

**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:** 21 November 2012**CLASSIFICATION****Classification of the document  
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**IENG SARY'S MOTION TO JOIN NUON CHEA'S PRELIMINARY RESPONSE TO  
CO-PROSECUTORS' FURTHER REQUEST TO PUT BEFORE THE CHAMBER  
WRITTEN STATEMENTS AND TRANSCRIPTS**

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**All Defence Teams****All Civil Parties**

IENG Sary, through his Co-Lawyers, (“the Defence”) hereby moves to join all relevant factual and legal arguments contained in the NUON Chea Defence’s Preliminary Response to Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts (“NUON Chea Preliminary Response”). The Defence supports and adopts the NUON Chea Defence submissions on: **a.** the law relating to the admission of written statements under Rule 92 *bis* of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) Rules of Procedure and Evidence;<sup>1</sup> **b.** the law relating to conditions precedent to the admission of evidence pursuant to Rule 92 *bis*;<sup>2</sup> and **c.** the law relating to statements that contain admissible and inadmissible evidence.<sup>3</sup> The Defence incorporates by reference all its previous submissions relevant to applications for the admission of witness statements,<sup>4</sup> and further supplements herein the NUON Chea Defence submissions in the Preliminary Response. In accordance with the Trial Chamber’s direction and set deadline,<sup>5</sup> the Defence will file specific objections to the OCP’s proposed witness statements and transcripts by the deadline.

1. The Trial Chamber provided the legal framework it will use when determining whether written statements or transcripts may be admitted *in lieu* of oral testimony and examination.<sup>6</sup> The Trial Chamber relied heavily on ICTY jurisprudence for its findings, though it *did not* explicitly address the discretion it has (and how it intends to exercise it) to exclude written statements that are otherwise admissible and / or to require the witness to appear in court for examination.<sup>7</sup> The Trial Chamber’s overriding obligation to ensure a fair trial mandates that it exercise such discretion, as recognized in the ICTY

<sup>1</sup> NUON Chea Preliminary Response, paras. 6-13.

<sup>2</sup> *Id.*, para. 14.

<sup>3</sup> *Id.*, paras. 15-16.

<sup>4</sup> See IENG Sary’s Response to the Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing, 22 July 2011 (“Response to OCP Rule 92 Submission”), E96/3; IENG Sary’s Objections to the Admissibility of Certain Categories of Documents, 6 September 2011, E114; Letter from IENG Sary Defence team to Trial Chamber’s Senior Legal Officer titled “Objections to Witness Statements”, 9 July 2012.

<sup>5</sup> Trial Chamber Memorandum titled “Forthcoming document hearings and response to Lead Co-Lawyers’ memorandum concerning the Trial Chamber’s request to identify Civil Party applications for use at trial (E208/4) and KHIEU Samphan Defence request to revise corroborative evidence lists (E223)”, 19 October 2012, E223/2, para. 14: “Pursuant to paragraph 36 of Decision E96/7, and where parties wish to pose objections to any material tendered in accordance with this decision, they may do so by written motion at any stage of proceedings [sic] but in any event no later than Friday 26 April 2013.”

<sup>6</sup> Decision on Co-Prosecutors’ Rule 92 Submission Regarding the Admission of Witness Statements and Other Documents Before the Trial Chamber, 20 June 2012 (“Trial Chamber Decision”), E96/7.

<sup>7</sup> The Trial Chamber made brief reference to discretionary factors in paragraphs 12-13, 17-18 and footnotes 13, 40 and 50 but did not explicitly indicate whether and how it would apply those factors.

jurisprudence.<sup>8</sup> This is especially relevant when considering that the Trial Chamber has opted to adopt and follow (to the extent possible) ICTY modalities for admitting certain evidence such as witness statements or transcripts – with or without affording confrontation by the opposing parties.

2. In addition to the factors enumerated in Rule 92 *bis* (A)(i) in favor of admitting written statements or transcripts, which were adopted by the Trial Chamber in its decision,<sup>9</sup> Rule 92 *bis* (A)(ii) and ICTY jurisprudence define factors that favor *excluding* written statements or transcripts. ICTY Chambers have consistently held that, in addition to the Rule 92 *bis* (A)(ii) factors,<sup>10</sup> a Trial Chamber may consider whether: **a.** the written statement or transcript goes to proof of the acts and conduct of the Accused’s subordinate or of some other person for whose acts and conduct the Accused is charged with responsibility;<sup>11</sup> *and b.* the evidence relates to a “live and important issue between the

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<sup>8</sup> *Prosecutor v. Galić*, IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), 7 June 2002 (“*Galić* Decision on Interlocutory Appeal”), paras. 13-17; *Prosecutor v. S. Milošević*, IT-02-54-T, Decision on Prosecution’s Request to Have Written Statements Admitted Under Rule 92*bis*, 21 March 2002 (“*S. Milošević* March 2002 Decision”), paras. 5, 7; *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence of Forensic Witnesses in lieu of *Viva Voce* Testimony Pursuant to Rule 92*bis*, 11 February 2009 (“*Đorđević* 11 February 2009 Decision”), paras. 6-7; *Prosecutor v. Đorđević*, IT-05-87/1-T, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 16 March 2009, para. 14; *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Prosecution’s Third Motion for Admission of Statements and Transcripts of Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis* (Witnesses for Sarajevo Municipality), 15 October 2009 (“*Karadžić* 2009 Decision”), paras. 7-8, 10; *Prosecutor v. Rasić*, IT-98-32/1-R77.2, Prosecution’s Motion for Admission of Evidence Pursuant to Rule 92*Bis*, 1 July 2011, paras. 11, 15-16; *Prosecutor v. Haradinaj et al.*, IT-04-84*bis*-PT, Decision on Prosecution’s Motion for Admission of Transcripts of Evidence in lieu of *Viva Voce* Testimony Pursuant to 92*bis*, 22 July 2011, paras. 21-22. See IENG Sary Response to OCP Rule 92 Submission, para. 21, regarding the Trial Chamber’s “discretionary rights”; NUON Chea Preliminary Response, para. 10, *citing Galić* Decision on Interlocutory Appeal, paras. 18-20. Although the legal principles articulated by the Nuon Chea Defence are sound, the Defence interprets this *Galić* holding in a different manner. The *Galić* Appeals Chamber stated that it is “preferable” that a Trial Chamber consider discretionary factors when the Prosecution seeks to use Rule 92 *bis* materials in a case involving command responsibility, and that the *Galić* Trial Chamber may not have discussed discretionary factors in its decision because defence counsel did not raise them (*Galić* Decision on Interlocutory Appeal, para. 19). For those reasons, and for reasons relating to other appeal issues, the Appeals Chamber returned the matter to the Trial Chamber (*Id.*, para. 20).

<sup>9</sup> Trial Chamber Decision, para. 24.

<sup>10</sup> Rule 92 *bis* (A)(ii) indicates that factors against admitting written statements include: (a) there is an overriding public interest in the evidence in question being presented orally; (b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or (c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

<sup>11</sup> *Galić* Decision on Interlocutory Appeal, para. 13; *Karadžić* 2009 Decision, para. 8; *Prosecutor v. Lukić & Lukić*, IT-98-32/1-T, Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92 *bis*, 22 August 2008 (“*Lukić* 2008 Decision”), para. 19. See also *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Prosecution Motion for Admission of Milan Tupajić’s Evidence in lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*, 24 May 2012 (“*Karadžić* 2012 Decision”), para. 18.

parties, as opposed to a peripheral or marginally relevant issue”;<sup>12</sup> and / or **c.** the evidence is “pivotal” to the Prosecution’s case;<sup>13</sup> and / or **d.** the acts and conduct of a person over whom the Accused is charged with responsibility are “proximate” to the Accused.<sup>14</sup>

3. Given the Trial Chamber’s adoption of ICTY rules and jurisprudence regarding admitting witness statements and transcripts, “[i]n accordance with the relevant international rules and practice,”<sup>15</sup> the Trial Chamber *should* adopt the ICTY’s jurisprudence regarding when to exclude written statements and practice. It warrants cautioning that ICTY jurisprudence has evolved over the years with incremental changes to the Rules of Procedure and Evidence,<sup>16</sup> as deemed necessary based on the extensive application of the Rules during trial proceedings and the availability of transparent and inclusive modalities for modifying the Rules.<sup>17</sup> Were the Trial Chamber to deviate from ICTY practice, the

<sup>12</sup> See, e.g., *S. Milošević* March 2002 Decision, paras. 24-25; *Đorđević* 11 February 2009 Decision, para. 7; *Karadžić* 2009 Decision, para. 8; *Lukić* 2008 Decision, para. 20.

<sup>13</sup> *Galić* Decision on Interlocutory Appeal, paras. 13, 16; *Đorđević* 11 February 2009 Decision, para. 6; *Karadžić* 2009 Decision, para. 8; *Lukić* 2008 Decision, para. 19; *Prosecutor v. Martić*, IT-95-11-T, Decision on Prosecution’s Motions for Admission of Transcripts Pursuant to Rule 92 *bis* (D) and of Expert Reports Pursuant to Rule 94 *bis*, 13 January 2006 (“*Martić* Decision”), para. 18.

<sup>14</sup> *Galić* Decision on Interlocutory Appeal, para. 13; *Đorđević* 11 February 2009 Decision, para. 6; *Karadžić* 2009 Decision, para. 10; *Lukić* 2008 Decision, para. 19; *Martić* Decision, para. 18.

<sup>15</sup> Trial Chamber Decision, para. 24.

<sup>16</sup> The ICTY Rules of Procedure and Evidence have been amended 47 times since their adoption in February 1994. See ICTY website, available at <http://www.icty.org/sections/LegalLibrary/RulesofProcedureandEvidence> (last accessed 16 November 2012). Proceedings have concluded for 126 Accused at the ICTY (this number includes convictions, acquittals and transfers to national jurisdictions). 9 cases are currently in the middle of trial or awaiting judgement, and 6 cases are currently before the Appeals Chamber. See ICTY Key Figures, available at <http://www.icty.org/sections/TheCases/KeyFigures> (last accessed 16 November 2012).

<sup>17</sup> At the ICTY, Rule 6 governs amendments of the Rules of Procedure and Evidence, in conjunction with the Practice Direction on Procedure for the Proposal, Consideration of and Publication of Amendments to the Rules of Procedure and Evidence of the International Tribunals (issued on 24 January 2002) (“Practice Direction”), available at [http://www.icty.org/x/file/Legal%20Library/Practice\\_Directions/it143\\_amendmentstorules\\_procedure\\_rev2\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Practice_Directions/it143_amendmentstorules_procedure_rev2_en.pdf) (last accessed 16 November 2012). Per the Practice Direction, a Rules Committee composed of a minimum of three permanent Judges and non-voting representatives from the Registry, Office of the Prosecutor and Defence considers all proposals for rule amendments (Practice Direction, paras. 1-2). The Rules Committee then submits a report on the proposals, including the Committee’s recommendations, to the Plenary for action or to the permanent Judges for adoption (*Id.*, para. 1(a)). The procedure for Rules amendments at the ICTY, therefore, enables the Defence to consider and provide reasoned commentary on proposed rule amendments and to be heard by the Rules Committee. In contrast, at the ECCC, the Defence does not participate in Rule amendment proceedings, apart from proposing amendments. The Rules and Procedure Committee (“RPC”), composed of five national Judges and four international Judges, receives and considers requests for Rule amendments and drafts proposals for discussion at the Plenary Session (ECCC Internal Rules (“Rules”), Rule 20(1)-(2)). The RPC forwards its proposals to the Plenary Session for adoption (Rule 3(1), (2)). Although the Plenary Session includes the Head of the Defence Support Section (Rule 18(1)), there is no prior opportunity to comment on proposed amendments. The Defence has previously proposed rule amendments to the RPC and in September 2012 was asked to make a presentation to the RPC on its proposed amendment regarding interlocutory appeals. On the day of the meeting, however, the offer was rescinded. The Defence nevertheless sent a letter to the RPC regarding its proposed amendment and attaching the rules on interlocutory appeals from other international and internationalized tribunals. See Letter from IENG Sary Defence to RPC and Plenary Secretariat titled “Supplement to Proposed Rule Amendment of Rule 104 concerning Interlocutory Appeals”, 12 September 2012.

Defence submits the Trial Chamber would need to provide cogent reasoning for selectively abandoning the safety measures put in place by the ICTY to ensure the fair trial rights of the Accused.

4. Unlike the ICTY, the ECCC is an inquisitorial system based on Civil Law.<sup>18</sup> The circumstances in which the witness statements are gathered at the ECCC are different from those at the ICTY.<sup>19</sup> In particular, ICTY judges are not involved (directly or through their agents) in investigations. At the ECCC, in contrast, upon receipt of the OCP's Introductory Submission,<sup>20</sup> the Office of the Co-Investigating Judges ("OCIJ") and its investigators exclusively conduct investigations and interview witnesses,<sup>21</sup> with the Defence being specifically instructed not to do so<sup>22</sup> – thus denying the Defence the opportunity to qualitatively ascertain deficiencies in the investigative process and enhance the Case File with balanced and exculpatory evidence, including witness statements.<sup>23</sup>
5. The OCIJ investigators prepare summaries of their interviews with witnesses, which are then placed on the Case File for use by the Trial Chamber and parties at trial. As the

<sup>18</sup> See *Case of Kaing Guek Eav "alias" Duch*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, paras. 494-95.

<sup>19</sup> At the ICTY, the Office of the Prosecutor conducts its own investigations, including obtaining witness statements, to determine whether there are sufficient grounds to prosecute and whether an Indictment should be filed. Once the Indictment is filed, the case is transferred to the Trial Chamber for pre-trial and trial proceedings. There is no intervening investigation by judges. See ICTY Rules of Procedure and Evidence, Rules 39, 47, 62, 65 *ter*.

<sup>20</sup> The OCP conducts a preliminary investigation and opens a judicial investigation into alleged offenses by submitting an Introductory Submission to the Office of the Co-Investigating Judges. Rules 50, 53.

<sup>21</sup> Rule 55.

<sup>22</sup> See Order Issuing Warnings Under Rule 38, 25 February 2010, D367, paras. 8-9: "It is apparent to the Co-Investigating Judges that the Defence for IENG Sary seeks to base their investigation communication on their repudiation of the civil law process wherein the judicial investigation is conducted solely by the investigating judge.... The 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"; Letter from the OCIJ to the NUON Chea Defence re: Response to your letter dated 20 December 2007 concerning the conduct of the judicial investigation, 10 January 2008, A110/I, p. 2.

<sup>23</sup> In contrast, the ICTY, as a party-driven system, affords the Defence the ability to conduct its own investigations and obtain evidence, including witness statements. At the ICTY, as the Prosecution has the burden of proof, it presents its case first, followed by the Defence. See ICTY Rule 85(A); 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 January 2011, para. 18. The Prosecution chooses who to investigate, who to indict, the evidence it wishes to gather, the manner in which it collects the evidence, the witnesses it wishes to speak to, the charges it wishes to include in the indictment, and the evidence it wishes to present at trial. See Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. L. & POL'Y 87, 99-101 (2001). The Defence is similarly independent in conducting its own investigation, determining which witnesses to speak to, what evidence to gather, and which witnesses and evidence to present at trial. See John R.W.D. Jones, *The Gamekeeper-Turned-Poacher's Tale*, 2(2) J. INT'L CRIM. JUST. 486 (2004).

Defence has repeatedly demonstrated, several written summaries of statements by witnesses who subsequently testified at trial indicate irregularities, either in regard to the recording of the interviews or the manner in which the interviews were conducted.<sup>24</sup> The Defence has so far identified 12 other instances, relating to witnesses who have not yet appeared in court, in which OCIJ investigators conducted unrecorded interviews prior to taking recorded statements.<sup>25</sup> This, it would appear, is only the tip of the iceberg.<sup>26</sup>

6. Given the concerns about the reliability and utility of many of the OCIJ written summaries of interviews, the Trial Chamber should direct the OCP to notify it and the parties of the portions of the proposed witness statements and transcripts that it believes are admissible and should not be excluded. The OCP has proposed admitting at least 1400 witness statements and transcripts *in lieu* of oral testimony.<sup>27</sup> As the proponent of these materials, the onus is on the OCP to indicate which portions of the witness statements and transcripts it believes to be admissible. As the Trial Chamber has adopted ICTY jurisprudence with regard to the standards for admitting witness statements *in lieu* of oral testimony,<sup>28</sup> it should also adopt ICTY jurisprudence regarding the obligations of the OCP in this regard.<sup>29</sup>

<sup>24</sup> For example, several witnesses confirmed in court that they had met with OCIJ investigators in unrecorded settings prior to giving recorded statements. Transcript, 14 June 2012, E1/87.1, p. 46-48; Transcript, 25 July 2012, E1/96.1, p. 70-72; Transcript, 1 August 2012, E1/100.1, p. 3-14; Transcript, 6 September 2012, E1/123.1, p. 45-46. See also IENG Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Existence of Any Record Relating to the Questioning of Witness Oeun Tan on 8 October 2008, 29 August 2012, E224; IENG Sary's Request to Hear Evidence from the Interpreter Concerning Witness Phy Phuon's Second OCIJ Interview Whereby Irregularities Occurred Amounting to Subterfuge, 23 August 2012, E221; IENG Sary's Request that the Trial Chamber Seek Clarification from the OCIJ as to the Questioning of Witness Norng Sophang on 17 February 2009 and Summon the OCIJ Investigators to Give Evidence Regarding This Interview, 27 September 2012, E234.

<sup>25</sup> See IENG Sary's Request for the Trial Chamber to Hold a Public Hearing and Take Evidence Concerning the OCIJ's Widespread and Systematic Practice of Conducting Unrecorded Interviews with Witnesses, 2 November 2012, E241, paras. 2-3.

<sup>26</sup> The "tip of the iceberg" is an expression referring to the fact that the majority of an iceberg is below the surface of the water. In other words, the irregularities in the statements the Defence has identified thus far are only what we have been able to easily observe. The rest of the irregularities are hidden amongst the cascade of statements – at least 1400, not all of which are accompanied by audio recordings – which the OCP proposes to have admitted at face value and with no right of confrontation by the Defence.

<sup>27</sup> Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 1 of the Population Movement, 15 June 2012, E208; Co-Prosecutors' Request to Admit Witness Statements Relevant to Phase 2 of the Population Movement and Other Evidentiary Issues with confidential Annexes 1, II, III and Public Annex IV, 5 July 2012, E208/2; Co-Prosecutors' Further Request to Put Before the Chamber Written Statements and Transcripts with Confidential Annexes 1 to 16, 27 July 2012, E96/8.



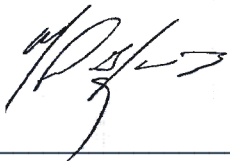
<sup>28</sup> Trial Chamber Decision, paras. 20-33.

<sup>29</sup> *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Admission of Evidence Pursuant to Rule 92 bis (A) of the Rules (Brix-Andersen), 23 January 2008, para. 15. See also *Karadžić* 2012 Decision, para. 8 (in which the OTP redacted portions of the witness's prior testimony relating to acts and conduct of the Accused, as well as acts and conduct of organs or groups that could arguably encompass acts and conduct of the Accused, "out of an

**WHEREFORE**, for all the reasons stated herein, the Defence respectfully:

- A. JOINS NUON Chea’s Preliminary Response to Co-Prosecutors’ Further Request to Put Before the Chamber Written Statements and Transcripts;
- B. REQUESTS the Trial Chamber to exercise its discretion when determining whether to admit written statements or transcripts that are otherwise admissible and / or whether to require the witness to appear in court for examination; and
- C. REQUESTS the Trial Chamber to direct the OCP to notify it and the parties of the portions of its proposed written statements and transcripts that it believes to be admissible.

Respectfully submitted,

 _____ ANG Udom		 _____ Michael G. KARNAVAS
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Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **21<sup>st</sup>** day of **November, 2012**

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abundance of caution and in order to ensure compliance with Rule 92 *bis*’); *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Admission of Statements of Deceased Witnesses, 19 January 2005, para. 18.