

ក្រុមបេធាវីការពារក្តី អៀង សារី
IENG SARY DEFENCE TEAM
EQUIPE DE DEFENSE DE IENG SARY

ANG Udom and Michael G. KARNAVAS

Co-Lawyers for IENG Sary

21 February 2011

To: **Susan LAMB**
Senior Legal Officer, ECCC Trial Chamber

Copy: **ECCC Trial Chamber**
ECCC Defence Teams
ECCC Defence Support Section
ECCC Office of the Co-Prosecutors
ECCC Lawyers for the Civil Parties in Case 002
ECCC Office of Administration

Re: Your 18 February 2011 Memorandum

Dear Ms. Lamb,

Through this letter we wish to clarify certain matters you have raised in your memorandum to the parties dated 18 February 2011 concerning the filing of preliminary objections. We take exception to certain statements made in this memorandum. We wish to set the record straight or at least provide our understanding of the events which gave rise to your memorandum.¹

First, you thank the Ieng Thirith Defence team for “complying with” the Trial Chamber’s direction and filing a single preliminary objection within 15 pages. You then note that the other Defence teams filed multiple preliminary objections, thus implying that the other Defence teams did not comply with the Trial Chamber’s direction. The Trial Chamber never ordered the Defence teams to file a single preliminary objection. The Trial Chamber has not yet issued any orders or reasoned decisions concerning any matter related to preliminary objections. The parties have only received a series of memoranda communicated by email, with less than clear and consistent instructions. None of these memoranda stated that the Defence teams were only permitted to file a single preliminary objection. The Rules do not require the parties to file only one preliminary objection and it is not reasonable to assume that the Rules could be interpreted in such a way. Rule 89, for example, allows preliminary objections which concern the jurisdiction of the Chamber and also preliminary objections relating to the nullity of procedural acts made after the indictment is filed. These types of objections obviously raise distinct issues and could not be lumped into a single filing. Jurisdictional matters themselves often raise distinct issues. A jurisdictional challenge related to amnesty cannot easily be merged with a jurisdictional challenge arguing that a statute of limitations had expired, for example.

Second, you state that the advance copies of our preliminary objections, “while appreciated

¹ An annex containing all related filings, memoranda, and emails has been attached.



ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception): 21 02 2011
ម៉ោង (Time/Heure) : 16 5 00
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier: SANN RADA

as an indication of future filings” would not be considered by the Trial Chamber and that “[a] consolidated document that meets the filing guidelines indicated by the Trial Chamber is the only filing that will be considered as final.” This statement is in contrast to your earlier memoranda.² Having complied with your earlier memoranda, we submit that the advance copies of our preliminary objections must be accepted. On 17 January, we had requested that the page limit for each preliminary objection be extended to 45 pages rather than 15 pages, due to the complexity of the issues involved.³ On 3 February, in an emailed memorandum, you denied this request. You stated, “The Chamber will reject all requests to extend the present page limits for the filing of preliminary objections (15 pages in English or French, or 30 pages in Khmer) and requests the parties to present arguments in summary form. Should the Chamber consider that more extensive submissions are required, these will be requested in due course.”⁴ We then endeavored to fit each of our preliminary objections into 15 page summaries, but were informed that these could not all be translated by the deadline. We informed you of this issue and requested leave to file the objections in English only.⁵ In an emailed memorandum, you responded on 8 February that “Where a party has been advised by ITP that it would be unable to deliver the Khmer translation of a pleading within the filing deadline, the Parties may advise the Senior Legal Officer of this, attaching the relevant communication from ITP. An advance copy of the filing (in either English or French) may then be communicated to the Senior Legal Officer. Providing this is done as soon as these translation constraints are known and in advance of the filing deadline, the pleading will be considered to have been received by the Chamber in time.”⁶ Having met the 15 page limit per objection as requested by the 3 February memorandum and having emailed you the communication from ITP and the English copies of our objections as requested by the 8 February memorandum, we submit that the Chamber is now bound to accept our objections.

Finally, you state that we have misinterpreted your earlier direction concerning duplicate or overlapping preliminary objections in a letter we sent to the Office of Administration. You state that your 14 February memorandum had referred “to overlap and duplication in the Ieng Sary preliminary objections only.” We provided you with advance copies of 8 distinct preliminary objections relating to:

1. Amnesty and pardon
2. *Ne bis in idem*
3. Applicability of international crimes and forms of liability
4. The applicable statute of limitations for grave breaches of the Geneva Conventions
5. The applicability of Article 3 national crimes
6. The applicability of command responsibility

² See *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Interoffice Memorandum from Susan Lamb, Senior Legal Officer – Trial Chamber – to all Parties in Case 002, Advance Notification of Chamber’s disposition of Motions E14, E15, E9/2, E9/3, E/24 and E27, 3 February 2011, E35, ERN: 00642291-00642292; Memorandum – Trial Chamber, Re: Interim Procedure Before the Trial Chamber where Translation Constraints Preclude Compliance by the Parties with Filing Deadlines, 8 February 2011.

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, 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, 25 January 2011, E15.

⁴ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Interoffice Memorandum from Susan Lamb, Senior Legal Officer – Trial Chamber – to all Parties in Case 002, Advance Notification of Chamber’s disposition of Motions E14, E15, E9/2, E9/3, E/24 and E27, 3 February 2011, E35, ERN: 00642291-00642292.

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary’s Urgent Expedited Request to File Preliminary Objections in English with the Khmer Translation to Follow, 7 February 2011, E34, ERN: 00642202-00642203.

⁶ Memorandum – Trial Chamber, Re: Interim Procedure Before the Trial Chamber where Translation Constraints Preclude Compliance by the Parties with Filing Deadlines, 8 February 2011 (emphasis added).

7. The application of crimes against humanity
8. Nullity of your procedural act of refusing an extension of time until we received the Pre-Trial Chamber's reasoning for its decision on our appeal of the Closing Order.

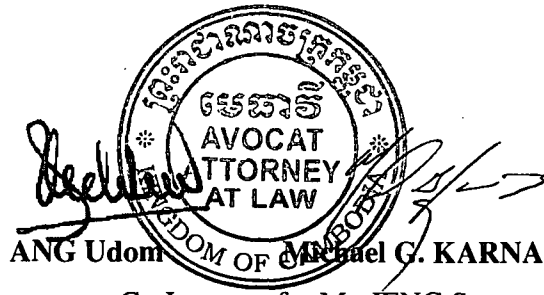
It is inevitable that there will be some small overlap between these objections, but they do not duplicate any arguments and they are not repetitive. For example, we have argued that the ECCC does not have jurisdiction to apply international crimes and forms of liability which did not exist in applicable national law in 1975-79. Obviously, should this objection be granted, there is no need for us to argue that command responsibility did not exist in customary international law in 1975-79. Obviously we would not need to argue that the crime of grave breaches does not apply as the applicable statute of limitations has expired. The fact that we have raised each of these arguments does not make the objections duplicative or repetitive. Each objection we have raised relates to discrete issues. We therefore assumed that you must have meant that the Defence teams together had raised duplicate and overlapping objections, which is true, but as we explained in the letter to the Office of Administration, this is of no concern to us. The Defence teams are not a single entity.

We hope that this letter has helped to clear up any confusion which may have been created by this latest memorandum related to the filing of preliminary objections. As requested, we have drafted an outline containing the list of our preliminary objections. This will be filed as soon as it has been translated. Once this list has been accepted and the Trial Chamber – in a reasoned Order or Decision – has authorized us to present full arguments relating to each of our objections after receiving the Pre-Trial Chamber's reasoned decision on our appeal against the Closing Order, we will consider that this matter has been adequately addressed. Also, to avoid further confusion and in order to ensure that a judicial record is adequately preserved and that procedural mechanisms are in place for higher review, we will be filing a request that all such further matters – if indeed these memoranda are reflective of the Trial Chamber's position – should be disposed of in the form of formal orders or decisions. The current ECCC procedures do not seem to permit appeals of e-mails and letters from the Trial Chamber's Legal Officers. When considering that the matters being disposed of through these channels of communication could result in the infringement of Mr. IENG Sary's guaranteed fair trial rights, it is imperative that adjustments be made. There is also the issue of language: if submissions cannot be accepted for filing unless they are also in Khmer (presumably because of the National Judges) then how can such memoranda purportedly represent the entire Trial Chamber, if some of the Judges cannot read the contents of the memoranda?⁷ Also, Mr. IENG Sary is entitled to have access to these memoranda in a language he understands. We merely bring this to your attention as a matter of courtesy.⁸ Naturally, to the extent we can be of any assistance in finding a creative solution which does not impact on Mr. IENG Sary's rights, we will be more than willing to oblige.

⁷ The memoranda relating to preliminary objections have been circulated initially by email and in English only. Later, these have been placed on the Case File and eventually translated.

⁸ We have also copied the Office of Administration into this letter since translation constraints have become a major issue and may best be resolved with its assistance. It is appropriate to have as much transparency as possible and to keep all who are concerned with these issues informed.

Respectfully,


ANG UDOM MICHAEL G. KARNAVAS
Co-Lawyers for Mr. IENG Sary

