

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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IENG SARY'S RULE 89 PRELIMINARY OBJECTION

(RULE 89(1)(C))

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Rule 89(1)(c) of the ECCC Internal Rules (“Rules”), this Preliminary Objection to the Trial Chamber’s procedural disposition to “reject all requests to extend the present deadlines in relation to the filing of materials in preparation for trial” and “in due course address whether limited, supplementary submissions will be required and accepted once the Pre-Trial Chamber’s full reasons are issued” (the “Disposition”).¹ This Preliminary Objection is made necessary because the Disposition is procedurally defective:² it is prejudicial to Mr. IENG Sary’s rights to prepare a defence, to adequate time and facilities for such preparation, and to be tried expeditiously. The Disposition requires the Defence to file Preliminary Objections without the benefit of analyzing the Pre-Trial Chamber’s reasoning for its Decision on IENG Sary’s Appeal against the Closing Order.³ The Defence – being forced to provide objections in the abstract – cannot but object to this prejudicial procedural impropriety at this stage of the proceedings; anything less would not be consistent with the Defence’s obligations of acting in due diligence to ensure Mr. IENG Sary’s fair trial rights.⁴

I. BACKGROUND

1. On 15 September 2010, the OCIJ filed the Closing Order in Case 002.⁵
2. On 17 September 2010, the Defence filed a Notice of Appeal,⁶ and also filed a Request for Extension of Pages to Appeal the Closing Order.⁷

¹ *Case of IENG Sary*, 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 (“Interoffice Memorandum”).

² Rule 48 states that “judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.” Rule 89(1)(c) states that preliminary objections may be made concerning the nullity of procedural acts made after the indictment has been filed.

³ *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 (“Decision on IENG Sary’s Appeal”).

⁴ The Co-Lawyers have the obligation of due diligence in their representation of Mr. IENG Sary. This duty obliges the Defence to act diligently to protect Mr. IENG Sary’s rights and interests, and thus do its part to ensure that his trial is fair. Discussing the requirement of due diligence with respect to the right to adequate time and facilities for the preparation of a defence, one author noted that “[w]ith regard to both time and facilities, a certain degree of diligence on the part of the defence is expected and indeed required. The defence can only complain of a violation of their rights if they did everything required by the domestic law to obtain the respective (extension of) time or facility.” STEFAN TRECHSEL, *HUMAN RIGHTS IN CRIMINAL PROCEEDINGS* 214 (Oxford University Press, 2005) (emphasis added).

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246 (“Closing Order”).

⁶ *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, 20 September 2010, D427/1, ERN: 00607319-00607321.

⁷ *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.



3. On 1 October 2010, this Request was accepted by the Pre-Trial Chamber.⁸
4. On 25 October 2010, the Defence appealed the Closing Order to the Pre-Trial Chamber on eleven jurisdictional grounds.⁹
5. On 13 January 2011, the Pre-Trial Chamber issued its Decision on IENG Sary's Appeal, with reasons to "follow in due course."¹⁰ The effect of the Decision on IENG Sary's Appeal was to confirm the Closing Order, and seize the Trial Chamber in Case 002.¹¹
6. On 17 January 2011, the Defence filed 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.¹² The Defence stated that it "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."¹³
7. On 3 February 2011, Ms. Susan Lamb, Senior Legal Officer for the Trial Chamber, communicated the Disposition in the Interoffice Memorandum.¹⁴ Reasons for the Disposition were not provided in the Interoffice Memorandum, though the parties were notified that "a consolidated decision will soon be rendered..."¹⁵

II. APPLICABLE LAW

8. 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

⁸ *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.

⁹ *See 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 ("Appeal").

¹⁰ *See* Decision on IENG Sary's Appeal.

¹¹ Rule 79(1).

¹² *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.

¹³ *Id.*, para. 7.

¹⁴ Interoffice Memorandum.

¹⁵ *Id.*

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

9. Article 33 new of the Establishment Law states in pertinent part:

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses.¹⁷

10. Article 35 new of the Establishment Law states in pertinent part:

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...¹⁸

11. Article 14(3) of the International Covenant on Civil and Political Rights states in pertinent part:

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...¹⁹

12. 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."²⁰

III. ARGUMENT

13. The Trial Chamber has put the Defence in the unenviable position of having to make Hobson's choice.²¹ Forced to speculate as to the Pre-Trial Chamber's reasoning for rejecting certain of its arguments in its Appeal, it can choose not to file Preliminary Objections pursuant to Rule 89(1)(a) at all, or file basically the same jurisdictional

¹⁶ Emphasis added.

¹⁷ Emphasis added.

¹⁸ Emphasis added.

¹⁹ Emphasis added.

²⁰ Emphasis added.

²¹ "Hobson's Choice" is commonly referred to when no meaningful choice is being afforded. It is defined by the Oxford English Dictionary as "the option of taking the one thing offered or nothing." The definition is available at <http://www.oed.com/view/Entry/32111?redirectedFrom=hobson's%20choice#eid9544746>.



- challenges to the Trial Chamber that it submitted to the OCIJ or to the Pre-Trial Chamber.²²
14. The Defence appreciates the magnitude of the Pre-Trial Chamber's task, and commends it for discharging its duties in a most diligent manner. It takes time to analyze and provide a reasoned decision regarding complicated jurisdictional challenges and to have this decision translated into multiple languages. All ECCC stakeholders benefit from the Chambers' measured deliberations that are not rushed simply to meet rigid deadlines. In terms of scope and complexity, Case 002 is quite possibly one of the largest cases in world legal history. There is no doubt that its scale is unprecedented in Cambodia. For the Pre-Trial Chamber, the "appeals raised points never before raised before a Cambodian Court and in many cases never before considered in international law and especially within the temporal context of the ECCC."²³ The precedent set by Case 001 is not instructive. *Duch* was an elaborate change of plea hearing; the legal issues (substantive and procedural) were effectively not challenged, the evidence was hardly tested, and the proceedings were not adversarial, despite the length of the proceedings. The Pre-Trial Chamber itself recently summarized the position eloquently when it stated 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."²⁴
15. Mr. IENG Sary's rights to prepare a defence and to adequate time and facilities for the same should not be prejudiced by the Pre-Trial Chamber's delay in issuing a fully reasoned decision. The Trial Chamber unreasonably expects the Defence to be clairvoyant; to forecast the Pre-Trial Chamber's legal reasoning in reaching its decisions. Without the benefit of the Pre-Trial Chamber's reasoning, the Defence is not able to prepare Mr. IENG Sary's Defence adequately and with sufficient time, in accordance with his fair trial rights. Prejudice to Mr. IENG Sary is unavoidable in light the avoidable Hobson's choice the Trial Chamber has insisted on presenting the Defence.
16. It is injudicious to expect: **a.** a party to file one set of Preliminary Objections with revised or supplementary submissions to follow once the Pre-Trial Chamber issues its reasons; and **b.** the Interpretation and Translation Unit ("ITU") to translate two sets of submissions

²² Appeal.

²³ *Case of IENG Sary*, 002/19-09-2007-ECCC, Interoffice Memorandum from the Pre-Trial Chamber Responding to the Interoffice Memorandum from the Trial Chamber dated 4 February 2011, 9 February 2011, D427/1/28, ERN: 00641791-00641796, p.2.

²⁴ *Id.*



