

E9/22

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: 1 April 2011

CLASSIFICATION

Classification of the document suggested by the filing party:

PUBLIC WITH CONFIDENTIAL ANNEX

Classification by OCIJ or Chamber:

សាធារណៈ / Public

Classification Status:

Review of Interim Classification:

Records Officer Name:

Signature:

IENG SARY'S INITIAL LIST OF DOCUMENTS ALREADY ON THE CASE FILE

&

NOTICE CONCERNING HIS FORTHCOMING INITIAL LIST OF NEW DOCUMENTS TO PUT BEFORE THE CHAMBER AT TRIAL

Filed by:

Distribution to:

The Co-Lawyers:

The Trial Chamber Judges:

ANG Udom

Judge NIL Nonn

Michael G. KARNAVAS

Judge THOU Mony

Judge YA Sokhan

Judge Silvia CARTWRIGHT

Judge Jean-Marc LAVERGNE

Reserve Judge YOU Ottara

Reserve Judge Claudia FENZ

ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):

01 / 04 / 2011

ម៉ោង (Time/Heure):

15:20

អគ្គិសនីសម្របសម្រួលឯកសារ/Case File Officer/L'agent chargé

du dossier: Ratanak

Co-Prosecutors:

CHEA Leang

Andrew CAYLEY

All Defence Teams

All Civil Parties

E9/22

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to the Trial Chamber’s Order to File Material in Preparation for Trial (“Order”),¹ hereby: **a.** submits a list of all documents on the Case File; **b.** notifies the Trial Chamber that it is not required – nor is it able – to choose at this time the specific documents in this list that it will rely upon at trial; **c.** notifies the Trial Chamber that it is unable to provide a “Documentary Evidentiary Chart” for the material already on the Case File; and **d.** notifies the Trial Chamber that it will provide an initial list of new documents, including documents on the Shared Materials Drive (“SMD”), by the Trial Chamber’s deadline. This motion is made necessary in order to comply with the Trial Chamber’s Order to the extent possible and to raise certain issues concerning this Order, so that these issues may be discussed at the upcoming Trial Management meeting.

I. BACKGROUND

1. On 17 January 2011, the Trial Chamber Ordered the Parties to provide, no later than 13 April 2011:
 - i) A list of the documents already in the Case File they intend to put before the Chamber, appropriately identified by their document reference number, title, available languages/s and, if available, a brief description of their nature and contents;
 - ii) A list of the new documents they intend to put before the Chamber, containing a brief description of their nature and contents; and
 - iii) A “Documentary Evidentiary Chart” which indicates, for each relevant evidentiary topic, the documentary evidence upon which the party will rely with regards to the allegations contained in the Closing Order.²
2. On 4 February 2011, the Defence filed a motion concerning the conduct of Case 002 and requested a stay of the Trial Chamber’s Order until the Trial Chamber had resolved this matter.³
3. On 8 February 2011, the Khieu Samphan Defence filed a request for more time to file its lists of documents required pursuant to this Order.⁴ It requested the Trial Chamber to find that the application of Rule 80 violates: **a.** the presumption of innocence, **b.** the principle that the burden of proof is on the prosecution, **c.** the right to have adequate time and facilities to prepare a defence and **d.** the right to be tried without undue delay. It

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 *Id.*, para. 12.

³ *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.

⁴ *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/TC, Application for Extension of Time to File Evidence, 8 February 2011, E9/6, ERN: 00650206-00650215.



requested the Trial Chamber to allow it to file documents at the end of the presentation of evidence by the Co-Prosecutors and Civil Parties, and to find that the time limit for filing such documents starts to run only from notice of the French version of the Trial Chamber's Decision on its application.⁵

4. On 18 March 2011, the Defence filed a request for more time to file its lists of documents and exhibits.⁶ The Defence's request explained that requiring these lists to be submitted by 13 April 2011 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 requested to be authorized to submit these lists after the OCP and the Civil Parties have presented their cases, or alternatively, 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.⁷
5. On 23 March 2011, the NUON Chea Defence joined this request.⁸
6. On 25 March 2011, the IENG Thirith Defence also joined this request.⁹
7. On 29 March 2011, in a Decision signed by Judge Nil Nonn alone, the Trial Chamber rejected the Defence requests for additional time.¹⁰ The sole reason provided for the rejection was: "the Defence, having been notified of the relevant deadlines ordered by the Trial Chamber since its Order of 17 January 2011 and having had access to the case file since the start of the judicial investigation, cannot claim a lack of sufficient time and facilities for, the preparation of their defence."¹¹

II. APPLICABLE LAW

8. Article 321 of the Cambodian Criminal Procedure Code ("CPC") states in relevant part:

Unless it is provided otherwise by law, in criminal cases all evidence is admissible. The court has to consider the value of the evidence submitted for its examination, following the judge's intimate conviction. The judgment of the court may be based only on the evidence included in the case file or which has been presented at the hearing.

9. Article 334 of the CPC states:

⁵ *Id.*, para. 35.

⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary's Request for Extension of Time to File His Lists of Documents and Exhibits, 18 March 2011, E9/16, ERN: 00655282-00655288.

⁷ *Id.*, opening.

⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Notice in Joinder of IENG Sary's Request for Additional Time in Which to File Its Lists of Documents and Exhibits, 23 March 2011, E9/16/1, ERN: 00655718-00655719.

⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Thirith Defence Motion in Support of "IENG Sary's Request for Extension of Time to File His Lists of Documents and Exhibits", 25 March 2011, E9/16/3, ERN: 00656495-00656496.

¹⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Decision on Requests for Extension of Time to File Lists of Documents and Exhibits, 29 March 2011, E9/16/4, ERN: 00657167-00657169.

¹¹ *Id.*

Until the end of the trial hearing, the accused, the civil party, and civil defendants may make written statements and submit all documents and evidence that they think will be conducive to ascertain the truth. The written submissions shall be stamped by the presiding judge and the court clerk and be attached to the case file.¹²

10. Rule 87(1)-(4) of the ECCC Internal Rules ("Rules") states:

1. Unless provided otherwise in these IRs, all evidence is admissible. 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. Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination.

3. The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court. The Chamber may reject a request for evidence where it finds that it is:

- a. irrelevant or repetitious;
- b. impossible to obtain within a reasonable time;
- c. unsuitable to prove the facts it purports to prove;
- d. not allowed under the law; or
- e. intended to prolong proceedings or is frivolous.

4. During the trial, either on its own initiative or at the request of a party, the Chamber may summon or hear any person as a witness or admit any new evidence which it deems conducive to ascertaining the truth. Any party making such request shall do so by a reasoned submission. The Chamber will determine the merit of any such request in accordance with the criteria set out in Rule 87(3) above. The requesting party must also satisfy the Chamber that the requested testimony or evidence was not available before the opening of the trial.

11. Rule 80(3) states:

The Chamber may order the parties, within a prescribed time limit prior to the Initial hearing, to file documents including the following:

...

b). A list of exhibits they intend to offer in the case, containing a brief description of their nature and contents.

...

d). A list of new documents which they intend to put before the Chamber with a brief description of their contents and a list of documents already on the case file, appropriately identified...

III. ARGUMENT

A. List of documents already on the Case File

¹² Emphasis added.

1. Documents relied upon by the OCIJ in the Closing Order

12. The Trial Chamber has a comprehensive list of documents cited in the Closing Order which link allegations or assertions made in the Closing Order to documents and witnesses. The Defence submits that, as its starting point, all these documents are subject to being used by any party or the Trial Chamber throughout the proceedings. As such, the Trial Chamber effectively does have – albeit not in the specific format it is requesting – a documentary evidentiary chart.

2. All other material on the Case File which was not cited in the Closing Order

13. The Trial Chamber requested the parties to provide it with “[a] list of the documents already in the Case File they intend to put before the Chamber, appropriately identified by their document reference number, title, available languages/s and, if available, a brief description of their nature and contents.”¹³ The Defence has attached an Annex listing all of the documents on the Case File (including those cited in the Closing Order) as of 31 March 2011 in an Excel table. This list provides the requested information: document reference numbers, ERNs of the document and its translation as well as related documents, titles of the documents in English and Khmer, document type, filing party, filing date, document date, DC-Cam document number, document language, category of document, source of document, document summary, creation date, number of pages, and classification. The Defence submits that it is entitled to rely upon any document on the Case File, for reasons that will be addressed *infra*.

B. Notification that the Defence is not required – nor is it able – to choose at this time the specific documents in this list that it will rely upon at trial

14. The Defence respectfully notifies the Trial Chamber that Cambodian law and the Rules do not require the Defence to provide a list of documents which are already on the Case File that it intends to put before the Chamber at trial. Moreover, this was not the practice in Case 001. It is not possible at this time to choose specific documents on the Case File to put before the Chamber at trial. Limiting the Defence’s ability to rely upon any document on the Case File would neither be reasonable nor just to Mr. IENG Sary.

1. Cambodian law and the Rules do not require the parties to list documents on the Case File which they intend to put before the Chamber at trial

15. Rule 87 states in part that “Any decision of the Chamber shall be based only on evidence that has been put before the Chamber and subjected to examination. The Chamber bases its decision on evidence from the case file provided it has been put before it by a party or

¹³ Order, para. 12.

if the Chamber itself has put it before the parties. Evidence from the case file is considered put before the Chamber or the parties if its content has been summarised, read out, or appropriately identified in court.” This Rule appears to be based on Article 321 of the CPC, which states in part that “Unless it is provided otherwise by law, in criminal cases all evidence is admissible.... The judgment of the court may be based only on the evidence included in the case file or which has been presented at the hearing.” Accordingly, the general rule at the ECCC and in other Cambodian courts is that any material on the Case File may be put before the Chamber at trial and relied upon by the Chamber in reaching its judgement.

16. Rule 80(3) states that “The Chamber may order the parties, within a prescribed time limit prior to the Initial hearing, to file documents including the following: b). A list of exhibits they intend to offer in the case, containing a brief description of their nature and contents.... d). A list of new documents which they intend to put before the Chamber with a brief description of their contents and a list of documents already on the case file, appropriately identified.”¹⁴ There are two important points to note concerning this Rule. *First*, unlike the other information that the Trial Chamber may request pursuant to this Rule (a list of exhibits and a list of new documents), the Rule simply states that the Trial Chamber may order the parties to provide a list of documents already on the Case File. It does not state that the Trial Chamber may order the parties to provide a list of documents already on the Case File which they intend to put before the Chamber. The Trial Chamber’s Order, in requiring the parties to provide a “list of the documents already in the Case File they intend to put before the Chamber,”¹⁵ thus goes farther than what is provided for by the Rule. *Second*, this Rule is silent as to the consequences of noncompliance. The Rule does not state that if a party fails to provide the Trial Chamber with a list of documents already on the Case File that party cannot rely on documents from the Case File at trial.

17. Rule 80(3) cannot be interpreted as requiring the parties to provide a list of all documents on the Case File that they intend to put before the Chamber at trial and as prohibiting the parties from relying on documents not on this list. Such interpretation would be a clear departure from Article 334 of the CPC, which states:

Until the end of the trial hearing, the accused, the civil party, and civil defendants may make written statements and submit all documents and evidence that they

¹⁴ Emphasis added.

¹⁵ Order, para. 12 (emphasis added).

think will be conducive to ascertain the truth. The written submissions shall be stamped by the presiding judge and the court clerk and be attached to the case file.¹⁶

18. The Pre-Trial Chamber has noted that the preamble to the Rules states that the Rules were adopted to consolidate applicable Cambodian procedure and adopt additional rules where existing procedure does not deal with a matter, or if there is a question regarding consistency with international standards.¹⁷ The Pre-Trial Chamber has stated that:

The Internal Rules therefore 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. They do not stand in opposition to the Cambodian Criminal Procedure Code ('CPC') but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.¹⁸

19. In this instance, there is no reason why "unique circumstances" would necessitate a departure from Article 334 of the CPC.¹⁹ In fact, the unique circumstances in Case 002 support the opposite conclusion: that the Defence should be entitled until the end of the trial to submit all documents and evidence that it believes will be conducive to ascertain the truth. As the Canadian Supreme Court has concluded:

It is essential in a case where the events took place 45 years ago that all material evidence be put before the jury. With the passage of time it becomes increasingly difficult to get at the truth of events: witnesses die or cannot be located, memories fade and evidence can be so easily forever lost. It is then essential that in such a case all available accounts are placed before the court. The argument that all cases pose difficulties in presenting a defence fails to recognize that this case, because of the time elapsed, presents very real difficulties for the defence in getting at the truth which is not comparable to other cases.²⁰

2. Past practice indicates that the parties may rely upon any material on the Case File without submitting a list in advance

20. In Case 001, the parties were not required to provide a list of documents already on the Case File which they intended to put before the Trial Chamber.²¹ Parties were allowed to

¹⁶ Emphasis added.

¹⁷ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC06), Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, ERN: 00219322-00219333, para. 13.

¹⁸ *Id.*, para. 14 (emphasis added).

¹⁹ If there is uncertainty as to the interpretation of Rule 80(3) or its consistency with Article 334 of the CPC, the principle of *in dubio pro reo*, which must be respected in accordance with Article 38 of the Cambodian Constitution, requires the interpretation most favorable to the Accused to apply.

²⁰ *R. v. Finta* [1994] 1 S.C.R. 701, 707 (Can.) (emphasis added).

²¹ See *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Notification of a Trial Management Meeting and Order to the Parties to File Additional Materials, 11 December 2008, E5, ERN: 00250117-00250121, para. 4. The Trial Chamber only ordered the parties to file a list of exhibits (tangible objects) and a list of new

announce their intention to put evidence from the Case File before the Chamber throughout the trial. During the Trial Management meeting in Case 001, a Civil Party asked: "Which would be the deadline for the parties to announce their intention to put up evidence, either through summarising or reading out that piece of evidence? I think that the conduct of the hearing and the statements from witnesses may lead this kind of need to arise, and parties may not necessarily know that need a few days in advance. Thank you." Judge Lavergne responded:

I think there is a certain latitude in this matter. Some parties may wish to file in advance a list of documents that it would like to be discussed at the hearing. So no specific deadline has been set, the principle I think here is that the hearing may be conducted in a flexible manner and in an efficient manner. So if we can anticipate this kind of request the better, and that should be possible because I think you will know in advance which witness will be heard on what day, and you may prepare questions. You can also prepare documents that you may want to put up to the witness. However, maybe -- in the light of what's going to happen concretely that we may give a more specific answer, but ideally it should be done before the document should be put up.²²

21. Judge Lavergne also stated:

The next item is about guidance from the Trial Chamber on notification of the evidence that the parties intend to have examined during the hearing. Indeed, the Co-Prosecutors have inquired whether and when they shall notify the Chamber of evidence they believe should be examined during the trial, and how you should proceed. The Trial Chamber notes that under Rule 92, any party may make written submissions up until the closing statements. Notification of evidence a party considers should be examined is to be considered a written submission in the sense of Rule 92. Therefore, and although such notification is not required, the parties may file a notification of what evidence they wish to have examined, and the Chamber notes that, for translation purposes or for purposes of the conduct of the hearing, the earlier such documents [sic] is received, the more useful it will be. The Chamber would also like the parties to check in advance and indicate in which working language those documents are available.²³

22. Rule 80 was amended on 17 September 2010 to state that the Trial Chamber may order the parties to provide a list of documents already on the Case File. The amendment to Rule 80, however, fundamentally changes the treatment between Duch and the Accused in Case 002. Mr. IENG Sary has a fundamental right to be treated equally before the law.

documents they intended to offer in the case. At the Trial Management meeting, Judge Cartwright stated: "The Co-Prosecutors state that they're not intending to offer any exhibit, namely any tangible objects, other than the scanned documentary evidence currently available on the case file, which includes photographic and video material." *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 15 January 2009, E1/1.1, ERN: 00295179- 00295272, p. 50 (emphasis added).

²² *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 15 January 2009, E1/1.1, ERN: 00295179-00295272, p. 66-67 (emphasis added).

²³ *Id.*, p. 72-73.



This right is guaranteed to him by Article 31 of the Cambodian Constitution, which provides in part that “[e]very Khmer citizen shall be equal before the law...”²⁴ This right is further set out in the CPC which states in Article 3 that “Criminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex, language, creed, religion, political tendency, national origin, social status, resources or other status.” This right is also enshrined in Article 7 of the Universal Declaration of Human Rights and the Articles 14 and 26 of the International Covenant on Civil and Political Rights, which the ECCC must respect pursuant to the Cambodian Constitution.²⁵

23. As the Trial Chamber is exactly the same in Case 001 and Case 002, its procedure should be the same.²⁶ Requiring the Case 002 Defence teams to set out prior to trial all the material from the Case File they intend to rely on places an additional burden on the Defence teams that was not placed upon the Defence in Case 001 and is not envisaged by the Rules.

3. It is not possible or ethical at this stage to limit the documents the Defence intends to put before the Chamber at trial

24. The Defence would not be acting with due diligence²⁷ if it limited the material available to it to put before the Trial Chamber at this stage. The Defence has not yet been informed as to how the case will be structured, despite having requested such information on two occasions.²⁸ If the OCP will be entitled to present its case as it has requested,²⁹ the

²⁴ Emphasis added.

²⁵ Cambodian Constitution, Art. 31. The ECCC must also respect the rights enshrined in the ICCPR pursuant to Article 13 of the Agreement and Article 35 new of the Establishment Law.

²⁶ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 71), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Decision Refusing to Accept the Filings of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, ERN: 00601705-00601717, where the Pre-Trial Chamber found that the right to equal treatment required that the Defence in Case 002 be allowed to respond to the OCP’s Final Submission, since the Defence in Case 001 was afforded that right.

²⁷ Defence counsel are required to act with due diligence to safeguard their clients interests. *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). The ICTY 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 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).

²⁸ 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; *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Request for Extension of Time to File His Lists of Documents and Exhibits, 18 March 2011, E9/16, ERN: 00655282-00655288.

Defence must equally be afforded the opportunity to present its case, to respect the equality of arms. The OCP bears the burden of going forward with the evidence and the burden of proof.³⁰ Until the trial occurs and the OCP puts material before the Trial Chamber, the Defence will not know what material is necessary to rebut the OCP's case. Requiring the Defence to provide this material now, if the case is structured in this manner, will violate Mr. IENG Sary's right to be presumed innocent,³¹ as it effectively reverses the burden of proof by requiring him to disclose aspects of his defence before the OCP's case has been presented. The OCP is ideally situated to provide the Trial Chamber with this information at this stage, since it prepared the Introductory and Final Submissions in Case 002. Presumably it would have prepared these submissions by linking documents to its various allegations.

25. If there is to be no "OCP case," the trial must follow a classic inquisitorial system. Each Judge of the Trial Chamber must read all of the material on the Case File and the SMD prior to the start of trial.³² The Trial Chamber has had access to the Case File for the past six months, since 15 September 2010, in order to perform this task.³³ The Trial Chamber has an affirmative obligation to develop in full the facts of every case.³⁴ Until the Trial Chamber introduces evidence at trial or provides the parties with an advance list of the material it intends to introduce, the Defence will not know what material the Trial Chamber considers relevant and probative, and will not know what additional material it

²⁹ 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. The OCP has also acknowledged that "Rule 21(1)(a) of the Rules describes the proceedings before the ECCC as adversarial which is the classic description of a common law criminal law trial." Interoffice memorandum from OCP to Susan Lamb, Judicial Coordinator, "Two Rule Amendment Proposals to ensure More Efficient Trial Procedures Relating to (1) the Tendering of Evidence at Trial and (2) the Questioning of Accused and Witnesses," 20 April 2010, p. 6.

³⁰ Rule 87(1).

³¹ See Constitution, Art. 38; Establishment Law, Art. 35 new; Rule 21(1)(d).

³² Professor Damaška notes some problems which occur when judges not familiar with the case question witnesses: "[T]he interrogation process - to be effective - requires the questioner to be familiar with the subject matter of inquiry. As things presently stand, however, the Anglo-American judge knows very little about the facts of the case in which he is sitting. If the current situation continued, his questioning would seldom elicit more than a thin narrative account from a witness. Counsel, who are aware of information available from the witness, would soon take over, and resume their dominant role in the interrogation process. The 'thin' initial questioning from the bench would only bedevil their planning for orderly and clear presentation of evidence. A measure of repetition and confusion would most likely result. The enforcement of the present regime of rules of admissibility would also become more difficult: the freer narrative generated by broad questions from the bench would inject far more inadmissible material into the case than the now prevailing technique of narrow questions put by counsel." Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839, 850 (1997).

³³ Rule 69(3) allows the Trial Chamber to access the Case File for purposes of advance preparation as soon as the OCIJ issues the Closing Order.

³⁴ Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87(2) Yale L.J. 240, 246 (1977).

may be necessary to put before the Chamber in order to supplement the Trial Chamber's evidence and assist the Trial Chamber in ascertaining the truth. As Judge Lavergne has noted in Case 001, **"the Chamber ... being in charge of the conduct of the proceedings ... would have the primary role in introducing evidence during the hearing.** However, where a party or parties wish to refer to a particular piece of evidence which has not been introduced by the Trial Chamber, this evidence could be summarised or read by that party or parties."³⁵

C. Notification of the Defence's inability to fully provide a "Documentary Evidentiary Chart" for the material already on the Case File

26. The Defence is currently unable to provide a "Documentary Evidentiary Chart" for all of the material currently on the Case File, and notes, as set out above, that applicable law does not require the Defence to provide the Trial Chamber with such a table. The Defence further notes that the Closing Order refers to many documents on the Case File to support its factual and legal conclusions. The Trial Chamber thus already has the information it requested the parties to provide concerning the material cited in the Closing Order: the link between these documents and their relevant evidentiary issues.
27. The total number of documents on the Case File grows almost daily. There are currently over 70,000 documents on the Case File. These documents include not only investigative material, but also filings by the parties and the authorities they cite and various memoranda, orders, and decisions by the Chambers. Many, though not all, of the documents on the Case File have been translated and exist in Khmer, French, and English. Some documents exist in other languages as well, such as German, Swedish and Vietnamese. The documents on the Case File are not organized according to what evidentiary topic(s) they may relate to.
28. The Trial Chamber has denied the Defence's request for an extension of time on the basis that the Defence had access to the Case File since the start of the judicial investigation.³⁶ This conclusion is, with respect, rather simplistic and does not take into account the reality of the situation. Although the Defence could access the Case File since the start of the judicial investigation – or, more accurately, since the Co-Lawyers were appointed to represent Mr. IENG Sary and the rest of the team had been hired – not all of the material on the Case File was available from the start. Material has been steadily added over the

³⁵ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 15 January 2009, E1/1.1, ERN: 00295179-00295272, p. 64.

³⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Decision on Requests for Extension of Time to File Lists of Documents and Exhibits, 29 March 2011, E9/16/4, ERN: 00657167-00657169.

past three and a half years. Most of it was not added to the Case File in a language the entire team could speak, and the Defence had to wait for translation. The Defence team is quite small and has had many other pre-trial tasks. It has been unable to devote itself entirely to reviewing the material on the Case File. For example, in Case 002 there were many complex jurisdictional issues of first impression which had to be addressed in a timely manner.³⁷ If the Defence had not raised these issues, it could have later faced a claim of ineffective assistance of counsel and the issues could have been waived. An example is the argument first raised on appeal in Case 001 that the ECCC does not have jurisdiction over Duch because he was not a senior leader or someone most responsible.³⁸ The OCP argued that this jurisdictional challenge was belated.³⁹

29. During the judicial investigation, the Defence requested the OCIJ to provide it with information which would have assisted it in compiling the information the Trial Chamber now requests, but the OCIJ would not do so. The Defence first requested the OCIJ to disclose its investigative methodology, including, *inter alia*, the OCIJ's planning and overall strategy of the judicial investigation, and the collection and analysis of exculpatory evidence by the OCIJ, encompassing information on alternative theories of the events set out in the Introductory Submission which were considered by the OCIJ and information on how these alternative theories are translated into systems for identifying, collecting and analyzing exculpatory evidence.⁴⁰ The OCIJ refused to concretely⁴¹

³⁷ See, e.g., *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), IENG Sary's Submissions Pursuant to the Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues, 7 April 2008, C/22/I/26, ERN: 00177265-00177280; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Application of Crimes Against Humanity at the ECCC, 13 April 2010, D378, ERN: 00498540-00498552; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Application of Grave Breaches at the ECCC, 7 May 2010, D379, ERN: 00511576-00511589; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application at the ECCC of the Mode of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97, ERN: 00208225-00208240; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 15 February 2010, D345/2, ERN: 00475513-00475527; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382, ERN: 00532798-00532812.

³⁸ See Julia Wallace & Kuch Naren, *Lawyers Argue Duch Not 'Most Responsible'*, CAMBODIA DAILY, 29 March 2011, p. 1.

³⁹ See James O'Toole & Cheang Sokha, *Duch Sentencing Debated, Debate Continues in Duch Appeal*, Phnom Penh Post, 30 March 2011, p. 1.

⁴⁰ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Third Request for Investigative Action, 21 May 2009, D171, ERN: 00330819-00330834; *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Notice of Joinder to IENG Sary's Third Request for Investigative Action, 9 June 2009, D171/2, ERN: 00337488-00337489; *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ, Notice of Adoption of IENG Sary's Third Request for Investigative Action, Rule 55-10, 24 August 2009, D171/3, ERN: 00379332-00379333.

⁴¹ The OCIJ did eventually respond to the Defence's request for such information, but the response was too vague and general to be of use to the Defence. See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-

provide this information which would have assisted the Defence in evaluating the evidence on the Case File. The Defence next requested the OCII to provide it, as part of the Closing Order, with an analytical table which links each material fact to each relevant inculpatory or exculpatory piece of evidence, as well as to each element of the crimes charged and each constituent element of the modes of participation.⁴² This would have greatly assisted the Defence in evaluating the evidence on the Case File. The OCII refused, stating simply that the Closing Order “cannot be presented in an analytical table, given that the Closing Order may be read out at the beginning of the substantive hearing...”⁴³

D. Initial list of new documents the Defence intends to put before the Chamber

30. The Defence will file by the Trial Chamber’s deadline an initial list of new material it intends to put before the Chamber. This list will include material from the SMD, as well as other new material. The Defence reserves its right to add to this list at a later stage. It is not possible to submit a full list of new material the Defence intends to put before the Chamber at this time. This is because: **1.** the Defence has not yet been informed as to how the case will be structured; **2.** it is not yet possible to determine which documents are already on the Case File; **3.** it has not been possible to review all of the documents on the SMD; and **4.** the Defence was prohibited from investigating while the OCII was seized with the Case. The Defence must be afforded an opportunity to supplement its partial list of new documents at a later stage and to put any new document before the Chamber which is conducive to ascertaining the truth.
31. The Defence has not been provided with the evidence the OCP and the Trial Chamber will present at trial. For the reasons explained above, relating to material already on the Case File, the Defence cannot now, acting with due diligence, provide a complete list of new evidence it will rely upon.
32. It is impossible at this time to prepare a complete list of new documents to put before the Chamber, because it is not yet possible to determine which documents are already on the

Investigating Judges’ Response to Ieng Sary’s “Request for Investigative Action”, concerning, inter alia, the Strategy of the Co-Investigating Judges in regard to the Judicial Investigation”, 14 December 2009, D171/5.

⁴² *Case of IENG Sary*, 002/19-09-2007-ECCC-OCII, Ieng Sary’s Request for an Analytical Table Linking Each Material Fact to Each Relevant Inculpatory or Exculpatory Piece of Evidence, Each Element of the Crimes Charged and Each Constituent Element of the Modes of Participation as part of the Closing Order, 31 March 2010, A372, ERN: 00492598-00492604.

⁴³ *Case of IENG Sary*, 002/19-09-2007-ECCC-OCII, Response to IENG Sary’s Request to Provide the Defence with an Analytical Table of the Evidence, 8 April 2010, A372/1, ERN: 00495269.

Case File. Document translations are still being notified to the parties nearly every day.⁴⁴ Currently, not every member of the Defence team can read all of the documents on the Case File. The Defence cannot determine whether each new document it may wish to put before the Chamber is in fact a new document, or whether it may already exist on the Case File, but without a translation.

33. There are currently 19,370 documents on the SMD. As explained by the Pre-Trial Chamber:

The documents on the SMD includes [sic]:

- (i) clips of contemporaneous footage from the Democratic Kampuchea (DK) era;
- (ii) documents from the People's Revolutionary Tribunal at Phnom Penh in 1979;
- (iii) numerous contemporaneous records created by the DK government;
- (iv) interviews;
- (v) analytical material related to the DK period;
- (vi) newspaper clippings, press releases, public statements, excerpts from the British Broadcasting Corporation's World Service Summary of World Broadcasts coverage of Far Eastern Affairs and academic articles related to DK and the Communist Party of Kampuchea (CPK); and
- (vii) a collection of contemporaneous, open source, radio and press reports relating to DK and associated issues, from January 1975 to January 1979.

These documents may contain relevant information to the judicial investigation, including:

- (i) interviews with suspects named in the Introductory Submission, victims and potential witnesses;
- (ii) information about living conditions in Cambodia during the DK era;
- (iii) information on the structure and organization of the DK government;
- (iv) evidence of information flow between various branches of the government;
- (v) official publications produced by the government of DK; and
- (vi) contemporaneous news coverage of the situation in Cambodia from the early 1970s to the 1990s.⁴⁵

34. The Defence is in the process of reviewing the 19,370 documents on the SMD, but it will be unable to complete this task by the deadline set out by the Trial Chamber. It has had to perform this task in addition to reviewing the over 70,000 documents on the Case File. During the judicial investigation, the IENG Sary, IENG Thirith, and NUON Chea

⁴⁴ See, e.g., *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Minutes of the meeting of comrades 164: Report on vessel training, D2-15.11, ERN: 00657354-00657356, notified on 29 March 2011; *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Note of meeting chief's divisions about Production, enemy situation, and name list of chief's division, IS13.38, ERN: 00656376-00656392, notified on 25 March 2011; *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, DC-Cam: interview with Ham Seng, Koh Tiev K village, Sâmpov Poun commune, Koh Thom district, Kândal province, by PHANN Sochea, IS19.43, ERN: 00656345-00656375, notified on 25 March 2011.

⁴⁵ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC24), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 18 November 2009, D164/4/13, ERN: 00402746-00402762, paras. 29-30.

E3/22

Defence teams each requested the OCIJ to review the documents on the SMD to determine whether they contained any exculpatory information and to place such information on the Case File,⁴⁶ but the OCIJ refused to conduct this investigation.⁴⁷ Had the OCIJ not refused, the Defence's task may have been lighter, as some of this material would have already been placed on the Case File.

35. The Defence also cannot submit a complete list of new documents at this time because it was prohibited from investigating while the OCIJ was seized with the Case.⁴⁸ 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 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."⁴⁹ 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."⁵⁰
36. Only now that the OCIJ is no longer seized with the Case can the Defence attempt to search for any documents not already on the Case File or in the public domain 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

⁴⁶ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Urgent Joint Defence Request for Investigative Action to Seek Exculpatory Evidence in the Shared Materials Drive, 20 April 2009, D164, ERN: 00316292-00316302.

⁴⁷ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Order on the Request for Investigative Action to Seek Exculpatory Evidence in the SMD, 19 June 2009, D164/2, ERN: 00343271-00343278.

⁴⁸ *See, e.g., Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, 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.

⁴⁹ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, OCIJ Memorandum to the Defence, 10 January 2008, p. 2 (emphasis added).

⁵⁰ *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.



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.”⁵¹

37. Because the Defence does not yet know how the case will be structured, cannot currently determine all of the documents already on the Case File, has not had sufficient time to analyze all of the documents in the SMD, and has not had sufficient time to conduct investigation, it is not possible to provide a complete list of new documents at this time. The Defence must be afforded an opportunity to supplement its partial list of new documents at a later stage and to put any new document before the Chamber which is conducive to ascertaining the truth.

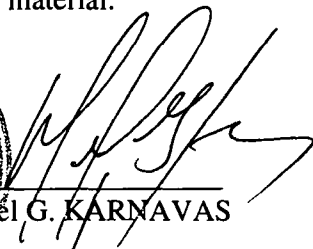
IV. CONCLUSION AND RELIEF REQUESTED

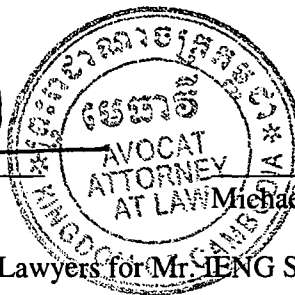
38. The Defence hereby submits an Annex containing a list of documents on the Case File. It submits that it is entitled to rely upon any document on the Case File at trial. The Defence is unable to provide a “Documentary Evidentiary Chart” for this material as requested by the Trial Chamber. The Defence further notifies the Trial Chamber that it will submit by the Trial Chamber’s deadline an initial list of new documents and material it intends to put before the Chamber at trial. It is not possible to submit a complete list of new material at this stage, and the Defence submits that it must be afforded an opportunity to supplement its partial list of new documents at a later stage and to put any new document before the Chamber which is conducive to ascertaining the truth.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **ALLOW** it to put any document on the Case File which is conducive to ascertaining the truth. It further requests the Trial Chamber to **ACCEPT** its initial list of new documents and **ALLOW** it to supplement this list at a later date as soon as it becomes aware of the existence of new material or of the relevance of such material.

Respectfully submitted,


ANG Udom


Michael G. KARNAVAS



Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 1st day of April, 2011

⁵¹ 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.