

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/13-01-2011-^{002/13-09-2007-ECCC/TC}EC~~CC~~TC Party Filing: The Defence for IENG Sary

Filed to: The Trial Chamber Original language: ENGLISH

Date of document: 17 January 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:

IENTG 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

Filed by:
The Co-Lawyers:
ANG Udom
Michael G. KARNAVAS

Distribution to:
The Trial Chamber Judges:
Judge NIL Nonn
Judge THOU Mony
Judge YA Sokhan
Judge Silvia CARTWRIGHT
Judge Jean-Marc LAVERGNE
Reserve Judge YOU Ottara
Reserve Judge Claudia FENZ

Co-Prosecutors:
CHEA Leang
Andrew CAYLEY

All Defence Teams

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
រៀបចំ ឬ ទទួល (Date of receipt/Date of reception):	
..... 17 / 01 / 2011	
ម៉ោង (Time/Heure):	
..... 11:30	
មន្ត្រីទទួលបន្ទុកសំណុំរឿង (Case File Officer/L'agent chargé du dossier):	
..... U.ch. ARUN	

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits this expedited request that the time period to file preliminary objections not commence until the Pre-Trial Chamber has given reasons for its Decision on IENG Sary’s Appeal against the Closing Order¹ and expedited request for an extension of time and page limit to file Rule 89 preliminary objections. The Request that the time period not commence until reasons are given is necessary because the Defence cannot determine which preliminary objections to raise before the Trial Chamber until it has received and analyzed the reasons why the Pre-Trial Chamber rejected its jurisdictional challenges. The Request to extend the applicable time and page limits for preliminary objections is necessary because there are many complex jurisdictional issues which the Defence will likely need to raise before the Trial Chamber. These issues cannot be adequately addressed in only a 30-day period and in 15 pages. These Requests are necessary to protect Mr. IENG Sary’s fundamental fair trial right to adequate time and facilities to prepare his defence.

I. Background

1. On 16 September 2010, the OCII filed the Closing Order in Case 002.²
2. On 17 September 2010, the Defence filed a Notice of Appeal³ and also filed a Request for Extension of Pages to Appeal the Closing Order.⁴
3. On 1 October 2010, this Request was accepted by the Pre-Trial Chamber.⁵ The Pre-Trial Chamber stated, “the Pre-Trial Chamber is of the view that the complexity of the seven issues alleged to be jurisdictional which the Appellant seeks to appeal constitutes the exceptional circumstance envisaged by the Practice Direction and warrants an extension of the page limit.... The Pre-Trial Chamber further notes that it is in the interest of the Charged Person to have such issues addressed as fully and comprehensively as possible...”⁶

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCII(PTC 75), Decision on IENG Sary’s Appeal Against the Closing Order, 13 January 2011, D427/1/26, ERN: 00634887-00634891.

² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCII, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246.

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCII (PTC 75), Appeal Register of IENG Sary’s Lawyers Against the Co-Investigating Judges’ Closing Order, 20 September 2010, D427/1.

⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCII (PTC 75), IENG Sary’s Expedited Request for Extension of Page Limit to Appeal the Jurisdictional Issues Raised by the Closing Order, 17 September 2010, D427/1/1.

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCII (PTC 75), Decision on IENG Sary’s Expedited Request for Extension of Page Limit to Appeal the Jurisdictional Issues Raised by the Closing Order, 1 October 2010, D427/1/3, ERN: 00611380-00611383, paras. 8-11.

⁶ *Id.*, paras. 10-11 (emphasis added).



4. On 25 October 2010, the Defence filed an Appeal against the Closing Order⁷ which contained eleven grounds of appeal, each of which dealt with the jurisdiction of the ECCC.
5. On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary's Appeal against the Closing Order, in which it found certain grounds of appeal inadmissible, dismissed certain grounds of appeal, and partially granted other grounds of appeal. The Decision was issued with reasons to "follow in due course."⁸

II. Applicable Law

6. Article 13(1) of the Agreement states:

The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.⁹

7. Article 35 new of the Establishment Law states:

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights. ... b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing...¹⁰

8. Article 14(3) of the International Covenant on Civil and Political Rights states:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing...

9. Article 11(1) of the Universal Declaration of Human Rights states: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

⁷ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), IENG Sary's Appeal Against the Closing Order, 25 October 2010, D427/1/6, ERN: 00617486-00617631.

⁸ *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.

⁹ Emphasis added.

¹⁰ Emphasis added.

III. 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

10. The Pre-Trial Chamber issued its Decision on IENG Sary's Appeal Against the Closing Order with reasons to "follow in due course."¹¹ The Defence does not yet know the reasons the Pre-Trial Chamber rejected the jurisdictional challenges the Defence raised in its Appeal. The Defence, therefore, cannot know whether to accept the Pre-Trial Chamber's reasoning or whether a valid basis exists to bring these jurisdictional challenges before the Trial Chamber. The Defence would not be acting with due diligence if it simply re-filed to the Trial Chamber the same objections it filed previously before the Pre-Trial Chamber. The Defence instead must analyze the reasoning of the Pre-Trial Chamber and respond to any errors in analysis it might have made. Valid and meaningful preliminary objections simply cannot be made until the Defence receives the Pre-Trial Chamber's reasoning. It would be a violation of Mr. IENG Sary's fundamental right to prepare a defence to require him to file preliminary objections without knowing why those objections were not accepted by the Pre-Trial Chamber.

IV. Request to Extend the Time Limit for Filing Rule 89 Preliminary Objections

11. Rule 89 of the ECCC Internal Rules ("Rules") states that "A preliminary objection concerning: a) the jurisdiction of the Chamber, b) any issue which requires the termination of prosecution; c) nullity of procedural acts made after the indictment is filed shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible."¹² 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."
12. The Defence respectfully requests the Trial Chamber to extend the applicable time limit – which should not start to run until the Pre-Trial Chamber has given its reasons – pursuant to Rule 39(4)(a).
13. Although it cannot make a final determination until it receives the Pre-Trial Chamber's reasons, the Defence expects to file a large number of preliminary objections challenging the jurisdiction of the ECCC. Several fundamental issues must

¹¹ *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.

¹² Emphasis added.

be resolved, such as the effect of Mr. IENG Sary's validly granted Royal Amnesty and Pardon, the effect of *ne bis in idem* on the current prosecution, whether the ECCC has jurisdiction to apply international crimes and forms of liability, and whether the ECCC has jurisdiction to apply national or international crimes. While it was possible for the Defence to conduct research on these issues before the Closing Order became final, it was not until after the Closing Order became final that the Defence knew that the case would be sent to trial and knew which issues must be raised as preliminary objections.

14. Issues of jurisdiction or other matters which would terminate prosecution are complex issues that take time to fully and properly address.¹³ These preliminary objections are vital to protecting Mr. IENG Sary's fundamental fair trial rights – if they succeed, Mr. IENG Sary's case may not even go to trial, or may do so in a more limited basis. It is therefore essential that they be drafted carefully and completely.
15. If the Defence is to be of maximum assistance to the Trial Chamber in fleshing out all legal nuances attendant to the issues involved, and if it is to be due diligent in protecting Mr. IENG Sary's rights, then sufficient time must be allotted to prepare these preliminary objections. Thirty days is not sufficient, especially when considering that a large portion of that time must be allocated to translation. The Defence respectfully requests to be permitted to file all Rule 89 preliminary objections within 60 days of the date that reasons are provided for the Pre-Trial Chamber's Decision on IENG Sary's Appeal Against the Closing Order.

V. Request to Extend the Page Limit for Rule 89 Preliminary Objections


16. According to Article 5.1 of the Practice Direction on the Filing of Documents before the ECCC, “[a] document filed to ... the Trial Chamber of the ECCC shall not exceed 15 pages in English or French or 30 pages in Khmer, unless otherwise provided in the Internal Rules or this Practice Direction or ordered by the ECCC.” According to Article 5.4, “[t]he Co-Investigating Judges or the relevant Chamber may, at the request of a participant, extend the page limit in exceptional circumstances.”
17. The Defence respectfully requests the Trial Chamber to extend the applicable page limit for Rule 89 preliminary objections, pursuant to Article 5.4. Jurisdictional issues

¹³ The Pre-Trial Chamber has previously recognized that these issues are complex and may constitute exceptional circumstances. *See Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ(PTC 75), Decision on IENG Sary's Expedited Request for Extension of Page Limit to Appeal the Jurisdictional Issues Raised by the Closing Order, 1 October 2010, D427/1/3, ERN: 00611380-00611383, para. 10.

or other issues which would require termination of prosecution are complex issues that are difficult to address in 15-page motions. They must be properly addressed in order to protect Mr. IENG Sary's fundamental fair trial rights. These issues are for the most part issues of first impression before the Trial Chamber. The Trial Chamber will benefit from a full discussion of each issue. The Pre-Trial Chamber has previously recognized that such issues are complicated and may require an extension of pages to fully develop. The Defence requests that the Trial Chamber be guided by the practice of the Pre-Trial Chamber and extend the applicable page limit for each Rule 89 objection to 45 pages.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to **EXTEND** the applicable time limit for Rule 89 preliminary objections to 60 days from the date that reasons are provided for the Pre-Trial Chamber's Decision on IENG Sary's Appeal Against the Closing Order and to **EXTEND** the applicable page limit for each preliminary objection to 45 pages.

Respectfully submitted,



 ANG Udom

 Michael G. KARNAVAS

 Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 17th day of **January**, 2011