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**BEFORE THE TRIAL CHAMBER**

**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# IENG SARY'S MOTION AGAINST THE TAKING OF JUDICIAL NOTICE OF ADJUDICATED FACTS FROM CASE 001

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**All Defence Teams**

Mr. IENG Sary, through his Co-Lawyers, ("the Defence") hereby moves the Trial Chamber not to take judicial notice of any facts adjudicated from Case 001 in Case 002.[1] The Motion is made necessary in order to protect Mr. IENG Sary's presumption of innocence, right to a defence and right to confrontation. The ECCC Internal Rules ("Rules") and the Cambodian Criminal Procedure Code ("CPC") do not provide for adjudicated facts from one case being applied in another case. Mr. IENG Sary has never been afforded the right to challenge any factual finding made in Case 001. Case 001 was not a trial; it was effectively a change of plea hearing, where few alleged facts were challenged by the Defence. Any challenges made by the defence in Case 001 do not protect Mr. IENG Sary's right to defence. Mr. IENG Sary's right to defence and right to confrontation will be violated if judicial notice is taken of any adjudicated facts from Case 001 in Case 002. Taking judicial notice of adjudicated facts from Case 001 in Case 002 will shift the burden of proof from the prosecution to the defence to prove that the adjudicated facts are incorrect, thereby violating Mr. IENG Sary's constitutionally protected right of being presumed innocent throughout the trial proceedings.

## I. BACKGROUND

### A. Adjudicated facts

1. Adjudicated facts are expressly provided for in the Rules at the *ad hoc* tribunals. Rule 94(B) of the ICTY Rules of Procedure and Evidence ("RPE") and International Criminal Tribunal for Rwanda ("ICTR") RPE both state:

> At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

2. Similarly, Rule 94(B) of the Special Court for Sierra Leone ("SCSL") RPE states, "At the request of a party or of its own motion, a Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings."

[1] The Trial Chamber at the International Criminal Tribunal for the Former Yugoslavia ("ICTY") explained that an adjudicated fact "establishes a well founded presumption for the accuracy of this fact which therefore does not have to be proven again at trial – *unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial." *Prosecutor v. Krajišnik*, IT-00-39-PT, Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, 28 February 2003 ("*Krajišnik* Decision"), para. 16 (emphasis in original).

3. The ICTY Trial Chamber in *Krajišnik* expanded on the definition of Rule 94(B) of the ICTY RPE, in that an adjudicated fact:

> [E]stablishes a well founded presumption for the accuracy of this fact which therefore does not have to be proven again at trial – *unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial. In other words, the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial, but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party.[2]

4. Adjudicated facts should be "*truly adjudicated*"[3] in previous judgements in the sense that:

> (i) it is distinct, concrete and identifiable;
> (ii) it is restricted to factual findings and does not include legal characterizations;
> (iii) it was contested at trial and forms part of a judgement which has either not been appealed or has been finally settled on appeal; or
> (iv) it was contested at trial and now forms part of a judgement which is under appeal, but falls within issues which are not in dispute during the appeal;
> (v) it does not attest to criminal responsibility of the Accused;
> (vi) it is not the subject of (reasonable) dispute between the Parties in the present case;
> (vii) it is not based on plea agreements in previous cases; and
> (viii) it does not impact on the right of the Accused to a fair trial.[4]

### B. Matters disputed by Duch

5. Case 001 was effectively a change of plea hearing with Duch not challenging any parts of the Closing Order in Case 001 apart from the following:

   a. The Closing Order stated that "DUCH has repeatedly portrayed S21 as an integral part of the politico-military structure of the CPK at the Centre level."[5] Duch challenged this by stating that "it would be more accurate to say that S21 was 'managed by the Standing Committee of the Central Committee' rather than at 'the Centre Level.' It would have been possible to assert that S21 was at the 'Centre Level' if Duch himself had been part of the Standing Committee of the Central Committee, but he was not."[6]

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[2] *Krajišnik* Decision, para. 16 (emphasis in original).
[3] *Id.*, para. 15 (emphasis in original).
[4] *Id.*
[5] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ, Closing Order indicting Kaing Guek Eav alias Duch, 8 August 2009 ("Duch Closing Order"), para. 32.
[6] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Defence Position on the Facts Contained in the Closing Order, 30 January 2009, D288/6.5/11/6.1, ERN: 00326412-00326456 ("Duch Defence Position on the Facts"), para. 66.

b. The Closing Order stated that "[i]t also appears that names from different confessions were combined to form lists of enemies."[7] Duch challenged this by stating that "this was not a common practice at S21"[8] and "he did so only twice, following a specific order concerning Divisions 170 and 290 (which were part of the General Staff and part of the East Zone.)"[9]

c. The Closing Order stated that prisoners at S-21 "included a number of members of the Central and Standing Committees."[10] Duch challenged this by stating that "[t]he only evidence in support of this is the testimony of [a confidential witness], someone the Defence does not consider to be a credible witness."[11]

d. The Closing Order stated that "DUCH admitted he was aware of the existence of armed hostilities with Vietnam from mid April 1975 to at least 6 January 1979."[12] Duch challenged this by stating that he "had limited knowledge of details about, and the nature of the conflict between Democratic Kampuchea and Vietnam."[13] The defence in Case 001 stated that "[a]s to exactly when the international armed conflict between Cambodia and Vietnam started, the Defence wishes to defer to the wisdom of the Trial Chamber. Nonetheless, the Defence notes that there is lingering doubt as to whether such a conflict existed before the end of 1977."[14] The defence in Case 001 continued, "[i]n any event, the Defence submits that the Accused was only informed of the existence of an armed conflict between Democratic Kampuchea and Vietnam after the declaration of the break off of diplomatic relations on 31 December 1977."[15]

e. The Closing Order stated that "[s]ome sources suggest DUCH personally played a role in a number of decisions to arrest."[16] Duch challenged this by stating that NUON Chea and SON Sen "were the only ones who put forward

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[7] Duch Closing Order, para. 45.
[8] Duch Defence Position on the Facts, para. 98(c).
[9] *Id.*
[10] Duch Closing Order, para. 48.
[11] Duch Defence Position on the Facts, para. 104(d).
[12] Duch Closing Order, para. 49.
[13] Duch Defence Position on the Facts, para. 108(d).
[14] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Final Defence Written Submissions, 11 November 2009, D288/6.159/8, ERN: 00401125-00401140 ("Duch Final Defence Written Submissions"), para. 26.
[15] *Id.*, para. 28.
[16] Duch Closing Order, para. 55.

the names of people to arrest."[17] The defence in Case 001 stated that "decisions regarding arrests were outside [Duch's] realm of authority, as were policies on arrests and executions. [And that Duch] has constantly denied making decisions on arrests has maintained that only his superiors took decisions on arresting people for transfer to S-21."[18]

f. The Closing Order stated that the "'*upper echelon*' would occasionally consult [Duch] before arresting people, especially for important Party members."[19] Duch challenged this by stating that "the upper echelon did not 'consult' him before arresting somebody, but would hold discussions with him in order to finalise the technique for the arrest, to make preparations and thus avoid all eventualities such as flight, rebellion etc."[20]

g. The Closing Order stated that "at times, [Duch] received direct reports from outside military and administrative units concerning arrests."[21] Duch challenged this by stating that he "he did receive reports from outside administrative or military units but only through his superiors, not directly."[22]

h. The Closing Order stated that a witness "declared that only DUCH could give orders to arrest S21 personnel."[23] Duch challenged this by stating that the Central Committee made these orders.[24]

i. The Closing Order stated that "[a] number of witnesses observed DUCH interrogating prisoners at S21."[25] The defence in Case 001 challenged this stating that Duch "has constantly maintained that he personally interrogated only one person."[26]

j. The Closing Order stated that "[s]everal witnesses declared that they saw DUCH beating prisoners, including: kicking prisoners; beating a man with a piece of rattan; and striking blows. One witness claimed to have observed him

[17] Duch Defence Position on the Facts, para. 124.
[18] *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/OCIJ, Response of Kaing Guek Eav's Defence Team to the Prosecutor's Final Submission, 24 July 2008, D96/1, ERN: 00224322-00224332 ("Duch Response to Final Submission"), paras. 26-27.
[19] Duch Closing Order, para. 56.
[20] Duch Defence Position on the Facts, para. 121.
[21] Duch Closing Order, para. 56.
[22] Duch Defence Position on the Facts, para. 119.
[23] Duch Closing Order, para. 61.
[24] Duch Defence Position on the Facts, para. 135.
[25] Duch Closing Order, para. 82.
[26] Duch Response to Final Submission, para. 31.

beating a prisoner in front of S21."[27] The defence in Case 001 challenged this stating that Duch "has constantly maintained that he personally interrogated only one person ... and that he did not resort to torture."[28] However, Duch declared that "while he was deputy director, he would sometimes give a few slaps."[29]

k. The Closing Order stated that a witness "stated that no one could be removed from S21 without authorisation from DUCH."[30] The defence in Case 001 challenged this stating that "the decision to execute these people was taken long before they were taken to S-21."[31]

l. The Closing Order stated that "[o]ne alleged method of killing involved dropping the children from the third floor of the complex in order to break their necks."[32] Duch denied this was the case.[33]

## II. APPLICABLE LAW

### A. Presumption of innocence

6. Article 38 of the Cambodian Constitution states in pertinent part: "The accused shall be considered innocent until the court has judged finally on the case."

7. Article 35 new of the Establishment Law states: "The accused shall be presumed innocent as long as the court has not given its definitive judgment."

8. Rule 21(1)(d) states in pertinent part: "Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established."

9. Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR") states: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

10. Article 11(1) of the Universal Declaration of Human Rights ("UDHR") states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty

[27] Duch Closing Order, para. 92.
[28] Duch Response to Final Submission, para. 31.
[29] *Id.*, para. 34.
[30] Duch Closing Order, para. 108.
[31] Duch Response to Final Submission, para. 42.
[32] Duch Closing Order, para. 127.
[33] Duch Defence Position on the Facts, para. 261.

according to law in a public trial at which he has had all the guarantees necessary for his defence."

### B. Burden of proof

11. 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."

### C. The right to a defence

12. Article 38 of the Cambodian Constitution states in pertinent part: "Every citizen shall enjoy the right to defense through judicial recourse."

13. Article 35 new(b) of the Establishment Law states: "In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees ... to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing."

14. 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 ... to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing."

### D. Right of confrontation

15. Article 35 new of the Establishment Law states: "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 ... to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them."

16. Article 13(1) of the Agreement states: "The rights of the Accused enshrined in Articles 14 and 15 of the 1966 International Covenant of Civil and Political Rights shall be respected throughout the trial process. Such rights shall in particular, include ... to examine or have examined the witnesses against him or her."

17. Article 14(3)(e) 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 ... To examine, or have examined, the witnesses against him and to obtain the attendance

and examination of witnesses on his behalf under the same conditions as witnesses against him."

## III. ARGUMENTS

### A. Adjudicated facts should not permitted at the ECCC

18. Neither the Rules nor the CPC provide for adjudicated facts to enter into cases at the ECCC. Rule 87(2) states that "[a]ny decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination." The Trial Chamber may put evidence before the parties or evidence may put before the Trial Chamber by the parties.[34] Although documents from the Case File of Case 001 have been put on the Case File of Case 002,[35] these documents have not been put before the Trial Chamber or the parties. The Trial Chamber cannot base a decision on any evidence – documents and the testimony of witnesses – from the Case File of Case 001 which is on the Case File of Case 002 which has not been subject to examination in Case 002.

19. Rule 94(B) of the ICTY RPE was adopted on 11 February 1994, and was last amended on 10 July 1998.[36] This predates the Agreement and the Establishment Law. Those drafting the Agreement and the Establishment Law would have been fully aware of the concept of adjudicated facts. If the drafters of the Agreement and the Establishment Law wanted to permit adjudicated facts at the ECCC, they would have made it explicit. The purpose of the Rules are "to consolidate applicable Cambodian procedure for proceedings before the ECCC and ... to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards."[37] Even though the drafters of the Rules could have "adopt[ed] additional rules where these existing procedures do not deal with a particular matter," they chose not to.

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[34] Rule 87(3).
[35] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Note of Co-Investigating Judges, 28 October 2008, D108, ERN: 00236076-00236077. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Co-Prosecutors' Request for the Placement on Case File 002 of Documents Contained in Case File 001, 22 December 2009, D288/1, ERN: 00418084-00418087. *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on the OCIJ's Request for Transfer of Documents in Case File 001 to Case File 002, 8 January 2010, D288/3, ERN: 00424786-00424787.
[36] ICTY RPE, Rev.44, 10 December 2009.
[37] Rules, preamble.

20. At the *ad hoc* tribunals, the Trial Chamber has discretion whether to take judicial notice of adjudicated facts relating to matters at issue in the proceedings it is currently adjudicating over.[38] In *Krajišnik*, the ICTY Trial Chamber laid out criteria to be employed by Trial Chambers when deciding whether the take judicial notice of adjudicated facts.[39] One of these criteria is that the fact "is not based on plea agreements in previous cases."[40] Not only must the fact must not be based on an agreement between the parties to the original proceedings, it must be "truly adjudicated."[41] In Case 001, Duch only challenged a limited number of facts, and those which were challenged were not sufficiently challenged for the Trial Chamber to have "truly adjudicated" them. For example, the defence in Case 001 stated that "[a]s to exactly when the international armed conflict between Cambodia and Vietnam started, the Defence wishes to defer to the wisdom of the Trial Chamber."[42] The defence in Case 001 focused more on Duch's knowledge of an international armed conflict; a matter which does not protect the interests of Mr. IENG Sary or challenge whether there was an international armed conflict.[43]

### B. Adjudicated facts violate Mr. IENG Sary's fair trial rights

21. Mr. IENG Sary has the right to a defence and right to confrontation. Mr. IENG Sary was not a party to Case 001, and when he requested to partake in matters which affect him, he was denied.[44] If the Trial Chamber take judicial notice of adjudicated facts from Case 001 in Case 002, Mr. IENG Sary's right to challenge the evidence and witnesses from where these adjudicated facts originated will be denied, violating his right to a defence and right to confrontation. As eloquently stated by Judge Patricia Wald, "[p]lainly, to accept as fact any matter already adjudicated would shorten trials – a desirable goal – but

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[38] Rule 94(B), ICTY RPE; Rule 94(B), ICTR RPE. *See also Prosecutor v. Stanišić*, IT-08-91-T, Decision Granting in Part Prosecution's Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B), 1 April 2010, para. 44.
[39] *Krajišnik* Decision, para. 15.
[40] *Id.*
[41] *Id.*
[42] Duch Final Defence Written Submissions, para. 26.
[43] Duch Defence Position on the Facts, para. 108(d); Duch Final Defence Written Submissions, para. 28.
[44] *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, ERN: 00345178-00345180.

it also raises serious questions about fairness to the second set of defendants who were not before the Court in the first trial."[45]

22. Under the principle of *in dubio pro reo*, the Trial Chamber must not interpret Rule 87(2) in a wide manner.[46] The Case File in Case 001 is not the same Case File as in Case 002. Evidence was put before the Trial Chamber in Case 001, however the Defence was not a party to Case 001 and was explicitly prohibited from participating in matters which affected Mr. IENG Sary.[47] If the Trial Chamber rules that evidence put before it in Case 001 is "evidence that has been put before the Chamber" in Case 002, the Defence will have no opportunity to challenge this evidence. Mr. IENG Sary's right to a defence and right to confrontation will be violated.

23. Mr. IENG Sary's right to a defence was not protected by the defence in Case 001. First, Case 001 was effectively a change of plea hearing. Few alleged facts were challenged.[48] If the alleged facts were not challenged, they were not subject to examination. Consequently, the criteria for this evidence to be admitted as evidence, in accordance with Rule 87(2) are not fulfilled. Second, any alleged facts which were challenged, were not challenged sufficiently enough for the Trial Chamber to truly adjudicate upon them. For example, the defence in Case 001 did not challenge the existence of an international armed conflict, but rather Duch's knowledge thereof.[49] Third, the defence in Case 001 only has Duch's interest to protect. These interests are not the same as Mr. IENG Sary's interests.

24. Judicial notice taken of any adjudicated facts from Case 001 in Case 002 will violate Mr. IENG Sary's presumption of innocence. Taking judicial notice of adjudicated facts from Case 001 in Case 002 will result in these facts having already been accepted. The burden then shifts to the Defence to prove the findings of fact are incorrect. The Defence need

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[45] Patricia Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, (2001) 5 WASH. UNI. J. OF L. AND POLICY 87, 111.

[46] Cambodian Constitution, Art. 38 states in pertinent part: "Any case of doubt shall be resolved in favor of the accused."

[47] *See Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, ERN: 00345178-00345180.

[48] *See supra*, Section I(B).

[49] Duch Defence Position on the Facts, para. 108(d); Duch Final Defence Written Submissions, para. 28.

not prove anything to the Trial Chamber. The burden of proof falls on the Co-Prosecutors.[50] A position shared by Judge David Hunt who stated that:

> As I have already stated, it is inappropriate to impose rebuttable presumptions of fact in favour of the prosecution which carries the onus of proof in relation to that fact. A basic right of the accused enshrined in the Tribunal's Statute is that he or she is innocent until proven guilty by the prosecution. Proof by way of presumptions of fact such as will be permitted by the majority decision offends against that basic right. It should only be where a fact is not the subject of reasonable dispute that judicial notice may be taken of it, and thus it cannot be challenged.[51]

**WHEREFORE,** for all of the reasons stated herein, the IENG Sary Defence respectfully moves the Trial Chamber not to take judicial notice of any facts adjudicated from Case 001 in Case 002.

Respectfully submitted,

AVOCAT ATTORNEY AT LAW KINGDOM OF CAMBODIA

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **28th** day of **March, 2011**

[50] Rule 87(1).

[51] *Prosecutor v. Milošević*, IT-02-54- AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts Dissenting Opinion of Judge David Hunt, 28 October 2003, para. 14.