

## BEFORE THE TRIAL CHAMBER

## EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' RULE 92 SUBMISSION  
REGARDING THE ADMISSION OF WRITTEN WITNESS STATEMENTS BEFORE  
THE TRIAL CHAMBER  
&  
REQUEST FOR A PUBLIC HEARING**

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby responds to the Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber ("OCP Submission").<sup>1</sup> The OCP misinterprets applicable law and erroneously concludes that the Trial Chamber may admit witness statements without affording Mr. IENG Sary the right to confront all witnesses whose statements are introduced. This is contrary to the Agreement, Establishment Law and the International Covenant on Civil and Political Rights ("ICCPR"). Mr. IENG Sary's right of confrontation should not be rescinded or curtailed as the OCP suggests for the sake of its convenience or the presumptive expediency it claims this curtailment will yield. The Trial Chamber should reject the OCP Submission. A public, oral hearing is requested.

#### **I. SUMMARY OF OCP SUBMISSION AND RESPONSE**

1. The OCP essentially<sup>2</sup> asserts that:

- A. The Accused do not have an absolute right to examine witnesses at trial. Instead, the Trial Chamber may exercise its discretion to admit witness statements without summoning the witnesses to testify at trial.<sup>3</sup>
- B. The Trial Chamber may exercise its discretion "to admit a witness's statement and to require the witness to appear for examination at trial if the statement relates to: i) the acts and conduct of an accused's immediately proximate subordinate; or ii) a pivotal issue in the case";<sup>4</sup> and
- C. The Trial Chamber should be guided by "i) the Court's overriding duty to ensure a fair trial; ii) other principles governing the proceedings, such as the Chamber's obligation to safeguard the interests of victims; iii) the civil law procedure applicable before the ECCC, which places significant emphasis on the use of written records gathered by investigating judges; iv) international principles calling for a flexible approach to the admission of evidence in cases

<sup>1</sup> Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements before the Trial Chamber, 15 June 2011, E96.

<sup>2</sup> The summary in the body is based on the OCP's summary of argument. The OCP's actual argument is structured differently and is somewhat difficult to follow, as it takes place mainly in the "Law" section of the Submission. The OCP appears to assert that the Rules are unclear and thus procedural rules established at the European Court of Human Rights and the *ad hoc* international tribunals should be followed, rather than the procedural rules of the International Criminal Court, as this will protect the expediency of the proceedings.

<sup>3</sup> OCP Submission, para. 2.

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



of mass crime; and v) the scope of the case and the nature of the allegations against the Accused.”<sup>5</sup>

2. The Defence responds – as argued more fully below – that:

A. Mr. IENG Sary has the absolute right to examine witnesses against him; and

B. If the Trial Chamber determines that Mr. IENG Sary does not have this absolute right, the Trial Chamber must carefully consider the admissibility of each witness statement as many, if not all, of these statements lack reliability.

## II. PRELIMINARY OBSERVATIONS: *APPEARANCE OF A CONTRADICTIONARY STANDARD*

3. The OCP Submission is a 15 page submission on a procedural issue that requests relief which has no basis in the ECCC Internal Rules (“Rules”). As the OCP has previously recognized, “the Trial Chamber is not the proper forum to seek a revision of the Rules.”<sup>6</sup> If the OCP believes that Mr. IENG Sary or the other Accused should not be afforded the right to examine witnesses, it should have proposed a rule amendment. It did not, and instead filed a “lengthy” application which has “no legal basis.”<sup>7</sup> When the Defence has filed “lengthy” motions concerning procedural issues, the Trial Chamber has directed the other parties not to respond and has directed the Interpretation and Translation Unit not to translate the motions.<sup>8</sup> Concerning the OCP Submission, however, the Trial Chamber has accepted the filing and even granted the OCP leave to reply, before such leave was requested.<sup>9</sup> This application of contrasting procedures leads to the appearance of a contradictory standard applied to the detriment of the Mr. IENG Sary.

<sup>5</sup> *Id.*

<sup>6</sup> Co-Prosecutors’ Response to IENG Sary’s Motion for the Trial Chamber to Conduct the Trial in Case 002 by Following a Proposed Revised Procedure & Request for an Expedited Stay on the Order to File Materials in Preparation for Trial, 4 February 2011, E9/3/1, para. 2(a).

<sup>7</sup> See Decision on IENG Sary’s Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002, 4 April 2011, E69/1, p. 3, where the Trial Chamber stated that the Defence had filed a “lengthy” application with “no legal basis.”

<sup>8</sup> *Id.*; Decision on IENG Sary’s Motion for a Hearing on the Conduct of the Judicial Investigations, 8 April 2011, E71/1.

<sup>9</sup> See Email from Trial Chamber Senior Legal Officer to all Parties, Trial Chamber’s proposed modification of deadlines in relation to three recent Prosecution findings; advance notice of deadline for supplementary document/exhibit lists (for first phases of trial), 20 June 2011; Decision on Extension of Time, 7 July 2011, E107.



### III. RESPONSE

#### A. Mr. IENG Sary has the absolute right to examine witnesses against him

##### 1. The Rules and Cambodian Code of Criminal Procedure afford Mr. IENG Sary the absolute right to examine witnesses against him

4. The right of an accused to confront or examine witnesses against him is a fundamental fair trial right, guaranteed by the Agreement,<sup>10</sup> the Establishment Law<sup>11</sup> and the ICCPR,<sup>12</sup> which Cambodia must respect pursuant to the Constitution.<sup>13</sup> This right has been described as “basic to any civilised notion of a fair trial”<sup>14</sup> and is recognized in both Civil and Common Law jurisdictions.<sup>15</sup> In the United States<sup>16</sup> and certain other countries it is a constitutional right.<sup>17</sup> The right “can be founded on the defendant’s core right against a factually inaccurate verdict” and “is an instrumental procedure for testing evidence and enabling the court to decide how much reliance can safely be placed upon it.”<sup>18</sup> “Cross-examination of adverse witnesses enables the defendant to participate fully in the presentation of the evidence to the fact-finder. The defendant’s autonomy and dignity is acknowledged by allowing his voice to be heard to the maximum extent, irrespective of the effect of the cross-examination on the reliability of the evidence and the likely outcome of the case.”<sup>19</sup>
5. The English version of Rule 84(1) states that “[t]he Accused shall have the absolute right to summon witnesses against him or her whom the Accused had no opportunity to

<sup>10</sup> Agreement, Art. 13(1).

<sup>11</sup> Establishment Law, Art. 35 new.

<sup>12</sup> Article 14(3) 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: ... (e) 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...”

<sup>13</sup> See 1993 Constitution, as amended in 1999, Art. 31.

<sup>14</sup> *R. v. Hughes*, 2 N.Z.L.R. 129, 148, as quoted in Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, CRIM. L.R. 255, 255 (2010). The right “is widely agreed to be a fundamental element of a fair trial, rather like the presumption of innocence.” *Id.*

<sup>15</sup> See Article 6(3)(d) of the European Convention on Human Rights (“ECHR”), which contains a provision identical to Article 14(3)(d) of the ICCPR. The ECHR has been ratified by nearly all European States and thus applies across a range of judicial systems.

<sup>16</sup> See U.S. CONST. amend. VI. See also *Crawford v. Washington*, 541 U.S. 36 (2004), where the United States Supreme Court emphatically rejected the proposition that the 6<sup>th</sup> amendment only provides the accused the right to confront witnesses who are physically present at trial.

<sup>17</sup> STEFANO MAFFEI, *THE EUROPEAN RIGHT TO CONFRONTATION IN CRIMINAL PROCEEDINGS: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES* 9 (Europa Law Publishing 2006), citing the Albanian and Italian constitutions.

<sup>18</sup> Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, CRIM. L.R. 255, 259 (2010).

<sup>19</sup> *Id.*, at 266.



examine during the pre-trial stage.” The OCP asserts that there are inconsistencies in the English, French and Khmer translations of Rule 84(1) and that the meaning of “witnesses against him” is “vague.”<sup>20</sup>

6. The inconsistencies in the translations of Rule 84(1) are immaterial. Each version of Rule 84(1) makes it clear that Mr. IENG Sary has the right to summon witnesses whom he did not have the opportunity to examine during the pre-trial stage. The meaning of “witnesses against him” is unambiguous. It is a standard phrase which has been used in, *inter alia*, the International Covenant on Civil and Political Rights,<sup>21</sup> the European Convention on Human Rights,<sup>22</sup> and the United States Constitution.<sup>23</sup> Its meaning has been considered by courts and legal scholars.<sup>24</sup> The United States Supreme Court, for example, held that the right of an accused to confront “witnesses against him” set out in the US Constitution:

applies to ‘witnesses’ against the accused--in other words, those who ‘bear testimony.’ ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ ... Various formulations of this core class of ‘testimonial’ statements exist: ‘*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ ... ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ ... These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it.<sup>25</sup>

7. Considering Rule 84(1) together with the other Rules demonstrates that the Rules’ drafters intended to respect the Accused’s right to examine witnesses. Rule 26(1) states:

The testimony of a witness or expert ... at trial shall be given in person, whenever possible. However, the Co-Investigating Judges and the Chambers may allow a witness to give testimony by means of audio or video technology, provided that such technology permits the witness to be interviewed by the Co-Investigating Judges or the Chambers, and the parties, at the time the witness so testifies. Such

<sup>20</sup> OCP Submission, para. 4.

<sup>21</sup> ICCPR, Art. 14(3)(e).

<sup>22</sup> ECHR, Art. 6(3)(d).

<sup>23</sup> U.S. CONST. amend. VI.

<sup>24</sup> According to Dr. Stefano Maffei, “[a] witness is adverse to the defendant whenever his statements, if accepted as true by the court, may have an unfavourable impact on the case for the Defence.” STEFANO MAFFEI, *THE EUROPEAN RIGHT TO CONFRONTATION IN CRIMINAL PROCEEDINGS: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES* 19 (Europa Law Publishing 2006).

<sup>25</sup> *Crawford v. Washington*, 541 U.S. 36, 51-52 (U.S. 2004) (internal references omitted).



technologies shall not be used if they would be seriously prejudicial to, or inconsistent with defence rights.<sup>26</sup>

8. Rule 28(7)(a) discusses possibilities to give effect to assurances to witnesses that their testimonies will be kept confidential and will not be used against them. It lists one possibility as allowing the witness to testify *in camera*. It does not list the possibility of allowing written statements to be put before the Chamber *in lieu* of oral testimony.

9. Rule 29(3)-(4) states:

3. The Co-Investigating Judges and the Chambers may ... order appropriate measures to protect victims and witnesses whose appearance before them is liable to place their life or health or that of their family members or close relatives in serious danger....

4. In this respect, the Co-Investigating Judges and the Chambers may make a reasoned order adopting measures to protect the identity of such persons, including: ...

c) authorising recording of the person's statements without his or her identity appearing in the case file;

d) where a Charged Person or Accused requests to be confronted with such a person, technical means may be used that allow remote participation or distortion of the person's voice and or physical features....<sup>27</sup>

These Rules demonstrate that oral testimony is envisaged for all witnesses. The Accused's right to examine witnesses must be respected, albeit with certain protective measures, which must not be prejudicial to or inconsistent with the Accused's rights.

10. The OCP is misinformed when it asserts that the Cambodian Code of Criminal Procedure ("CPC") does not provide guidance.<sup>28</sup> The CPC is consistent with the plain reading of the English version of Rule 84(1). Article 297 states that "[i]nculpatory witnesses who have never been confronted by the accused shall<sup>29</sup> be summonsed to testify at the trial hearing."<sup>30</sup> In Khmer, the word translated as "inculpatory" in this Article is the same word used in the Khmer version of Rule 84(1) which has been translated into English as "witnesses against him or her."

<sup>26</sup> Emphasis added.

<sup>27</sup> Emphasis added.

<sup>28</sup> OCP Submission, para. 4.

<sup>29</sup> The word used in the Khmer version also translates as "must" in English.

<sup>30</sup> Emphasis added.



11. The OCP asserts that if Rule 84(1) is interpreted as an absolute right, it is inconsistent with Rule 21(1)(a).<sup>31</sup> The OCP demonstrates no inconsistency. It notes that Rule 21(1)(a) requires the Court to preserve a balance of rights between the parties,<sup>32</sup> apparently implying that respect for Rule 84(1) would somehow upset this balance. To the contrary, Rule 21(1)(a) is consistent with and supportive of Rule 84(1). Rule 84(1) does not limit any rights of the OCP or Civil Parties. There are important reasons why Rule 84(1) refers specifically to the Accused having the right to summon witnesses:

The defendant is the subject of the criminal proceedings, the central figure. He is the person charged and therefore the person at risk of conviction and punishment. The evidence in the case is focused on his alleged guilt of the offence. Clearly society in general and the victim of the offence in particular have important interests in the probative value of the evidence and the factual accuracy of the verdict founded on the evidence. But the defendant has a unique interest in the sense that if a verdict of guilty is incorrect he is the person who will suffer unjust blame and punishment.<sup>33</sup>

**2. There are no *lacunae* in the Rules and thus there is no reason to consider procedural rules at the international level**

12. The OCP asserts that there are a number of *lacunae* in the Rules because they do not contain provisions on the admission of witness statements or transcripts from other trials, as the rules of the *ad hoc* tribunals do.<sup>34</sup> The OCP notes that Rule 87(1) states that “[u]nless provided otherwise in these IRs, all evidence is admissible,” but then asserts that there is no guidance as to the relationship between Rule 87(1) and Rule 84(1).<sup>35</sup> Because of this supposed lack of clarity in the Rules and these supposed *lacunae*, the OCP asserts that the Trial Chamber should seek guidance in procedural rules established at the international level.<sup>36</sup> As such, the OCP points to European Court of Human Rights (“ECtHR”) jurisprudence and jurisprudence from the International Criminal Tribunal for the former Yugoslavia (“ICTY”), the Special Court for Sierra Leone (“SCSL”) and the International Criminal Court (“ICC”).

<sup>31</sup> OCP Submission, para. 4.

<sup>32</sup> *Id.*

<sup>33</sup> Ian Dennis, *The Right to Confront Witnesses: Meanings, Myths and Human Rights*, CRIM. L.R. 255, 259 (2010).

<sup>34</sup> OCP Submission, para. 5.

<sup>35</sup> *Id.*

<sup>36</sup> According to Article 12(1) of the Agreement: “[w]here Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.”



13. Irrespective of what may or may not be the substantive or procedural practice at international tribunals, as demonstrated above, the Rules are clear. There is no *lacuna*. Hence, there is no legitimate reason to consider procedural rules established at the international level.
14. The Rules “form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC.”<sup>37</sup> They were created specifically with international procedures in mind, 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.”<sup>38</sup> There is therefore no reason to consider that these Rules were adopted without consideration of ECtHR, ICTY, SCSL or ICC jurisprudence. If the Rules depart from the procedure at these courts, it was an intentional departure, due to the unique circumstances of the ECCC.
15. The OCP is incorrect to assert that “the Rules do not provide guidance on how the Court should approach the relationship between Subrules 87(1) and 84(1).”<sup>39</sup> The Trial Chamber has previously explained that the scope of Rule 87(1) is qualified by Rule 87(2) and (3):

Whilst any material on the case file may be produced before the Trial Chamber, ... the Chamber may reject it as evidence on the criteria listed in Rule 87(3), namely irrelevance, inability to prove the facts alleged, impossibility of obtaining evidence within a reasonable time, or due to the existence of breaches of fundamental legal standards concerning the rules of evidence.<sup>40</sup>

The Trial Chamber relied upon Rule 87(3) to exclude statements from deceased witnesses, determining that these statements, due to their origins, content, contested character and the inability of the Accused to challenge their veracity, were unsuitable to prove the facts they purported to prove.<sup>41</sup>

<sup>37</sup> Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 14.

<sup>38</sup> Rules, preamble.

<sup>39</sup> OCP Submission, para. 5.

<sup>40</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Admissibility of Materials on the Case File, 26 May 2009, E43/4, para. 6.

<sup>41</sup> *Id.*, para. 16.





16. ECtHR jurisprudence – which is not controlling at the ECCC – demonstrates that the ECtHR does not consider the right to examine witnesses to be absolute. However, in the majority of the cases cited by the OCP, the ECtHR found that the defendants' rights had been violated and in all but two<sup>42</sup> of these cases the witnesses were unavailable, refused to testify or testified anonymously. In none of the cases cited by the OCP was the right to examine witnesses curtailed simply due to expediency. The issue of witness safety should not arise in the present case, but if it does, the ECCC already has adequate Rules in place to address this situation.<sup>43</sup> Furthermore, according to ECtHR jurisprudence, "any measures restricting the rights of the defence should be strictly necessary. If a less restrictive measure can suffice then that measure should be applied."<sup>44</sup> If the Trial Chamber is inclined to allow the OCP to put statements before it without calling the witnesses to be examined, the OCP must first demonstrate that it is strictly necessary to do so. As the Trial Chamber has previously found: "[ECtHR] case law indicates that the right to examine a witness as part of the right to a fair trial normally presupposes that the evidence be produced at a public hearing, in the presence of the Accused, with a view to adversarial argument. While there are exceptions to this general principle, as a general rule an Accused must be given adequate and proper opportunity to challenge and question a witness against him..."<sup>45</sup>

17. The OCP relies extensively on the procedural rules of the ICTY and SCSL and related jurisprudence,<sup>46</sup> but the ICTY and SCSL's procedural rules specifically state that written witness statements may in certain circumstances be admitted *in lieu* of oral testimony.<sup>47</sup> The ECCC's Rules contain no equivalent. The drafters of the Rules would have been aware of the ICTY and SCSL's procedural rules and could have adopted a similar or even identical rule, had they deemed it necessary. The fact that they did not do so is an

<sup>42</sup> In *A.S. v. Finland*, a videotaped interview with the four year old victim of sexual abuse was admitted and the defendant was not given the opportunity to question the child. The ECtHR found that there had been a violation of the defendant's rights. *A.S. v. Finland*, Eur. Ct. H.R., Application number 40156/07 (2010). In *Luca v. Italy*, a person found with cocaine in his possession gave a statement to the prosecutor that the defendant was his dealer. The declarant then exercised his right to remain silent. The ECtHR found that the defendant's rights had been violated because he was convicted based upon this statement. *Luca v. Italy*, 2001-II Eur. Ct. H.R. 167 (2001).

<sup>43</sup> See Rules 26, 29.

<sup>44</sup> *Van Mechelen et al. v. Netherlands*, 1997-III Eur. Ct. H.R. (1997), para. 58.

<sup>45</sup> *Case of Kaing Guek Eav*, Decision on Admissibility of Material on the Case File, 26 May 2009, E43/4, para. 14 (emphasis added).

<sup>46</sup> OCP Submission, paras. 12-27.

<sup>47</sup> See ICTY Rules of Procedure and Evidence, Rule 92bis; SCSL Rules of Procedure and Evidence, Rule 92bis.

indication that the procedure at the ECCC differs from that at the ICTY and SCSL.<sup>48</sup> The OCP disregards the obvious differences in the procedural systems of the ECCC and the ICTY and SCSL, and even asserts that the ECCC should not follow ICC rules of procedure, even though the ICC is more closely related procedurally to the ECCC than the ICTY and SCSL.

18. The ICC only allows the admission of witness statements without the witness appearing at trial if both the prosecution and defence have had the opportunity to examine the witness when the statement was recorded.<sup>49</sup> The OCP asserts that the ICC rules are “less relevant” because they contain an express limitation on the admission of written statements, where the ECCC contains no express limitation.<sup>50</sup> It could as easily be asserted that the rules at the ICTY and SCSL are “less relevant” than the ICC, because they contain express permission to rely on witness statements without the witnesses appearing at trial in certain circumstances, while the ECCC’s Rules do not. At the ECCC, there is no need for an express limitation on the use of witness statements when the witness does not appear at trial, because Rule 84(1) affords the Accused the absolute right to confront witnesses at trial. The OCP has not demonstrated that the procedural rules at the ICTY and SCSL should be preferred over those at the ICC.
19. Even if the Trial Chamber does find a *lacuna* in the Rules and is inclined to follow the procedure of the ICTY and SCSL rather than the ICC, it must only allow statements to be admitted without calling the witnesses to testify where certain conditions have been satisfied.<sup>51</sup> As the OCP has recognized, statements admitted by the ICTY and SCSL usually relate to crime base evidence<sup>52</sup> and statements which go to prove an act or conduct of the accused which may establish that the accused participated in a joint

<sup>48</sup> The OCP has put forth a similar argument, albeit in different circumstances. It asserts that the drafters of the Establishment Law would have been aware of the ICTY Statute and by employing similar wording in Article 29, would have intended this wording to have the same meaning. *See* Co-Prosecutors’ Request for the Trial Chamber to Consider JCE III as an Alternative Mode of Liability, 17 June 2011, E100, para. 15.

<sup>49</sup> ICC Rules of Procedure and Evidence, Rule 68(a).

<sup>50</sup> OCP Submission, para. 20.

<sup>51</sup> The Trial Chamber has found that at the ICTY and SCSL, “[f]actors taken into account in considering whether or not to admit such evidence include the circumstances in which the statement was made and recorded, whether the statement was subject to questioning by a party against whom the evidence is to be used, and whether the statement relates to events about which there is other evidence. Where the evidence goes to proof of acts and conduct of an accused as charged, this is a factor against the admission of such evidence, or that part of it.” *Case of Kaing Guek Eav*, Decision on Admissibility of Material on the Case File, 26 May 2009, E43/4, para. 15.

<sup>52</sup> *Id.*, paras. 22, 36.



criminal enterprise or shared the requisite intent with the person who committed crimes must be excluded unless the witnesses testify at trial.<sup>53</sup>

20. The OCP has asserted that international Co-Lawyer Michael G. Karnavas has “effectively endorsed the principles set out in this submission.”<sup>54</sup> It is clear from the transcript cited by the OCP that Co-Lawyer Karnavas was discussing procedure at the *ad hoc* tribunals and that this does not indicate that such practice is applicable at the ECCC. Before discussing international practice, Co-Lawyer Karnavas stated: **“Let’s also keep in mind that this is a Cambodian court, it’s within the Cambodian court system, and we should only be looking at international modalities if, for instance, the Cambodian modalities are insufficient, or there are gaps.”**<sup>55</sup> The OCP incorrectly equates the Defence’s application for the admission of written witness statements in the ICTY *Prosecutor v. Prlić* case with the present OCP submission. The right to examine witnesses is a fundamental right of the Accused, not the prosecution. The prosecution’s procedural right to cross-examination in adversarial trials cannot be equated to this right.<sup>56</sup>

**3. The admission of witness statements without calling the witnesses to testify at trial is not necessary to protect the expediency of the proceedings**

21. The OCP asserts that the practice of admitting witness statements without calling the witnesses to testify at trial will allow the trial to be conducted with reasonable expediency.<sup>57</sup> It asserts that “[t]o allow an accused to insist on examining several hundred individuals whose statements are on the case file, regardless of whether the statements relate to the acts of the accused or other parts of the case, regardless of whether they are corroborated by *viva voce* and/or written evidence, and regardless of the impact on the length of the trial, would be tantamount to allowing him/her to frustrate the

<sup>53</sup> *Id.*, para. 17.

<sup>54</sup> OCP Submission, para. 23.

<sup>55</sup> Transcript, 5 April 2011, E1/2.1, p. 89.

<sup>56</sup> “The prosecution’s ‘procedural’ right to cross-examine ... cannot by any means be equated to the *fundamental* right to cross-examine of the accused person, since only the latter finds its ultimate foundation in constitutional texts and treaties for the protection of fundamental rights and freedoms.” STEFANO MAFFEI, *THE EUROPEAN RIGHT TO CONFRONTATION IN CRIMINAL PROCEEDINGS: ABSENT, ANONYMOUS AND VULNERABLE WITNESSES* 10-11 (Europa Law Publishing 2006).

<sup>57</sup> OCP Submission, paras. 26, 34.



proceedings and abuse the Court's processes."<sup>58</sup> This statement is absurd. The OCP cannot claim with any degree of credibility that the Defence would "frustrate the proceedings" simply because the Defence has the right to examine witnesses. If the OCP is concerned with the length of the trial and does not wish "several hundred" witnesses to be examined at trial, it should not seek to place several hundred witnesses' statements before the Trial Chamber. The OCP cannot and should not shift the blame to the Defence for its own failure to reasonably limit the evidence it seeks to put before the Chamber. Suffice it to say, while Mr. IENG Sary has the absolute right to examine witnesses against him, this should not be interpreted to mean that he will – irrespective of the necessity – exercise this right in every single instance. Considerations of what might possibly happen in the future simply foster unwarranted anticipatory anxiety. The Trial Chamber is perfectly within its discretionary rights to limit the questioning of any witness, in instances where the questions relate to irrelevant matters or are duplicative / redundant.

**B. If the Trial Chamber determines that Mr. IENG Sary does not have the absolute right to examine witnesses, the Trial Chamber must carefully consider the admissibility of and weight afforded to each witness statement**

22. The OCP has not yet filed its document list for the first four trial topics and it is not yet known specifically which witness statements the OCP wishes the Trial Chamber to accept without hearing the witnesses. Once this list is filed, the Defence will be in a better position to voice objections to the use of particular statements. At this stage it merits recalling, however, that the OCIJ, mandated solely with carrying out the judicial investigation,<sup>59</sup> collected and placed on the Case File many witness statements taken by the OCP and outside individuals and organizations, such as the Documentation Center of Cambodia ("DC-Cam"). Mr. IENG Sary did not have an opportunity to examine these – or any<sup>60</sup> – witnesses when their statements were made. These witness statements must not be admitted unless the witnesses are examined at trial.

<sup>58</sup> *Id.*, para. 34.

<sup>59</sup> OCIJ Memorandum to the Defence, 10 January 2008, p. 2.

<sup>60</sup> During the judicial investigation, the OCIJ explained that confrontations during the investigative stage are organized at the discretion of the OCIJ in order to clarify contradictory testimony and that participating in a confrontation would result in waiving the right to remain silent. *See* Letter from the OCIJ to the NUON Chea Defence: Response to your Letter Dated 20 December 2007 Concerning the Conduct of the Judicial Investigation, 10 January 2008, A110/I. *See also* Letter from the OCIJ to the IENG Thirith Defence: Response to your Request Dated 30 Mai 2008, to Safeguard the Rights of the Defense During the Interview of Kaing



23. Little is known about the circumstances in which these statements were taken or about the experience and qualifications of the interviewers. The motives of the interviewers are also questionable. DC-Cam, for example, was created as a result of the United States of America's Cambodian Genocide Justice Act in 1994.<sup>61</sup> The Cambodian Genocide Justice Act assumes crimes against humanity were committed and that there was genocide.<sup>62</sup> DC-Cam's mandate was to "collect relevant data on crimes of genocide committed in Cambodia."<sup>63</sup> This is still part of its mission today.<sup>64</sup> It was not created to seek the truth or to determine whether genocide or crimes against humanity occurred, but to verify this predetermined conclusion. Witness statements taken by DC-Cam cannot be considered reliable enough to admit into evidence unless these witnesses appear at trial for examination.
24. The Trial Chamber has previously excluded witness statements taken by DC-Cam where the witnesses have since died, finding that the statements were unsuitable to prove the facts they purported to prove.<sup>65</sup> The Trial Chamber noted that no oath was taken by the witnesses or the interpreters of the excluded DC-Cam witness statements.<sup>66</sup> Indeed, even at the ICTY, which expressly allows witness statements to be admitted in certain situations where the witnesses do not testify at trial, one requirement is that the witness statement be accompanied by a witnessed declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief.<sup>67</sup> The OCP claims that this requirement would be inappropriate at

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Guek Eav, 2 June 2008, A178/I; Letter from the OCIJ to the NUON Chea Defence: Response to Request for Clarification Concerning Confrontation, Dated 5 November 2008, 11 November 2008, D114/1. Mr. IENG Sary has not chosen to waive his right to remain silent and was not requested to and did not participate in any confrontations during the judicial investigation.

<sup>61</sup> 22 U.S.C. 2656, Part D, §§ 571–74.

<sup>62</sup> *Id.*, § 572. "a. In General. -- Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes against humanity committed in Cambodia between April 17, 1975, and January 7, 1979. b. Specific Actions Urged. -- To that end, the Congress urges the President -- 1. to collect, or assist appropriate organizations and individuals to collect relevant data on crimes of genocide committed in Cambodia; 2. in circumstances which the President deems appropriate, to encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia; and 3. as necessary, to provide such national or international tribunal with information collected pursuant to paragraph (1)."

<sup>63</sup> *Id.*

<sup>64</sup> The DC-Cam website states: "DC-Cam is working to reconstruct Cambodia's modern history, much of which has been obscured by the flames of war and genocide." DC-Cam website, *available at*: <http://www.dccam.org/Abouts/History/Histories.htm>.

<sup>65</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Admissibility of Materials on the Case File, 26 May 2009, E43/4, para. 16.

<sup>66</sup> *Id.*

<sup>67</sup> ICTY Rules of Procedure and Evidence, Rule 92bis(B).



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the ECCC “in the case of written records of interview produced during the judicial investigation.”<sup>68</sup> The OCP does not explain why it considers this inappropriate. It further claims that the Trial Chamber should consider whether certification of statements collected before the commencement of ECCC proceedings is appropriate or whether statements may be admitted if witnesses are deceased or cannot be located.<sup>69</sup> The Trial Chamber should follow its past procedure in this regard and refuse to admit statements of deceased witnesses and those who did not take an oath.<sup>70</sup> The Trial Chamber’s admission of other witness statements in Case 001<sup>71</sup> is not instructive in that the Defence in that case did not challenge a whole host of legal issues, including procedural ones, presumably because the only issue of importance was the sentence Duch would receive for his acknowledged criminal acts. Suffice it to say, Mr. IENG Sary should not suffer as a result of the lack of due diligence or strategic ploys of Duch’s lawyers.

25. Witness statements taken by the OCP should not be admitted unless the witnesses are examined at trial. The OCP has a clear interest in focusing on inculpatory evidence. Questions of an exculpatory nature would not have likely been asked by OCP investigators. In Germany, the criminal code expressly prohibits third persons not involved in the final decision-making process from taking evidence which will be used in court.<sup>72</sup> The Trial Chamber should follow this approach and only admit witness statements taken by the CIJs, if it decides to admit statements at all when the witnesses are not called to testify at trial.
26. Witness statements taken by investigators or analysts with the OCIJ (as opposed to the CIJs themselves) are not reliable enough to be admitted into evidence without affording the Accused the right of confrontation. Certain OCIJ staff members, including those who conducted witness interviews, have prior associations with the OCP or DC-Cam which

<sup>68</sup> OCP Submission, para. 25.

<sup>69</sup> *Id.*, para. 39.

<sup>70</sup> *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Admissibility of Materials on the Case File, 26 May 2009, E43/4, para. 16.

<sup>71</sup> This was referred to by the OCP in para. 30 of the OCP Submission. The OCP’s footnote is incorrect; thus the Defence has been unable to examine the authority relied upon by the OCP.

<sup>72</sup> “The *Unmittelbarkeitsprinzip* [the principle of presentation of evidence before the deciding judges] prohibits the court from delegating the taking of evidence to third persons not involved in the final decision-making process. A court may, in the course of a regular trial, thus not instruct another official to visit, for example, a witness living abroad or in hospital in another city and take her statement, and then use the record of that official as evidence, unless the conditions for a so-called *kommissarische Beweisaufnahme* (commissary taking of evidence) under §§ 223 – 225 are fulfilled.” Michael Bohlander, *Basic Concepts of German Criminal Procedure – An Introduction*, 1 DURHAM L. REV. 1, 21 (2011).



may affect the reliability of the statements.<sup>73</sup> It merits highlighting Judge Lemonde's instructions to his senior investigators that he **"would prefer that we find more inculpatory evidence than exculpatory evidence."**<sup>74</sup> Judge Lemonde never categorically denied uttering such instructions, though he claimed it would have been said in jest.<sup>75</sup> Furthermore, in some witness interviews, OCIJ investigators appeared to ask questions with a certain result in mind and/or did not ask relevant follow up questions.<sup>76</sup> Defence interests were not protected.

27. Witness statements taken by OCIJ investigators are no substitute for examining these witnesses at trial. As the famed legal scholar Sir William Blackstone explained:

This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law:<sup>77</sup> where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken.<sup>78</sup>

#### IV. CONCLUSION AND RELIEF REQUESTED

28. The Rules are clear and unambiguous: they afford Mr. IENG Sary the right to examine all witnesses against him. The Cambodian Constitution's guarantee to uphold the ICCPR and the Cambodian Code of Criminal Procedure also guarantee Mr. IENG Sary this right. There is no reason to curtail Mr. IENG Sary's right of confrontation by turning to the procedural rules of other Courts and Tribunals such as the ECtHR, ICTY or SCSL.

<sup>73</sup> See, e.g., Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, A252; Decision on Defence Appeal against Order on IENG Thirith Defence Request for Investigation into Mr. Ysa Osman's Role in the Investigations, Exclusion of Certain Witness Statements and Request to Re-Interview Certain Witnesses, 27 August 2010, D361/2/4.

<sup>74</sup> See IENG Sary's Application to Disqualify Co-Investigating Judge Marcel Lemonde & Request for a Public Hearing, 9 October 2009, 1, opening, Annex 1.

<sup>75</sup> Consolidated Response by Co-Investigating Judge Marcel Lemonde to Applications to Disqualify Filed on Behalf of IENG Sary and KHIEU Samphan, 5 November 2009, 4, para. 8.

<sup>76</sup> See, e.g., D200/5, p. 4, in which a translator was asked "Did any of those documents talk about the purge?" when there had been no prior mention of any purge; D125/160, in which a witness states that IENG Thirith did not grant his request to go to his home village for a ceremony because of fear that it could affect her. The interrogator did not ask what IENG Thirith was afraid of or why she was afraid that it would affect her.

<sup>77</sup> Note that Blackstone's mention of the civil law dates from 1768. Much has changed since this time and, as noted *supra*, the civil law tradition today, and particularly in Cambodia, respects the right of an Accused to examine witnesses against him.

<sup>78</sup> WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (VOLUME 3, 1768).

Furthermore, it is unsound to adopt modalities supposedly for the protection of the expediency of the proceedings, which impinge on guaranteed fair trial rights. If the Trial Chamber is inclined to admit witness statements without affording Mr. IENG Sary the right to confront these witnesses, then the Trial Chamber should carefully consider the substance and source of these statements. Many witness statements on the Case File are not sufficiently reliable to be admitted as evidence, let alone be given any weight, without testing the accuracy, veracity and reliability of the witnesses statements – a matter that can only be achieved through *viva voce* testimony and confrontation.


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

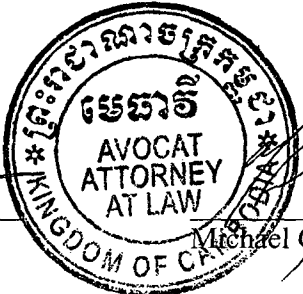
- a. RESPECT Mr. IENG Sary's absolute right to examine witnesses against him;
- b. REJECT the admission of any witness statement if Mr. IENG Sary is not afforded the right to examine the witness.

Alternately, should the Trial Chamber decide to admit witness statements without affording Mr. IENG Sary the right to examine the witnesses:

- a. CAREFULLY CONSIDER the accuracy, veracity and reliability of each statement and only admit those statements the Trial Chamber deems to possess a high degree of reliability.

Respectfully submitted,

  
ANG Udom

  
Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 22<sup>nd</sup> day of July , 2011