

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S MOTION TO ADD NEW TRIAL TOPICS TO TRIAL SCHEDULE

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves to add new topics to the Trial Chamber’s trial schedule. This motion is made necessary because the Trial Chamber’s early indications regarding the organization and sequencing of trial omitted reference to several topics which the Defence submits must be addressed for contextual purposes relevant to the assertions and allegations in the Closing Order. It is also relevant in determining whether Mr. IENG Sary bears any liability.

I. BACKGROUND

1. At the 5 April 2011 Trial Management meeting, the Trial Chamber announced its “early indications regarding the organization and sequencing of the trial.”¹ Presiding Judge Nil Nonn stated:

The Chamber wishes at this stage to provide an early indication of the sequencing of the beginning of the trial. The Chamber wishes to inform the parties of its intention to commence the hearing of the substance in the following order: **One**, the structure of Democratic Kampuchea; **two**, roles of each accused during the period prior to the establishment of Democratic Kampuchea, including when these roles were assigned; **three**, role of each accused in the Democratic Kampuchean government, their assigned responsibilities, the extent of their authority and the lines of communication, throughout the temporal period with which the ECCC is concerned; **four**, policies of Democratic Kampuchea on the issues raised in the indictment.²

2. This sequence appears to omit several pre-1975 and post-1979 topics which are material to the allegations made in the Indictment and are essential to a proper determination of the charges made therein.³

II. PROPOSED TRIAL TOPICS

A. Pre-1975

3. The following pre-1975 topics have been omitted:

¹ As had been on the agenda for the meeting. *See* Agenda for Trial Management Meeting, 17 March 2011, E9/5/1, p. 2.

² Transcript, 5 April 2011, p. 52 (emphasis added).

³ The Trial Chamber recognizes that pre-1975 information is relevant to the Indictment. It is unclear why this sequence does not contain pre-1975 topics, apart from the roles of the Accused prior to the establishment of Democratic Kampuchea. Along with the Order to File Material in Preparation for Trial, the Trial Chamber provided the parties a chart with list of evidentiary issues matched with the relevant paragraphs of the Closing Order. This chart included topics entitled “Relevant historical and biographical background prior to 17 April 1975,” (item 1) “Alleged existence of the policy to move parts of the population before 17 April 1975 and alleged roles of the Accused therein” (item 10), and “Pre-1975 situation in Phnom Penh and the alleged departure of its population to different initial destinations” (item 11). Order to File Materials in Preparation for Trial, 17 January 2011, E9, Annex 1, p. 1.

- a. the culture and demography of Cambodia from the pre-colonial period to 1975;
 - b. the background to, rise and aims of the Cambodian left, including the Issaraks, the Khmer Peoples' Republic Party, the Workers' Party of Kampuchea and the Communist Party of Kampuchea ("CPK");⁴
 - c. the context to attitudes towards Buddhism in Democratic Kampuchea ("DK");
 - d. the context to attitudes towards the Cham in DK; and
 - e. the context to attitudes towards the Vietnamese in DK.
4. These topics must be addressed at trial. They are material to ascertaining the truth of factual assertions which the Closing Order alleges provide historical background to the alleged Joint Criminal Enterprise.⁵ As such, they are (at a minimum and as a matter of fact) directly relevant to Closing Order's finding that Mr. IENG Sary, through his "acts or omissions, committed (via a joint criminal enterprise)" crimes against humanity, genocide, grave breaches of the Geneva Conventions and violations of the 1956 Penal Code.⁶

B. Post-1979

5. The following post-1979 topics are also material and are essential to a proper determination of the charges made in the Indictment:
- a. the United Nations' recognition of DK as the legitimate government of Cambodia;
 - b. the nature of government in the Peoples' Republic of Kampuchea ("PRK");⁷ and

⁴ The background to, rise and aims of the Cambodian left, including the Issaraks, the Khmer Peoples' Revolutionary Party (1951-60), the Workers' Party of Kampuchea (1960-66) and the CPK (1966-79) would encompass consideration of events in Cambodia: **a.** prior to the colonial period; **b.** during the colonial period; **c.** during the Sihanouk period (1953-1970); **d.** during the Lon Nol period (1970-75), including relating to the establishment of the GRUNK and FUNK and during the United States bombing campaign; **e.** relevant to understanding of the Cambodian left's relations with Vietnam prior to 1975; and **f.** relevant to a understanding of rural attitudes to city dwellers prior to 1975. Together, these sub-topics would encompass consideration of the context to the Cambodian left's attitudes towards Lon Nol soldiers and government officials. This topic would also encompass consideration of the history and background to the non-aligned movement in international relations prior to 1975.

⁵ See Closing Order, 15 September 2010, D427, paras. 18-32, 156-220.

⁶ *Id.*, para. 1614.

⁷ The nature of government in the PRK would include consideration of events in Cambodia relating to: **a.** the formation of first PRK government in 1979-80; **b.** PRK society from 1979; and **c.** Cambodian relations with Vietnam after 1979 and the withdrawal of Vietnamese forces.

- c. the historiography of DK.⁸
6. These topics must be addressed at trial. First, an understanding of United Nations recognition of DK and the nature of government in the PRK is critical, not least to ascertaining the truth of whether: **a.** Mr. IENG Sary had knowledge of atrocities committed in DK during the period of the Indictment; and **b.** whether certain acts taken by DK authorities during the period of the Indictment can be considered legitimate measures taken to protect State sovereignty and/or security (and consequently whether these acts can be attributed to the alleged Joint Criminal Enterprise). Second, an understanding of the historiography of DK is essential to enable the Trial Chamber decide the weight that it should accord to: **a.** evidence from and testimony given by certain individuals who may be called as expert witnesses in the case; and **b.** to material obtained from advocacy groups such as the Documentation Center of Cambodia, should the Trial Chamber decide to admit such material as evidence at all.

III. ARGUMENT

7. The Trial Chamber is tasked with reaching its judgement based on the factual allegations set out in the Indictment.⁹ The Indictment contains a section entitled “Background” which refers to the period of time between 1930 and 1975¹⁰ and a background section on Mr. IENG Sary, which begins with the 1940s.¹¹ The Indictment also relies upon post-1979 allegations in its section entitled “Character Information.”¹² Obviously, the OCIJ considered this information relevant to its determination to indict Mr. IENG Sary. Indeed, throughout the judicial investigation, the OCIJ accepted investigative requests which dealt with the period prior to the temporal jurisdiction of the ECCC.¹³ It relied on jurisprudence from the ICTR Appeals Chamber which has held that acts prior to the temporal jurisdiction may be relied upon where such evidence is aimed at: “clarifying a given context; establishing by inference the elements (in particular, criminal intent) of

⁸ The historiography of DK would encompass a critique of: **a.** the historiography of DK in the PRK period; **b.** the contemporary historiography of DK.

⁹ Rule 98(2).

¹⁰ Closing Order, Part I, Section I. Historical Background.

¹¹ *Id.*, Part I, Section IX.

¹² *Id.*, Part 4.

¹³ *See, e.g.*, Order on Requests DI53, D172, D173, D174, D178 & D284, 12 January 2009, D300.

criminal conduct occurring in [the temporal jurisdiction]; demonstrating a deliberate pattern of conduct.”¹⁴

8. The OCP also considers pre-1975 and post-1979 topics relevant to the charges in the Indictment. In Case 001, it stated that “everybody knows what our jurisdiction is, legally, personally and temporally. Everybody knows as well, especially those involved in international criminal trials beforehand, that these trials do not operate, nor do they tell the story in a vacuum.”¹⁵

9. In a recent hearing on provisional detention in Case 002, the international assistant Co-Prosecutor Dale Lysak stated:

And at this time I would simply wish to note two of the key factual bases that provide such well-founded reason to believe that Mr. Ieng Sary may have committed crimes. First, the accused was one of the founding members of the Communist Party of Kampuchea.... In September 1960, the accused was one of 20 representatives who met, in secret, in the quarters of a worker at the Phnom Penh railway station, and established the founding party lines and policies, including a decision to use violence to eliminate enemies of the party. At this first party congress, Ieng Sary was elected a member of the Central Committee, and an alternate member of the Standing Committee. He became a full rights member of the Standing Committee at the second party congress in February 1963....¹⁶

10. The OCP also included entire sections of its Final Submission dealing with the “Post DK Period.”¹⁷ It stated that these sections were relevant because they “show a consistent pattern of conduct [and because the Accused’s] actions after the CPK’s removal from power reinforce the evidence of [his or her] criminal participation and intent during the period under investigation.”¹⁸

IV. CONCLUSION AND RELIEF REQUESTED

11. The proposed topics are relevant and are necessary for determining the material truth as to the allegations in the Indictment. As the OCP acknowledges, any act alleged in the

¹⁴ *Id.*, para. 9, quoting *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, Judgment, 28 November 2007, para. 315. See also *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Judgment, 20 September 2006, para. 48: “Evidence of events prior to [the temporal jurisdiction of the ICTR] that can establish a ‘pattern, design or systematic course of conduct by the accused’ or provide a context or background to crimes falling within the temporal jurisdiction of the Tribunal is ... admissible” (emphasis added).

¹⁵ *Case of Kaing Guek Eav*, 001/18-07-2007-ECCC/TC, Transcript, 17 February 2009, D288/4.3.1, p. 78 (emphasis added). See also p. 79-80.

¹⁶ Transcript, 4 May 2011, p. 32.

¹⁷ Co-Prosecutor’s Rule 66 Final Submission, 16 August 2010, D390, paras. 949-96, 1036-42, 1129-48, 1206-16.

¹⁸ *Id.*, paras. 949, 1036, 1129, 1206.

Closing Order which did in fact occur did not take place in a vacuum. The proposed topics are critical to ascertaining the objective, material truth of those alleged acts; submissions on these topics will enable the Trial Chamber to place alleged acts in their social and historical context. Only then will the Trial Chamber be able to determine whether these acts can be attributed to a common criminal plan or to an act or omission for which Mr. IENG Sary bears individual criminal responsibility. They must be addressed at trial.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to ADD the following topics to the trial schedule:

- a. the culture and demography of Cambodia from the pre-colonial period to 1975;
- b. the background to, rise and aims of the Cambodian left, including the Issaraks, the Khmer Peoples' Revolutionary Party, the Workers' Party of Kampuchea and the CPK;
- c. the context to attitudes towards Buddhism in DK;
- d. the context to attitudes towards the Cham in DK;
- e. the United Nations' recognition of DK as the legitimate government of Cambodia;
- f. the nature of government in the PRK; and
- g. the historiography of DK.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 23rd day of May, 2011