

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:** 14 September 2011**CLASSIFICATION****Classification of the document
suggested by the filing party:****PUBLIC****Classification by OCLJ
or Chamber:****សាធារណៈ/Public****Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**IENG SARY'S REQUEST FOR ACCESS TO STRICTLY CONFIDENTIAL
DOCUMENTS ON THE CASE FILE**

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 21(1) and 86 of the ECCC Internal Rules (“Rules”) and Articles 2(d)(iii) and 6 of the Practice Direction on Classification and Management of Case-Related Information (“Practice Direction”), hereby requests the Trial Chamber to grant the Defence access to all strictly confidential documents on the Case File. In the alternative, the Defence requests the Trial Chamber to conduct an *in camera* inspection of all strictly confidential documents on the Case File to determine which, if any, should be disclosed to the Defence – irrespective of whether those documents may be introduced at trial. This Request is made necessary because there are more than 5,000 strictly confidential documents on the Case File which the Defence currently is unable to access, or even fully identify by title. This violates Mr. IENG Sary’s right to a fair trial, including: **a.** his right to examine the evidence and witnesses against him; **b.** his right to have adequate facilities for the preparation of his defence; and **c.** the principle of equality of arms. The disclosure of only generic titles of strictly confidential documents is inadequate to counter the prejudice to Mr. IENG Sary’s fair trial rights.

I. BACKGROUND

1. There are more than 5,000 strictly confidential documents on the Case File which the Defence is unable to access or identify by name.¹ The Case File inventory contains only very limited information regarding the contents of these documents, merely indicating that a document is, for example, a “victim’s application,” a “report,” or a “letter.”²
2. The OCP has included strictly confidential documents on its: **a.** Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5;³ **b.** Rule 80(3) Trial Document List;⁴ and **c.** document list for the first four trial topics.⁵ These strictly confidential documents cannot be accessed by the Defence, nor is it possible for the Defence to know their full titles, save for the generic titles that are provided in the Case File inventory.

¹ See Annex for a list of strictly confidential documents on the Case 002 Case File.

² *Id.*

³ Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011, E9/4. For example, in Annex 3, the OCP refers to document **D230/1.1.874a**.

⁴ Co-Prosecutors’ Rule 80(3) Trial Document List, 19 April 2011, E9/31. In this List, for example, the OCP refers to **D230/1/1/360a**.

⁵ Co-Prosecutors’ Response to the Trial Chamber’s Request for Documents Relating to the First Phase of Trial, 22 July 2011, E109/4. In its document list, the OCP refers to **D230/2/2.1.241a**.

II. ARGUMENT

A. Mr. IENG Sary's right to a fair trial is violated when he is denied access to the strictly confidential documents on the Case File

3. Mr. IENG Sary has the fundamental right to a fair trial.⁶ This includes the right to examine the evidence and witnesses against him,⁷ the right to have adequate facilities for the preparation of a defence,⁸ and the right to equality of arms with the OCP.⁹ In keeping with its obligations under the Establishment Law and the Agreement, the Trial Chamber must ensure a fair trial. Mr. IENG Sary's fair trial rights are violated by denying him access to strictly confidential documents on the Case File.
4. Article 2(d)(iii) of the Practice Direction defines "strictly confidential" as meaning "open only to the Judges and such other persons, including court staff who require access in the discharge of their duties, expressly given access by the Court."¹⁰ In order to discharge its duties diligently, the Defence requires access to all documents on the Case File.¹¹ Granting full access to the Case File will ensure Mr. IENG Sary's fair trial rights.

⁶ See Establishment Law, Art. 33 new; Agreement, Art. 12(2).

⁷ See Establishment Law, Art. 35 new; Agreement, Art. 13(1); Rule 86. See also International Covenant on Civil and Political Rights ("ICCPR"), Art. 14(3).

⁸ Article 35 new of the Establishment Law requires that Mr. IENG Sary must "have adequate time and facilities for the preparation of [his] defence...." Article 14(3)(b) 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 his defence."

⁹ Equality of arms means that "the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair." *Case of KAIING Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary's Request to Make Submission in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, D288/6.90, para. 4. The Trial Chamber in Case 001 confirmed that "the fundamental nature of this principle is acknowledged in the Internal Rules...." *Id.*

¹⁰ Emphasis added. See also Article 6 of the Practice Direction: "Subject to a different classification in accordance with a Court decision, the following categories of documents and information are in principle strictly confidential: a. Requests for protective measures and associated documents (including Witness and Expert Support Unit risk assessments); b. Documents and information subject to protective measures; and c. Information concerning the health of a Suspect, Charged Person or Accused."

¹¹ See Decision on IENG Sary's Motion to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, para. 2, in which the Trial Chamber acknowledged the parties' obligations of due diligence. Black's Law Dictionary defines due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." BLACK'S LAW DICTIONARY 468 (7th ed. 1999). See also *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 631, where the ICTY *Delalić* Appeals Chamber held that "[f]ailure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto." The ICTY *Tadić* Appeals Chamber has stated that the purpose of according the accused certain rights under the ICTY Statute "was that the accused should exercise due diligence in utilizing them." JUDGE RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 306 (Transnational Publishers Inc., 2002), discussing *Prosecutor v. Tadić*, IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998. As one scholar noted, "[w]ith regard to both time and

- 1. Mr. IENG Sary's right to examine the evidence and witnesses against him and his right to adequate facilities to prepare his defence are violated when he is denied access to strictly confidential documents**
5. Mr. IENG Sary must have access to all strictly confidential documents on the Case File in order to respect his right to examine the evidence and witnesses against him.¹² As the Human Rights Committee ("HRC") has noted, this protection is "important to ensure a defence by the accused and their counsel and guarantees the accused the same legal power of ... examining or cross-examining any witnesses as are available to the prosecution."¹³ The right to adequate facilities includes "access to documents and other evidence"¹⁴ including exculpatory material,¹⁵ and access to the essential contents of all documents which may be used in evidence at trial.¹⁶ "Exculpatory material" includes both material establishing innocence and "other evidence that could assist the defence."¹⁷ It is axiomatic that these principles apply in the Civil Law context where an accused acquires, before the case reaches trial, "an unlimited right to inspect the whole investigative dossier,"¹⁸ and where it is "obvious" that "advance knowledge of the file is of essential importance for the defence."¹⁹

facilities, a certain degree of diligence on the part of the defence is expected and indeed required. The defence can only complain of a violation of their rights if they did everything required by the domestic law to obtain the respective (extension of) time or facility." STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 214 (Oxford University Press, 2005) (emphasis added).

¹² Establishment Law, Art. 35 new; Agreement, Art. 13(1). See also ICCPR, Art. 14(3)(e); U.N. CCPR, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, para. 33, U.N. Doc. CCPR/C/GC/32, 23 August 2007, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement> ("General Comment 32").

¹³ *Ismailov v. Uzbekistan*, CCPR/C/101/D/1769/2008, Communication No. 1769/2008, 28 April 2011, para. 7.5; *Peart & Peart v. Jamaica*, CCPR/C/54/D/464/1991 & 482/1991, Communication Nos. 464/1991 & 482/1991, 19 July 1995, para. 11.5: "The Committee considers that the failure to make the police statement of the witness available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial of the defendants." See also *Windisch v. Austria*, Eur. Ct. H.R. No. 12489/86, 27 September 1990, para. 28: "Being unaware of [the identity of two anonymous witnesses], the defence was confronted with an almost unsurmountable handicap: it was deprived of the necessary information permitting it to test the witnesses' reliability or cast doubt on their credibility." (internal citations omitted).

¹⁴ General Comment 32, para. 33.

¹⁵ *Id.*

¹⁶ STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 229 (Oxford 2005): "[I]nformation which had not previously been seen by the defence may only be used as evidence if the defence had at least the opportunity to get acquainted with its essential contents."

¹⁷ General Comment 32, para. 33.

¹⁸ Mirjan R. Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 533, 559 (1972-73) ("Damaška"). See also Rule 86: "At all times, the Co-Prosecutors and the lawyers for the other parties shall have the right to examine and obtain copies of the case file, under supervision of the Greffier of the Chamber, during working days and subject to the requirements of the proper functioning of the ECCC"; Cambodian Code of Criminal Procedure, Arts. 48, 129, 145, 259, 304,

6. Mr. IENG Sary's right to examine the evidence and witnesses against him and his right to adequate facilities to prepare his defence are violated by denying him access to all documents on the Case File. At present, the Defence is unable to access approximately 5,000 documents on the Case File. This equates to at least 7% of the entire Case File.²⁰ Without the ability to see these documents, the Defence does not know whether it needs to object to their admissibility, whether the documents contain exculpatory material, or whether the documents are necessary to establish context. Therefore, the Defence requires access to all strictly confidential documents on the Case File.

2. The principle of equality of arms is violated when Mr. IENG Sary is denied access to strictly confidential documents relied upon by the OCP

7. Mr. IENG Sary has the right to equality of arms with the OCP. The HRC has held that it is "the duty of the Court ... to ensure that each party [can] challenge the documentary evidence which the other [party] filed or wished to file and, if need be, to adjourn proceedings."²¹ Similarly, it has held that the principle of equality of arms includes "the ability to contest all the argument and evidence adduced by the other party."²²
8. Without having access to the strictly confidential documents on the Case File, Mr. IENG Sary's right to equality of arms with the OCP is violated. The OCP has relied on strictly confidential documents in its witness and document lists.²³ There is no equality of arms if the Defence does not have access to documents which the OCP relies upon to discharge

319; French Code of Criminal Procedure, Art. 114, where defence counsel has a right to have access to all confidential materials but must respect the secrecy of criminal investigations. Counsel may make photocopies of the files for the accused unless the investigative judge considers that such disclosure would create a risk that pressure be put on victims, persons being examined or their counsel, witnesses, investigators, experts or other persons connected with the criminal proceedings. In those circumstances, access of defence counsel to confidential material can be denied, provided that the investigative judge gives explicit written reasons for such denial within five working days. This denial is subject to appeal with the president of the Chamber of investigations. *See also* Caroline Buisman et al., *Principles of Civil Law*, in KARIM A. A. KHAN, CAROLINE BUISMAN & CHRISTOPHER GOSNELL EDS., *PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE* 23 (Oxford 2010): "The defence has a right to inspect the entirety of the dossier for incompleteness. The defence can do that before the ... court. Alternatively or additionally, the defence can ask that missing materials be added to the dossier, which should in principle not be denied. Information can only be withheld from the defendant where a concrete interest of the investigation so requires."

¹⁹ STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 224 (Oxford 2005).

²⁰ The Case File Inventory dated 5 July 2011 shows 72,921 documents on the Case File.

²¹ *Jansen-Gielen v. The Netherlands*, CCPR/C/71/D/846/1999, Communication No. 846/1999, 3 April 2001, para. 8.2.

²² *Äärelä & Näkkäläjärvi v. Finland*, CCPR/C/73/D/779/199, Communication No. 779/1997, 4 February 1997, para. 7.4.

²³ *See supra*, para. 2.

its burden of persuasion. The Defence requires access to all of the strictly confidential documents on the Case File.

B. Disclosure of generic titles of strictly confidential documents is inadequate to counterbalance the prejudice to Mr. IENG Sary's fair trial rights

9. The Defence can access the Case File inventory, which discloses generic titles of its strictly confidential documents. This disclosure is pursuant to Article 10.1 of the Practice Direction, which states:

The inventory of the confidential section of the case file will contain the titles of public and confidential documents. This inventory will also contain generic titles of strictly confidential documents, to enable the individuals who have access to the inventory to understand the nature of such documents, without disclosing their strictly confidential contents.

This disclosure is inadequate to counterbalance the prejudice to Mr. IENG Sary's fair trial rights, as discussed above.

10. The European Court of Human Rights has held that "only such measures restricting the rights of the defence which are strictly necessary are permissible.... [I]n order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities..."²⁴ Denying the Defence access to everything except generic descriptions of more than 5,000 strictly confidential documents is not "strictly necessary." Considering that strictly confidential documents have been cited on the OCP witness and document lists, and in light of the high number of these documents on the Case File, denying the Defence access to potential evidence cannot be considered "strictly necessary."
11. The generic information provided on the Case File inventory does not properly indicate the nature of the strictly confidential documents it describes (as required by Article 10.1 of the Practice Direction). It merely indicates that a document is, for example, a "victim's application," a "report," or a "letter."²⁵ The prejudice caused to Mr. IENG Sary's fair trial rights by denying him access to strictly confidential material is not counterbalanced by the disclosure of these generic titles.

²⁴ *Rowe & Davis v. United Kingdom*, Eur.Ct.H.R. No. 28901/95, 16 February 2000, para. 61. See also *Van Mechelen et al. v. Netherlands*, Eur.Ct.H.R. Nos. 21363/93, 21364/93, 21427/93, 22056/93, 23 April 1997, para. 58: "Having regard to the place that the right to a fair administration of justice holds in a democratic society, 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."

²⁵ See Annex.

C. Should the Trial Chamber find that the Defence should not have automatic access to all strictly confidential documents on the Case File, the Defence requests that the Trial Chamber conduct an *in camera* review of these documents

12. The Trial Chamber has jurisdiction to re-classify strictly confidential documents with a different level of confidentiality and to grant parties access to these documents.²⁶ It follows that the Trial Chamber would have jurisdiction to conduct an *in camera* review of strictly confidential documents. Should the Trial Chamber find that the Defence should not have automatic access to strictly confidential documents on the Case File, the Defence requests that the Trial Chamber conduct an *in camera* review of all such documents to determine which, if any, should be disclosed to the Defence – irrespective of whether those documents may be introduced at trial. An *in camera* review of all strictly confidential documents on the Case File can protect Mr. IENG Sary’s fair trial rights while also protecting the confidentiality of the documents.²⁷
13. An *in camera* review is appropriate at this stage of the proceedings. The Trial Chamber is well-poised to appreciate which materials may be relevant for the Defence and should be disclosed. The Trial Chamber can also determine which documents should remain strictly confidential and should not be disclosed to any parties. The Defence objects to the admissibility as evidence of any document, and objects to the Trial Chamber relying upon any document, which has not been disclosed to the Defence.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to GRANT the Defence access to all strictly confidential documents; or in the alternative, CONDUCT an *in camera* review of all the strictly confidential documents on the Case File to determine which documents, if any, should be disclosed to the Defence; and

²⁶ Practice Direction, Arts. 2(d)(iii), 9.1.

²⁷ *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987): “We find that [the accused’s] interest (as well as that of the [prosecution]) in ensuring a fair trial can be protected fully by requiring that the [confidential] files be submitted only to the trial court for *in camera* review. ... An *in camera* review by the trial court will serve [the accused’s] interest without destroying the [prosecution’s] need to protect the confidentiality of those involved in child-abuse investigations.” Moreover, the trial court’s duty to disclose is ongoing; “information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial.” *Id.*, at 60. See also 23 Am Jur 2d Depositions and Discovery § 282: “The prosecution must permit the accused to inspect and copy exculpatory evidence excerpted from its files. If the government has any doubt about the discoverability of evidence not requested, it should submit the material to the court for *in camera* review.”

REFUSE to admit as evidence or rely upon any strictly confidential documents which have not been disclosed to the Defence.

Respectfully submitted,


ANG Udom


Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 14th day of **September, 2011**