

BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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| C. A. Fay | |

CO-PROSECUTORS' APPLICATION FOR AN EXTENSION OF PAGE LIMIT
FOR THEIR OBSERVATIONS ON JOINT CRIMINAL ENTERPRISE
PURSUANT TO THE CO-INVESTIGATING JUDGES'
ORDER OF 16 SEPTEMBER 2008

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SUBMISSION

1. In a motion (“Motion”) filed on 28 July 2008, the Charged Person IENG Sary (“Applicant”) has challenged the applicability of Joint Criminal Enterprise (“JCE”) as a mode of criminal liability before this Court.¹ Considering that the issue of JCE was “clearly important”, the Co-Investigating Judges, on 16 September 2008, directed all the parties in the case to file their observations (“observations”) on the issue. For this purpose, the Co-Investigating Judges granted a substantial period of more than three months so that the parties could assist them to make “a fully informed decision”.²
2. The Co-Prosecutors submit that the page limit of fifteen pages, set by the relevant Practice Direction, will not be sufficient to adequately address all the aspects of this important issue.³ It is therefore requested that the Co-Investigating Judges extend the page limit to thirty pages so that the parties can sufficiently brief them. The Practice Direction allows the Co-Investigating Judges to do so under “exceptional circumstances.”⁴ International criminal law practice, of persuasive significance before this Court, also supports such extension.⁵
3. The exceptional circumstances, amongst others, justifying extension of page limit are:
 - i. The Co-Investigating Judges have recognized that the issue of JCE is “clearly important”.⁶ In view of this importance, they have granted a sufficiently long period of deliberation to the parties to file their observations. A period of five months from the filing of the Motion is exceptionally long compared to fifteen

¹ *Case of Ieng Sary*, Ieng Sary’s Motion Against the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 28 July 2008, ERN 00208225–00208240, D97[*hereinafter* Motion].

² *Case of Ieng Sary*, Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 16 September 2008, ERN 00224208–00224209, D97/II, p. 2 [*hereinafter* Filing Order].

³ Practice Direction on Filing of Documents Before the ECCC, Revision 3, 27 October 2008, art. 5.1[*hereinafter* Practice Direction].

⁴ Practice Direction, art. 5.4.

⁵ *Prosecutor v. Brima et al*, Decision on Urgent Prosecution Motion for an Extension of the Page Limit for its Appeal Brief, SCSL-2004-16-A, 24 August 2007, p. 2; *Prosecutor v. Seselj*, Decision on the Prosecution Request to Exceed the Ten Page Limit for Motions, IT-03-67-PT, ICTY Trial Chamber, 4 February 2004, p. 2; *Prosecutor v. Stanisic*, Decision on Defence Request for Extension of Page Limit Pertaining to Defence Pre-Trial Brief, IT-03-69-PT, ICTY Trial Chamber, 6 December 2004, p. 2; *Prosecutor v. Milutinovic*, Decision on Prosecution Request for Extension of Page Limit, IT-99-37-PT, ICTY Trial Chamber, 3 June 2004, p. 2.

⁶ Filing Order, p. 2.

days envisaged to file responses to appeals before the Pre-Trial Chamber.⁷ If the parties are permitted to file responses of thirty pages within fifteen days before the Pre-Trial Chamber, then by implication, the Co-Investigating Judges should extend the page limit when responses are asked to be filed after a deliberation of five months.⁸

- ii. In considering a similar issue, the Pre-Trial Chamber requested three erudite *amici curiae* briefs of thirty pages each.⁹ The Co-Investigating Judges, on the other hand, have directed only the parties to file observations. It is, therefore, appropriate that the parties be granted the same page limit to file their observations as the *amici curiae*. The Co-Prosecutors note that while the issues before the Pre-Trial Chamber and the Co-Investigating Judges are similar, they are not duplicative of each other as the two proceedings emanate from different case files and contain different parties.¹⁰
- iii. Now that the Co-Investigating Judges have invited observations from all the parties, the Co-Prosecutors' observations will necessarily have to address the applicability of the JCE in the individual cases of all the five Charged Persons in this case file. To do so properly, the page limit will have to be more than fifteen pages. The Co-Prosecutors are seeking a page limit of thirty pages which is much less than the combined page limit of seventy-five pages that would apply if the Co-Prosecutors were to file separate briefs on the applicability of JCE in respect of each of the five Charged Persons. If an extension beyond fifteen pages is not granted, the Co-Prosecutors shall have to effectively restrict treatment of each of the five Charged Persons in three pages only, despite each of them having been put under investigation for some of the most egregious crimes of the past century

⁷ Practice Direction, art. 8.3.

⁸ Practice Direction, art. 5.2.

⁹ *Case of Kaing Gaek Eav alias DUCH*, Invitation to *Amicus Curiae*, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 23 September 2008, ERN 00225010–00225012, D99/3/12, p. 3. Two similar invitations were issued to other *amici*.

¹⁰ *Case of Kaing Gaek Eav alias DUCH*, Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order Against *Kaing Gaek Eav alias DUCH*, Case No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 6 October 2008, ERN 00226067–00226070, D99/3/19, para. 12.

committed as part of a complex JCE that spread over the whole of the Democratic Kampuchea for a period of about four years.

- iv. The issue of JCE is clearly complex and will require an analysis of statutory provisions and the jurisprudence since the Second World War. The analysis will also include a survey of Cambodian law for the past sixty years. Further, as a lot has been written on this issue, a survey of scholarly writings also will necessarily have to be part of a brief to permit the Co-Investigating Judges to make "a fully informed decision".¹¹
- v. Applicability of JCE before this Court is clearly a complex jurisdictional issue. A decision on this issue has the potential of not capturing the complete criminality, or even leading to acquittals, of persons who are allegedly responsible for some of the most egregious violations of international and national laws in the past century. This clearly is complex and it is a mixed issue of law and fact. It requires an appropriate and complete treatment. An extension of page limit is, therefore, justified.

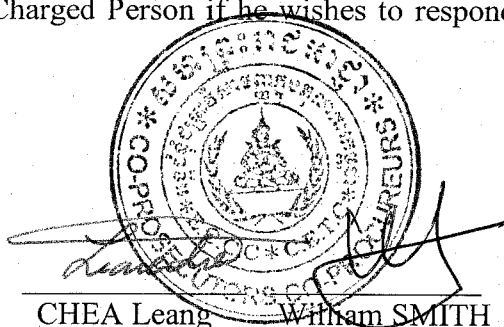
REQUEST

4. The Co-Prosecutors request that the Co-Investigating Judges extend the page limit for filing their observations to thirty pages. This extension shall not cause any material prejudice to the rights of the Applicant Charged Person and shall be in the interest of justice.¹²

¹¹ Filing Order, p. 2.

¹² *Prosecutor v. Brdjanin*, Decision on Prosecution Request for Extension of Page Limit on 98 *Bis* Response, IT-99-36-T, ICTY Trial Chamber, 5 September 2003, p. 1.

- 5. If an extension, as sought, is granted, the Co-Prosecutors shall not oppose an appropriate extension of page limit to the Applicant Charged Person if he wishes to respond to the observations of the parties.



CHEA Leang William SMITH
Co-Prosecutor Deputy Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this twenty-first day of November 2008.