**BEFORE THE TRIAL CHAMBER**
**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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# CO-PROSECUTORS' RESPONSE TO "IENG SARY'S REQUEST FOR AN EXPEDITED DECISION ON CERTAIN ISSUES RAISED AT THE TRIAL MANAGEMENT MEETING"

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## I. INTRODUCTION

1. On 11 May 2011, IENG Sary, through his defence team (the "Defence") filed his "Request for an Expedited Decision on Certain Issues Raised at the Trial Management Meeting"[1] (the "Motion"). The Defence requests the Trial Chamber to issue two expedited decisions. First, they request that each individual Defence team should be allowed the same length of time as given to the Co-Prosecutors for their opening statement. They state that 2 hours would be sufficient for the Co-Prosecutors and consequently are demanding a combined 8 hours for the four Defence teams.[2] Second, the Defence requests that parties be able to meet with witnesses and experts to discuss the content of their testimony prior to their appearance in court. They argue it will assist in focusing Defence questioning at trial and ensure the equality of arms between the parties.[3]

2. The Co-Prosecutors agree with the Defence that an expedited decision would assist the parties in their preparation for trial. However, for the reasons set out below, they request that the Motion be dismissed and accept the Co-Prosecutor's amended position on these two important issues.

## II. OPENING STATEMENTS

### A. Importance of Opening Statements

3. The Defence request that the Co-Prosecutors receive only 2 hours for an opening statement fails to fully take into account the statement's importance and the size and scope of this case. The opening statement is the only opportunity in this trial that the Co-Prosecutors have to provide a clear picture of the evidence, the law and the key themes to the Trial Chamber and the general public until their closing statements. Adequate time must be given to achieve these objectives.

4. The fact that the Defence have not agreed to any facts in the Closing Order, other than a handful by this Defence, justifies that the Co-Prosecutors receive enough time to assist the Court and the public in understanding and identifying the evidence to be adduced to prove the facts at issue. It is submitted an opening statement of five hours is reasonable to enable the Co-Prosecutors to adequately communicate their case. A case of this

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1 Document **E87,** "IENG Sary's Request for an Expedited Decision on Certain Issues Raised at the Trial Management Meeting," (the "Motion") 11 May 2011, ERN 00686787 – 00686790.

2 Motion at page 2. Although the Defence requested 10 hours, this appears to include 2 hours for the Prosecution. This leaves a combined total of 8 hours for the Defence teams.

3 Motion at page 2.

magnitude with crimes committed across the country over a 3 year period by these four high level Accused, warrants this time.

5. With the five hours the Co-Prosecutors intend to outline the themes, arguments and evidence supporting the jurisdictional elements of the crimes such as the existence of an armed conflict, the widespread and systematic attack against the civilian population, the nature and type of criminal events charged, the linkage between the Accused and the crimes and more particularly the Accused's direct participation in those crimes.

**B. Equality of Time Relates to Number and Nature of Issues to Be Addressed**

6. The Defence should of course receive an equally proportionate opportunity to present their case through an opening statement if they so choose. However, the proposal by this Defence that they be given exactly the same time as the Co-Prosecutors does not take into account that the Co-Prosecutors are presenting cases against four Accused whereas the Defence are required to only present a defence for one Accused. Bearing in mind, therefore, that the Co-Prosecutors have four times the workload regarding the proof of an Accused's involvement in the crimes, to allow an equal amount of time to the Defence individually would be unfairly disproportionate between the parties.

7. Further, taking into consideration the common character to all Defence teams of the jurisdictional elements of the crimes and the facts of the crimes themselves, the Defence teams should not receive four times the amount of time allotted to the Co-Prosecutors to address these areas. This is essential to preserve the balance of opportunities between the Defence teams and Co-Prosecutors to present their case and to preserve the equality of arms between them.

8. The Defence suggestion that the Trial Chamber should give 2 hours to the Prosecution and 2 hours to each individual Defence team as was done in Case 001[4] fails to take into account the comparatively small size of that case and the fact only one Accused was on trial. In contrast to this case, its' size and multiple Accused, the suggestion to use such a precedent appears arbitrary. Logically, the opposite is true. The Co-Prosecutors should receive significantly more time than any individual Defence team as they are prosecuting four cases not defending one.

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4 Motion at page 2.

### C. Conclusion

9. To conclude, the Co-Prosecutors do not object to the Defence request for 2 hours to present their opening statement. However, in light of the above factors it is requested that the Co-Prosecutors be given a minimum of 5 hours in order to effectively assist the Trial Chamber and general public to understand the key themes, arguments and evidence in the case. In effect this would still only mean that the Co-Prosecutors would have just over 60% of the time of the Defence teams combined to present their opening statements. In light of the common evidentiary areas existing between the Defence teams in this case such as the jurisdictional and crime base evidence, and the fact that the Co-Prosecutors are required to present cases against four Accused, it is submitted that such an apportioning of time will respect the equality of arms between the parties with regard to opening statements.

## III. PRE-TRIAL WITNESS INTERVIEWS BY PARTIES

### A. Party Witness Interviews Not Expressly Authorized under ECCC or the Cambodian Criminal Procedure Code

10. The second request by the Defence seeking permission to contact witnesses and experts to discuss their testimony prior to their appearance in court has been commonly called "witness proofing" at the international courts.[5] Such practice has not been authorized under the ECCC Rules, Cambodian Criminal Procedure Code[6] or in the French Code of Criminal Procedure[7] upon which the Cambodian system is based. Nor is it, to the Co-Prosecutor's knowledge, authorized in practice in the Cambodian nor the French criminal justice systems.

11. However, under Article 33 new the Trial Chamber may seek guidance from procedural rules established at the international level if 'existing procedure[s] 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 standard.'[8] In this case therefore, under the ECCC Statute "witness proofing" should only be authorized if there was a question regarding the consistency of the Cambodian criminal procedure with international standards.

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5 Jordash, W. 'The Practice of 'Witness Proofing'in International Crimnal Tribunals: Why the International Criminal Court Should Prohibit the Practice', *Leiden Journal of International Law*, 22 (2009), at p. 503-505.

6 Code of Criminal Procedure of the Kingdom of Cambodia, 1st publication, 2008.

7 Code of Criminal Procedure, Dalloz, 50th Edition, 2009.

8 Article 33 New, Law on the Establishment of ECCC, as amended.

### B. Witness Proofing an International Practice but not an International Standard in Civil Law Systems

12. The issue of whether such a standard of witness proofing exists has been directly addressed at the International Criminal Court in the case of *Lubanga.*[9] In this case, the Court held that although the practice of witness proofing was established at the ad hoc international criminal tribunals no such universal practice could be found in national systems.[10] It must be noted that the three ad hoc tribunals where this practice has been adopted are based on the common law "party driven" system whereas the ICC includes more civil law features.

13. At the ad hoc Courts the practice of witness proofing has always been a constant source of debate[11] as on the one hand it can prepare the witness more effectively for their trial testimony thereby promoting the expeditiousness of a trial[12], yet on the other hand such interviews between the parties and the witness or expert can be used to attempt to "influence that (the testimonies) content in ways that shade or distort the truth."[13]

### C. Specific Concerns with the Refreshing of Witness Memory by Parties

14. The Co-Prosecutors submits both positions are valid. Refreshing witnesses memory as to their own statements or documents that relate to events over three decades ago is bound to make the witnesses or experts recall more comprehensive and quicker in a formal courtroom. Yet at the same time, if the parties are involved in an unregulated process of "refreshing" the witnesses'or experts memory it has the natural and often not deliberate effect of influencing the witnesses' testimony in line with the parties case. Therefore, unless a strict system is put in place to ensure that such witness proofing sessions are properly conducted there is a real risk that undue influence could be placed on the witnesses or experts by the parties.

15. Aside from the lack of legal basis to authorize witness proofing sessions, the Co-Prosecutors also note the logistical difficulties and the regulation required by the Trial

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9 *Prosecutor v. Lubanga*, Decision on the Practice of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06, Judgment of 8 November 2006, at para. 42; *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarize Witnesses for Giving Testimony at Trial, ICC-01/04-01/06, Judgment of 30 November 2007, at para. 57.

10 *Prosecutor v. Lubanga*, Decision on the Practice of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06, Judgment of 8 November 2006, at para. 33.

11 Jordash, W. 'The Practice of 'Witness Proofing'in International Crimnal Tribunals: Why the International Criminal Court Should Prohibit the Practice', *Leiden Journal of International Law*, 22 (2009) 501-523

12 *Prosecutor v. Milutinović and al.*, Motion to Prohibit Witness Proofing, IT-05-87-T, Judgment of 12 December 2006, at para. 16 and para. 22.

13 *Prosecutor v. Karemera and al.*, Decision on Interlocutory Appeal Regarding Witness Proofing, ICTR-98-44-AR.73.8, Judgment of 11 May 2007, at para. 8.

Chamber to ensure that such interviewing sessions were conducted efficiently and fairly with respect for the victims, witnesses and accused's rights. The Co-Prosecutors are of the view that introducing such a process at this stage of the proceedings would not be simple and will likely create significant legal complications relating to the respective rights of parties in that process.

16. The Defence argument that pre-trial witness interviews should be allowed to ensure the equality of arms between the Defence and the Co-Prosecutors because they were allowed to meet potential witnesses during its preliminary investigation, apart from being legally unsupported, has no factual basis. In the preliminary investigation in this case, the Co-Prosecutors interviewed no more than 20 people who mostly gave evidence regarding S-21. Bearing in mind the magnitude of this case it simply cannot be said that the Co-Prosecutors have been placed in a significantly better position than the Defence by interviewing up to 20 witnesses of which the full information from those interviews have been disclosed to the Defence via the Case File.

17. A second concern about witness proofing by the parties prior to trial is in relation to the disclosure of information obtained from these interviews with witnesses. As the International Defence Counsel has stated in a previous case, such a process can generate information by the parties that needs to be disclosed to the others and inevitably it will be disclosed late, thereby creating a source of unfairness to the other parties. He expressed his concern about the proofing of witnesses in this manner;

> 'our primary concern is that proofing sessions, especially with 92 ter witnesses, are turning into whole new statements, and what the prosecution is doing is, now that they have some evidence that has come in and they want to bolster their case, they're using the opportunity to take an entirely new statement.'[14]

18. The concern raised by Ieng Sary's International Counsel in this previous case is also valid. The Trial Chamber would need to ensure that the witness proofing sessions conducted by the parties were in fact not re-opening the investigation process unsupervised by the Trial Chamber through the parties and not under the authorized legal avenue provided under Rule 94. If new information was obtained the Trial Chamber would be required to ensure that that information was communicated to all parties so as to place them on an equal footing in terms of their examinations in court.

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[14] *Prosecutor v. Prlic'* Case No. IT-04-74/T, Transcript, 22 March 2007, at paras. 16149–16150.

**D. The Need for an Objective System of Witness and Expert Refreshing of Memory Prior to Testimony**

19. That said, the Co-Prosecutors submit that an objective system of refreshing the witnesses memory for the areas of evidence they will be expected to testify would make an important contribution to assist the Trial Chamber in seeking the truth and ensuring that the trial is fair and expeditious. Witnesses are being expected to testify on events that occurred around 35 years ago in a courtroom surroundings that would be intimidating for even the most confident of witnesses. If witnesses were given a day to read their prior statements, review relevant documents, photographic, video exhibits and maps this would clearly assist in the quality of evidence that would be delivered in the courtroom. The "familiarization" process could be supervised by the Trial Chamber, through their legal officers, in conjunction with the Victims and Expert Support Unit. This would guarantee the objectivity of the process and would not require the implementing of a new party driven interview system which would be contrary to the Cambodian criminal procedure. This practice should apply to all witnesses including character witnesses.

20. With regards experts, their testimony would be greatly enhanced if the Trial Chamber and the parties through them were able to advise them weeks or months in advance of the topics and issues that they would like him or her to be questioned. Advanced notice of documents they would like the experts to refer to in court could also be given. If experts could make relevant preparation on particular issues and documents, the quality of their testimony would be greatly enhanced.

**E. Recommended Specific Guidelines**

21. In order, therefore, to improve the quality of the testimony given at trial without the risk of a witness being unduly influenced by any party, the Co-Prosecutors therefore request that the following witness and expert evidence "familiarization" practices be adopted:

    (a) under the supervision of the Trial Chamber, the witness or expert be allowed at least a full day before their testimony to read their prior statements, relevant documents, photographs, videos or maps to assist them to refresh their memory of the testimony they will be expected to give;

    (b) the Trial Chamber allow the parties to provide lists of relevant documents, photographs, videos or maps they would like the witness or expert to review prior to their testimony;

(c) the Trial Chamber allow, in relation to experts, (i) notice be given of the relevant materials as identified in (a) that the parties would like them to review weeks or months in advance of their testimony and (ii) allow the parties to also provide a list of topics or sub-topics, in advance, that they intend to question the expert on so that he or she can take those issues into account during preparation.

22. The Co-Prosecutors submit that preparing witnesses and experts in such a manner will meet the objectives raised by the Defence in this Motion while at the same time ensure that such preparation is undertaken in an objective and fair manner.

## IV. RELIEF REQUESTED

23. Accordingly, the Co-Prosecutors request that the Trial Chamber dismiss the Defence request on the terms pleaded and accept the adapted procedures as outlined in this Motion in relation to the length of the opening statements and preparation of witnesses and experts for trial.

Respectfully submitted,

| Date | Name | Place | Signature |
|---|---|---|---|
| 24 May 2011 | CHEA Leang<br>Co-Prosecutor | Phnom Penh | |
| | William SMITH<br>Deputy Co-Prosecutor | | |