

BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**CO-PROSECUTORS' REQUEST FOR LEAVE TO PROVIDE ASSURANCES WITH
RESPECT TO NON-PROSECUTION FOR WITNESSES**

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I. INTRODUCTION

1. The Co-Prosecutors respectfully seek leave of the Trial Chamber to provide Assurances Regarding Non-Prosecution (ARNP), in the form attached in **Annex A**, to witnesses who will be testifying before the Chamber in Case 002.
2. The Co-Prosecutors note that the issue of self-incrimination has been raised in relation to a number of witnesses who have testified thus far, and was addressed by the Trial Chamber in a recent set of directions.¹ The Co-Prosecutors propose to provide the ARNP, on a discretionary basis, to witnesses who may fear prosecution with respect to events which took place between 17 April 1975 and 6 January 1979. The purpose of these assurances is to assist the expeditious conduct of proceedings and encourage open and truthful testimony from witnesses who may otherwise be reluctant to give a full account of the relevant facts within their knowledge.
3. The ARNP informs the witness to whom it is issued that, with respect to any events that occurred in the above period: (1) the Co-Prosecutors will not initiate any prosecutions against that witness; and (2) the witness cannot be prosecuted under current Cambodian law in any other Cambodian court. The Co-Prosecutors propose to have the ARNPs delivered to witnesses by the Witness and Expert Support Unit.

II. THE NEED FOR ASSURANCES REGARDING NON-PROSECUTION

4. In large criminal cases involving accused who are alleged to have occupied senior roles within governmental, political, and/or military structures, the witnesses who are able to provide the most probative testimonies are often the ones most likely to have had a degree of involvement in, or proximity to, the crimes. In the absence of mechanisms to address the concern on the part of such witnesses that, if they tell the whole truth, they themselves may face prosecution, witness reluctance can be a very real hindrance to the ascertainment of the truth.
5. This issue is addressed in part by Rule 28 of the ECCC Internal Rules, which, *inter alia*, empowers the Chamber to compel a witness to answer a question in respect of which an issue of self-incrimination may arise. The Rule is modelled, in part, on Rule 74 of the Rules of Procedure and Evidence (RPE) of the International Criminal Court (ICC). An obvious limitation of this Rule, however, is that it only applies to circumstances in which a witness has refused to respond to a question. The Rule does not fully address the multitude of more subtle

¹ E193 Directions pursuant to Internal Rule 28 (right against self-incrimination), 10 May 2012.

and possibly more damaging ways in which fears of prosecution may manifest to undermine the willingness of witnesses to provide full and honest testimonies.

6. 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, and therefore complements the mechanisms provided by Rule 28. At the same time, the ARNP in no way limits the power of the Trial Chamber to use such measures as it deems necessary pursuant to Rule 28, or as part of its inherent powers.
7. Rules applicable at the international level provide a precedent for the provision of assurances against prosecution to witnesses who may fear self-incrimination. Article 93 (2) of the Statute of the ICC provides:

Article 93
Other forms of cooperation

2. 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. (emphasis added)

8. Rule 191 of the ICC Rules of Procedure and Evidence provides further guidance on the exercise of the discretion under Article 93(2). The Rule stipulates that, while the Court may provide assurances of its own motion or on application by a party or the witness, it shall do so only after taking into account the views of the Prosecutor and the witness concerned:

Rule 191
Assurance provided by the Court under article 93, paragraph 2

The Chamber dealing with the case, on its own motion or at the request of the Prosecutor, defence or witness or expert concerned, may decide, after taking into account the views of the Prosecutor and the witness or expert concerned, to provide the assurance described in article 93, paragraph 2.

While the ARNP proposed by the Co-Prosecutors does not foresee consultation with the witness, the Co-Prosecutors have no objection to witnesses being consulted prior to receiving the ARNP.

9. The existence of the above mechanism, which is additional to the Court's power to compel witnesses to answer questions (as provided in Rule 74 of the ICC RPE and Rule 28 of the Internal Rules), reflects the need for a multifaceted approach to addressing the issue of witnesses' fear of prosecution.
10. The terms of the ARNP are discussed in more detail below.

III. TERMS OF THE ASSURANCE REGARDING NON-PROSECUTION

11. Part 1 of the ARNP is an assurance to the witness to whom the document is addressed that the Co-Prosecutors shall not initiate any prosecutions against them for any events which took place during the 1975-1979 period. Rule 49(1) of the Internal Rules provides that the prosecution of crimes within the jurisdiction of the ECCC may be initiated only by the Co-Prosecutors, whether at their own discretion or on the basis of a complaint. Part 1 of the ARNP is based on this discretionary power.
12. Part 2 of the ARNP informs the witnesses that, under the current Cambodian law, they cannot be prosecuted for any event which took place in Cambodia in the 1975-1979 period. While it is additional to an assurance against prosecution before the ECCC, it supports the same underlying objective: securing the full cooperation of witnesses, and enabling the Court to ascertain the truth with respect to all factual allegations before it. The legal basis for the statement in Part 2 of the ARNP is provided below.
13. As the Co-Prosecutors have previously submitted in this case, international crimes are not subject to statutes of limitation.² Perpetrators of such crimes can be brought before domestic courts at any time, provided that domestic legislation is enacted to enable the prosecutions within the domestic legal system.³

² See, for example, **D427/3/6** Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010 at para. 203-204. This principle is reflected in, *inter alia*, Article 9 of the Cambodian Code of Criminal Procedure.

³ See, for example, **D427/3/6** Co-Prosecutors' Joint Response to Nuon Chea, Ieng Sary and Ieng Thirith's Appeals Against the Closing Order, 19 November 2010 at para. 134-135 (submitting that the ECCC Law is an enabling statute which vests jurisdiction in the ECCC with respect to international crimes), para. 139 (distinguishing the ECCC from ordinary Cambodian courts), and para. 141 (dealing with Accused Ieng Thirith's argument that French domestic courts refused to apply international criminal law in the absence of a domestic written provision). See also **E51/5/3/1** Co-Prosecutors' Joint Response to Defence Rule 98 Preliminary Objections, 21 March 2011, para. 6 (submitting that the ECCC can validly exercise jurisdiction over international crimes because the ECCC Law vests that jurisdiction in the Court).

14. While both the ECCC Law and the Criminal Code of 2009⁴ enable the prosecution of international crimes in Cambodia, they do not vest jurisdiction in ordinary domestic courts with respect to the crimes committed during the 1975-1979 period.
15. The ECCC Law deals with the above period, but vests jurisdiction only in the ECCC. The 2009 Criminal Code of the Kingdom of Cambodia, which does enable prosecution for international crimes before domestic courts, is prospective in operation. In other words, it cannot be relied upon to prosecute offences committed before its entry into force. This is apparent from, *inter alia*, Article 671, which governs the temporal application of criminal laws preceding the 2009 Code:

Article 671: Abrogation and effect of previous criminal provisions

The following criminal law and provisions shall have no effect from the date of the application of this Code:

(1) all criminal provisions before 1992;

(2) criminal provisions of the provisions concerning judicial system, criminal law and criminal procedure applicable in the Kingdom of Cambodia during the transitional period adopted on 10 September 1992;

...

However, the previous criminal provisions as defined in Paragraphs 671(1) and 671(2) above shall continue to have effect on offences committed before the application of this Code ...

16. The domestic felony provisions of the 1956 Penal Code, which would otherwise encompass criminal conduct engaged in during the 1975-1979 period, are subject to a 10 year statute of limitations.⁵ Notwithstanding the absence of a final decision on the validity of the extension of this limitation for the purposes of the ECCC (under article 3 new of the ECCC Law), the period of limitation for domestic felonies has now lapsed for the purposes of proceedings before all other Cambodian courts with respect to crimes committed on or before 6 January 1979. For completeness, it is noted that the 1992 Criminal Code of the United Nations Transitional Authority in Cambodia is prospective in application, and, like the 1956 Code, does not contain any provisions dealing with international crimes.
17. Part 2 of the ARNP is based on the above legal reality: namely that current Cambodian law does not provide for the prosecution of crimes committed in the 1975 - 1979 period before domestic courts. The Co-Prosecutors submit that it is appropriate to inform the witnesses of this legal position in light of the adverse impact which unfounded fears of prosecution can have on

⁴ See Articles 183 and following.

⁵ Penal Code of Cambodia 1956, Art. 109.

the full ascertainment of the truth before the ECCC. While it is of course always possible for the Cambodian parliament to enact legislation to enable domestic prosecutions, the Co-Prosecutors are not aware of any proposals for such legislation.

18. The Chamber has recently indicated that the Court provides legal counsel to all witnesses who have requested it or who are thought to require it.⁶ As the Chamber is aware, in August 2011, both the Office of the Co-Prosecutors (OCP) and the ECCC Defence Support Section (DSS) were invited by the Witness and Expert Support Unit to participate in the training for lawyers who were to be made available to witnesses before the ECCC. During that training, the OCP gave its understanding of Cambodian law as set out above, without disagreement from any of the participants in the training, including the DSS. If the Chamber considers it appropriate, the Co-Prosecutors 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.
19. In the interest of fairness, the Co-Prosecutors also state that they are willing to consider issuing the ARNPs to any witness, including those witnesses whom the Chamber decides to summon on request by the defence.
20. Finally, while the Co-Prosecutors note the (largely theoretical) possibility of prosecutions being initiated in other countries under the concept of universal jurisdiction, such scenarios are so remote (and, to the knowledge of the Co-Prosecutors, have never occurred since 1979) that their inclusion in the ARNP was not considered necessary.

IV. RELIEF REQUESTED

21. The Co-Prosecutors recall that, as reflected in the ECCC Agreement, one of the key objectives of the establishment of the ECCC is to address the legitimate concern of the people of Cambodia in the pursuit of justice and national reconciliation.⁷ It is submitted that these noble goals can only be attained if the judges of this Court are able to hear full and truthful accounts from those individuals whom the Chamber has selected as witnesses. The Co-Prosecutors therefore submit that the provision of assurances and information contained in the ARNP is in the interests of justice.
22. The Co-Prosecutors note that all witnesses, including those to whom an ARNP is issued, continue to enjoy the right against self-incrimination set out in Rule 28(1), and that the issuance of a warning is mandatory under Rule 28(2). The Co-Prosecutors respectfully submit that, where an ARNP has been given to a witness, it would be appropriate to add an

⁶ E193, *supra* note 1.

⁷ Agreement, preamble.

acknowledgment of the assurance to the warning against self-incrimination. The Co-Prosecutors suggest that words to the following effect be used:

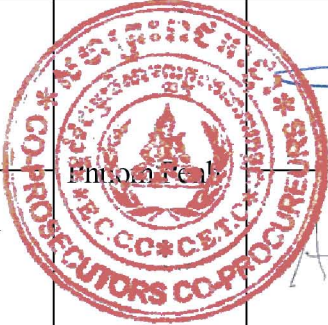

You have the right against self-incrimination, which means that you are not required to say anything which may incriminate you. However, the Chamber also notes that you have been given an Assurance Regarding Non-Prosecution by the Office of the Co-Prosecutors, and that a signed copy of that Assurance has been placed on the case file.

23. For the reasons given above, the Co-Prosecutors request authorization from the Trial Chamber for the Co-Prosecutors:

- a) to provide assurances in the form contained in **Annex A** to witnesses;
- b) to place the signed ARNPs on the case file in order to ensure transparency of the use of the assurances and to provide an official record for the witnesses' benefit; and
- c) to direct the Witness and Expert Support Unit to deliver the signed ARNPs to witnesses as early as possible before the witnesses appear before the Trial Chamber.

24. Finally, if the Chamber grants this motion, the Co-Prosecutors respectfully suggest that acknowledgments of the ARNPs be given in addition to the warning against self-incrimination, as set out in paragraph 22 above.

Respectfully submitted,

Date	Name	Place	Signature
30 May 2012	CHEA Leang Co-Prosecutor		
	Andrew CAYLEY Co-Prosecutor		