

**BEFORE THE TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**MOTION IN SUPPORT OF 'IENG SARY'S MOTION TO ADD
NEW TRIAL TOPICS TO THE TRIAL SCHEDULE'
AND REQUEST TO ADD ADDITIONAL TOPICS**

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I. INTRODUCTION

1. Pursuant to Rule 92 of the ECCC Internal Rules (the ‘Rules’),¹ counsel for the Accused Nuon Chea (the ‘Defence’) hereby submits its motion in support of ‘Ieng Sary’s Motion to Add New Trial Topics to the Trial Schedule’ (the ‘Ieng Sary Motion’)² and its request to add yet additional topics. For the reasons stated below, the Defence considers that the addition of certain topics to the trial schedule is necessary in order to guarantee Nuon Chea a fair trial, which would entail a comprehensive discussion of relevant events and mitigating circumstances.

II. RELEVANT FACTS

2. On 23 May 2011, the Ieng Sary Defence Team requested 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 Issarak, the Khmer Peoples’ Revolutionary Party, the Workers’ Party of Kampuchea and the [Communist Party of Kampuchea (the ‘CPK’)]; (c) the context to attitudes towards Buddhism in [Democratic Kampuchea (‘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 [People’s Republic of Kampuchea]; (g) the historiography of DK’³ (collectively, the ‘Ieng Sary Topics’).
3. On 18 May 2011, the Defence filed its ‘First Consolidated Request for Additional Investigations’, noting (among other things) that its view of the case could be divided into three broad categories.⁴ These were formulated as follows:
 - a. *Fair Trial*: the institutional, jurisdictional, procedural, and substantive nature and quality of the proceedings—to date and going forward;⁵

¹ See Internal Rules (Rev7), 23 February 2011.

² Document No E-89, ‘Ieng Sary’s Motion to Add New Trial Topics to Trial Schedule’, 23 May 2011, ERN 00696988-00698993 (the ‘Ieng Sary Motion’).

³ Ieng Sary Motion, paras 3 and 5.

⁴ See Document No E-88, (NC) ‘First Consolidated Request for Additional Investigations’, 18 May 2011, ERN 00698309-00698324, para 6.

⁵ *Ibid*, para 6(a). *N.B.* This category includes, *inter alia*, the following sub-categories: allegations of corruption; appointment of judges; authentication of evidence, including chain-of-custody; disclosure of material by foreign governments; independence, impartiality, and integrity of the judiciary; OCIJ investigation, including its scope and quality; political interference; selection of suspects for prosecution; selection of evidence; subject-matter/temporal/personal jurisdiction; verifying witness statements.

- b. *Context*: the historical, geo-political, socio-economic, demographic, military, and legal scenarios and/or institutions—including those of the Communist Party of Kampuchea (the ‘CPK’)—which directly or indirectly impacted Cambodia *before, during, and following* the DK regime;⁶
 - c. *Nuon Chea’s Personal Liability*: the alleged knowledge, intent, participation, position, and role of the Accused with respect to any of the putative criminal activity described in the various sections of the Indictment, including that of Office S-21; any relevant mitigating factors—including character evidence.⁷
4. For its part, this Chamber has indicated that it intends to structure the trial in a much more limited fashion.⁸

III. RELEVANT LAW

5. In assessing the relevance of the action requested herein by the Defence, the Trial Chamber is directed to international jurisprudence indicating that ‘acts prior to the temporal jurisdiction may be relied upon where evidence is aimed at “clarifying a given context”.’⁹ Indeed, the OCP has previously argued the importance of such contextual elements to a full understanding of the issues in this case.¹⁰ In this regard, Rule 55(2)’s reference to ‘the facts set out in an Introductory Submission or a Supplementary

⁶ *Ibid*, para 6(b). *N.B.* This category includes, *inter alia*, the following sub-categories: CPK command structure, including any alternatives to the one alleged in the Indictment; structure and functioning of CPK institutions and security centers; knowledge and involvement of the DK leadership at all levels; positive goals of the CPK; living conditions in Cambodia, especially at the time of the CPK’s rise to power in April 1975; foreign presence/involvement in Cambodia, including activity of any intelligence agencies—in particular, on the part of Vietnam; the existence of an armed conflict; role of King-Father Norodom Sihanouk; chapeau elements for crimes against humanity.

⁷ *Ibid*, para 6(c). *N.B.* This category includes, *inter alia*, the previous (and upcoming) testimony and credibility of adverse witnesses—especially Duch.

⁸ See Document No **E-1/2.1**, ‘Transcript of Hearing “Trial Management Meeting”’, 5 April 2011, ERN 00664215-00664345 (the ‘TMM Transcript’), 52:6–17 (‘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.’)

⁹ See Document No **D-365/2/1**, ‘Co-Prosecutors’ Appeal Brief in Response to Co-Investigating Judges’ Order Regarding Request to Place on Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ Knowledge of the Crimes’, 5 April 2010, ERN 00508881–00508908, para 11 (quoting Document No **D-300**, ‘Order on Requests D-153, D-172, D-174, D-178 & D-284’, 12 January 2010, ERN 00428047–00428058, para 9 (citing ICTR-99-52-A, *Prosecutor v Nahimana et al*, Appeals Judgment, 28 November 2007, para 315)); see also Document No **D-315/1/1**, (NC) Appeal Against OCIJ Order on Nuon Chea’s Requests for Investigative Action Relating to Foreign States’, 15 February 2010, ERN 00456083-00456100 (the ‘Foreign States Appeal’), para 12.

¹⁰ See Document No **D-365**, ‘Co-Prosecutors Request to Place on the Case File Additional Evidentiary Material which Assists in Proving the Charged Persons’ Knowledge of the Crimes’, 11 February 2010, ERN 00478047–00478055, para 1.

Submission' must be interpreted broadly and in light of the nature and scope of the current proceedings.

IV. ARGUMENT

A. The Request is Admissible

6. The instant request is properly submitted under Rule 92, and the Chamber has the discretion to grant the relief requested herein.

B. The Ieng Sary Topics Should be Added to the Trial Schedule

7. The Defence adopts and incorporates by reference, *mutatis mutandis*, the reasoning and relief requested in the Ieng Sary Motion.

C. Additional Topics Should Be Added To the Trial Schedule

8. In addition to the Ieng Sary Topics, the Defence requests certain further topics to be added to the trial schedule; these can be grouped together under the following main headings:¹¹
 - a. *Fair-Trial Concerns*: the institutional, jurisdictional, procedural, and substantive nature and quality of the proceedings—to date and going forward;¹²
 - b. *Relevant Contextual Elements*: the historical, geo-political, socio-economic, demographic, military, and legal circumstances and/or institutions—including those of the CPK and those originating in or operating from *outside* Cambodian soil—which directly or indirectly impacted Cambodia *before, during and following* the DK regime.¹³

¹¹ To a certain extent there is an overlap with the topics as suggested by the Ieng Sary defence.

¹² This category should include the following sub-categories: allegations of corruption; appointment of judges; authentication of evidence, including chain-of-custody; (non-)disclosure of material by foreign governments; independence, impartiality, and integrity of the judiciary; the OCIJ investigation, including its scope and quality; political interference; selection of suspects for prosecution; selection of evidence; subject-matter/temporal/personal jurisdiction; verifying witness statements.

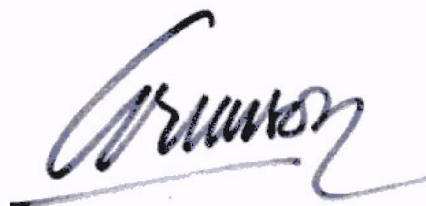
¹³ This category should include the following sub-categories: living conditions in Cambodia, especially at the time of the CPK's rise to power in April 1975 and the period preceding this event; foreign presence/involvement in Cambodia, including activity of any intelligence agencies—in particular, on the part of Vietnam; positive goals of the CPK, also before its ascension to power; the aims and effects of the bombing of Cambodia by the USA in the late sixties and early seventies, in terms of human casualties, material damage (including impact on capacity for food production), and impact on the living conditions and mindset of Cambodians in affected areas.

9. In addition to the arguments advanced by the Ieng Sary Defence Team, the Defence submits that comprehensive discussion of the topics suggested by the Defence is required to provide Nuon Chea with a fair trial. Such a trial must encompass due consideration of all relevant evidentiary issues as well as all mitigating circumstances. Merely discussing the topics suggested by the Trial Chamber¹⁴ would lead to an incomplete and unsatisfactory assessment of the ‘facts’ for which Nuon Chea is being prosecuted. The narrow approach propagated by this Chamber, while appealing from the perspective of judicial economy, will not do justice to the complexities of the situation facing Cambodia and its consecutive leaders from 1960 onward and, more specifically, during the DK era. For a full (historical) understanding and proper evaluation of what transpired in the time period as delineated by the temporal jurisdiction of the ECCC (1975-1979), and to accurately assess and appraise those events from a legal perspective, a more comprehensive consideration is required; such consideration must include a thorough examination of the relevant events that took place before the DK government came to power, and relevant occurrences after its toppling.¹⁵

V. CONCLUSION & REQUEST

10. For the foregoing reasons, the Defence hereby requests this Chamber to add the Ieng Sary Topics as well as those topics proposed herein (at paragraph eight) to the trial schedule. Should the Trial Chamber not be inclined to grant the instant motion, the Defence requests to be provided an opportunity to make further oral submissions on this issue at the Initial Hearing.

CO-LAWYERS FOR NUON CHEA



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¹⁴ See para 4, *supra*.

¹⁵ *N.B.* As the trial progresses, further topics may emerge that merit thorough discussion by the parties. Accordingly, the Defence reserves its right to propose further themes for consideration by this Chamber.