

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:** 28 January 2011**CLASSIFICATION****Classification of the document
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**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**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves for a revision of the conduct of the trial procedure at the ECCC and a Stay on the Trial Chamber’s Order to File Materials in Preparation for Trial (“Order”)¹. This Motion is made necessary because the Internal Rules (“Rules”) introduce modalities of trial procedure which differ from those which are followed in ordinary Cambodian courts. Most notably, **a.** the OCP must meet a burden of proof beyond reasonable doubt,² and **b.** proceedings at the ECCC are “adversarial.” In adopting these modalities, the ECCC³ appears to have intended a departure from certain aspects of inquisitorial criminal procedure and introduced elements of adversarial procedure similar to those adopted at the International Criminal Court (“ICC”) and the *ad hoc* international criminal tribunals.⁴ The procedures used in Case 001 and in ordinary Cambodian courts are incompatible for Case 002 as they will: **a.** shift the burden of proof from the OCP in violation of Rule 87(1); **b.** violate Mr. IENG Sary’s right to be presumed innocent; **c.** violate Mr. IENG Sary’s privilege against self-incrimination or deny Mr. IENG Sary adequate facilities for the preparation of his defence; and **d.** result in an inequality of arms between the Defence and the OCP. The Defence submits for adoption a proposed revised procedure, attached hereto as an Annex. An expedited Stay on the Order as applied to Mr. IENG Sary is necessary because applying Rules 80(2) and 80(3) (“Rule 80”) before the entirety of the case against Mr. IENG Sary has been put would infringe upon his fair trial rights. The Defence requests a hearing to discuss the proposed revised procedure.

I. BACKGROUND

1. On 24 January 2011, the Defence requested leave to file this Motion in English initially with the Khmer translation to follow (“Request for Leave”). The Request for Leave was made necessary because the Order requires Mr. IENG Sary to provide certain material set out in Rules 80(2) and 80(3) (“Rule 80 material”) within 30 days.⁵ This Motion deals directly with Rule 80’s application to Mr. IENG Sary. The Request for Leave would have allowed the Defence to save 4 days, which were lost due to translation. In keeping with its due diligence obligations, the Defence filed this Motion as soon as practicable following the Order.
2. On 28 January 2011, 4 days after the Defence attempted to file the Request for Leave and this Motion, the Trial Chamber returned the Motion as a deficient filing. The reason given was

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

² Although the French version of Rule 87(1) states that the: “the Chamber must have an intimate conviction of the Accused’s culpability,” rather than be convinced beyond reasonable doubt. (Unofficial translation).

³ The Rules have been adopted and amended through plenary sessions. See Rules 1-3.

⁴ For example, at the September 2010 Plenary, the ECCC Judges adopted a change in Rule 90 whereby they removed the words “After questioning by the judges” from in front of “The Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused.”

⁵ Order, para. 2.



that this Motion did not adhere to Rule 7.1 of the Practice Direction on Filing Documents before the ECCC, in that it was not also filed in Khmer.⁶

II. APPLICABLE LAW

A. Burden of Proof

3. 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."

B. Adversarial Proceedings

4. Rule 21(1)(a) states: "ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties. They shall guarantee separation between those authorities responsible for prosecuting and those responsible for adjudication."⁷

C. Presumption of innocence

5. An Accused is presumed innocent until definitively judged to be guilty.⁸

D. Privilege against self-incrimination

6. Article 35 new(g) of the Establishment Law states: "In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees ... not to be compelled to testify against themselves or to confess guilt."⁹

E. Equality of Arms

7. According to Article 33 new of the Establishment Law, the ECCC shall ensure that trials "are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused... If these existing procedure 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, guidance may be

⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Notice of Deficient Filing for Ieng Sary's Request for Leave to File in English Initially with the Khmer Translation to Follow & 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 January 2011.

⁷ *See Case of IENG Sary*, 002/19-09-2007-ECCC/PTC 71), Decision on IENG Sary's Appeal against Co-Investigating Judges' Decision Refusing to Accept the Filing 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, D390/12/4, ERN: 00601705-00601717, para. 16, where the Pre-Trial Chamber noted: "[t]he Co-Investigating Judges are ... bound by Rule 21(1)(a) and 21(1)(b), which provides that ECCC proceedings shall be fair and adversarial...."

⁸ 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 states: "The accused shall be presumed innocent as long as the court has not given its definitive judgment." 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." 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;" 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."

⁹ Article 14(3)(g) 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... Not to be compelled to testify against himself or to confess guilt."



sought in procedural rules established at the international level.”¹⁰ This Article mandates that the ECCC shall exercise jurisdiction “in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 [ICCPR].”

8. According to Rule 21(1)(a) of the Rules, “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.”¹¹ The right to a fair trial includes the right to equality of arms. Equality of arms is “the principle in law that, in a trial, the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair.”¹² The Trial Chamber in Case 001 confirmed that “the fundamental nature of this principle is acknowledged in the Internal Rules...”¹³ This principle is fundamental to various international human rights instruments,¹⁴ which, in accordance with the Cambodian Constitution, the ECCC must respect.¹⁵

F. Adequate facilities for the preparation of a defence

9. Article 35new(b) of the Establishment Law states: “In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees ... to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.”¹⁶

G. Stay of proceedings

10. Neither the Cambodian Code of Criminal Procedure (“CPC”) nor the Rules set out the requirements necessary to stay proceedings. The OCIJ, however, has stated that it “consider[s] that the principles governing the law applicable to a request for annulment and those governing the law applicable to a request for a stay of proceedings are the same, especially where the requests are essentially based on the same facts.”¹⁷ Accordingly, a

¹⁰ Emphasis added.

¹¹ Emphasis added.

¹² *Case of KANG Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary’s Request to Make Submissions in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 3 July 2009, D288/6.90, ERN: 00345178-00345180, para. 4.

¹³ *Id.*

¹⁴ According to Article 14(1) of the ICCPR: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...” Article 10 of the UDHR states: “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” (Emphasis added).

¹⁵ See 1993 Cambodian Constitution, as amended in 1999, Art. 31. This Article requires that Cambodian courts “shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights, the covenants and conventions related to human rights, women’s and children’s rights.”

¹⁶ Article 14(3)(g) of the ICCPR states: “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality... to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing.”

¹⁷ *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, 31 December 2009, D264/1, ERN: 00422607-00422618, para. 30 (“Order on IENG Thirith Annulment Request”).

Stay of proceedings may be granted where there has been a procedural defect,¹⁸ and “where the defect infringes the rights of the party making the application.”¹⁹

III. ARGUMENT

A. The proceedings at the ECCC differ from those in ordinary Cambodian criminal courts

11. The Rules introduced modalities of trial procedure which differ from those which are followed in ordinary Cambodian courts. Ordinary Cambodian criminal courts follow an inquisitorial procedure. The prosecution brings charges of criminal offenses against charged persons and asks for the application of laws by the court.²⁰ The prosecution does not bear the burden of proof. At trial, the onus is on the judge to ascertain the truth.²¹ This will be done using evidence on the Case File or evidence which has been presented at the hearing.²² In practice, the judge will have read the entire Case File prior to trial. The judge will then decide on the case following his intimate conviction;²³ the judge exercises his or her discretion as to how the case will proceed, including which witnesses will be called for *viva voce* testimony, the order in which witnesses are called, etc.²⁴
12. By providing that the burden of proof is on the OCP,²⁵ the ECCC introduced procedures grounded in the adversarial system, thus making the proceedings, effectively, party-driven: the parties being responsible for putting on their respective cases, despite the existence of a Case File, which, purportedly, contains the universe of facts upon which the case is to be tried. The Rules state that the proceedings at the ECCC are “adversarial,”²⁶ a fact

¹⁸ Rule 48.

¹⁹ Order on IENG Thirith Annulment Request, para. 30, referring to annulment of investigative or judicial action. The Pre-Trial Chamber has explained, in relation to annulments, that “a proven violation of a right of the Charged Person, recognized in the [ICCPR], would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled.” *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 (“NUON Chea Annulment Decision”), para. 40. It has also stated that requests for Stays of proceedings can fall “within the general ambit of an application falling within Article 33 New of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia which relevantly provides that ‘trials are fair’ and conducted ‘with full respect for the rights of the accused...’” *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1) 10 August 2010, D264/2/6, ERN: 00543781-00543799, para. 13.

²⁰ CPC, Art. 27.

²¹ See, e.g., CPC, Art. 325 which states in pertinent part: “The presiding judge shall ask any questions which he believes to be conducive to ascertaining the truth.”

²² Article 321 of the CPC states in pertinent part: “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.”

²³ *Id.*: “The court has to consider the value of the evidence submitted for its examination, following the judge’s intimate conviction.”

²⁴ Article 326 of the CPC states: “The presiding judge shall listen to the statements of civil parties, civil defendants, victims, witnesses and experts in the order which he deems useful. The presiding judge can hear judicial police officers and judicial police agents who conducted the enquiry as witnesses.”

²⁵ Rule 87(1).

²⁶ Rule 21(1)(a).



acknowledged by the OCP.²⁷ Further indicators that the proceedings are party-driven can be seen by the right afforded to the OCP and Defence to make opening statements²⁸ and put evidence before the Trial Chamber.²⁹ The Rules have precedence over the CPC.³⁰ Thus, it follows, the OCP *must* present *its* case *first* to the Trial Chamber to prove guilt.

13. As ECCC proceedings are adversarial and the burden of proof is on the OCP, the parties are best suited to lead the substantive questioning of witnesses. It is also significantly more judicious for the Trial Chamber to reserve its questions to matters for clarification as opposed to undertaking a burden of proof which is not provided for by the Rules.
14. There is no intrinsic tension or inconsistency in the Rules between the OCP bearing the burden of proof and the Rules' references to the Trial Chamber's role in ascertaining the truth. Such references must be considered in light of the shifting of the burden onto the OCP – as opposed to the Trial Chamber ascertaining the truth – and the modalities of adversarial trial procedure which the Rules quite plainly envisage.³¹

²⁷ "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.

²⁸ Rule 89*bis*(2) states: "Before any Accused is called for questioning, the Co-Prosecutors may make a brief opening statement of the charges against the Accused. The Accused or his/her lawyers may respond briefly."

²⁹ Rule 80.

³⁰ NUON Chea Annulment Decision, para. 14.

³¹ Rule 85(1) states: "The President of the Chamber shall preside over the proceedings, and facilitate interventions by the other judges. He or she shall guarantee the free exercise of defence rights. In consultation with the other judges, the President may exclude any proceedings that unnecessarily delay the trial, and are not conducive to ascertaining the truth" (emphasis added). The President's duties pursuant to Rule 85(1) are not inconsistent with adversarial proceedings, Rule 87(1) or the proposed trial procedure. Rule 85(1) ensures that party-led questioning will not be sidetracked by a direct or cross-examiner, for example, a. asking questions which are not relevant to the issues in dispute, by restricting a line of questioning where, for instance, the information being elicited is either inconsequential for the disputed issues or is just irrelevant; or b. simply asking questions to which answers have already been provided (i.e. the questioning is repetitious). The President may also consider that he may use Rule 87(1) to restrict or forbid the cross-examiner to ask questions which are personal in nature and where the only seeming reason for asking them is to embarrass the witness. Rule 87(3) states: "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" (emphasis added). Rule 87(3) is not inconsistent with adversarial proceedings, Rule 87(1) or the proposed trial procedure. It protects the Trial Chamber's overall control over the proceedings, and preserves the judges' right to call witnesses and hear evidence *proprio motu*. Analogous provisions exist in the ICTY's Rules of Procedure and Evidence. See Rules of Procedure and Evidence of the ICTY, as amended 10 December 2009, Rule 98, which states: "A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance." See also Rules of Procedure and Evidence of the ICTY, as amended 10 December 2009 ("ICTY Rules of Procedure and Evidence"), Rule 90(F)(i), further evidencing the absence of inconsistency between the prosecutor bearing the burden of proof and the Trial Chamber's role in ascertaining the truth.



15. Should the Trial Chamber perceive there to be any tension, it must be considered in light of **a.** Mr. IENG Sary's fundamental right to expeditious proceedings;³² and **b.** the principle *in dubio pro reo*, as provided for by the Cambodian Constitution;³³ if there is any doubt as to the applicable procedure, it must be resolved in a manner which is most favorable to Mr. IENG Sary. The proposed trial procedure will assist the Trial Chamber to conduct Case 002 with optimal expeditiousness,³⁴ remedying the inherent inconsistencies, while allowing for the Trial Chamber to maintain overall control over the proceedings.
16. No tension between the OCP presenting a case to meet its burden of proof and the Trial Chamber leading the questioning was evident in Case 001 because that was not a contested trial: it was a lengthy change of plea hearing / sentencing hearing for the purpose of ascertaining whether Duch's admissions satisfied the elements of the crimes for which he was charged and to determine an appropriate sentence. The OCP was effectively discharged of its burden of proof as Duch admitted to virtually all the facts establishing his guilt and to all the OCP's charges. The Trial Chamber in *Duch* could lead the questioning of witnesses with relative ease without interfering with the OCP's duty to discharge its burden of proof.

B. The procedure in Case 001 cannot be used in Case 002 without shifting the OCP's burden of proof

17. A fundamental difference between Case 001 and Case 002 is that Case 002 is contested. The Rules are clear that the onus is on the OCP to prove guilt.³⁵ The only way in which the OCP can attempt to prove guilt in contested, adversarial proceedings without shifting its burden of proof is to present its entire case to the Trial Chamber prior to the Defence case. Likewise, the Civil Parties should also present their entire case to the Trial Chamber prior to the Defence case.³⁶ Although the Trial Chamber has discretion to hear the evidence in the order it considers useful,³⁷ there is no burden of proof on the Accused, nor is he required to provide any information.³⁸ The Order or any request for Mr. IENG Sary to provide information prior to the entirety of the case against him shifts the burden of proof from the OCP to prove guilt to Mr. IENG Sary to prove his innocence, in violation of his fair trial rights and the Rules.³⁹
18. 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

³² Establishment Law, Art. 33 new.

³³ 1993 Cambodian Constitution, as amended in 1999, Art. 38: "any case of doubt shall be resolved in favor of the accused."

³⁴ See *infra* paras. 26-29.

³⁵ Rule 87(1).

³⁶ Rule 23(1).

³⁷ Rules 90, 91.

³⁸ Establishment Law, Art. 35 new(g); ICCPR, Art. 14(3)(g).

³⁹ 1993 Cambodian Constitution, as amended in 1999, Art. 38; Establishment Law, Art. 35 new; Rules 21(1)(d), 87(1); ICCPR, Art. 14(2); UDHR, Art. 11(1).



ECCC. At the ICC⁴⁰ and the ICTY⁴¹ 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.⁴² In practice, at the ICC, the prosecution presents its case first, followed by the defence.⁴³ This prevents the prosecution's burden of proof from being reversed.⁴⁴ At the ICTY, as the prosecution has the burden of proof, it presents its case first, followed by the defence.⁴⁵ A close analogy can also be drawn with the procedure of the Special Tribunal for Lebanon ("STL"). The STL applies national law,⁴⁶ and has *sui generis* Rules of Procedure.⁴⁷ The Lebanese legal system is based upon the French legal system.⁴⁸ At the STL, the burden of proof also falls on the prosecutor.⁴⁹ There, "in the interests of justice" the prosecution presents its case first, followed by any victim participating in the proceedings, and finally the defence.⁵⁰ 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.

⁴⁰ Rome Statute, Art. 66(2): "The onus is on the Prosecutor to prove the guilt of the accused."

⁴¹ "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.

⁴² Rules of Procedure and Evidence of the ICC, 3-10 September 2002 ("ICC Rules of Procedure and Evidence"), Rule 140(1).

⁴³ 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."

⁴⁴ 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."

⁴⁵ 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."

⁴⁶ Statute of the Special Tribunal for Lebanon, S/RES/1757 (2007) ("STL Statute"), 30 May 2007, Art. 2.

⁴⁷ Rules of Procedure and Evidence, Special Tribunal for Lebanon, STL/BD/2009/01/Rev.3 ("STL Rules of Procedure and Evidence"), 10 November 2010.

⁴⁸ 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.

⁴⁹ STL Statute, Art. 16(3)(b).

⁵⁰ 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. Because the burden of proof is on the OCP,⁵¹ the Trial Chamber cannot know how the OCP intends to meet its burden of proof – save for having the OCP's selected list of witnesses and documents – until the OCP presents its case in court. The Trial Chamber should not question witnesses on what it presumes the OCP's case against Mr. IENG Sary should be. To do so would place the Trial Chamber in the role of the OCP. This would violate the separation of the role between the OCP – the prosecutorial body – and the Trial Chamber – the adjudicating body.⁵²
20. The proposed revised procedure will prevent the burden of proof from shifting as it envisages that the OCP and Civil Parties will present their respective cases prior to the Accused presenting their cases. While the Trial Chamber will initiate the questioning on perfunctory matters, each party will be the first to question its witnesses substantively.

C. The Trial Chamber cannot apply the Order to Mr. IENG Sary as it violates his fair trial rights

21. The Order compels Mr. IENG Sary to provide a list of any additional witnesses he may wish to call to the Trial Chamber within 15 days from the date the OCP provides its list of witnesses to the Trial Chamber.⁵³ The Rule 80 material has been requested prior to the OCP and Civil Parties presenting their cases during trial. There is no Rule explicitly permitting Mr. IENG Sary to provide the Rule 80 material after the entire case against him has been put by the OCP and Civil Parties if that material was available prior to the opening of the trial.⁵⁴ By compelling Mr. IENG Sary to disclose material which will provide information about his defence, Rule 80 and the Order shift the burden of proof to Mr. IENG Sary to prove his innocence as they require that he provide information to the Trial Chamber and parties prior to any case against him being put, violating his fair trial rights.⁵⁵
22. If Mr. IENG Sary is compelled to disclose material which will provide information about his defence prior to the entirety of the case against him being presented during trial by the OCP and Civil Parties, his privilege against self-incrimination will be violated, in violation of the

⁵¹ Rule 87(1).

⁵² See Rule 21(1)(a).

⁵³ Order, para. 2. The Order also requires Mr. IENG Sary to provide a summary of the facts on which each witness is expected to testify and the points of the indictment to which each witness is expected to testify, by no later than 23 February 2011. The Order requires Mr. IENG Sary to provide a list of documents and exhibits intended to be offered in the case with a description of their nature and contents, and a list of new documents, by no later than 13 April 2011.

⁵⁴ Rule 87(4) states: "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." (Emphasis added).

⁵⁵ See 1993 Cambodian Constitution, as amended in 1999, Art. 38; Establishment Law, Art. 35 new; Rules 21(1)(d), 87(1); ICCPR, Art. 14(2); UDHR, Art. 11(1).



Establishment Law.⁵⁶ Guidance can be taken from the European Court of Human Rights in the cases of *Funke v. France*⁵⁷ and *JB v. Switzerland*,⁵⁸ where it was held that the privilege against self-incrimination extends to the pressure to produce documents.

23. Mr. IENG Sary can choose to exercise his privilege against self-incrimination by not providing the Rule 80 material. However, if Mr. IENG Sary does not comply with the Order, he will not be able to provide the Rule 80 material at another stage in the trial proceedings unless he can prove that it was not available to him prior to trial. Rule 80 will thus deny Mr. IENG Sary adequate facilities for the preparation of his defence, in violation of the Establishment Law⁵⁹ and the ICCPR.⁶⁰
24. Case 001 provides little, if any, guidance as to how Rule 80 should be applied in this case. In Case 001, the defence submitted Rule 80 witness and evidence lists prior to trial.⁶¹ Duch's guilty plea effectively discharged the OCP's burden of proof, allowing the Trial Chamber to adhere to Rule 80 without violating Duch's privilege against self-incrimination or denying him adequate facilities for the preparation of his defence. Case 002 is contested and the OCP maintains its burden of proof. Rule 80 is a procedural rule which does not protect Mr. IENG Sary's fundamental fair trial rights or adhere to international standards of justice.⁶²
25. The proposed revised procedure allows Mr. IENG Sary to produce the Rule 80 material after the OCP and Civil Parties have presented their cases. This will maintain the OCP's burden of proof, maintain Mr. IENG Sary's right to be presumed innocent, maintain Mr. IENG Sary's privilege against self-incrimination, and allow Mr. IENG Sary adequate facilities for the preparation of his defence.

D. The Trial Chamber cannot apply the Order to Mr. IENG Sary as it creates an inequality of arms between the Defence and the OCP

26. By requiring Mr. IENG Sary to provide the Rule 80 material prior to the OCP putting on its case, Rule 80 and the Order also create an inequality of arms between the Defence and the OCP. The Rule 80 material allows the OCP to adduce Mr. IENG Sary's case prior to putting

⁵⁶ Establishment Law, Art. 35 new(g).

⁵⁷ *Funke v. France*, Application no. 10828/84, Judgement, 23 February 1993, para. 44.

⁵⁸ *J.B. v. Switzerland*, Application no. 31827/94, Judgement, 3 May 2001, para. 64.

⁵⁹ Art. 35 new(b), Establishment Law.

⁶⁰ ICCPR, Art. 14(3)(b).

⁶¹ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Notification of a Trial Management Meeting and Order Parties to File Additional Materials, 11 December 2008, E5, ERN: 00250117-00250121.

⁶² For example, the ICC, ICTY, ICTR, and the Special Tribunal for Lebanon do not have rules similar to Rule 80. The ICC Rules of Procedure and Evidence, Rule 76 only provides for pre-trial disclosure for prosecution witnesses. The Rules of Procedure and Evidence of the ICTY, as amended 10 December 2009, Rule 65ter(G) explicitly requests for the defence's list of witnesses and evidence following the prosecution's case. The Rules of Procedure and Evidence of the ICTR, as amended 9 February 2010, Rule 73ter explicitly requests for the defence's list of witnesses and evidence following the prosecution's case. Rule of Procedure and Evidence, Special Tribunal for Lebanon, STL/BD/2009/01/Rev.3, 10 November 2010, Rule 112 explicitly requests for the defence's list of witnesses and evidence following the prosecution's case.



on its own case. In doing so, the OCP can both put on its case and rebut Mr. IENG Sary's case during the presentation of its case, prior to the Defence having an opportunity to present its case at trial. This gives the OCP an unfair advantage over Mr. IENG Sary during trial, resulting in an inequality of arms. The proposed revised procedure will preserve the equality of arms as Mr. IENG Sary will only have to provide the Rule 80 material, and therefore information regarding his defence, after the end of the OCP's and Civil Parties' cases.

27. From a practical point of view, the OCP can much more easily provide the Rule 80 material prior to the commencement of the trial in Case 002. The OCP has much of the Rule 80 material at hand following its preparation of Case 001; the Defence did not participate in Case 001.⁶³ The OCP has been permitted to transfer evidence from Case File 001 to Case File 002;⁶⁴ the Defence was forbidden to participate in Case 001.⁶⁵ As the Introductory Submission was the work product of the OCP, the OCP would have gathered much of the Rule 80 material over three years ago.⁶⁶ The OCP conducted extensive investigation before handing over the Case File to the OCIJ.⁶⁷ Conversely, the Defence was prohibited from investigating,⁶⁸ practically placing the OCP in a much better position to provide the Rule 80 material at this time.

E. The proposed revised procedure will assist the Trial Chamber and facilitate the expeditious progress of the proceedings

⁶³ For example S-21 is a crime site for both Cases 001 and 002.

⁶⁴ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Note of Co-Investigating Judges, 28 October 2008, D108, ERN: 00236076-00236077. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on the Co-Prosecutors' Request for the Placement on Case File 002 of Documents Contained in Case File 001, 22 December 2009, D288/1, ERN: 00418084-00418087. *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on the OCIJ's Request for Transfer of Documents in Case File 001 to Case File 002, 8 January 2010, D288/3, ERN: 00424786-00424787.

⁶⁵ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Decision on Ieng Sary's Request to Make Submissions in Response to the Co-Prosecutors' Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, ERN: 00345178-00345180.

⁶⁶ The judicial investigation into Case 002 began with the OCP's Introductory Submission. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Introductory Submission, 18 July 2007, D3, ERN: 00141011-00141166 ("Introductory Submission"). The investigation into Case 002 ended with the Closing Order. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246 ("Closing Order").

⁶⁷ Rule 53 states in pertinent part: "1. If the Co-Prosecutors have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they shall open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons. The submission shall contain the following information: a) a summary of the facts; b) the type of offence(s) alleged; c) the relevant provisions of the law that defines and punishes the crimes; d) the name of any person to be investigated, if applicable; and e) the date and signature of both Co-Prosecutors. 2. The submission shall be accompanied by the case file and any other material of evidentiary value in the possession of the Co-Prosecutors, including any evidence that in the actual knowledge of the Co-Prosecutors may be exculpatory."

⁶⁸ *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.



28. The OCP filed its Introductory Submission in Case 002 on 18 July 2007 and has been involved in the investigation to the extent provided for by the Rules, as has the Defence.⁶⁹ By contrast, the Trial Chamber has only had access to the Case File, which spans over 350,000 pages,⁷⁰ since 16 September 2010.⁷¹ As a result, there is a reasonable likelihood that the Trial Chamber will not be able to read and digest the entire, voluminous Case File prior to the commencement of the trial proceedings in Case 002.⁷² Without a full analysis of the Case File prior to the commencement of the trial proceedings, the Trial Chamber will not effectively lead the questioning in a diligent manner.
29. The Trial Chamber proceeded in Case 001 according to subject area. It requested witness and evidence lists prior to the trial commencing,⁷³ led the questioning and questioned Duch first on each subject area. It could do this primarily because Duch acknowledged most of the facts establishing his guilt and because Duch waived his right to silence. The Trial Chamber also managed to proceed in this manner because there was only one Accused, a Closing Order which was only 45 pages (excluding footnotes), one crime site and a relatively limited number of charges when compared to Case 002.⁷⁴ Yet still Case 001 attracted criticism for being unfocused, eliciting irrelevant evidence and being repetitious.⁷⁵ Case 002 is far more

⁶⁹ Rule 55(10) provides the OCP, Defence and Civil Parties the right to make investigative requests. The OCP and Defence have on several occasions made investigative requests. *See, e.g., Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Request for Investigative Action Concerning the Documentation Center of Cambodia [DC-CAM], 16 November 2009, D242, ERN: 00402284-00402288; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Second Request for Investigative Action, 2 April 2009, D160, ERN: 00302361-00302370.

⁷⁰ Closing Order, para. 17.

⁷¹ Rule 69(3) provides that the Trial Chamber may have access to the Case File for the purpose of advance preparation as soon as the Closing Order has been issued.

⁷² *See* Open Society Justice Initiative, Recent Developments at the Extraordinary Chambers in the Courts of Cambodia, November 2009 ("OSJI November"), p. 15, available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_2009_1120/eccc_20091123.pdf which states: "It is unrealistic to expect judges who only receive the case file a few months before will master facts of such scale and breadth in sufficient detail to ask probing questions of witnesses who are not fully cooperative. Examination of witnesses requires detailed familiarity with all aspects of a case, including knowledge of what other witnesses have said about each element of the subject matter at issue, what other statements the witness has made, how the witness's testimony fits into the larger case, and what biases the witness may have. The chamber judges do not have the time or the support staff to have this kind of familiarity with such details in a case as massive as Case 002."

⁷³ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/TC, Notification of a Trial Management Meeting and Order Parties to File Additional Materials, 11 December 2008, E5, ERN: 00250117-00250121.

⁷⁴ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ, Closing Order, 8 August 2008.

⁷⁵ The Asian International Justice Initiative's KRT Trial Monitoring Group criticized the trial proceedings in Case 001 for being unfocused and also for eliciting irrelevant evidence: "[t]he general nature of the topics meant that at times, the focus of the proceedings seemed to be largely on elements of a particular topic that were unlikely to have any direct bearing on assessing the degree of culpability of the Accused. This included ascertaining the distinct features of the brand of communism represented by the Khmer Rouge ideology (which seemingly lead to discussions which were too abstract to determine Duch's individual criminal responsibility) and minutiae of the prison conditions at S-21 (which seemed irrelevant, in light of the extent to which he had already admitted being responsible)." Michelle Staggs Kelsall et. al., *Lessons learned from the "Duch" Trial: A Comprehensive Review of the First Case Before the Extraordinary Chambers in the Courts of Cambodia*, ASIAN INTERNATIONAL JUSTICE INITIATIVE'S KRT TRIAL MONITORING GROUP, December 2009 ("Staggs"), p. 17. The

complex with four Accused. All the Accused contest the charges against them. Case 002 has a Closing Order of over 400 pages (excluding footnotes), 20 crime sites and more charges when compared to Case 001. If the same trial procedure is used by the Trial Chamber in Case 002 as was used in Case 001, there is a **very strong likelihood** that the trial in Case 002 will run into more serious problems than only being unfocused, eliciting irrelevant evidence and being repetitious.

30. Due to the comparatively limited time the Trial Chamber has had with the Case File as compared to the parties in Case 002, the Trial Chamber would be assisted by the parties leading substantive questioning. The OCP, Defence and Civil Parties know their respective cases and the proposed revised procedure allows them to present their cases.⁷⁶ For example, the party which called a witness will know why it did so and be able to elicit the necessary information more efficiently if it substantively questions that witness first. In Case 001, witnesses requested by the Defence were first questioned by the Trial Chamber, followed by the OCP, Civil Parties and the Defence, in that order.⁷⁷ Yet it was only when the Defence questioned the witness that the Trial Chamber was fully aware why that witness had been called. The proposed revised procedure enables the parties to assist the Trial Chamber to determine the order the witnesses are called to give evidence so that the evidence is presented in the clearest and most coherent way. This will help the Trial Chamber to focus on the key issues and avoid the problems faced in Case 001.⁷⁸

Open Society Justice Initiative has also criticized the trial proceedings in Case 001 for being unfocused, repetitive and having rigid questioning, although it did note that there were improvements as the trial progressed: "The majority of the questioning of each witness is done by the Trial Chamber, with the president often questioning the witness extensively before asking the other judges if they have additional questions. Because the time limits for questioning by the parties, particularly by the prosecutors, is so limited, it is important that the chamber's questioning fully develop the contribution that the witness can make to the issues before the court. Unfortunately, this is not always accomplished. Questioning by the court is often rambling and imprecise. It is frequently not clear that there is a relevant purpose to a line of questions. Facts that are not in dispute are unnecessarily repeated by several witnesses. The chamber often sticks to a planned line of questioning and ignores the need to listen to the witness' response and ask follow-up questions when an answer is non-responsive or reveals important new information." Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, August 2009 ("OSJI August"), p. 17, available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/eccc_2009_0817/eccc_20090817.pdf.

⁷⁶ See OSJI November, p. 15, which states: "The prosecution, which will have worked with the evidence for over four years when the trial starts, is in a much better position to effectively question witnesses in such a complex case. The interests of justice might be better served in Case 002 by allowing the prosecution, with its greater familiarity with the details of the case and the witnesses, to take a much larger role in questioning witness."

⁷⁷ For example, Richard Goldstone, a witness requested by the Defence, was questioned first by the Trial Chamber, followed by the OCP, the Civil Parties, then finally by the Defence. *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ, Transcript – Day 70, 14 September 2009, E1/74.1, ERN: 00378450-00378590.

⁷⁸ Staggs, p. 17; OSJI August, p. 17.

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



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31. Prior to the September 2010 plenary session, the OCP voiced similar concerns that “the rules as currently drafted expect the judges to always lead on the questioning of the Accused and all the witnesses... With very large and complex case files this sequence may not always be the most efficient use of time bearing in mind the Chamber has had the least amount of time to familiarize itself with the case file and the witness’ testimony.”⁷⁹ The OCP recommended that “Civil law convention can be maintained by the presiding judge asking one or two preliminary questions and then handing the witness over to a party for substantive questioning.”⁸⁰ The OCP’s concerns resulted in a change to Rule 90, which removed the words “After questioning by the judges” from in front of “The Co-Prosecutors and all the other parties and their lawyers shall have the right to question the Accused.” However, the rule amendment falls short of accepting a party-led approach to questioning for all witnesses. The proposed revised procedure extends a party-led approach to questioning for all witnesses. This will enable the party calling the witness to question that witness substantively first, ensuring that the Trial Chamber is fully aware why that witness is providing testimony before asking its own substantive questions.

F. The proposed revised procedure will allow the Trial Chamber to maintain control over the proceedings

32. The proposed revised procedure will allow the Trial Chamber to maintain control over the proceedings.⁸¹ For example, the Trial Chamber will still have discretion to choose witnesses from the list submitted by the parties.⁸² The Trial Chamber will still open the questioning of the witnesses and can question a witness at any time during the period he or she is providing testimony.⁸³ The Trial Chamber will still determine whether the continued testimony of a witness is conducive to ascertaining the truth.⁸⁴ The Trial Chamber can still order additional investigations.⁸⁵ Although a departure from Rule 80 is necessary if the Trial Chamber adopts the proposed revised procedure, this would show merely that the Rules are, like the ICC’s

⁷⁹ 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. 5-6.

⁸⁰ *Id.*

⁸¹ Rule 85 states in pertinent part: “The President of the Chamber shall preside over the proceedings.”

⁸² Rule 80bis(2) states in pertinent part: “Where the Chamber considers that the hearing of a proposed witness or expert would not be conducive to the good administration of justice, it shall reject the request that such person be summoned.”

⁸³ Rule 91(2) states: “The Judges may ask any questions and the Co-Prosecutors and all the other parties and their lawyers shall also be allowed to ask questions with the permission of the President. Except for questions asked by the Judges, the Co-Prosecutors and the lawyers, all questions shall be asked through the President of the Chamber.”

⁸⁴ Rule 91(3) states: “The Co-Prosecutors and all the other parties and their lawyers may object to the continued hearing of the testimony of any witnesses, if they consider that such testimony is not conducive to ascertaining the truth. In such cases, the President shall decide whether to take the testimony.”

⁸⁵ Rule 93(1) states in pertinent part: “Where the Chamber considers that a new investigation is necessary it may, at any time, order additional investigations.”



and *ad hoc* tribunals' Rules of Procedure and Evidence, a work in progress; rules are fine tuned and adjustments made to fit particular circumstances while remaining faithful to the essential nature of the institution and its constitutive instruments.

IV. REQUEST TO HEAR ISSUES RELATING TO THE PROPOSED REVISED PROCEDURE

33. A hearing is necessary to address the issues relating to the proposed revised procedure in order for the Trial Chamber to hear the views of all the parties and make a clear decision as to how the trial will proceed in Case 002. The trial procedure must be determined as early as possible in order for all parties in Case 002 to prepare effectively for trial. This, in turn, will allow for smoother running of the trial. A clearly articulated trial procedure will avoid problems when the trial commences. These issues will be ripe to be heard at the trial management hearing scheduled sometime between mid-March and mid-April 2011.⁸⁶ All parties will be able to submit their views and the opportunity for an informed debate is available to the Trial Chamber prior to the commencement of trial. However, all issues relating to the Order and Rule 80, or at the very minimum the requested Stay, must be determined prior to the Order's deadline.

V. REQUEST FOR AN EXPEDITED STAY ON THE ORDER

34. A procedural defect exists as the Order – which adheres to Rule 80 – reverses the burden of proof, violates Mr. IENG Sary's right to be presumed innocent, privilege against self-incrimination, and right to equality of arms. The Order requires the Defence to submit its list of proposed witnesses within 30 days. This deadline impacts upon Mr. IENG Sary's fundamental fair trial rights. An expedited Stay is therefore necessary to protect Mr. IENG Sary's fair trial rights. If a Stay is not granted and there are no subsequent changes to the Order, Mr. IENG Sary will lose some, if not all, time to submit an additional witness list. This will deny Mr. IENG Sary adequate facilities to prepare his defence and result in an inequality of arms with the OCP, which would have had the full time allocated to prepare its witness and document lists. A Stay of the Order as applicable to the Defence is necessary until the resolution of this matter.

VI. CONCLUSION

35. The OCP bears the burden of proof pursuant to the Rules. The Trial Chamber should not be placed in a position where, even unwittingly, it becomes the midwife for the OCP in delivering a conviction by discharging that burden on the OCP's behalf. The Trial Chamber is constituted by independent judges who Cambodia and the international community expect will tenaciously guard against violations of universal human rights, including the fair trial rights of the Accused. The Defence respectfully requests the Trial Chamber to conduct the

⁸⁶ Email from Susan Lamb to IENG Sary Defence Team, Communication to the parties on behalf of the Trial Chamber – Ieng Sary Defence Team, 14 January 2011.



trial using the proposed revised procedure and depart from the Order and Rule 80 until the entirety of the case against Mr. IENG Sary has been put by the OCP and Civil Parties.

WHEREFORE, for all the reasons stated herein, the Defence respectfully MOVES for the Trial Chamber to:

- a. CONDUCT the trial in Case 002 by following the proposed revised procedure;
- b. DEPART from the application of Rule 80 to the Defence until the entirety of the case against Mr. IENG Sary has been put by the OCP and Civil Parties;
- c. STAY the Order as applicable to the Defence until the resolution of this matter; and
- d. CONVENE a hearing to address the issues raised in this motion.

Respectfully submitted,


ANG Udom


Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 28th day of January 2011