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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S REPLY TO THE OCP'S RESPONSE TO IENG SARY'S EXPEDITED REQUEST FOR THE TIME PERIOD FOR PRELIMINARY OBJECTIONS NOT TO COMMENCE UNTIL THE PRE-TRIAL CHAMBER HAS GIVEN REASONS FOR ITS DECISION ON IENG SARY'S APPEAL AGAINST THE CLOSING ORDER

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EXPEDITED REQUEST FOR EXTENSION OF TIME AND PAGE LIMIT TO FILE RULE 89 PRELIMINARY OBJECTIONS

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby replies to the Co-Prosecutors' Response to IENG Sary's Expedited Request for the Postponement of the Time Period, Extension of Time and Page Limits Relating to the Rule 89 Preliminary Objections ("Response").[1] The Response essentially asserts that the time period to file preliminary objections should run from 14 January 2011 and that no extension of time or pages should be granted. The Response is deficient in both its substance and reasoning. It must be disregarded by the Trial Chamber.

I. REPLY

1. In paragraph 2, the OCP asserts that the Closing Order became final on 14 January 2011 and that the 30-day time period for raising preliminary objections commenced from this date. 14 January 2011 was the date the Trial Chamber greffiers were formally forwarded the Case File by the Pre-Trial Chamber.[2] The Trial Chamber has used 14 January as the date to commence a time period requiring the parties to provide certain factual material.[3] Factual issues – unlike jurisdictional issues – are not dependent on the Pre-Trial Chamber's reasoning, as the OCP appears to recognize.[4] It is absurd to suggest that the Defence should file preliminary objections concerning the jurisdiction of the Trial Chamber without knowing the Pre-Trial Chamber's reasoning on precisely those issues. By extension, the OCP's Response is tantamount to arguing that the Trial Chamber render a decision on the Defence's preliminary objections without the benefit of the Pre-Trial Chamber's reasoning. This is an illogical and preposterous position which must be dismissed.

2. The Pre-Trial Chamber is under an obligation to provide reasoning for its decisions.[5] The Pre-Trial Chamber has yet to provide reasons for its Decision on IENG Sary's Appeal

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[1] *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Co-Prosecutors' Response to IENG Sary's Expedited Request for the Postponement of the Time Period, Extension of Time and Page Limits Relating to the Rule 89 Preliminary Objections, 25 January 2011, E15/1, ERN: 00640111-00640115.
[2] *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Order to File Material in Preparation for Trial, 17 January 2011, E9, ERN: 00635754-00635759, para. 2.
[3] *Id.*
[4] *See Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Co-Prosecutors' Observations on IENG Thirith and NUON Chea's Urgent Defence Request to Determine Deadlines, 25 January 2011, E14/1, ERN: 00640189-00640193, para. 3. "The Defence fails to explain how its ability to compile its witness lists will be impacted in the absence of access to the specific reasoning underlying the Pre-Trial Chamber's rulings on its *jurisdictional* grounds of appeal..."
[5] Rule 77(14).

Against the Closing Order.[6] To date, it has issued a decision with reasons to "follow in due course."[7] This may be because the Accused would be released from detention if a decision were not issued on 15 January 2011, within 4 months of the issuance of the Closing Order.[8] The Defence appreciates the magnitude of the Pre-Trial Chamber's task – it takes time to analyze and provide a reasoned decision regarding complicated jurisdictional challenges and to have this decision translated into multiple languages. These are the same challenges the Defence will face when it presents its preliminary objections to the Trial Chamber; hence the Defence's Request for an extension. The Defence must not be prejudiced for the Pre-Trial Chamber's delay in issuing a fully reasoned decision, nor should it be forced to file preliminary objections based on speculative reasoning.

3. In paragraph 3, the OCP asserts that the Defence should not be allowed to depart from the Rules, because "Rule 89 in particular reflects the conclusion of the drafters of the Rules that 30 days is an adequate time period to prepare preliminary objections challenging the jurisdiction of the court or any issue which would require termination of prosecution." The Rules do not provide for a situation which occurs when decisions are issued "with reasons to follow." The Rules' drafters did not contemplate such a scenario. However, Rule 39(4)(a) states that "[t]he Co-Investigating Judges or the Chambers may, at the request of the concerned party or on their own motion: a) extend any time limits set by them." The Trial Chamber would plainly be acting within its powers to allow the Request to ensure that the ends of justice are met.

4. In paragraph 3, the OCP further asserts that the Defence has filed past jurisdictional motions to the OCIJ and Pre-Trial Chamber and thus is prepared and in need of no extra time to file preliminary objections. This is a spurious argument. The Defence must carefully analyze the Pre-Trial Chamber's reasoning. Without the benefit of such reasoning, it is not able to prepare Mr. IENG Sary's Defence adequately and with sufficient time, in accordance with his fair trial rights. Should the Defence find the Pre-Trial Chamber reasoning sound, it may decide not to submit certain preliminary

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[6] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 75), Decision on IENG Sary's Appeal Against the Closing Order, 13 January 2011, D427/1/26, ERN: 00634887-00634891, p. 4.
[7] *Id.*
[8] Due to Rule 68(3).

objections. The Defence cannot, acting in due diligence[9] and without suffering prejudice, merely file the exact same motions to the Trial Chamber that it submitted to the OCIJ or to the Pre-Trial Chamber.

5. In paragraph 4, the OCP asserts that the Trial Chamber is not bound by the Pre-Trial Chamber and that "there is no reason why the Accused's preliminary objections, which will be made before the Trial Chamber, will be affected by the Pre-Trial Chamber's full decision." This argument ignores that ECCC procedure sequentially provides for pre-trial appeals against orders or decisions of the Co-Investigating Judges confirming the jurisdiction of the ECCC,[10] followed by preliminary objections concerning the jurisdiction of the Trial Chamber no later than thirty days after the Closing Order becomes final, should the case proceed to trial.[11] This procedure plainly envisages that the parties will have the benefit of the Pre-Trial Chamber's reasoning for confirming the ECCC's jurisdiction when lodging any preliminary objections. The procedure also envisages that the Trial Chamber will have the benefit of such reasoning, and the parties' analysis thereof, when it comes to consider any preliminary objections. There is every reason to consider that an Accused's preliminary objections will be affected by the Pre-Trial Chamber's full decision.

6. In paragraph 4, the OCP further asserts that the right to a fair trial includes the right to be tried without undue delay. This is a fair trial right held by an Accused.[12] It may not be invoked by the OCP in an attempt to violate Mr. IENG Sary's right to adequate time and facilities to prepare his defence.[13] In any case, postponing and extending the time period to file preliminary objections would not amount to "undue delay," especially considering

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[9] The Co-Lawyers have the obligation of due diligence in their representation of Mr. IENG Sary. This duty obliges the Defence to act diligently to protect Mr. IENG Sary's rights and interests, and thus do its part to ensure that his trial is fair. Discussing the requirement of due diligence with respect to the right to adequate time and facilities for the preparation of a defence, one scholar noted that "[w]ith regard to both time and facilities, a certain degree of diligence on the part of the defence is expected and indeed required. The defence can only complain of a violation of their rights if they did everything required by the domestic law to obtain the respective (extension of) time or facility." STEPHAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 214 (Oxford University Press, 2005) (emphasis added).

[10] Rule 74(3)(a).

[11] Rule 89(1).

[12] *See* ICCPR, Art. 14(3)(c), which affords an Accused the right to be tried without undue delay.

[13] "[C]onsiderations of economy should never violate the right of the Parties to a fair trial." *Prosecutor v. Prlić*, IT-04-74-T, Decision on Adoption of New Measures to Bring the Trial to an End within a Reasonable Time, 13 November 2006, para. 16.

that the reason for the postponement is the Pre-Trial Chamber's own delay in issuing its reasoned decision.

7. In paragraph 5, the OCP asserts that although it is unnecessary for the Defence to address the Pre-Trial Chamber's reasoning in its submissions on preliminary objections, it would not object to the Defence filing supplemental submissions. This proposal is as unfeasible as it is impractical. The Defence would be required to prepare an additional submission for each preliminary objection it files once it receives the Pre-Trial Chamber's reasoning. The Trial Chamber may then be required to consider twice as many submissions as it would if the Defence's Request were granted. As such, the Response condones an abuse of the Trial Chamber's process. A simple postponement of the time period will be significantly more judicious.

8. In paragraph 6, the OCP again asserts that the 30 day time period is reasonable, especially considering the Defence's numerous past filings on jurisdictional issues. The OCP asserts that if an extension of time is granted, the result will be that the Trial Chamber will have less time to consider the merits of the submissions. The OCP provides no authority for this assertion, as there is none. The Trial Chamber does not have any deadline by which it must decide on preliminary objections. It is abhorrent to suggest that the Trial Chamber would be more concerned with making a quick decision in order to start trial rather than a fully-considered decision taking into account all of the complexities that arise in jurisdictional challenges.

9. In paragraph 7, the OCP asserts that the Defence should not be granted an increase in the 15-page limit for preliminary objections because exceptional circumstances meriting an extension do not exist. A decision of this magnitude issued with reasons to follow constitutes an exceptional circumstance. Moreover, the OCP contends that the Rules do not specifically contemplate an extension of pages for such objections. The Rules do not set out page limits for <u>any</u> filings. It is only Practice Directions which do this.

10. In paragraph 8, the OCP asserts that even if the Trial Chamber were to grant a page extension, the 45 pages requested by the Defence would be excessive. It notes that the Pre-Trial Chamber allowed an extension of pages to appeal the Closing Order, but asserts that the Defence was able to address each of its eleven grounds of appeal in approximately 16.3 pages each. This is not an accurate way in which to calculate the

pages necessary to address a jurisdictional issue. Some issues obviously require many more pages (as well as more time) than other issues. For example, the Pre-Trial Chamber granted the Defence an extension of time and an extension to 40 pages to address the applicability of JCE at the ECCC.[14] The OCP was similarly granted an extension of time and pages to address this issue.[15]

II. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein and based on the reasoning set forth in IENG Sary's Expedited Request for the Time Period for Preliminary Objections not to Commence until the Pre-Trial Chamber has Given Reasons for its Decision on IENG Sary's Appeal against the Closing Order & Expedited Request for Extension of Time and Page Limit to File Rule 89 Preliminary Objections, the Trial Chamber should GRANT the relief sought by the IENG Sary Defence.

Respectfully submitted,

ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 31st day of **January, 2011**

[14] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 35), Decision on Co-Lawyers' Application for Extension of Time to file IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 22 December 2009, D97/14/2, ERN: 00417965-00417967; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 35), Decision on IENG Sary's Expedited Request for Extension of Page Limit for IENG Sary's Appeal Against the OCIJ's Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 20 January 2010, D97/14/4, ERN: 00432771-00432774.

[15] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 35), Decision on Co-Prosecutors' Application for Extension of Time and Page Limits to File a Joint Response to IENG Thirith, KHIEU Samphan, IENG Sary, and Certain Civil Parties' Appeals against the Order on Joint Criminal Enterprise, 9 February 2010, D97/16/4, ERN: 00450058-00450061.