

**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:** 16 November 2011**CLASSIFICATION****Classification of the document  
suggested by the filing party:** PUBLIC**Classification by OCIJ  
or Chamber:** សាធារណៈ/Public**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**


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**IENG SARY'S REQUEST FOR IMMEDIATE RESOLUTION OF AND REASONED  
DECISIONS ON OUTSTANDING ISSUES PRIOR TO THE COMMENCEMENT OF  
TRIAL**

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

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests immediate resolution of outstanding issues prior to the commencement of trial. These unresolved issues should, *if not must*, be decided upon with appropriate cogent reasoning prior to the opening of the substantive proceedings. These issues have been set out herein and are encompassed by the following categories: **a.** jurisdiction and applicable law; **b.** framework for the trials; **c.** admission of evidence; **d.** witness testimony; and **e.** other unresolved issues.

## I. Introduction

1. The Defence is sometimes accused of employing delay tactics or of obstructing the efficient conduct of the proceedings.<sup>1</sup> In actual fact, the Defence welcomes a speedy trial and has timely and consistently sought the prompt resolution of such fundamental matters as whether the ECCC has jurisdiction over Mr. IENG Sary and what law is applicable to try him.<sup>2</sup> The Defence has repeatedly raised actual trial management issues and other administrative matters to the Trial Chamber in a timely manner and has even made several suggestions aimed at resolving these matters expeditiously.<sup>3</sup> At all times, the

<sup>1</sup> See, e.g., Report from conference held in Phnom Penh 2-3 March 2005 organized by FIDH, LICADHO and ADHOC, *International Criminal Court Programme: Articulation between the International Criminal Court and the Khmer Rouge Tribunal: the Place of Victims*, 3. B. David Boyle, The Legal Framework of the Khmer Rouge Tribunal, p. 18, available at <http://www.vrwg.org/Publications/02/FIDHcambodge420ang.pdf>. “All these questions will be raised by the defense, and should be dealt with beforehand in order to avoid that talented lawyers will slow trials down so much that three years will not be enough to finish.” See also Letter from US Representative Edward R. Royce to US Secretary of State Hillary Rodham Clinton regarding the ECCC, 29 June 2011. “The four defendants, now between the ages of 79 and 85, have each denied responsibility for charges of genocide, war crimes and crimes against humanity. They have also asserted other legal defences to their prosecution, by blaming others for the violence, raising prior assurances of amnesty, and even demanding that the tribunal consider facts outside of its temporal jurisdiction (which is limited to the years of the Khmer Rouge’s reign). While these arguments should not have much traction in light of the ECCC’s mandate and procedural rules, not to mention the evidence against the accused, I am concerned they will prolong an already protracted attempt to bring these regime leaders to justice.”

<sup>2</sup> The Trial Chamber became seized of Case 002 on 14 January 2011. See Order to File Materials in Preparation for Trial, 17 January 2011, E9. These issues were first raised before the Trial Chamber in February 2011. See Summary of IENG Sary’s Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4 (“Summary of IENG Sary’s Rule 89 Preliminary Objections”). They were raised again in April 2011, through IENG Sary’s Indication of Legal Issues He Intends to Raise at the Initial Hearing, 13 April 2011, E9/23, and were more recently the subject of letters to the Trial Chamber Senior Legal Office, including Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Issues which Impede the Efficiency of the Early Portion of the Substantive Hearing”, 1 November 2011, and Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Request for Information Concerning Outstanding Preliminary Objections,” 4 November 2011.

<sup>3</sup> See, e.g., Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Scheduling of the Substantive Trial,” 17 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Request for Clarification of Trial Chamber Memorandum entitled ‘Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5’”, 21 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Issues which Impede the Efficiency of the Early Portion of the Substantive Hearing”, 1 November 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Request for Clarification Concerning Objections to OCP and Civil Party Document Lists,” 3 November 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Notice Concerning Ieng Sary’s

Defence has acted in good faith to advance the proceedings as expeditiously, efficiently, and transparently as possible.

2. The Trial Chamber has expressed a desire to commence the substantive proceedings in 2011,<sup>4</sup> no doubt under pressure from the ECCC's donors. Despite this desire, the Trial Chamber does not appear to be in a position to effectively commence the proceedings at this time, particularly if the Trial Chamber continues to view itself as a "model court," where the fundamental rights of the Accused are respected, while also ensuring fair and just proceedings for all concerned.
3. In its rush to commence the trial proceedings, the Trial Chamber has left several legal and procedural issues either unresolved or unclear, even though it is apparent – by all accounts – that the Trial Chamber has had ample time to consider and render reasoned decisions. Commencing trial without resolving these issues will – to say the least – result in proceedings that are disorganized, inefficient, and, most troubling, unfair.
4. The Defence, and indeed most of the parties, have repeatedly requested trial management meetings,<sup>5</sup> but these requests have thus far gone unheeded. Many, if not all of the issues below have been raised repeatedly in letters to the Trial Chamber Senior Legal Officer,<sup>6</sup>

Objections to OCP and Civil Party Documents for the Initial Three Weeks of Trial," 4 November 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Request for Information Concerning Outstanding Preliminary Objections," 4 November 2011.

<sup>4</sup> See Decision on Co-Prosecutors' Request for Reconsideration of the Terms of the Trial Chamber's Severance Order, 18 October 2011, E124/7, paras. 6, 12.

<sup>5</sup> See Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Scheduling of the Substantive Trial," 17 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Request for Clarification of Trial Chamber Memorandum Entitled 'Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5'", 21 October 2011; Co-Prosecutors' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002, 21 October 2011, E132; IENG Sary's Support for the Co-Prosecutors' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002, 24 October 2011, E132/1; Civil Parties Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002 and for Clarification on Trial Scheduling and Preparation, 28 October 2011, E132/2; [NUON Chea's] Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, 14 November 2011, E131/1/9.

<sup>6</sup> See Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Scheduling of the Substantive Trial," 17 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Request for Clarification of Trial Chamber Memorandum entitled 'Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5'", 21 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Issues which Impede the Efficiency of the Early Portion of the Substantive Hearing", 1 November 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Request for Clarification Concerning Objections to OCP and Civil Party Document Lists," 3 November 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Notice Concerning Ieng Sary's Objections to OCP and Civil Party Documents for the Initial Three Weeks of Trial," 4 November 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled "Request for Information Concerning Outstanding Preliminary Objections," 4 November 2011.



as the Trial Chamber has requested.<sup>7</sup> It has become clear that these informal letters – which contribute to the lack of transparency for which this Court is so often criticized<sup>8</sup> – have had no impact. Perhaps this formal Request will have a positive effect.

## II. Request

5. The Defence submits that the following issues must be resolved fully prior to the commencement of the substantive trial. A small number these issues may not directly relate to the first “smaller trial” or “discrete case.”<sup>9</sup> However, because the scope of this first trial is unclear and may be expanded at any time,<sup>10</sup> all of the issues below merit immediate resolution. Any issues raised as preliminary objections which the Trial Chamber may consider not to be jurisdictional should nonetheless be determined by the

<sup>7</sup> See Transcript, 5 April 2011, p. 10: “the parties are encouraged, where possible, to raise concerns or request information informally from the Trial Chamber Senior Legal Officer. This channel should be utilised to the extent possible and appropriate as an alternative to filing motions which do no more than seek information or raise questions.” See also Email from Trial Chamber Senior Legal Officer Susan Lamb to the Parties, Communication to parties in Case 002 regarding scheduling of opening statements and the hearing of the substance in Case 002, and information in advance of hearing on 19-20 October 2011, 17 October 2011 (“Scheduling Email”): “The parties are encouraged to raise any remaining legal issues that they consider may impeded the efficiency of the early portion of the hearing of the substance informally with the Trial Chamber Senior Legal Officer...”; Email from the Trial Chamber Senior Legal Officer to the OCP, 18 October 2011: “You are also requested to remove the judges’ names from future correspondence of this sort, which is in clear breach of earlier directions given to the parties.”

<sup>8</sup> See, e.g., Recommendations Regarding Additional Transparency at the Extraordinary Chambers of the Courts of Cambodia (ECCC) Submitted by members of Civil Society and Members of the Cambodian Press 24 March 2008, available at <http://www.cambodiatribunal.org/CTM/Recommendations%20Regarding%20Additional%20Transparency.pdf?phpMyAdmin=8319ad34ce0db941ff04d8c788f6365e>: “The ECCC is designed to be a model for the Cambodian legal and judicial reform; therefore, the ECCC should not be a model for unnecessary limitation on free expression and access to information.” See also Holly Telerant & Pen Rany, *Must Justice be Seen to be Done? Public Scrutiny and Participation in the KRT*, VOICE OF JUSTICE RESEARCH BULLETIN, Year 14, Issue 136, March-April 2007, p. 15-18: “The KRT was established for the Cambodians for a variety of well-considered reasons. Not only was it established to bring the perpetrators to justice, but also so that justice could be seen to be done. It was established to set the historical record straight, to stimulate a national discussion, and to begin a long-overdue process of national reconciliation. It is difficult to achieve these goals if the important pre-trial process is conducted completely in private”; Long Panhavuth, *More Transparency Needed at Khmer Rouge Tribunal*, Cambodian Journalism Review, 18 April 2008, available at <http://cjenglish.wordpress.com/2008/04/18/more-transparency-needed-at-eccc/>: “The public is frustrated with the amount of information that the court discloses about its work. The current practice of secrecy about many aspects of the operations of the ECCC hinders public engagement and diminishes the credibility of its processes. The court needs to amplify transparency and reinforce engagement and dialogue with NGOs and media organizations”; *Joint Statement of NGOs: Concern about the Restrictions on Transparency Resulting from the Co-Investigating Judges Order on Breach of Confidentiality*, 6 March 2009, D138/1/1.9: “Transparency is an essential condition of all public institutions, including courts, as a foundation for public confidence, and a bulwark against corruption and improper political influence. Secrecy and confidentiality in portions of court proceedings are necessary... However, policies about secrecy must be balanced against a high value in transparency of public institutions generally and the unique goals and circumstances of the ECCC.”

<sup>9</sup> In the Severance Order, the Trial Chamber notified the parties that it will defer decisions on: portions of IENG Sary’s Motion to Strike Portions of the Indictment due to Defects, 24 February 2011, E58; IENG Sary’s Motion to the Trial Chamber to Conduct Site Visits, 31 August 2011, E113; and the Co-Prosecutors’ Request for the Trial Chamber to Recharacterize the Facts Establishing the Conduct of Rape as a Crime Against Humanity of Other Inhumane Acts, 16 June 2011, E99, as it considers that none of these requests relates to the first trial.

<sup>10</sup> See Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124, para. 6.

Trial Chamber prior to the commencement of trial through the Trial Chamber's inherent power to determine the contours of the applicable law.<sup>11</sup>

**A. Final determination as to the ECCC's jurisdiction and the applicable law**

6. A final determination as to the ECCC's jurisdiction over Mr. IENG Sary due to his Royal Pardon and Amnesty and the principle of *ne bis in idem* has not yet been made. Mr. IENG Sary should not be subjected to trial if it is ultimately determined by the Supreme Court Chamber that the ECCC does not have jurisdiction over him. In order to ensure that Mr. IENG Sary's rights are not violated, the Defence has requested the Trial Chamber to stay the proceedings until the matter is fully resolved, since this is a dispositive issue of law.<sup>12</sup> It would be fundamentally unfair to try Mr. IENG Sary if his Royal amnesty or the principle of *ne bis in idem* bar his prosecution. The Trial Chamber has not yet decided on the stay, despite the fact that opening statements are scheduled to begin next week.
7. A final determination has not yet been made as to whether a nexus with international armed conflict is an element of crimes against humanity at the ECCC. If this determination is not made by the Supreme Court Chamber prior to the commencement of trial, the parties will not know whether they must adduce evidence relating to a nexus between acts charged as crimes against humanity and international armed conflict during the first phase of the trial. In order to protect Mr. IENG Sary's rights, the Defence has requested the Trial Chamber to stay the proceedings until the matter has been finally resolved.<sup>13</sup> This Request was necessary to ensure that any witness called between now and the full resolution of the issue of the nexus requirement can testify on whether an armed conflict existed during the temporal jurisdiction of the Closing Order and whether acts charged as crimes against humanity were sufficiently connected with any such armed conflict. This will ensure that should the Supreme Court Chamber overrule the Trial Chamber and decide in favor of the Pre-Trial Chamber's holding on this matter, there will be no need to recall these witnesses for this discrete issue. The Trial Chamber has not yet

<sup>11</sup> See, e.g., Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, E100/6, paras. 24-25.

<sup>12</sup> IENG Sary's Request to Stay the Commencement of the Trial Proceedings until the Final Determination of IENG Sary's Preliminary Objections Regarding the Royal Pardon and Amnesty and *Ne Bis in Idem*, 4 November 2011, E135.

<sup>13</sup> IENG Sary's Request for a Stay of Execution of the "Decision on Co-Prosecutors' Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity", 2 November 2011, E134.

decided on the stay, despite the fact that opening statements are scheduled to begin next week.

8. A final determination has not yet been made as to whether the ECCC may apply international crimes and forms of liability despite the fact that they did not exist in applicable Cambodian law in 1975-79.<sup>14</sup> If the ECCC may not apply international crimes and forms of liability, it will have no jurisdiction to try Mr. IENG Sary, since the national crimes with which Mr. IENG Sary was charged have been found invalid.<sup>15</sup>
9. A final determination has not yet been made as to whether the ECCC has jurisdiction to apply command responsibility and, if it does, as to what the contours of this form of liability are.<sup>16</sup> If the ECCC may apply command responsibility, it is unknown whether:
  - a. it may only be applied in situations involving international armed conflicts;
  - b. it may only be applied to military superiors;
  - c. it may only apply where there was a causal relationship between the superior's actions and the crimes of his subordinates and where the crimes concerned activities that the superior had a preexisting legal duty to prevent or punish; or
  - d. it may be applied to specific intent crimes.
10. If the ECCC may apply crimes against humanity despite the fact that they did not exist in applicable Cambodian law in 1975-79, a final determination has not yet been made as to:
  - a. whether a State or organizational policy is an applicable chapeau element of crimes against humanity: **1.** due to its existence under customary international law in 1975-79; and/or **2.** pursuant to the principle of *lex mitior*.
  - b. whether the principle of legality attaches to the entire category of "other inhumane acts" but not to each sub-category thereof;
  - c. whether the *nullum crimen sine lege scripta* principle is protected by the application of "other inhumane acts";

<sup>14</sup> See Summary of IENG Sary's Rule 89 Preliminary Objections, para. 24.

<sup>15</sup> Decision on Defence Preliminary Objections (Statute of Limitations on Domestic Crimes), E122, 22 September 2011.

<sup>16</sup> See Summary of IENG Sary's Rule 89 Preliminary Objections, para. 26.



- d. whether “forced transfer” was an “other inhumane act” constituting a crime against humanity under customary international law in 1975-79 (if “other inhumane acts” are applicable, and the principle of legality attaches to each sub-category thereof);
- e. whether “enforced disappearances” was an “other inhumane act” constituting a crime against humanity under customary international law in 1975-79 (if “other inhumane acts” are applicable, and the principle of legality attaches to each sub-category thereof);
- f. what are the applicable constitutive elements and definitions of the crimes against humanity of murder, extermination, persecution on political and racial grounds, and (if applicable) “other inhumane acts,” including attacks on human dignity, forced transfer and enforced disappearances;
- g. whether the discriminatory nature of an “attack” is to be assessed from the subjective perspective of the Accused, or on an objective basis;
- h. whether specific intent as an element of persecution is to be assessed from the subjective perspective of the Accused, or on an objective basis;
- i. whether when the definition of crimes against humanity under today’s customary international law and under the ICC Statute is more favorable to the Accused than under the customary international law of 1975-79 then, pursuant to the principle of *lex mitior*, the contemporary or ICC definition must be applied;
- j. whether the authorities relied on in the Closing Order’s definition of crimes against humanity violate the ban on analogy in both Civil Law and in international criminal law;
- k. whether the: **1.** obligation to live in cooperatives leading to the expropriation of all property; **2.** abolition of the private sphere; **3.** replacement of economic, administrative and political institutions by a revolutionary power structure; and **4.** abandonment of basic principles governing criminal justice in favor of a highly centralized system of political control, can be characterized as facts

which are probative of the existence of an “attack” under the applicable definition of crimes against humanity;

- l. whether military and security personnel, including those *hors de combat*, may be characterized a “civilian population”;
- m. whether acts of violence in which soldiers (including those *hors de combat*) were the primary object of an attack would constitute evidence of an “attack” as a chapeau element of crimes against humanity at the ECCC;
- n. whether in 1975-79, customary international law included a discriminatory intent requirement in the definition of crimes against humanity;
- o. what are the applicable constitutive elements and definitions of the crimes against humanity of enslavement, torture (if applicable), rape (if applicable), and forced marriage (if applicable);
- p. whether “imprisonment” was an underlying act constituting a crime against humanity under customary international law in 1975-79;
- q. whether “torture” was an underlying act constituting a crime against humanity under customary international law in 1975-79;
- r. whether “rape” was an underlying act constituting a crime against humanity under customary international law in 1975-79;
- s. whether “forced marriage” was an “other inhumane act” constituting a crime against humanity under customary international law in 1975-79 (if “other inhumane acts” are applicable, and the principle of legality attaches to each sub-category thereof);
- t. whether “sexual violence” was an “other inhumane act” constituting a crime against humanity under customary international law in 1975-79 (if “other inhumane acts” are applicable, and the principle of legality attaches to each sub-category thereof);



- u. if “forced transfer” is applicable, whether grounds permitted by international law are the sole justification for an evacuation determines legality under international humanitarian law; and
- v. if “forced transfer” is applicable, whether prevention of food shortages and ensuring access to medical care are grounds permitted for an evacuation under international humanitarian law.<sup>17</sup>

11. A final determination has not yet been made as to whether the ECCC has jurisdiction to apply Grave Breaches of the Geneva Conventions against Mr. IENG Sary.<sup>18</sup>
12. A final determination has not yet been made as to whether certain portions of the Indictment will be struck due to procedural defect.<sup>19</sup>

#### **B. Framework for the trials**

13. The parties have not yet been informed how many “discrete cases,”<sup>20</sup> or “smaller trials”<sup>21</sup> will be held and what each one will encompass.
14. The parties have not yet been informed how many and which specific “trial segments” will make up each “discrete case” or “smaller trial.”
15. The parties have not yet been informed how these “discrete cases” or “smaller trials” will relate to each other. *Specifically:*
- a. The Trial Chamber has previously stated that it will endeavor to hear each witness only once,<sup>22</sup> although it has later stated that “[w]here necessary, recall of witnesses to examine in detail areas covered in later trials will be permitted

<sup>17</sup> See Summary of IENG Sary’s Rule 89 Preliminary Objections, para. 27.

<sup>18</sup> See *id.*, para. 25.

<sup>19</sup> See IENG Sary’s Motion to Strike Portions of the Indictment due to Defects, 24 February 2011, E58. The portion of this Motion relating to National Crimes has already been addressed by the Trial Chamber, but the Request remains outstanding in relation to genocide, crimes against humanity, command responsibility, joint criminal enterprise, and planning, instigating, aiding and abetting, and ordering.

<sup>20</sup> Severance Order Pursuant to Internal Rule 89ter, 22 September 2011, E124, para. 2.

<sup>21</sup> Scheduling Email, p. 1.

<sup>22</sup> At the Trial Management Meeting, Presiding Judge Nil Nonn stated, “The Chamber can already indicate that as a general rule, it will endeavour to hear witnesses once only on all topics to which a particular witness can testify, rather than re-calling the same witnesses multiple times.” Trial Transcript, E1/2.1, 5 April 2011, p. 53.

by the Chamber.”<sup>23</sup> Hearing a witness in only one “discrete case” or “smaller trial” seems to conflict with the Trial Chamber’s previously stated position that it will not take judicial notice of adjudicated facts, since “there is no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts or for facts of common knowledge to be applied before the ECCC.”<sup>24</sup>

- b. How will the first trial “provide a general foundation for all the charges, including those which will be examined in later trials”<sup>25</sup> if the Trial Chamber will not, because it cannot, take judicial notice of adjudicated facts? There is also added question of the appeal process: how can findings of fact and conclusions of law from the first trial be used in the second trial while they are being subject to appellate review?

16. The parties have not yet been sufficiently informed due to the lack of clarity in the Severance Order as to whether the Trial Chamber will consider the policies of Democratic Kampuchea on all of the issues raised in the Indictment, or only the issues related to the first trial.<sup>26</sup>
17. The parties have not yet been informed as to how often trial sessions will be held and for how many hours per session.
18. The parties have not yet been informed as to whether regular periods will be set aside for trial management meetings or for raising objections to documents, as most of the parties have requested.<sup>27</sup>

<sup>23</sup> Memorandum – Trial Chamber, Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E109/5, 18 October 2011, Confidential Annex B.

<sup>24</sup> Decision on Ieng Sary’s Motions Regarding Judicial Notice of Adjudicated Facts from Case 001 and Facts of Common Knowledge Being Applied in Case 002, E69/1, 4 April 2011, p. 3. “CONSIDERING FURTHER that, as the Defense itself emphasised in both applications, there is no legal basis in the Law on the Establishment of the ECCC or in the Internal Rules for the Chamber to take judicial notice of adjudicated facts or for facts of common knowledge to be applied before the ECCC.”

<sup>25</sup> Scheduling Email, p. 1.

<sup>26</sup> See Co-Prosecutors’ Request for Clarification of the Scope of the First Trial, 4 November 2011, E124/9. While the Defence concurs with the OCP that numerous questions surrounding the parameters of the Severance Order remain unclear, the Defence considers this Request an abuse of process, since it appears to be a second reconsideration of the Severance Order. See IENG Sary’s Response to the Co-Prosecutors’ Request for Clarification of the Scope of the First Trial, forthcoming.

<sup>27</sup> See Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Scheduling of the Substantive Trial,” 17 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Request for Clarification of Trial Chamber Memorandum Entitled ‘Witness Lists for Early

### C. Admission of evidence

19. The parties have not yet been informed as to whether witness statements will be admitted into evidence if the witnesses who gave the statements are not called to testify.<sup>28</sup>
20. The parties have not yet been informed as to whether witness statements from Cases 003 and 004 which relate to Case 002 witnesses will be disclosed to the parties in Case 002.<sup>29</sup>
21. The Trial Chamber has not yet clarified how the parties may tender documents.<sup>30</sup>
22. The Trial Chamber has not yet clarified how the parties should deal with document objections in the situation where the OCP and Civil Parties have included an unreasonably large number of documents on their lists of documents to be tendered in the first trial segment.
23. The Trial Chamber has not yet decided whether the Defence will be granted access to strictly confidential documents.<sup>31</sup>

### D. Witness testimony

24. The Trial Chamber has not yet issued a decision concerning the parties' objections to witnesses, Civil Parties and experts.
25. The Trial Chamber has only informed the parties of the Civil Parties and witnesses it intends to call during the first three weeks of trial, but has given the parties no indication

Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5", 21 October 2011; Co-Prosecutors' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002, 21 October 2011, E132; IENG Sary's Support for the Co-Prosecutors' Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002, 24 October 2011, E132/1; Civil Parties Request for a Trial Management Meeting and Regular Trial Status Meetings for Case 002 and for Clarification on Trial Scheduling and Preparation, 28 October 2011, E132/2; [NUON Chea's] Objections, Observations, and Notifications Regarding Various Documents to be Put Before the Trial Chamber, 14 November 2011, E131/1/9.

<sup>28</sup> See, e.g., Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber, 15 June 2011, E96; IENG Sary's Response to Co-Prosecutors' Rule 92 Submission Regarding the Admission of Written Witness Statements Before the Trial Chamber & Request for a Public Hearing, 22 July 2011, E96/3.

<sup>29</sup> See International Co-Prosecutor's Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A, 6 October 2011, E127; IENG Sary's Response to International Co-Prosecutor's Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A, 14 October 2011, E127/1; IENG Thirith Defence Response to International Co-Prosecutor's Disclosure to Trial Chamber Regarding Interviews of Case 002 Witnesses in Cases 003 and 004 with Strictly Confidential Annex A, 17 October 2011, E127/3.

<sup>30</sup> See Co-Prosecutors' Request to Establish an Efficient System for Admitting Documentary Evidence at Trial, 3 November 2011 (notified 14 November 2011, E136. See also IENG Sary's Response to the Co-Prosecutors' Request to Establish an Efficient System for Admitting Documentary Evidence at Trial, forthcoming.

<sup>31</sup> See IENG Sary's Request for Access to the Strictly Confidential Documents on the Case File, 14 September 2011, E118.

- as to when they will be informed of the next witnesses who will be called and the order in which they will be called.<sup>32</sup>
26. The parties have not yet been informed as to how much time will be allocated to the questioning of each Accused.
27. The parties have not yet been informed as to how this time will be divided among the parties.
28. The parties have not yet been informed as the order in which the parties will question each Accused.
29. The parties have not yet been informed as to whether the Trial Chamber will take the same approach to questioning the Accused in Case 002 as it did in Case 001.<sup>33</sup>
30. The parties have not yet been informed as to whether an Accused will be called multiple times within each “small trial.”
31. If the Accused will be questioned more than once, the parties have not yet been informed as to which topics the Accused will be questioned on initially.
32. The parties have not yet been informed as to whether a witness in the first trial will be called again to testify at later trials, or whether each witness will appear only once to provide testimony on all topics/segments (for all trials) on which he or she is competent to testify.
33. The parties have not yet been informed as to the order in which the witnesses and Civil Parties for the first trial segment will testify.<sup>34</sup>

<sup>32</sup> The Defence has suggested that the Trial Chamber inform the parties one month in advance of the Civil Parties and witnesses it intends to call in the following month, in order to give the parties sufficient time to prepare. *See* Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Scheduling of the Substantive Trial,” 17 October 2011; Letter from Ieng Sary Defence Team to Trial Chamber Senior Legal Officer, entitled “Request for Clarification of Trial Chamber Memorandum entitled ‘Witness Lists for Early Trial Segments, Deadline for Filing of Admissibility Challenges to Documents and Exhibits, and Response to Motion E-109/5’”, 21 October 2011.

<sup>33</sup> In Case 001, Duch was questioned initially for two and a half days and then at various points throughout the trial.

<sup>34</sup> Confidential Annex B is unclear in this respect. Initially, it states that after questioning of the Accused, the Chamber will proceed to call the listed Civil Parties and witnesses, but “not necessarily in the order listed.” Later, however, it states that “any changes to the envisaged order of call will be communicated to the parties at the first opportunity.”



34. The parties have not yet been informed as to how much time has been allocated in this initial trial segment to the questioning of each Accused, Civil Party and witness and how this time will be divided.

**E. Other unresolved issues**

35. The parties have not yet been informed as to whether the Trial Chamber will order site visits.<sup>35</sup>

36. The parties have not yet been informed as to whether Ms. IENG Thirith is fit to stand trial.

37. The Trial Chamber has not yet clarified the nature and extent of any *ex parte* communication between the International Co-Prosecutor and Judge Cartwright.<sup>36</sup>

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

- a. RESOLVE the above-listed questions and issues prior to the commencement of the substantive proceedings; or, in the alternative,
- b. HOLD a meaningful trial management meeting prior to the commencement of the trial in Case 002, scheduled with the opening statements to be delivered on 21 November 2011.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **16<sup>th</sup>** day of **November, 2011**

<sup>35</sup> See IENG Sary's Motion to the Trial Chamber to Conduct Site Visits, 31 August 2011, E113.

<sup>36</sup> See Request for Information Regarding Ex-Parte Meetings Among Judge Silvia Cartwright, the International Co-Prosecutor, and the Deputy Director of Administration, 15 November 2011, E137/1.