

BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IENG SARY'S APPEAL AGAINST THE TRIAL CHAMBER'S ORDER TO IENG SARY DEFENCE ON FILING OF PRELIMINARY OBJECTIONS

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rules 104 and 21 of the ECCC Internal Rules (“Rules”), hereby appeals the Trial Chamber’s Order to IENG Sary Defence on Filing of Preliminary Objections (“Impugned Decision”).¹ This Appeal is made necessary because the Trial Chamber has erred in law and has abused its discretion, resulting in prejudice to Mr. IENG Sary. Rule 89 allows the parties to file preliminary objections to the Trial Chamber concerning matters such as the jurisdiction of the Trial Chamber. The Rules do not limit the number of objections each party may raise, but the ECCC Practice Directions require each objection to be made within 15 pages.² Mr. IENG Sary has eight preliminary objections to raise before the Trial Chamber, seven of which deal with complicated jurisdictional issues. The Impugned Decision forbids Mr. IENG Sary to file full 15 page preliminary objections, and instead requires him to summarize each of these preliminary objections in one consolidated 35 page outline summary. The Trial Chamber did not have the discretion to alter the requirements for filing preliminary objections in such a manner. The Impugned Decision results in prejudice to Mr. IENG Sary because it violates his right to a defence.

I. SUMMARY OF IMPUGNED DECISION

1. The Impugned Decision “**DIRECT[ED]** the IENG Sary Defence to file a single, consolidated preliminary objections submission of no greater than 35 pages (English) or 50 pages (Khmer) no later than Monday 28 February 2011.”³ The Impugned Decision did not provide any authority or reasoning for the Trial Chamber’s decision not to allow the Defence to file its preliminary objections individually within 15 pages each, but simply stated that it was issued:

NOTING the IENG Sary Defence team’s provision of advance courtesy copies of eight individual preliminary objections, comprising a total of 111 pages in English, and the Chamber’s subsequent rejection of these purported filings in view both of the page limits set forth in the Practice Direction on the Filing of Documents before the ECCC;

FURTHER NOTING its directions to the parties concerning the required length of filings in relation to preliminary objections at this stage of the proceedings before the Trial Chamber of 18 February 2011 and 22 February 2011, respectively, granting the IENG Sary Defence an extension of the above time and page limits...

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Order to IENG Sary Defence on Filing of Preliminary Objections, 25 February 2011, E51/6, ERN: 00648420-00648421.

² Practice Direction for the Filing of Documents, Art. 5.1.

³ Impugned Decision, p. 2.



2. In the email sent with the attached Order, the Trial Chamber Senior Legal Officer, Susan Lamb (“Senior Legal Officer”), stated that the Trial Chamber would not allow full preliminary objections to be filed because, “Firstly, this would create equality of arms concerns vis-a-vis other parties, who have generally been granted lesser page limits for their preliminary objections than the Ieng Sary team. Secondly, it would follow from placement on the case file that these advance courtesy copies would also need to be translated into khmer in due course, essentially negating any benefit of having ordered shortened filings.”⁴

II. SUMMARY OF THE APPEAL

3. This Appeal will demonstrate that:
- A. The Trial Chamber erred in law in requiring the Defence to file a single consolidated summary preliminary objection;
 - B. The Trial Chamber abused its discretion:
 - It gave weight to extraneous and irrelevant considerations;
 - It failed to give weight or sufficient weight to relevant considerations;
 - It was unreasonable and plainly unjust; and
 - C. The Impugned Decision caused prejudice to Mr. IENG Sary.

III. PRELIMINARY MATTERS

A. Admissibility of the Appeal

1. Applicable law

4. Rule 104, which relates to jurisdiction of the Supreme Court Chamber, states:
1. The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds:
 - a) an error on a question of law invalidating the judgment or decision; or
 - b) an error of fact which has occasioned a miscarriage of justice.

Additionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant.

⁴ Email from Trial Chamber Senior Legal Officer to Michael Karnavas, 25 February 2011.

For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.

2. The Supreme Court Chamber may either confirm, annul or amend decisions in whole or in part, as provided in Rule 110.

3. Decisions of the Chamber are final, and shall not be sent back to the Trial Chamber.

4. The following decisions of the Trial Chamber are subject to immediate appeal:

- a) decisions which have the effect of terminating the proceedings;
- b) decisions on detention and bail under Rule 82;
- c) decisions on protective measures under Rule 29(4)(c); and
- d) decisions on interference with the administration of justice under Rule 35(6).

Other decisions may be appealed only at the same time as an appeal against the judgment on the merits. Unless otherwise provided in the IRs or decided by the Trial Chamber, an immediate appeal does not stay the proceedings before the Trial Chamber.

2. The Impugned Decision, although titled an “Order,” is a “Decision” within the meaning of Rule 104

5. Rule 104(1) states that the Supreme Court Chamber “shall decide an appeal against a ... decision...”⁵ The Impugned Decision is in the form of an Order which was emailed to the parties by the Senior Legal Officer, before being placed on the Case File. It was signed by Presiding Judge Nil Nonn and was stamped. The fact that it is titled an “Order” does not entail that it is not a “Decision.” It acts as a Decision denying the Defence’s request – made 17 January⁶ – to be granted an extension of time and pages to file each of its preliminary objections. No other decision specific to this request has been received, and in light of the Impugned Decision, any decision which might be forthcoming would be a denial.

3. Even if the Impugned Decision is not considered to be a decision within the meaning of Rule 104, the Trial Chamber’s failure to rule on the Defence’s request for an extension of the applicable time and page limit to file each of its preliminary objections,

⁵ Emphasis added.

⁶ *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, ERN: 00636076-00636081.

together with the Impugned Decision, results in a constructive denial, which is appealable

6. If the Supreme Court Chamber considers that the Impugned Decision is not appealable because it is entitled an "Order" rather than a "Decision," then the Chamber must still find this Appeal admissible as an Appeal against the constructive denial of the Defence's request to have an extension to 45 pages for each preliminary objection and its request for the time limit not to start running immediately and for an extension of time. The Pre-Trial Chamber has allowed appeals against the OCIJ's constructive denial of Defence requests.⁷ The Pre-Trial Chamber stated that a constructive denial occurs where "with the passage of time, the failure [to act on a request] makes it impossible for the Charged Person to obtain the benefit which he sought."⁸ The Supreme Court Chamber must similarly allow appeals against constructive denial, in order to protect the Accused's rights. In the present case, the failure to act on the Defence's request to be granted an extension, and the subsequent requirement to file all objections within one 35 page summary, makes it impossible for the Defence to obtain the benefit it sought, i.e. the ability to properly defend Mr. IENG Sary through filing individual preliminary objections of 45 pages each within a reasonable time.

4. The Trial Chamber has erred in law, which is appealable pursuant to Rule 104(1)(a)

7. This Appeal is admissible pursuant to Rule 104(1)(a). This Rule states: "The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds: a) an error on a question of law invalidating the ... decision." The Trial Chamber erred in its interpretation of Rule 89. Rule 89 does not restrict the Defence to filing only one preliminary objection. It furthermore does not provide for objections to be listed in outline summary form. Rule 89(1) simply states: "A preliminary objection concerning: a) the jurisdiction of the Chamber, b) any issue which

⁷ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 10), Decision on IENG Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, para. 21, A189/I/8, ERN: 00233433-00233443. See also *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 29), Decision on IENG Sary's Appeal against the Co-Investigating Judges' Constructive Denial of IENG Sary's Third Request for Investigative Action, 22 December 2009, D171/4/5, ERN: 00417267-00417272. Mr. IENG Sary's appeal was found inadmissible by this decision, but this was because the Pre-Trial Chamber determined that there had been no constructive denial on the part of the OCIJ.

⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 10), Decision on IENG Sary's Appeal Regarding the Appointment of a Psychiatric Expert, 21 October 2008, para. 21, A189/I/8, ERN: 00233433-00233443, para. 23 (emphasis added).

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.”

5. The Trial Chamber has abused its discretion, which is appealable pursuant to Rule 104(1)

8. Rule 104(1) also provides that “an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant.”⁹ As explained in the Argument section *infra*, the Trial Chamber erred in the exercise of its discretion and caused prejudice to Mr. IENG Sary. This Appeal is therefore admissible pursuant to Rule 104(1).

6. The Appeal is appealable immediately under Rule 104(4)

9. This Appeal is admissible immediately pursuant to Rule 104(4)(a) and (d). Rule 104 states in relevant part:

The following decisions of the Trial Chamber are subject to immediate appeal:

a) decisions which have the effect of terminating the proceedings;

...

d) decisions on interference with the administration of justice under Rule 35(6).

10. The Impugned Decision is not itself a decision which has the effect of terminating proceedings. However, the Decision is closely related with a decision which could have the effect of terminating proceedings. This is because the Impugned Decision denies Mr. IENG Sary the right to present his full preliminary objections. Most of these preliminary objections, if granted, would terminate proceedings. Without the benefit of Mr. IENG Sary’s full reasons for making his preliminary objections, the Trial Chamber will be unlikely to grant the objections.
11. The Impugned Decision is also a decision which amounts to interference with the administration of justice. This Decision interferes with the administration of justice because it directly violates Mr. IENG Sary’s fundamental fair trial right to present a defence. Rule 104(4)(d) refers to Rule 35, which sets out certain behavior that constitutes an interference with the administration of justice, however Rule 35 is not exhaustive.

⁹ Emphasis added.

This is clear by its wording “any person who knowingly and willfully interferes with the administration of justice, including any person who...”¹⁰

7. The Appeal is admissible under Rule 21

12. This Appeal is also admissible pursuant to Rule 21. Rule 21(1) states, “The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement.”¹¹ The Pre-Trial Chamber has recognized this and has stated that “[c]onsidering the fair trial rights of the Appellant ... the Pre-Trial Chamber finds that Rule 21 requires it to interpret the Internal Rules in such a way that the Appeal is also admissible on the basis of Rule 21.”¹² Therefore, if there is any doubt as to the above interpretation of Rule 104, it must be interpreted in a way which safeguards Mr. IENG Sary’s interests, which would require that this Appeal be admissible. Mr. IENG Sary has no other avenue at this point to ensure that his rights are safeguarded.

13. This Appeal is furthermore admissible pursuant to Rule 21 alone. Rule 21 requires the Chambers to always safeguard Mr. IENG Sary’s interest. The Pre-Trial Chamber has previously determined that Rule 21 required it to find appeals admissible in order to ensure that fair trial rights were safeguarded where there was otherwise no Rule granting a right to appeal.¹³ The Supreme Court Chamber should follow this precedent set by the Pre-Trial Chamber. If this Appeal is not accepted, Mr. IENG Sary’s fundamental right to prepare a defence will be violated. The Trial Chamber’s decision not to accept the filing of Mr. IENG Sary’s preliminary objections effectively turns him into a mere object of the proceedings, rather than a participant. His right to a defence has been denied.

¹⁰ Emphasis added.

¹¹ Emphasis added.

¹² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC64), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, 11 June 2010, A371/2/12, ERN: 00531173-00531191, para. 18 (emphasis added).

¹³ *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 71), Decision on IENG Sary’s Appeal against the Co-Investigating Judges’ Decision Refusing to Accept the Filings of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, ERN: 00601705-00601717, para. 13.

14. Rule 21(2) also requires that “Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity.” The requirement to condense all of Mr. IENG Sary’s preliminary objections into one 35 page summary without any sort of guarantee that the Defence would be entitled to present full summaries at a future point is a coercive measure not strictly limited to the needs of the proceedings. The justification that the Interpretation and Translation Unit (“ITU”) is understaffed and behind in its work is not a valid reason to curtail Mr. IENG Sary’s fundamental right to object to the ECCC’s jurisdiction over him, as will be further explained *infra*. There were less restrictive alternatives which could have been taken, such as allowing the objections to be placed on the Case File in one language initially, until the translation could be complete. This is an option of which the Trial Chamber has availed itself on multiple occasions – it has placed its informal memoranda on the Case File in English only, and it later files the French and Khmer versions once these have been completed.¹⁴

B. Request for a Public Hearing

15. The Defence requests a public, oral hearing to address the issues raised in this Appeal. Rule 109(1) states: “Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only.” This Rule indicates that hearings of appeals should generally be conducted in public. The issues raised in this Appeal affect Mr. IENG Sary’s fundamental fair trial rights and the future course of the proceedings. As such, they will be of interest to the Cambodian public, who deserve and will benefit from a transparent and open procedure. None of the issues raised are in any way confidential.

IV. APPLICABLE LAW

A. Preliminary Objections

16. Rule 89(1) states:

Rule 89. Preliminary Objections

(Amended on 1 February 2008, on 11 September 2009 and on 23 February 2011)

A preliminary objection concerning:

¹⁴ See Background section *infra*.

- 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.

17. This Rule does not limit the number of objections each party may raise, but the ECCC Practice Directions require each objection to be made within 15 pages.¹⁵

B. The Right to Prepare a Defence

18. Article 31 of the Cambodian Constitution states, "The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights." Article 38 states, "Every citizen shall enjoy the right to defense through judicial recourse."

19. 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.¹⁶

20. 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...¹⁷

21. 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...

22. 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."

¹⁵ Practice Direction for the Filing of Documents, Art. 5.1.

¹⁶ Emphasis added.

¹⁷ Emphasis added.

V. BACKGROUND

23. On 16 September 2010, the OCIJ filed the Closing Order in Case 002.¹⁸
24. On 17 September 2010, the Defence filed a Notice of Appeal¹⁹ and also filed a Request for Extension of Pages to Appeal the Closing Order.²⁰
25. On 1 October 2010, this Request was accepted by the Pre-Trial Chamber.²¹ 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...”²²
26. On 25 October 2010, the Defence filed an Appeal against the Closing Order which contained eleven grounds of appeal, each of which dealt with the jurisdiction of the ECCC.²³
27. 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.”²⁴

¹⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246.

¹⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), Appeal Register of IENG Sary’s Lawyers Against the Co-Investigating Judges’ Closing Order, 17 September 2010, D427/1, ERN: 00607319-00607321.

²⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (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, ERN: 00607672-00607674.

²¹ *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, paras. 8-11.

²² *Id.*, paras. 10-11 (emphasis added).

²³ *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.

²⁴ *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.

28. On 14 January 2011, the Trial Chamber became seized with the Case File. This started the time period for filing preliminary objections, making the original due date for such objections 15 February 2011.²⁵
29. On 17 January 2011, the Defence filed a request to the Trial Chamber for the time period to file Rule 89 preliminary objections not to commence until reasons were given for the Pre-Trial Chamber's Decision on IENG Sary's Appeal against the Closing Order and for an extension of the applicable time and page limits for preliminary objections.²⁶ The Defence requested 45 pages per preliminary objection, due to the complexity of the issues. The request for the time period not to start running immediately was made necessary because the Defence did not yet know the reasons the Pre-Trial Chamber had rejected the jurisdictional challenges the Defence had raised in its appeal. The Defence therefore could not know whether to accept the Pre-Trial Chamber's reasoning or whether a valid basis existed to bring these jurisdictional challenges before the Trial Chamber. The Defence explained that it 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. Furthermore, the jurisdictional issues the Defence considered it was likely to raise before the Trial Chamber were complex and could not be adequately raised in only a 30 day period and in only 15 pages each.
30. On 3 February 2011, the Senior Legal Officer distributed a memorandum by email which stated that "the Chamber will reject all requests to extend the present deadlines in relation to the filing of material in preparation for trial."²⁷ However, it noted that "prejudice may stem from the Pre-Trial Chamber's failure to provide reasons in relation to those preliminary objections relevant to the Pre-Trial Chamber's decisions."²⁸ The memorandum stated that the Trial Chamber would in due course address whether limited, supplementary submissions would be required and accepted once the reasons are issued.

²⁵ See *Case of NUON Chea*, 002-19-09-2007-ECCC/TC, Order to File Materials in Preparation for Trial, 17 January 2011, E9, ERN: 00635754-00635759.

²⁶ *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, 17 January 2011, E15, ERN: 00636076-00636081.

²⁷ *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 ("3 February memorandum").

²⁸ *Id.*

The memorandum also rejected all requests to extend page limits for filing preliminary objections and requested the parties to present arguments in summary form. The memorandum did not indicate that only one 15 page objection would be accepted.

31. On 7 February 2011, the Defence filed a request to the Trial Chamber to accept the filing of its preliminary objections in English with the Khmer translation to follow as soon as possible, due to the fact that the ITU had informed the Defence that it would be unable to complete the translation of the Defence's preliminary objections by the filing deadline.²⁹
32. On 8 February 2011, the Senior Legal Officer distributed a memorandum by email which stated that where a party was unable to deliver the Khmer translation of a pleading by the filing deadline, the parties may advise the Senior Legal Officer of this and attach the relevant communication from the ITU.³⁰ The parties could then provide her with an advance copy of the filing in either English or French. If this were done as soon as the translation constraints were known and in advance of the deadline, the Senior Legal Officer stated that the pleading would be considered to be received by the Chamber in time. Official filing would then be allowed as soon as the filing is available in Khmer and either English or French.
33. On 9 February 2011, the Defence emailed 5 of its 8 preliminary objections to the Senior Legal Officer,³¹ as requested. It informed her that one other preliminary objection was currently being proofread and could be sent to her the following day and that another preliminary objection was expected to be translated by the deadline and so did not need to be sent to the Trial Chamber in advance.³² The Defence also raised two issues of concern relating to the Trial Chamber's interim method of accepting advance copies in one language:
- A. The Defence generally proofreads and makes small changes to the original language version of motions while these are in translation. These changes are then made to the translated version before filing. It is often necessary to

²⁹ *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.

³⁰ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum – Trial Chamber, Re: Interim Procedure Before the Trial Chamber where Translation Constraints Preclude Compliance by the Parties with Filing Deadlines, 8 February 2011, E35, ERN: 00642291-00642292 (“8 February memorandum”).

³¹ See email from Tanya Pettay to the Senior Legal Officer, 9 February 2011.

³² The Defence had another preliminary objection as well that was translated by the deadline and so did not need to be sent to the Senior Legal Officer in advance.

submit motions for translation while the Defence is still proofreading them, due to tight deadlines and the need to reserve several days of each allotted time period for translation. With the amended procedure, the Defence would either be unable to proofread motions after they have been submitted for translation or it would end up filing motions which might differ from the advance copies it provided to the Trial Chamber.

- B. The 8 February memorandum stated that the Chamber would distribute the advance copies the Defence provides to it to the other parties and would communicate applicable response deadlines on a case by case basis. The Defence expressed concern that if the parties were provided advance copies, but the deadline for a response did not run until the actual filing in 2 languages, the other parties would benefit by having significant extra time to prepare responses.

34. On 10 February 2011, the Defence emailed the Senior Legal Officer two additional preliminary objections.³³

35. On 14 February 2011, two of the Defence's preliminary objections were filed, as their translations were complete.³⁴ These two objections were placed on the Case File and notified to the parties on 14 February and 15 February 2011. The Defence intended to file all eight of its objections, but not all of these were translated in time to be officially filed. The eight preliminary objections relate to:

- A. Amnesty and pardon;
- B. *Ne bis in idem*;
- C. Applicability of international crimes and forms of liability;
- D. The applicable statute of limitations for grave breaches of the Geneva Conventions;
- E. The applicability of Article 3 national crimes;
- F. The applicability of command responsibility;
- G. The application of crimes against humanity; and

³³ See email from Tanya Pettay to the Senior Legal Officer, 10 February 2011.

³⁴ See *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary's Rule 89 Preliminary Objection (Statute of Limitations for Grave Breaches), 14 February 2011, E43, ERN: 00643924-00643929; *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary's Rule 89 Preliminary Objection (Rule 89(1)(c)), 14 February 2011, E48, ERN: 00644260-00644265.

H. Nullity of the procedural act of refusing an extension of time until the Defence received the Pre-Trial Chamber's reasoning for its decision on the Defence's appeal of the Closing Order.

36. On 15 February 2011, in an emailed memorandum dated 14 February 2011, the Senior Legal Officer set forth amended procedures "for the filing of preliminary objections and clarification of envisaged response deadlines."³⁵ The Senior Legal Officer stated that despite her request for the parties to submit preliminary objections "in summary form" within a page limit of no more than 15 pages in English or French and 30 pages in Khmer, some of the parties had filed multiple documents many of which are individually of the maximum page limit.³⁶ The Senior Legal Officer stated that the Trial Chamber was "now aware that a number of these preliminary objections are duplicative or overlap. Further it is apparent that a number of these submissions raise doubts as to whether they are jurisdictional and whether they will therefore be viewed as admissible preliminary objections by the Chamber."³⁷ The Senior Legal Officer stated that the Trial Chamber would notify the parties as to which of these filings, or portions of filings, were considered inadmissible as preliminary objections by 18 February 2011.³⁸ Pending these determinations, she stated that the Trial Chamber directed the suspension of translation into Khmer of all pending preliminary objections not in accordance with its page limit guidelines. The Senior Legal Officer directed all parties to file a "single, consolidated document containing an outline of all their preliminary objections no later than Friday 25 February 2011." She noted that the Trial Chamber might at a later date request further, more detailed submissions in relation to those preliminary objections which the Chamber believes "warrant[] more detailed consideration before the Chamber."³⁹

37. On 16 February 2011, the Defence sent a letter to the Office of Administration, which was copied to the Trial Chamber and the parties.⁴⁰ The Defence informed the Office of

³⁵ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Trial Chamber's Amended Procedure for the Filing of Preliminary Objections and Clarification of Envisaged Response Deadlines, 14 February 2011, E51, ERN: 00644105-00644106 ("14 February memorandum").

³⁶ *Id.*

³⁷ *Id.*

³⁸ After the Defence pointed out that the Trial Chamber would be unable to decide on the admissibility of preliminary objections which had not been translated and therefore most of the Chamber could not read, the Trial Chamber did not follow through with this determination as to admissibility.

³⁹ 14 February memorandum.

⁴⁰ Letter to Office of Administration, Re: The Trial Chamber's Amended Procedures for Filing Preliminary Objections, 16 February 2011.

Administration of the problems it had encountered in filing its preliminary objections and the Trial Chamber's handling of the matter and requested the Office of Administration to consult with Chambers as to any matters within its authority. The Defence noted, in particular, the following problems:

- A. **The Trial Chamber never informed the teams that only one preliminary objection per team would be accepted.** The Defence requested an extension of pages from 15 pages to 45 pages to file preliminary objections before the Trial Chamber.⁴¹ In this request, it was clear that the Defence intended to file multiple preliminary objections – something not prohibited by the Rules. The request for additional pages was denied in an email from the Senior Legal Officer.⁴² The Senior Legal Officer's emailed response did not lead the Defence to believe that it was only allowed one single filing.
- B. **The Trial Chamber appeared to consider the Defence teams as a single entity.** The 14 February memorandum stated that “a number of these preliminary objections are duplicative or overlap.” The Defence explained that it is not the concern of the Defence whether its objections may overlap with other teams' objections. The Defence must not be treated as one monolithic entity which is expected to collaborate and ensure that its filings do not duplicate that of other teams'. Each Defence team may have competing interests which may at times be at odds. This is not the first time the Senior Legal Officer made such troubling statements. In the 3 February memorandum, the Senior Legal Officer stated that the Defence should coordinate their requests wherever possible and file consolidated motions before the Chamber.⁴³
- C. **The Trial Chamber Judges are failing to perform their required duties.** According to the 14 February memorandum, the Trial Chamber would decide which preliminary objections were admissible before these filings were even

⁴¹ *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 PTC 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.

⁴² 3 February memorandum.

⁴³ *Id.*, p. 2.

translated into Khmer. Almost all⁴⁴ of the Defence's preliminary objections were emailed to the Senior Legal Officer in English pending their translation into Khmer. Their translation was suspended and the Senior Legal Officer announced that the Trial Chamber would determine which preliminary objections were admissible by 18 February 2011. Since these objections were not translated into Khmer, their admissibility would presumably be decided by only those members of the Trial Chamber whose working language is English. The Trial Chamber judges who work in Khmer and French may not refuse to perform their judicial function. They are required to consider the admissibility and merit of the preliminary objections.

- D. The Trial Chamber's handling of this matter prevents the Defence from making a record.** The Senior Legal Officer refused to formally accept the Defence's filings until they are translated into two languages. ITU was then ordered to cease translating the Defence's preliminary objections. This means that the preliminary objections which the Defence drafted and submitted by email to the Trial Chamber will not be able to be formally filed and will never be placed on the Case File. There will be no record that the Defence ever made any objections which the Trial Chamber might determine are inadmissible.
- E. The requirement of a single 15 page summary of preliminary objections prevents the Defence from properly presenting its arguments and effectively preparing a defence.** The Defence has several preliminary objections which must be made to the Trial Chamber's jurisdiction, including, *inter alia*, the validity of Mr. IENG Sary's amnesty and pardon, whether the principle of *ne bis in idem* bars his current prosecution, and whether the ECCC has jurisdiction over international crimes and forms of liability. These are complicated issues which are vital to Mr. IENG Sary's defence as they challenge the very jurisdiction of this Court to try him. These issues cannot be properly addressed in a single 15 page summary. The Defence cannot

⁴⁴ The only preliminary objection which was not provided in advance to the Senior Legal Officer was translated by the filing deadline, and therefore did not need to be submitted by email in advance. This preliminary objection related to the nullity of procedural acts made after the close of the investigation.

diligently represent Mr. IENG Sary by filing one single summary of all its arguments and hoping that the Trial Chamber will request supplementary submissions.⁴⁵

38. On 17 February 2011, the Defence filed a letter to the Senior Legal Officer detailing the above complaints.⁴⁶

39. On 18 February 2011, the Senior Legal Officer emailed a memorandum stating, *inter alia*, that “[t]he Ieng Sary defence team has filed advance courtesy copies of motions with a total of 101 pages in English only. In view of the total of number pages [sic] filed by the Ieng Sary defence team and despite its previous orders, the Trial Chamber now requires it to file a consolidated preliminary objection with a limit of no more than 25 pages in English or French and 50 pages in Khmer.”⁴⁷ The Senior Legal Officer also stated that while the Trial Chamber “appreciated [the advance courtesy copies of preliminary objections] as an indication of the subject of future filings,” they could not be treated as formal filings and that “[a] consolidated document that meets the filing guidelines indicated by the Trial Chamber is the only filing that will be considered as formally filed.”⁴⁸

40. On 21 February 2011, the Defence sent a letter to the Senior Legal Officer, copied to the Office of Administration and the parties, to clarify some issues raised by the 18 February memorandum:⁴⁹

- A. First, in the 18 February memorandum, the Senior Legal Officer thanked the Ieng Thirith Defence for “complying with” the Trial Chamber’s direction and filing a single preliminary objection within 15 pages. She then noted 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 to file a single preliminary

⁴⁵ To date, the Defence has received no response from the Office of Administration.

⁴⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Letter to Susan Lamb Re: Trial Chamber’s amended procedures for the filing of preliminary objections and clarification of envisaged response deadlines, 17 February 2011, E51/2, ERN: 00645568-00645570.

⁴⁷ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum – Trial Chamber, Re: Preliminary Objections, 21 February 2011, E51/1, ERN: 00645408-00645409 (“18 February memorandum”).

⁴⁸ *Id.*

⁴⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Letter to Susan Lamb Re: Your 18 February 2011 Memorandum, 21 February 2011, E51/1/1, ERN: 00646245-00646248.

objection. 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.

- B. Second, the 18 February memorandum stated that the English copies of the Defence's preliminary objections, "while appreciated 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 the 8 February memorandum, which stated that filings would be accepted as long as they were emailed to the Senior Legal Officer as soon as translation constraints were known. Having complied with the 8 February memorandum, the Defence submitted that the advance copies of its preliminary objections must be accepted.
- C. Finally, the 18 February memorandum stated that the Defence misinterpreted the Senior Legal Officer's earlier direction concerning duplicate or overlapping preliminary objections in a letter the Defence sent to the Office of Administration. The Senior Legal Officer stated that the 4 February memorandum had referred "to overlap and duplication in the Ieng Sary preliminary objections only." The Defence provided the Senior Legal Officer with advance copies of 8 distinct preliminary objections. 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, the Defence 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 the Defence to argue that command responsibility did not exist in customary international law in 1975-79. Obviously the Defence 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 the Defence raised each of these arguments does not make the objections duplicative or repetitive. Each objection the Defence has raised relates to discrete issues. The Defence



therefore assumed that the Senior Legal Officer must have meant that the Defence teams together had raised duplicate and overlapping objections, which is true, but as the Defence explained in the letter to the Office of Administration, this is of no concern to the Defence. The Defence teams are not a single entity.

41. On 21 February 2011, the Defence circulated a courtesy copy of the outline of its preliminary objections. Along with this outline, the Defence gave notice of its intention not to be bound by any future informal email communication and insisted upon reasoned decisions from the Trial Chamber.
42. On 21 February 2011, the Senior Legal Officer emailed a memorandum which increased the page limit required for the summary of preliminary objections to 35 pages, due 28 February 2011.⁵⁰
43. On 23 February 2011, the Defence met briefly with the Senior Legal Officer to explain its concerns. The Defence explained that it was not opposed to receiving Trial Chamber decisions in English and by emailed memoranda in order to expedite proceedings, provided that these are official decisions of the Trial Chamber signed by the Judges and that these emailed memoranda are placed upon the Case File once translated. The Defence requested to have each of its preliminary objections placed on the Case File in order to make a record and to ensure that the Judges have access to them. The Defence suggested that it could place the full preliminary objections on the Case File as annexes to the outline summary requested by the Trial Chamber. The Defence stated that it would not file its Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, which it had circulated two days earlier, if this were permitted. The Defence was informed that the Senior Legal Officer would consult with the Judges as to whether this would be possible. The Defence also requested to make supplementary submissions concerning preliminary objections once it receives the Pre-Trial Chamber's reasoning for its decision on Mr. IENG Sary's Appeal against the Closing Order. The Defence was informed that supplementary submissions would in

⁵⁰ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum – Trial Chamber, Re: Page limits for Preliminary Objections, 22 February 2011, E51/5, ERN: 00648654-00648654.

principle be accepted, but the Trial Chamber would instruct the Defence further as to page and time limits after the Pre-Trial Chamber's reasoning was received.⁵¹

44. On 25 February 2011, the Senior Legal Officer emailed the Impugned Decision,⁵² which "DIRECT[ED] the IENG Sary Defence to file a single, consolidated preliminary objections submission of no greater than 35 pages (English) or 50 pages (Khmer) no later than Monday 28 February 2011."⁵³ In the email sent with the attached Impugned Decision, the Senior Legal Officer stated, "In view of your preference for an Order of the Chamber, an advance courtesy copy of this is attached. It will be filed on the Case File on Monday. It follows that the Chamber has rejected your earlier request that it be permitted to annex to your preliminary objection filing on Monday your eight earlier preliminary objections filings, which had been provided to the Chamber as advance courtesy copies. It is unable to accede to this request. Firstly, this would create equality of arms concerns vis-a-vis other parties, who have generally been granted lesser page limits for their preliminary objections than the Ieng Sary team. Secondly, it would follow from placement on the case file that these advance courtesy copies would also need to be translated into khmer in due course, essentially negating any benefit of having ordered shortened filings."

45. On 25 February 2011, the Defence officially filed its Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review,⁵⁴ which it had circulated by courtesy copy earlier in the week. The Defence also sent an email to the Senior Legal Officer requesting the Trial Chamber to issue a decision on its request to file preliminary objections in 45 pages each which was filed 17 January 2011 and further requested the Trial Chamber's legal basis for the Trial Chamber's requirement

⁵¹ See email from Tanya Pettay to the Senior Legal Officer 23 February 2011 confirming the points raised in the meeting and adding some additional clarifications and the Senior Legal Officer's response of 24 February 2011.

⁵² *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Order to IENG Sary Defence on Filing of Preliminary Objections, 25 February 2011, E51/6, ERN: 00648420-00648421.

⁵³ *Id.*, p. 2.

⁵⁴ *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Summary of IENG Sary's Rule 89 Preliminary Objections & Notice of Intent of Noncompliance with Future Informal Memoranda Issued in lieu of Reasoned Judicial Decisions Subject to Appellate Review, 25 February 2011, E51/4, ERN: 00648370-00648385.

of a summary of all preliminary objections, rather than full filings.⁵⁵ The Defence received no response to this email.

46. On 1 March 2011, the OCP requested an extension of time and pages to respond jointly to the Defence teams' preliminary objections.⁵⁶ The OCP stated that this was necessary because "in light of the page limit and time extensions granted to Nuon Chea, Ieng Sary and Khieu Samphan, and the multitude of the preliminary objections that have been filed, it is not possible to provide a meaningful joint response by 7 March 2011, and within the original 20 page limit. The Co-Prosecutors respectfully request that the deadline for their joint response to the preliminary objections be extended to 21 March 2011, and that the page limit for that response be extended to 40 pages."⁵⁷

47. On 2 March 2011, the Civil Parties also requested an extension of pages to respond.⁵⁸ This filing has not yet been notified in English, so the Defence has been unable to analyze it.

48. On 4 March 2011, the Trial Chamber issued an Order on the Co-Prosecutors' and Civil Party Lead Lawyers' Requests for Extension of Time and Page Limit.⁵⁹ This Order granted the Civil Party Lead Co-Lawyers' request to file a consolidated response to the preliminary objections of all Defence teams in 25 pages in English or French and 50 pages in Khmer by 7 March 2011.⁶⁰ It also granted the OCP's request to file a consolidated response to the preliminary objections of all Defence teams in 35 pages in English or French and 70 pages in Khmer by 21 March 2011.⁶¹ It "clarifies that replies by the Defence teams to these responses, or responses to the preliminary objections filed by other Defence teams, are not sought by the Chamber."⁶²

VI. ARGUMENT

⁵⁵ See email from Tanya Pettay to the Senior Legal Officer, 25 February 2011.

⁵⁶ *Case of NUON Chea*, 001-19-09-2007-ECCC/TC, Co-Prosecutors' Request for an Extension of Time and Page Limit to Respond to Preliminary Objections of the Accused, 1 March 2011, E51/5/1, ERN: 00648752-00648754.

⁵⁷ *Id.*, para. 6.

⁵⁸ *Case of NUON Chea*, 001-19-09-2007-ECCC/TC, Demande d'Extension des Pages aux fins de Reponse Conjointe aux Exceptions Preliminaires de Toutes Les Equipes de Defense, 2 March 2011, E51/5/2, ERN: 00649087-00649091.

⁵⁹ *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Order on Co-Prosecutor's and Civil Party Lead Lawyers' Requests for Extension of Time and Page Limit, 4 March 2011, E51/5/3, ERN: 00649249-00649251.

⁶⁰ *Id.*, p. 2.

⁶¹ *Id.*, p. 3.

⁶² *Id.*

A. The Trial Chamber erred in law

49. The Trial Chamber erred in law by requiring the Defence to submit only a single preliminary objection. It did not cite any authority for its departure from the applicable law. Applicable law does not contain this limitation. Rule 89 allows parties to file multiple preliminary objections. First, the Rule does not expressly state that only one objection per Party is allowed. The text of the Rule refers to “a preliminary objection” when defining what constitutes a preliminary objection, however, the Rule itself is titled “Preliminary Objections.”
50. Second, Rule 89 allows preliminary objections which concern: **1.** the jurisdiction of the Chamber; **2.** issues which require termination of the proceedings; and **3.** the nullity of procedural acts made after the indictment is filed. These types of objections obviously raise distinct issues and cannot be lumped into a single filing. Even within the first category, 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.

B. The Trial Chamber abused its discretion

51. If the Trial Chamber possessed any discretion to alter the requirements of Rule 89, or even if the Supreme Court Chamber considers that Rule 89 provides only for a single preliminary objection, the Trial Chamber abused its discretion in denying the Defence’s request for an extension of time and pages to file each of its preliminary objections individually. Concerning the abuse of discretion standard, the Pre-Trial Chamber has cited approvingly and relied upon the standard of review set out by the ICTY *Milošević v. Prosecutor* “Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel.”⁶³ In this Decision, the ICTY Appeals Chamber stated:

In order to challenge a discretionary decision, appellants must demonstrate that ‘the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion,’ or that the Trial Chamber ‘[gave] weight to extraneous or irrelevant considerations,... failed to give weight or sufficient weight to relevant considerations, or... made an error as to the facts upon which it has exercised its discretion,’ or that the Trial Chamber’s decision was ‘so unreasonable or plainly unjust that the Appeals Chamber is able

⁶³ See *Case of IENG Sary*, 002/19-09-2007-ECCC/OIJ(PTC25), Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, ERN: 00384466-00384483, para. 25.

to infer that the Trial Chamber must have failed to exercise its discretion properly.⁶⁴

It is clear from reviewing this definition that the Trial Chamber abused its discretion. In particular, and in addition to its error of law discussed *supra*: **1.** the Trial Chamber gave weight to extraneous and irrelevant considerations; **2.** the Trial Chamber failed to give weight of sufficient weight to relevant considerations; and **3.** the Impugned Decision is unreasonable and plainly unjust.

1. The Trial Chamber gave weight to extraneous and irrelevant considerations

52. Although the Impugned Decision itself provided no reasoning from which to determine the considerations upon which it was based, the various emails and memoranda the Defence received from the Senior Legal Officer make clear that the Impugned Decision was based upon two considerations: **1.** translation constraints;⁶⁵ and **2.** equality of arms with the other Defence teams.⁶⁶ These considerations are extraneous, in that they do not reflect valid considerations for the infringement of Mr. IENG Sary's fundamental fair trial rights.

53. Mr. IENG Sary's fundamental fair trial rights must never be denied or restricted due to reasons such as translation capacity. If translation constraints did not allow for the filing of the preliminary objections simultaneously in both English and Khmer, the Trial Chamber should have allowed the Defence to file the objections in one language initially, with the translated version to follow as soon as the translation issue was resolved. This was the approach the Pre-Trial Chamber took regularly when translation constraints threatened to interfere with fair trial rights. The Trial Chamber itself employs this approach, by emailing memoranda in English initially and later filing the translations

⁶⁴ *Id.*, quoting *Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004.

⁶⁵ *See, e.g.*, 14 February memorandum, p. 1, 18 February memorandum, para. 1. The Trial Chamber has also stated, "constraints on ITU's ability to produce timely Khmer translations of all pleadings in Case 002 have forced the Trial Chamber to adopt exceptional measures in order to avoid disruption to trial time-lines." *Case of NUON Chea*, 002/19-09-2007-ECCC/TC, Memorandum – Trial Chamber, to Office of Administration, Re: Translation Constraints before the Trial Chamber in Case 002 and Vacant Posts in the Interpretation and Translation Unit, 9 February 2011, E38/1, ERN: 00642944-00642945, p. 1.

⁶⁶ The Senior Legal Officer stated that the Defence would not be authorized to place its full preliminary objections on the Case File as annexes to the required outline summary, because "It is unable to accede to this request. Firstly, this would create equality of arms concerns vis-a-vis other parties, who have generally been granted lesser page limits for their preliminary objections than the Ieng Sary team." Email from the Senior Legal Officer to Michael Karnavas, 25 February 2011.

once available. More importantly, this was an approach which would have protected Mr. IENG Sary's fair trial rights. Furthermore, rather than directing the ITU to stop translating the Defence's preliminary objections, the Trial Chamber should have consulted with the Defence to enquire whether the Defence could request outside assistance with translation.

54. Concerning equality with the other defence teams, this was not a valid reason to require a 35 page summary. First, the other teams never intended to file as many preliminary objections as the IENG Sary Defence.⁶⁷ The IENG Sary Defence intended to raise issues which were unique to it and did not affect the other defence teams, such as the issue of Mr. IENG Sary's Royal Amnesty and Pardon and the issue of *ne bis in idem*, due to Mr. IENG Sary's 1979 trial.
55. Second, the failure to respect the fair trial rights of one Defence team does not and cannot justify the failure to respect the fair trial rights of another Defence team in order for there to be equality of arms between the teams. Even if all the Defence teams had intended in the first place to submit the same number of preliminary objections within the same number of pages, the failure to accept the filings of one or more teams in violation of fair trial rights does not justify the failure to accept the filings of another defence team. This would be illogical.

2. The Trial Chamber failed to give weight or sufficient weight to relevant considerations

56. As is clear from the background section *supra*, the Defence raised its concerns to the Trial Chamber on multiple occasions. The Trial Chamber failed to give weight to these considerations in issuing the Impugned Decision.
57. The Defence explained that the issues it intended to address in its preliminary objections were complicated and could not be adequately addressed in a single outline summary. The Defence intended to raise 8 preliminary objections relating to: **1.** Amnesty and pardon; **2.** *Ne bis in idem*; **3.** Applicability of international crimes and forms of liability;

⁶⁷ The IENG Thirith Defence only submitted a single preliminary filing of 13 pages in English. See *Case of IENG Thirith*, 002/19-09-2007-ECCC/TC, IENG Thirith Defence's Preliminary Objections, 14 February 2011, E44, ERN: 00643947-00643960. The Nuon Chea Defence originally filed 2 objections which were 26 pages in English combined. See 18 February memorandum. The KHIEU Samphan Defence originally filed 2 objections which were 25 pages in French combined. 18 February memorandum.

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; 7. The application of crimes against humanity; and 8. Nullity of the procedural act of refusing an extension of time until the Defence received the Pre-Trial Chamber's reasoning for its decision on the Defence's appeal of the Closing Order. The first 7 of these objections were also addressed in similar arguments made in IENG Sary's Appeal against the Closing Order.⁶⁸

58. The Pre-Trial Chamber has repeatedly recognized and pointed out that the issues raised in the Appeal against the Closing Order are complex and novel. It stated, for example:

The appeal[] raised points never before raised before a Cambodian Court and in many cases never considered in international law and especially within the context of the temporal jurisdiction of the ECCC.... The Pre-Trial Chamber had determined that the rights of the parties would be most egregiously affected by failing to properly thoroughly assess and address all issues raised in the appeals.⁶⁹

59. It also stated:

As the Appeal raises a number of legal issues of considerable complexity and of high importance for the Charged Person, the Cambodian people and the Khmer speaking legal community, the Pre-Trial Chamber determined that the rights of the parties would be most egregiously affected by failing to properly and thoroughly assess and address all the issues raised and by not providing full reasoning in English and Khmer.⁷⁰

60. The Trial Chamber gave no weight to the complexity and novelty of the issues the Defence intended to raise. It even announced that it would decide whether certain objections were admissible on 18 February 2011 without even receiving the full arguments related to the objections⁷¹ – although it later backtracked and has not yet followed through with this announcement.

61. The Trial Chamber also failed to give consideration to the fact that the Defence had not yet received the Pre-Trial Chamber's reasoning for the rejection of its Appeal against the Closing Order at the time it was required to submit its preliminary objections. The

⁶⁸ *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.

⁶⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 75), Interoffice Memorandum from the Pre-Trial Chamber to the Trial Chamber, 9 February 2011, D427/1/28, ERN: 00641791-00641796, p. 2-3.

⁷⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 75), Interoffice Memorandum, to Mr. Sophy Kong, Head, Translation and Interpretation Unit and Ms. Michelle Keating, Senior Co-ordinator, Translation and Interpretation Unity, 1 March 2011, D427/1/29, ERN: 00648473-00648474, p. 1.

⁷¹ See 14 February memorandum.

Defence explained that it was necessary to receive this reasoning so that it could determine whether to accept the Pre-Trial Chamber's reasoning or whether a valid basis existed to bring these jurisdictional challenges before the Trial Chamber. The Defence explained that it 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 Trial Chamber did acknowledge the Defence's concern, but did not affirmatively state that it would accept all necessary supplemental submissions which may be necessary based on the Pre-Trial Chamber's reasoning. Instead, it simply stated that it would address whether limited, supplementary submissions would be required and accepted once the reasons are issued.⁷²

62. The Trial Chamber further failed to consider that the refusal to place the Defence's full preliminary objections on the Case File, and instead to require a single outline summary, would prevent the Defence from making a record for appeal. Since the full objections are not on the Case File, there is no record that they have been made and no record of what they contain. The Supreme Court Chamber will therefore be unable to consider them in the future. If the Trial Chamber denies the objections based on the outline summary alone, the Supreme Court Chamber will be unable to determine whether denial was correct.
63. Finally, the Trial Chamber failed to consider that its severe restriction on the filing of preliminary objections violated Mr. IENG Sary's right to a defence. Mr. IENG Sary has the fundamental right to a defence, which requires that he must be entitled to present objections to the jurisdiction of the ECCC to try his case. Requiring these objections to be submitted in summary form, without any guarantee that full submissions will be accepted at a later date, violates Mr. IENG Sary's right to a defence. It effectively prevents him from having any meaningful say in the proceedings and prevents him from making any submissions which may assist the Trial Chamber. As stated by former ICTY and ICTR Appeals Chamber Judge Schomburg, "The international community has come to accept that an accused must never become the mere object of criminal proceedings."⁷³

⁷² See 3 February memorandum.

⁷³ See Fundamentally Dissenting Opinion of Judge Schomburg on the Right to Self-Representation, para. 3, in *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momcilo Krajišnik's Request to Self-Represent, on Counsel's



3. The Impugned Decision is unreasonable and plainly unjust

64. The Trial Chamber's error of law and its consideration of extraneous and irrelevant considerations and its failure to consider relevant considerations, as set out above, demonstrate that the Impugned Decision is unreasonable. There was no legitimate basis in the Rules or in the reasoning provided in the Impugned Decision and related memoranda to deny the Defence's request to file multiple objections within a reasonable amount of time.
65. Furthermore, the Trial Chamber's treatment of the preliminary objections issue is plainly unjust. It violates Mr. IENG Sary's right to a defence. It has also created an immeasurable amount of extra work for the Defence, the ITU, the DSS translators, the Supreme Court Chamber and for the Trial Chamber itself. The Trial Chamber did not inform the Defence from the start that it would only accept one preliminary objection. It was not until after the Defence had, with great difficulty, fit these complex arguments into individual objections which did not exceed 15 pages per objection, and had these objections at least partially translated, that the Trial Chamber decided not to accept them. The Trial Chamber informed the Defence of the procedure for accepting documents when the documents could not be translated by the deadline. The Defence complied with this procedure, but the Trial Chamber later decided not to follow this procedure it had created and it refused to allow the formal filing of documents which were not translated. The Trial Chamber also repeatedly changed the deadline and the page limits for its required outline summary. It first required this summary to be filed within 15 pages, then adjusted this to 25 pages, and finally to 35 pages, although the Defence did not request these extensions.

C. The Impugned Decision causes prejudice to Mr. IENG Sary

66. As explained *supra*, the Impugned Decision violates Mr. IENG Sary's right to a defence. A violation of fair trial rights necessarily causes prejudice.⁷⁴

Motions in Relation to Appointment of Amicus Curiae, and on the Prosecution Motion of 16 February 2007, 11 May 2007 (emphasis added).

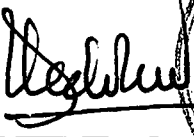
⁷⁴ The Pre-Trial Chamber has explained that "a proven violation of a right of the Charged Person, recognized in the ICCPR, ... would harm the interests of a Charged Person." *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ(PTC06), Decision on NUON Chea's Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, ERN: 00219322-00219333, para. 40. The right to a defence is a right protected by the ICCPR. See Applicable Law section *supra*.

67. Furthermore, the Trial Chamber's actions have caused prejudice to Mr. IENG Sary as this matter has prevented the Defence team from expending its resources efficiently. Instead of dedicating its full resources to preparing for the upcoming trial, the Defence has been forced to allocate valuable time and resources to address this egregious attempt to deny Mr. IENG Sary the adequate facilities necessary to prepare a defence.

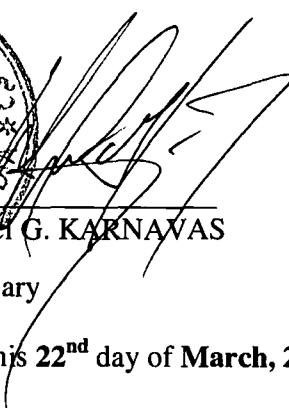
VII. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to **REVERSE** the Impugned Decision and to **ORDER** the Trial Chamber to accept full filings of each of Mr. IENG Sary's preliminary objections and to place these on the Case File.

Respectfully submitted,




 ANG Udom



 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary



Signed in Phnom Penh, Kingdom of Cambodia on this 22nd day of March, 2011