNP. Such an amendment of the 2009 Criminal Code would be in accordance with Article 15(2) of the ICCPR⁴² – and accordingly Article 31

CHRAC calls upon the United Nations to appoint a new International Co-Investigating Judge to fill the vacancy of Judge Laurent Kasper-Ansermet, 7 June 2012.

⁴⁰ Margot Wallstrom, UN Special Representative of the Secretary-General on Sexual Violence in Conflicts, *Victims of Khmer Rouge Sexual Violence Still Seek Justice, Letter to the Editor, CAMBODIA DAILY, 29 May 2012.*

⁴¹ See, e.g., IENG Sary’s Rule 89 Preliminary Objection (Statute of Limitation for Grave Breaches), 14 February 2011, E43 (summarized in Summary of IENG Sary’s Rule 89 Preliminary Objections & Notice of Noncompliance with Future Informal Memoranda Issued in Lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4), arguing that the crime of Grave Breaches of the Geneva Conventions is subject to a statute of limitations; IENG Sary’s Appeal against the Closing Order, 25 October 2010, D427/1/6, paras. 103-35, arguing that because international crimes were not set out in domestic legislation before the acts at issue in 1975-79 allegedly occurred, and because Cambodian law applicable at the time contained a stricter prohibition against retroactive application of law than that contained in the ICCPR, international crimes could not be prosecuted at the ECCC, a domestic Cambodian court.

⁴² Article 15 of the ICCPR states in pertinent part: “1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed... 2. Nothing in this article shall prejudice the trial and punishment of any

of the Constitution – which permit an exception to the retroactive application of law for international crimes.⁴³ Indeed, the Co-Prosecutors have previously acknowledged that “Article 15(1) of the ICCPR does not prevent the prosecution of an individual under a law which is enacted subsequent to the events that are the subject of the prosecution, provided that, at the time of those events, the acts (or omissions) in respect of which the individual is prosecuted were criminal – either under national or international law.”⁴⁴ The Co-Prosecutors’ knowing lack of full disclosure in the ARNP calls into question their sincerity.

15. In paragraph 16, the Co-Prosecutors assert that the ten year statute of limitations for domestic felonies set out in the 1956 Penal Code has lapsed for all Cambodian courts, except the ECCC, for crimes committed on or before 6 January 1979. The Co-Prosecutors further assert that the 1992 United Nations Transitional Authority Criminal Code is prospective in application and does not contain any provisions dealing with international crimes. While these assertions are correct, they must be read in light of the Co-Prosecutors’ previous assertions that “international law requires prosecution of domestic crimes that rise to the level of international crimes even when a statute of limitation purports to bar those prosecutions,”⁴⁵ and that the ECCC “should refuse to apply any statute of limitation to the Appellants’ crimes under the 1956 Penal Code because they also constitute genocide, crimes against humanity and grave breaches of the Geneva Conventions.”⁴⁶ When it is to their convenience, the Co-Prosecutors are willing to shamelessly assert that a statute of limitations bars future prosecution of crimes even where they rise to the level of international crimes (a position antithetical to their previous submissions) – while at the same time publicly proclaiming how victims

person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

⁴³ Note that the Defence position is that Article 6 of the 1956 Penal Code (the law applicable during the 1975-79 period) is stricter than Article 15(2) of the ICCPR and requires crimes to be set out in domestic criminal legislation before they can be prosecuted in domestic Cambodian courts. The Co-Prosecutors have argued against this position, asserting that “there is no requirement to show that the criminal offence was expressly provided for under the domestic law applicable at the time of the relevant conduct.” Co-Prosecutors’ Joint Response to the Appeals of NUON Chea, IENG Sary and IENG Thirith Against the Closing Order, 19 November 2010, D427/1/17, para. 149. The Defence position was rejected by the Pre-Trial Chamber which considered only the ECCC’s (rather than other domestic courts’) ability to prosecute international crimes. Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 213.

⁴⁴ Co-Prosecutors’ Joint Response to the Appeals of NUON Chea, IENG Sary and IENG Thirith Against the Closing Order, 19 November 2010, D427/1/17, para. 149.

⁴⁵ *Id.*, section F.3.8.

⁴⁶ *Id.*, para. 120.

not covered by the ECCC regime should nonetheless receive justice in future judicial proceedings.⁴⁷ The hypocrisy is stifling.

16. In paragraph 17, the Co-Prosecutors assert that it is appropriate to inform witnesses of the “legal reality: namely that current Cambodian law does not provide for the prosecution of crimes committed in the 1975 – 1979 period before domestic courts.” This assertion is a subterfuge. Witnesses must be given full disclosure of the possible effect of their testimonies, including prosecution, however unlikely it may be; this is *the* “legal reality” as is evidenced by the ongoing prosecution of Mr. IENG Sary. In 1996, when Mr. IENG Sary was granted his Royal Pardon and Amnesty,⁴⁸ there was no pending legislation to create the ECCC.
17. In paragraph 18, the Co-Prosecutors assert that the Defence Support Section (“DSS”) participated in a training session in August 2011 for Legal Counsel for the witnesses and expressed no disagreement with the Co-Prosecutors’ understanding of Cambodian law as set out in the Request. This assertion is unpersuasive and immaterial. While DSS may have participated in training Legal Counsel to represent witnesses expected to testify in Case 002, this has nothing to do with providing false information to, and/or selectively withholding information from, witnesses. The Co-Prosecutors further assert that they “do not object to a copy of this motion, or its summary, being provided to legal counsel who are assisting witnesses to whom ARNPs are provided.” This assertion is irresponsible; it would only serve to provide false information to, and/or selectively withhold information from, Legal Counsel for the witnesses.
18. In paragraph 19, the Co-Prosecutors assert “that they are willing to consider issuing ARNPs to any witness, including those witnesses whom the Chamber decides to summon on request by the defence.” This assertion is as gratuitous in magnanimity as it is irrelevant to whether the ARNP is fully accurate and truthful and whether it is appropriate to provide to witnesses.

⁴⁷ “Many women in this country go on suffering in silence as a result of sexual assault and violence that took place over thirty years ago. Shame and stigma surrounds them. They deserve compassion and they deserve justice. But the ECCC cannot meet all the needs of these victims.” Andrew Cayley QC, *Co-Prosecutors Office Did Not Ignore KR Rape Crimes, Letter to the Editor*, CAMBODIA DAILY, 1 June 2012.

⁴⁸ Royal Decree, NS/RKT/0996/72, 14 Sept 1996.

19. In paragraph 20, the Co-Prosecutors assert that the possibility of prosecutions in other countries under the theory of universal jurisdiction is so remote that informing witnesses of this possibility is not necessary. This assertion is misleading. Irrespective of the accuracy of this assertion – which the Defence does not accept – it certainly cannot be reconciled with International Deputy Co-Prosecutor William Smith’s refrain to the Trial Chamber that where there *remains a possibility of a prosecution, however unlikely*,⁴⁹ witnesses are entitled to refuse to answer questions which may be incriminating. An example where witnesses may be prosecuted, albeit not necessarily under the theory of universal jurisdiction, is in Vietnam. Recent media reports have indicated that Cambodians may have committed crimes in Vietnam during the period between 17 April 1975 and 6 January 1979.⁵⁰ The ARNP excludes information from witnesses that prosecution in Vietnam could still be possible for crimes committed on Vietnamese territory.
20. In paragraph 21, the Co-Prosecutors assert that “the provision of assurances and information contained in the ARNP is in the interests of justice.” This assertion perverts the course of justice:⁵¹ it is never in the interests of justice for judges and prosecutors to provide false information to witnesses in order to cajole them to abandon certain constitutional rights. The Co-Prosecutors seek the Trial Chamber to aid and abet in providing false information to witnesses supposedly “in the interests of justice.”⁵² The

⁴⁹ Transcript, 3 April 2012, E1/58.1, p. 74, ln: 19 – 25.

⁵⁰ “The judge conducted field investigations into the conflict between Cambodia and Vietnam in the 1970s and states ‘new facts’ were discovered about the war. These ‘new facts’ include ‘a premeditated attack on an undefended civilian Vietnamese village’ and a supposition that other similar attacks occurred, along with evidence of repeated incursions into Vietnamese territory.” *Cambodian Officials Named Over Khmer Rouge Genocide*, WA TODAY, 3 June 2012, available at <http://www.watoday.com.au/world/cambodian-officials-named-over-khmer-rouge-genocide-20120602-1zosv.html>.

⁵¹ The Oxford English Dictionary defines “pervert, v.” as: “To interfere with or distort (a correct order or process); to impede, thwart (justice, etc.). Chiefly *Law* in later use, esp. in to pervert the course of justice (an indictable offence under common law in the U.K).” OXFORD ENGLISH DICTIONARY (Online ed. June 2012), available at

<http://www.oed.com/view/Entry/141685?redirectedFrom=pervert+the+course+of+justice#eid31012991>.

⁵² Should the Judges of the Trial Chamber aid and abet the Co-Prosecutors, they would violate Article 3(3) of the Agreement (“The judges shall be persons of high moral character.”), Article 10 new of the Establishment Law (“[Judges] shall have high moral character.”), and their respective codes of ethics. Article 5(1) of the ECCC Code of Judicial Ethics states: “Judges shall act diligently in the exercise of their duties and shall devote their professional activities to those duties.” Article 18 of the Cambodian Code of Ethics for Judges states: “a judge shall be an honest person.” Paragraph 66 of the New Zealand Guidelines for Judicial Conduct states: “Judges should diligently and faithfully discharge their judicial functions. The obligation covers not only intellectual honesty in judging and prompt disposal of work, but willingness to undertake a fair share of the work of the court.” Principle C. 6 of the Recueil des obligations déontologiques des magistrats states: “The probity of the magistrate refers to the general requirement of honesty.” (Unofficial translation from: “La probité du magistrat s’entend de l’exigence générale d’honnêteté.”). Value 2, Application 2.2 of the Bangalore

Co-Prosecutors essentially assert that the end justifies the means; a rather primitive process, which, if anything, is antithetical to the interests of justice.

21. In paragraph 22, the Co-Prosecutors assert that “it would be appropriate to add an acknowledgement of the assurance to the warning against self-incrimination.” This assertion is injudicious. An acknowledgement only legitimizes the Co-Prosecutors’ usurpation of the Trial Chamber’s authority.
22. In paragraphs 23 and 24, the Co-Prosecutors merely repeat – with no added value – their request for the Trial Chamber to authorize the Request, and their suggestion that if the Request is granted, the acknowledgement of the ARNP, as set out in paragraph 22, be given to witnesses. As argued above, were the Trial Chamber to grant the Co-Prosecutors’ Request and accept their suggestion, it would be aiding and abetting the Co-Prosecutors in providing false information to, and/or selectively withholding information from, witnesses, and in so doing, it would also be legitimizing the abandonment of its own responsibility by sanctioning the usurpation of its own authority by the Co-Prosecutors.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **REJECT** the Request.

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 **June**, 2012

Principles of Judicial Conduct 2002 states that “[a] judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.”