

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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**IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' MOTION WHICH
ACCOMPANIED THEIR RULE 80 EXPERT, WITNESS AND CIVIL PARTY LISTS**

Filed by:

Distribution to:

The Co-Lawyers:

ANG Udom

Michael G. KARNAVAS

The Trial Chamber Judges:

Judge NIL Nonn

Judge THOU Mony

Judge YA Sokhan

Judge Silvia CARTWRIGHT

Judge Jean-Marc LAVERGNE

Reserve Judge YOU Ottara

Reserve Judge Claudia FENZ

Co-Prosecutors:

CHEA Leang

Andrew CAYLEY

All Defence Teams

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby responds to the Co-Prosecutors’ Motion which accompanied their Rule 80 Expert, Witness and Civil Party lists (“Motion”).¹ The Motion raises six issues which must be addressed prior to trial:

- a. The proportional length of time to examine witnesses;²
- b. The use of witness statements without hearing the relevant witness;³
- c. Hearing the witnesses listed in Annex 5;⁴
- d. The structure and presentation of evidence;⁵
- e. The ability to call additional witnesses during trial;⁶ and
- f. The ability to call witnesses not already interviewed by the OCIJ.⁷

The Defence requests an oral hearing to discuss these matters. This may be appropriate for the upcoming trial management meeting to be held in March or April 2011.⁸

I. ARGUMENT

A. The proportional length of time to examine witnesses

1. In paragraph 7, the OCP asserts that it has based its time estimates on the assumption that it would be able to question experts, Civil Parties, or witnesses for at least one third of the time estimated for their total testimony. This leaves the remaining two thirds to be divided between the Trial Chamber, the approximately 2,123 Civil Parties, and the four Defence teams. Even if it can be assumed that the Trial Chamber will leave most of the substantive questioning to the parties – and this has not yet been discussed or settled – and even if it can be assumed that only one Civil Party lawyer will question each expert, Civil Party, or witness – and this does not seem to be a requirement under the Rules – the four Defence teams cannot be considered as a joint entity only deserving of one third of the available time.⁹ The Defence teams each represent different Accused and have competing concerns and interests. They are not one monolithic group with one single

¹ *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.

² *Id.*, para. 7.

³ *Id.*, para. 10.

⁴ *Id.*, para. 11.

⁵ *Id.*, paras. 15-21.

⁶ *Id.*, para. 10-12.

⁷ *Id.*, para. 13.

⁸ Email from Susan Lamb, Senior Judicial Coordinator, to the IENG Sary Defence team Re: Communication to the parties on behalf of the Trial Chamber - Ieng Sary Defence team, 14 January 2011.

⁹ See *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, para. 339(b). “In determining the role of the accused, the Trial Chamber has kept at the forefront of its consideration the following: ... (b) The principle that the case against each accused must be considered separately. The fact that the accused have been tried together does not mean that their cases should not receive separate consideration.”

E9/4/L

interest.¹⁰ Mr. IENG Sary's fundamental rights to present a defence and to examine witnesses against him will not be respected if the time allotted to him is restricted in such a manner.¹¹ The OCP must not be allowed to curtail the rights of the individual Accused.

B. The use of witness statements without hearing the relevant witness

2. In paragraph 10, the OCP asserts:

[o]ther individuals have not been placed on the lists on the basis that the Co-Prosecutors will be permitted to introduce into evidence their witness statements and related documents pursuant to Rule 87. In the event that certain witness statements and or related documents are not admitted, the Co-Prosecutors provide notice to the Trial Chamber that they may request further experts, witnesses or civil parties to be summoned to appear at trial if in the opinion of the Co-Prosecutors such exclusion of documentary evidence jeopardizes their ability to meet the standard of proof required on any particular material issue in the case.

The Defence hereby informs the Trial Chamber that Mr. IENG Sary intends to invoke his right to confront all witnesses against him.¹² The Defence will challenge the introduction of any witness statement by a witness who will not be called to testify – the Defence must be able to test all evidence against Mr. IENG Sary. The OCP should be required to immediately revise its lists and include all witnesses, Civil Parties, and experts whose statements the OCP intends to introduce.

C. Hearing the witnesses listed in Annex 5

3. In paragraph 11, the OCP asserts that it has not included all individuals that could assist in the authentication of relevant documents which will be sought to be admitted. It asserts that Annex 5 contains the names of a number of such individuals. The Defence hereby informs the Trial Chamber that it will likely challenge the authenticity of most if

¹⁰ Speaking of which, it shocks the conscience that the Trial Chamber Judges, both national and international, from both common and civil law backgrounds, have recently acted as if the Accused are a collective, rather than individually represented Accused with separate and distinct interests. In the Trial Chamber's recent internal memorandum dated 3 February 2011, the Trial Chamber stated that the Defence should coordinate their requests wherever possible and file consolidated motions before the Chamber. See Interoffice Memorandum: Advance Notification of Chamber's Disposition of Motions E14, E15, E9/2, E9/3, E24 and E27, 3 February 2011, p. 2.

¹¹ The right to confrontation is fundamental to the fairness of the trial process. See, e.g., *Saidi v. France*, ECHR, Application no. 14647/89, 20 September 1993, para. 44.

¹² See International Covenant on Civil and Political Rights, Art. 14(3)(e), which the ECCC must respect pursuant to Article 31 of the 1993 Cambodian Constitution as amended in 1999. "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...." In Case 001, the Trial Chamber rejected the admission of two witness statements taken by DC-Cam because the witnesses died prior to trial and Duch was unable to challenge the veracity of their statements. See *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Decision on Admissibility of Material on the Case File as Evidence, 26 May 2009, E43/4, ERN: 00332849-00332857, paras. 13-17.



not all documents sought to be admitted by the OCP. The Trial Chamber should therefore expect to call the witnesses listed in Annex 5 and the OCP should be required to submit summaries and additional information for these witnesses as it will be required to do for all other witnesses.

D. The structure and presentation of evidence

4. In paragraphs 15 through 21, the OCP explains that it has submitted a proposed structure for the appearance of experts, witnesses and Civil Parties and in which key areas of the Indictment should be presented. “[T]he Co-Prosecutors request that their proposal for the overall structure of the presentation of evidence be maintained so as to give the Trial Chamber and the public the ability to develop the best possible understanding of the case and promote efficiency in its presentation by the parties.”¹³ The OCP further submits that Defence and Civil Party witnesses appear for questioning in accordance with the OCP’s proposed structure. While the Defence agrees with the OCP that the OCP bears the burden of proof beyond a reasonable doubt,¹⁴ the OCP must only be allowed to put forth its own proposed structure of the case if the trial is to be conducted in a more adversarial and party-driven manner whereby each party may present its case.
5. If the OCP is allowed to present its case in the manner it chooses, the Defence must equally be allowed to present its case in the manner it chooses, in keeping with the principle of equality of arms. If there are to be no separate OCP and Defence cases, the Trial Chamber must structure the case in the way it deems best, rather than simply accepting the structure presented by the OCP.
6. The Defence recently put forth a fair and reasonable proposal for the conduct of the trial, which would allow the OCP, Civil Parties, and Defence to present their cases.¹⁵ The OCP’s suggestion, in contrast, does not adequately respect the principle of equality of arms.

E. The ability to call additional witnesses during trial

7. In paragraph 12, the OCP asserts that:

where experts, witnesses or civil parties identified in these annex lists cannot appear at trial for any reason, or if they appear and are unable to establish the

¹³ Motion, para. 16.

¹⁴ See Motion, para. 8; *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, 28 February 2010, E9/3, ERN: 00640920-00640935.

¹⁵ *Id.*, Annex.

facts contained in their written statements, the Co-Prosecutors also provide notice to the Trial Chamber that they may request that alternative experts, witnesses or civil parties be summoned to appear in order to testify on the same or similar issues. More generally, if as the trial progresses the Co-Prosecutors believe that further witnesses need to be called on any particular issue to satisfy their burden of proof, they provide notice to the Trial Chamber that they will make such request once this belief is formed.

8. The Rules as currently drafted do not provide for the possibility for a party to call additional witnesses who were not included in its witness lists, unless the party can satisfy the Chamber that the requested testimony was not available before the opening of trial.¹⁶ If the OCP is allowed the privilege of adding witnesses to its witness list whose testimony was available before the opening of the trial, the Defence must equally be afforded this privilege in order to respect equality of arms.

F. The ability to call witnesses not already interviewed by the OCIJ

9. The OCP asserts that it intends to call witnesses, experts, and Civil Parties who were not previously interviewed by the OCIJ. In paragraph 13, the OCP states:

There is a small number of individuals that the Co-Prosecutors wish to summon before the Trial Chamber who have not been interviewed by the Office of the Co-Investigating Judges. These include most of the experts listed in **Annex 2**. It is apparent that the Office of Co-Investigating Judges did not interview individuals who already have extensive expertise on issues relating to the subject matter of the Indictment. Instead, their publications were placed on the Case File. The fact that these experts or witnesses did not testify before the Co-Investigating Judges does not diminish the value of their testimony. Indeed, these individuals are in a position to offer unique insights, often on a wide range of issues pertinent to this case and in a concise manner conducive to judicial economy. Further, where the Co-Prosecutors have requested summons for witnesses (**Annex 3**) or civil parties (**Annex 4**) whom the Office of the Co-Investigating Judges have not interviewed, they have done so on the belief that the testimony of these individuals is particularly pertinent to the proof of key material facts.

10. The OCP should not be allowed to call witnesses who were not interviewed by the OCIJ during the judicial investigation. The OCP had over three years in which it could have requested that the OCIJ interview these people during the judicial investigation.¹⁷ It would circumvent the OCIJ's authority for the OCP to call witnesses which the OCIJ found it unnecessary to interview. The Rules state that the Trial Chamber "bases its decision on evidence from the case file provided it has been put before it by a party or if

¹⁶ Rule 87(4).

¹⁷ Rule 55(10).



the Chamber itself has put it before the parties.”¹⁸ In Civil Law systems, “[a]lthough the court may order witnesses and parties to testify (an enquete), testimony from these individuals does not enter into evidence. Instead, such testimony serves as background information to clarify the documentary evidence compiled.”¹⁹ The proposed new witnesses cannot assist the Trial Chamber, since they do not have interviews or related documents on the Case File which must be clarified.

11. The proposed new experts, however, should be allowed to testify (except where they do not qualify as experts, which will be addressed in a future motion²⁰), if they are called to explain and interpret statements made in their publications which are already on the Case File. As the OCIJ has previously stated, “the Co-Investigating Judges consider that ... given that some of [these proposed experts] are current or former staff members of a party to the proceedings (Dr Etcheson and Ea Meng-Try) or of OCIJ (Dr Heder), it would not be in the best interests of justice to appoint them as experts under ECCC Internal Rule 31 in these circumstances. ... In the event any Charged Person is indicted and sent for trial in this case, the persons named in the Request may still be called to testify, at the request of the parties, should the Trial Chamber consider it useful to do so.”²¹

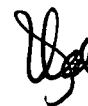
II. RELIEF REQUESTED

¹⁸ Rule 87(3) (emphasis added).

¹⁹ Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT’L L.J. 58, 87 (1994) (emphasis added).

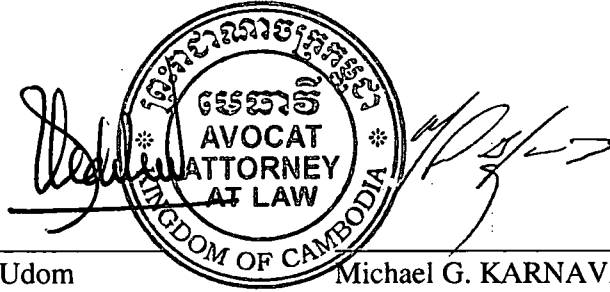
²⁰ Stephen Heder, for example, is on the OCP’s list of experts. Mr. Heder worked for the OCP in drafting the Introductory Submission and then switched to the OCIJ to assist in the investigation process of the Introductory Submission he had assisted in drafting. In essence, Mr. Heder was tasked with drafting allegations against Mr. IENG Sary and then investigating these very same allegations. Mr. Heder is also an associate advisor of DC-Cam, which may affect his impartiality. Furthermore, it appears, especially in light of his refusal to answer questions about his background, that Mr. Heder may have been employed by the CIA during the period relevant to the Indictment, which would create a conflict of interest. Additionally there have been allegations concerning Mr. Heder’s contractual arrangement and efforts by Co-Investigative Judge Lemonde to have Mr. Bastin confabulate into providing a favorable assessment of Mr. Heder’s performance. See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, dated 30 January 2009, A252, ERN: 00282718-00282722, para. 4; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, OCIJ Letter to the Defence concerning the Defence Letter entitled Request for Information regarding an eventual conflict of interest, dated 24 January 2008, A121/I, ERN: 00159515-00159516, p.1; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for Information Concerning the Potential Existence of Conflict of Interest of OCIJ Investigator Stephen Heder, 30 January 2009, A252, ERN: 00282718-00282722; *Case of IENG Sary*, 002/14-12-2009-ECCC/PTC(08), Statement by Wayne Bastin, 2 December 2009, D263.4, p. 15.

²¹ *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Order on Co-Prosecutors’ Request for Appointment of Experts, 23 February 2010, D281/3, ERN: 00464901-00464904, paras. 7-8.



WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to hold an oral hearing to discuss the above matters and to ensure that Mr. IENG Sary's rights are fully respected with regard to each of these matters.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **8th** day of **February, 2011**