

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IENG SARY'S REQUEST FOR EXTENSION OF TIME TO FILE HIS LISTS OF DOCUMENTS AND EXHIBITS

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests an extension of time to file his lists of documents and evidence. This Request is made necessary because the Trial Chamber’s Order to File Material in Preparation for Trial (“Order”)¹ requires these lists to be submitted by 13 April 2011, yet enforcing this deadline would violate Mr. IENG Sary’s right to be presumed innocent and his right to adequate time and facilities to prepare his defence. The Defence has already made a similar request,² but no Decision on the matter has yet been made by the Trial Chamber despite the fact that the deadline for filing the lists draws near. The Defence respectfully requests to be authorized to submit these lists after the Office of the Co-Prosecutors (“OCP”) and the Civil Parties have presented their cases. Alternatively, should the Trial Chamber choose not to follow a Party-led process, as suggested by the Defence³ and the OCP,⁴ the Defence respectfully requests to submit its lists within 60 days from the date the Trial Chamber has informed the parties as to the structure of the trial and the order of the topics which will be addressed.

I. APPLICABLE LAW

A. Presumption of Innocence and the Burden of Proof

1. 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.”
2. Article 38 of the Cambodian Constitution states: “The accused shall be considered innocent until the court has judged finally on the case.” Article 35 new of the Establishment Law similarly states, “The accused shall be presumed innocent as long as the court has not given its definitive judgment.”
3. 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.”

¹ *Case of NUON Chea*, 002-19-09-2007-ECCC/TC, Order to File Materials in Preparation for Trial, 17 January 2011, E9, ERN: 00635754-00635759.

² *See Case of IENG Sary*, 002/19-09-2007-ECCC/TC, 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, ERN: 00641756-00641760.

³ *Id.*

⁴ *See Case of NUON Chea*, 002-19-09-2007-ECCC/TC, Co-Prosecutors’ Rule 80 Expert, Witness and Civil Party Lists, Including Confidential Annexes 1, 2, 3, 3A, 4 and 5, 28 January 2011, E9/4.2, ERN: 00640732-00640736, paras. 15-20.

4. 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.”
5. 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 according to law in a public trial at which he has had all the guarantees necessary for his defence.”

B. Adequate Time and Facilities to Prepare a Defence

6. Article 13(1) of the Agreement states:

The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.⁵

7. 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. ... b. to have adequate time and facilities for the preparation of their defence...⁶

8. 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: ... (b) To have adequate time and facilities for the preparation of his defence...

9. Article 11(1) of the UDHR states, “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

II. REQUEST

A. An Extension is Necessary in Order to Protect Mr. IENG Sary’s Right to be Presumed Innocent

⁵ Emphasis added.

⁶ Emphasis added.

10. The Trial Chamber must grant an extension of time to file the lists of documents set out in its Order to protect Mr. IENG Sary's right to be presumed innocent. The OCP has the onus of proving guilt.⁷ Mr. IENG Sary is not required to prove his innocence – *he possesses the presumption of innocence already* – yet requiring him to present a list of all documents he wishes to put before the Chamber before any case has been put against him at trial reverses the burden of proof and presumption of innocence. It presumes that Mr. IENG Sary has a case to answer.

11. As the Defence has previously explained, an analogy can be drawn with the ICC and the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), as both deal with trials of similar size and complexity as the ECCC. At the ICC⁸ and the ICTY⁹ the burden of proof is also on the prosecution. At the ICC, if the presiding judge does not give directions, the prosecution and defence agree upon an order and manner in which the evidence shall be submitted to the Trial Chamber.¹⁰ In practice, at the ICC, the prosecution presents its case first, followed by the defence.¹¹ This prevents the prosecution's burden of proof from being reversed.¹² At the ICTY, as the prosecution has the burden of proof, it presents its case first, followed by the defence.¹³ A close analogy can also be drawn with the procedure of the Special Tribunal for Lebanon (“STL”). The STL applies national law,¹⁴ and has *sui generis* Rules of Procedure.¹⁵ The Lebanese legal

⁷ See Rule 87(1).

⁸ Rome Statute, Art. 66(2): “The onus is on the Prosecutor to prove the guilt of the accused.”

⁹ “Whereas the Prosecution is bound to prove the allegations against the accused beyond a reasonable doubt, the accused is required to prove any issues which he might raise on the balance of probabilities.” *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, 16 November 1998, para. 603.

¹⁰ Rules of Procedure and Evidence of the ICC, 3-10 September 2002 (“ICC Rules of Procedure and Evidence”), Rule 140(1).

¹¹ See, e.g., *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-PIDS-CIS-DRC2-01-001/09, Background Information, Questions and Answers, 19 November 2009: “At the hearings, the Office of the Prosecutor will present all the evidence at its disposal, submitting for consideration by the judges a large number of the documents which it has compiled in the case, as well as audiovisual extracts. It will also call 26 witnesses including one expert witness. The Counsel for the Defence will then have the opportunity to cross-examine the Prosecution witnesses... Following the conclusion of the Prosecution case, probably in a few months' time, the Defence teams will present exculpatory evidence in their possession, in support of which they will call a number of witnesses. These witnesses will be examined by Defence Counsel and cross-examined by the Prosecution.”

¹² Article 67(1)(i) of the Rome Statute states an accused shall: “Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.”

¹³ ICTY Rules of Procedure and Evidence, Rule 85(A) states: “Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the prosecution; (ii) evidence for the defence; (iii) prosecution evidence in rebuttal; (iv) defence evidence in rejoinder; (v) evidence ordered by the Trial Chamber pursuant to Rule 98; and (vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.”

¹⁴ Statute of the Special Tribunal for Lebanon, S/RES/1757 (2007) (“STL Statute”), 30 May 2007, Art. 2.

system is based upon the French legal system.¹⁶ At the STL, the burden of proof also falls on the prosecutor.¹⁷ There, “in the interests of justice” the prosecution presents its case first, followed by any victim participating in the proceedings, and finally the defence.¹⁸ Because the burden of proof at the ECCC is on the OCP – as it is at the ICC, ICTY, ICTR and the STL – the Trial Chamber should be guided by procedural rules established at these institutions in determining that the OCP and Civil Parties should present their cases first, which will then be responded to by the Defence.

12. The Defence does not yet know what documents and evidence the OCP will put before the Chamber at trial,¹⁹ so it cannot at this stage prepare lists of documents and evidence to rebut the OCP’s case. This is true, even if the Trial Chamber does not conduct the trial in a party-driven manner.

B. An Extension is Necessary in Order to Protect Mr. IENG Sary’s Right to Adequate Time and Facilities

13. An extension of time is necessary to protect Mr. IENG Sary’s right to adequate time and facilities to prepare his defence. Mr. IENG Sary has a right to put new documents before the Trial Chamber which are not already on the Case File.²⁰ The Defence must conduct its own investigation to ascertain whether it must submit any documents to the Trial Chamber which are not already on the Case File. However, the Defence was prohibited from conducting investigations while the OCIJ was seized with the Case.²¹ The OCIJ stated: “Before this Court, the power to conduct judicial investigations is assigned solely to the two independent Co-Investigating Judges and not to the parties. There is no provision which authorizes the parties to accomplish investigative action in place of the

¹⁵ Rules of Procedure and Evidence, Special Tribunal for Lebanon, STL/BD/2009/01/Rev.3 (“STL Rules of Procedure and Evidence”), 10 November 2010.

¹⁶ Firas El Samad, *The Lebanese Legal System and Research*, HAUSER GLOBAL LAW SCHOOL PROGRAM, NYU LAW, November/December 2008, available at: http://www.nyulawglobal.org/Globalex/Lebanon.htm#_2._Legal_system.

¹⁷ STL Statute, Art. 16(3)(b).

¹⁸ STL Rules of Procedure and Evidence, Rule 146(B) states: “Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence: (i) evidence for the Prosecutor; (ii) evidence called by the Trial Chamber at the request of victims participating in the proceedings; (iii) evidence for the defence; (iv) Prosecutor evidence in rebuttal; (v) rebuttal evidence called at the request of victims participating in the proceedings; (vi) defence evidence in rejoinder.”

¹⁹ The OCP’s lists have been ordered to be provided at the same time as the other parties’. See Order, para. 12.

²⁰ See Rule 80(3)(d); Order, paras. 12-14.

²¹ See, e.g., *Case of NUON Chea*, Office of the Co-Investigating Judges, Response to your letter dated 20 December 2007 concerning the conduct of our judicial investigation, A110/I, 10 January 2008, p. 2; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order issuing warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519, para. 9.

Co-Investigating Judges, as may be the case in other procedural systems. ... The capacity of the parties to intervene is thus limited to such preliminary inquiries as are strictly necessary for the effective exercise of their right to request investigative action.”²² It later affirmed its prohibition on party-conducted investigations, when it stated in a warning to the Defence that “[t]he Co-Investigating Judges hereby warn the lawyers for IENG Sary under Rule 38 of the Internal Rules that they are prohibited from conducting their own investigations and any breach of this prohibition may result in the application of sanctions against them.”²³

14. Only now that the OCIJ is no longer seized with the Case File can the Defence attempt to search for any documents not already on the Case File in order to provide a list of such documents to the Trial Chamber. This will take considerable time. It is important that the Defence conduct such investigation rather than relying solely on documents gathered by the OCIJ, because there is evidence that the judicial investigation was biased against the Accused. The International Co-Investigating Judge, Marcel Lemonde, for example, was accused by a former Chief of the Intelligence and Analysis Unit of the OCIJ of having expressed the wish to his international investigators that he **“would prefer that [they] find more inculpatory evidence than exculpatory evidence.”**²⁴
15. Even documents which are already on the Case File will take considerable time to compile and a thorough job cannot be done prior to the current deadline. There are tens of thousands of documents from the OCIJ investigation on the Case File. Although some documents have been on the Case File for years, English and Khmer translations of documents continue to be added to the Case File to this day,²⁵ and translations are not available for all documents on the Case File at this time. The Defence cannot review each of these documents by the current deadline. Requiring it to provide the requested lists by the deadline would violate Mr. IENG Sary’s right to adequate time and facilities to prepare his defence.

²² *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2 (emphasis added).

²³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order Issuing Warnings under Rule 38, 25 February 2010, D367, ERN: 00478513-00478519, para. 9.

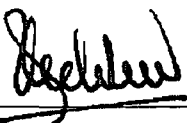
²⁴ *See Case of IENG Sary*, 002/09-10-2009-ECCC/PTC(01), IENG Sary’s Application to Disqualify Co-Investigating Judge Marcel Lemonde and Request for a Public Hearing, 9 October 2009, ERN: 00386956-00386968, Annex A, p. 1.

²⁵ For example, the Defence was notified on 16 March 2011, that English translations of documents D56-D0c.133, D366/7.1.50, D166/168.1, D166/170.1, IS 5.108, IS 19.3, IS 21.25, D222/1.18, D199/26.2.25, and D200/2.13 were added to the Case File. The Defence has not yet been able to review these documents.

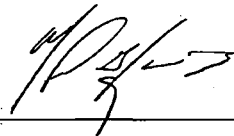
16. The lack of adequate facilities uniquely affects the Defence, because the OCP, while prohibited from investigating into Case 002 during the judicial investigation of Case 002, was permitted to conduct preliminary investigations prior to submitting its Initial Submission to the OCIJ. It also conducted preliminary investigation in Case 001 and is authorized to conduct investigation into additional cases, which may overlap with Case 002. The OCP, furthermore, is in a better position to provide the requested material at this time, because it was a party in Case 001, and so has had much more time to compile documents which it believes support its case. It has already performed a similar task for Case 001, which overlaps with Case 002. It will therefore not violate the equality of arms to require the OCP to provide the requested lists by the original deadline and to grant the Defence an extension.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **EXTEND** the deadline for the Defence to file lists of documents and exhibits until after the OCP and Civil Parties have presented their case, or alternately until 60 days from the date the Trial Chamber has informed the parties as to the structure of the trial and the order of the topics which will be addressed.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 18th day of **March, 2011**