

BEFORE THE TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** The Defence for IENG Sary**Filed to:** The Trial Chamber**Original language:** ENGLISH**Date of document:** 4 November 2011**CLASSIFICATION****Classification of the document
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**IENG SARY'S REQUEST TO STAY THE COMMENCEMENT OF THE TRIAL
PROCEEDINGS UNTIL THE FINAL DETERMINATION OF IENG SARY'S
PRELIMINARY OBJECTIONS REGARDING THE ROYAL PARDON AND
AMNESTY AND *NE BIS IN IDEM***

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All Defence Teams**All Civil Parties**

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests the Trial Chamber to Stay the commencement of the Trial Proceedings until the final determination by the Supreme Court Chamber of the issues of whether the Royal Pardon and Amnesty (“RPA”) and/or *ne bis in idem* prohibit the prosecution of Mr. IENG Sary at the ECCC. This request is made necessary because any continuation of the proceedings prior to the final determination by the Supreme Court Chamber of these issues will violate Mr. IENG Sary’s fair trial rights. These issues are dispositive and *must* be finally determined before Mr. IENG Sary can be tried. The Defence has raised these issues in a timely and diligent manner. It is no fault of Mr. IENG Sary that a final decision on these issues has yet to be rendered. Resultantly, Mr. IENG Sary should not have his fundamental fair trial rights circumscribed for the sake of commencing the trial in Case 002 prior to the end of 2011.

I. BACKGROUND¹

1. On 14 January 2011, the Trial Chamber became seized with the Case File. This started the time period for filing Rule 89 Preliminary Objections, making the due date 15 February 2011.²
2. 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.³ This motion 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.⁴

¹ It bears recalling that the Defence first raised the issues of the RPA and *ne bis in idem* before the ECCC on 7 April 2008. See IENG Sary’s Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, C/22/1/26.

² See Order to File Materials in Preparation for Trial, 17 January 2011, E9.

³ 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 The Pre-Trial Chamber’s Decision on the Defence’s Appeal of the Closing Order, which included a decision on whether the RPA and *ne bis in idem* prohibited the prosecution of Mr. IENG Sary at the ECCC was rendered on 11 April 2011. Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30.

3. On 3 February 2011, the Trial Chamber Senior Legal Officer distributed a memorandum by email which declared that “the Chamber will reject all requests to extend the present deadlines in relation to the filing of material in preparation for trial.”⁵ The memorandum also rejected all requests to extend page limits for filing Preliminary Objections and requested the parties to present arguments in summary form.
4. 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 Interpretation and Translation Unit (“ITU”) had informed the Defence that it would be unable to complete the translation of the Defence’s preliminary objections by the filing deadline.⁶
5. On 8 February 2011, the Trial Chamber 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.⁷
6. On 9 February 2011, the Defence emailed the Trial Chamber Senior Legal Officer its Preliminary Objections, *inter alia*, on the issues of the RPA and *ne bis in idem*, with the intention to file them as soon as ITU had translated them into Khmer.⁸
7. On 15 February 2011, in an emailed memorandum dated 14 February 2011, the Trial Chamber Senior Legal Officer, directed the parties to, *inter alia*, file a “single, consolidated document containing an outline of all their preliminary objections no later than Friday 25 February 2011.”⁹

⁵ Memorandum from Trial Chamber Senior Legal Officer, Susan Lamb, to all Parties in Case 002, entitled “Advance Notification of Chamber’s disposition of Motions E14, E15, E9/2, E9/3, E/24 and E27,” 3 February 2011, E35.

⁶ IENG Sary’s Urgent Expedited Request to File Preliminary Objections in English with the Khmer Translation to Follow, 7 February 2011, E34.

⁷ Memorandum from Trial Chamber Senior Legal Officer, Susan Lamb, to all Parties in Case 002, entitled “Interim Procedure Before the Trial Chamber where Translation Constraints Preclude Compliance by the Parties with Filing Deadlines,” 8 February 2011.

⁸ 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, para. 12.

⁹ Memorandum from the Trial Chamber Senior Legal Officer, Susan Lamb, to all parties in Case 002, entitled “Trial Chamber’s Amended Procedures for the Filing of Preliminary Objections and Clarification of Envisaged Response Deadlines,” 14 February 2011.

8. On 18 February 2011, the Trial Chamber 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.”¹⁰ The Trial Chamber 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.”¹¹
9. On 25 February 2011, after exhausting all attempts to file full Preliminary Objections and under the direction of the Trial Chamber, the Defence submitted an outline of its Preliminary Objections regarding the RPA and *ne bis in idem* to the Trial Chamber.¹² Within its outline, the Defence requested the Trial Chamber to refer to previous Defence filings for more comprehensive submissions on the issues of the RPA¹³ and *ne bis in idem*.¹⁴

¹⁰ Memorandum from Trial Chamber Senior Legal Officer, Susan Lamb, to all Parties in Case 002, entitled “Preliminary Objections,” 18 February 2011.

¹¹ *Id.*

¹² For a description of the Defence’s attempts to deal with matters relating to Preliminary Objections, see 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.

¹³ IENG Sary’s Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, C/22/I/26; IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, paras. 160-69; IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 42-102; IENG Sary’s Reply to the Co-Prosecutors’ Joint Response to NUON Chea, IENG Sary, and IENG Thirith’s Appeals Against the Closing Order, 6 December 2010, D427/1/23.

¹⁴ These previous submissions include: IENG Sary’s Submissions Pursuant to the *Decision on Expedited Request of Co-Lawyers for a Reasonable Extension of Time to File Challenges to Jurisdictional Issues*, 7 April 2008, C/22/I/26; IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, paras. 145-59; IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6, paras. 21-41; IENG Sary’s Reply to the Co-Prosecutors’ Joint Response to NUON Chea, IENG Sary, and IENG Thirith’s Appeals Against the Closing Order, 6 December 2010, D427/1/23.

10. On 11 April 2011, the Pre-Trial Chamber rendered its decision on Mr. IENG Sary's appeal against the Closing Order.¹⁵ The Pre-Trial Chamber found that neither the RPA nor the principle of *ne bis in idem* bars the prosecution of Mr. IENG Sary at the ECCC.¹⁶
11. On 13 April 2011, the Defence indicated to the Trial Chamber that it intended at the Initial Hearing to raise the issues that the ECCC does not have jurisdiction over Mr. IENG Sary due to **a.** his validly granted and applicable RPA; and **b.** the principle of *ne bis in idem*.¹⁷
12. On 12 May 2011, the Trial Chamber invited the Defence to file supplemental submissions on: **a.** the question of whether the RPA is in conformity with the Cambodian Constitution;¹⁸ **b.** the question of whether Mr. IENG Sary's 1979 trial was conducted in conformity with basic fair trial standards;¹⁹ and **c.** the Pre-Trial Chamber's Decision on IENG Sary's Appeal Against the Closing Order regarding the RPA and *ne bis in idem*.²⁰
13. On 27 May 2011, the Defence submitted to the Trial Chamber "IENG Sary's Supplement to his Rule 89 Preliminary Objection (Royal Pardon and Amnesty)"²¹ and "IENG Sary's Supplement to his Rule 89 Preliminary Objection (*Ne Bis In Idem*)."²²
14. On 7 June 2011, the OCP submitted the "Co-Prosecutors' Combined Response to IENG Sary's Supplements to his Rule 89 Objection (*Ne Bis In Idem* and Royal Pardon and Amnesty)."²³ On 10 June 2011, the Civil Parties submitted the "Civil Party Co-Lawyers' Response to the Supplement to Rule 89 Preliminary Objection (Royal Pardon and Amnesty)."²⁴

¹⁵ Decision on IENG Sary's Appeal Against the Closing Order, 11 April 2011, D427/1/30.

¹⁶ *Id.*, paras. 114-202.

¹⁷ IENG Sary's Indication of Legal Issues He Intends to Raise at the Initial Hearing, 13 April 2011, E9/23.

¹⁸ Memorandum from the Trial Chamber President, Judge Nil Nonn, to all parties in Case 002, entitled "Additional preliminary objections submission (amnesty and pardon)," 12 May 2011, E51/8.

¹⁹ Memorandum from the Trial Chamber President, Judge Nil Nonn, to all parties in Case 002, entitled "Additional preliminary objections submission (*ne bis in idem*)," 12 May 2011, E51/9.

²⁰ *Id.*; Memorandum from the Trial Chamber President, Judge Nil Nonn, to all parties in Case 002, entitled "Additional preliminary objections submission (amnesty and pardon)," 12 May 2011, E51/8.

²¹ IENG Sary's Supplement to his Rule 89 Preliminary Objection (Royal Pardon and Amnesty), 27 May 2011, E51/10.

²² IENG Sary's Supplement to his Rule 89 Preliminary Objection (*Ne Bis In Idem*), 27 May 2011, E51/11.

²³ Co-Prosecutors' Combined Response to IENG Sary's Supplements to his Rule 89 Objection (*Ne Bis In Idem* and Royal Pardon and Amnesty), 7 June 2011, E51/13.

²⁴ Civil Party Co-Lawyers' Response to the Supplement to Rule 89 Preliminary Objection (Royal Pardon and Amnesty), 10 June 2011, E51/10/3.

15. On 27 and 28 June 2011, the Trial Chamber heard oral arguments at the Initial Hearing regarding the RPA and *ne bis in idem*.²⁵
16. On 17 October 2011 and 1 November 2011, through letters, the Defence further notified the Trial Chamber that the issues of the RPA and *ne bis in idem* must be determined prior to the commencement of the substantive trial.²⁶
17. On 3 November 2011, the Trial Chamber rendered its decision on Mr. IENG Sary's Rule 89 Preliminary Objections regarding the RPA and the principle of *ne bis in idem*.²⁷ The Trial Chamber found that neither the RPA nor the principle of *ne bis in idem* bars the prosecution of Mr. IENG Sary at the ECCC.²⁸ The Defence will be appealing this decision; its brief to the Supreme Court Chamber is due on 5 December 2011.

II. REQUEST FOR A STAY OF THE PROCEEDINGS

A. RPA

18. Mr. IENG Sary must not be tried until the issue of whether the RPA bars his prosecution at the ECCC has been finally determined. This includes the determination of appellate proceedings for this discrete issue. Mr. IENG Sary must not face trial where he is amnestied and/or pardoned from doing so. Any possibility that Mr. IENG Sary would face trial when he otherwise should not would: **a.** violate Mr. IENG Sary's right to a fair trial – any trial would be unfair if there is the possibility that he should not be facing trial at all; **b.** violate Article 27 of the Cambodian Constitution which grants the King the right to grant partial or complete amnesty;²⁹ **c.** result in judicial inefficiency as there is the possibility that there should be no trial at all for Mr. IENG Sary; and **d.** result in donor funding being wasted if a trial takes place when it otherwise should have not.³⁰

²⁵ Transcript of Initial Hearing, 27 June 2011, E1/4.1; Transcript of Initial Hearing, 28 June 2011, E1/5.1.

²⁶ Letter from IENG Sary Defence team to Trial Chamber Senior Legal Officer, entitled "Scheduling of the Substantive Trial," 17 October 2011; Letter from IENG Sary Defence team to Trial Chamber Senior Legal Officer, entitled "Issues which impede the efficiency of the early portion of the substantive hearing," 1 November 2011.

²⁷ Decision on IENG Sary's Rule 89 Preliminary Objections (Ne Bis in Idem and Amnesty and Pardon), 3 November 2011, E51/15.

²⁸ *Id.*

²⁹ Article 27 of the Cambodian Constitution states: "The King shall have the right to grant partial or complete amnesty."

³⁰ The struggle which the ECCC faces to receive donor funding has been made well known by the media. See, e.g., Julia Wallace, *Court Coffers to Dry Up Without More Funds*, CAMBODIA DAILY, 3 August 2011.

As aptly opined by the *Tadić* Appeals Chamber, “Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and a proper rule is selected.”³¹

B. *Ne Bis in Idem*

19. According to international standards to which the Trial Chamber is mandated to adhere,³² and which it has relied on in the past,³³ Mr. IENG Sary should not be tried until the issue of *ne bis in idem* has been finally determined. This includes the determination of appellate proceedings for this discrete issue. Mr. IENG Sary has a fundamental right not to be tried for an offense for which he has been previously tried. Article 14(7) of the International Covenant on Civil and Political Rights (“ICCPR”) states, “No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”³⁴ Article 14 of the ICCPR must be respected at the ECCC in accordance with Article 31 of the Cambodian Constitution, Articles 12(2) and 13(1) of the Agreement, and Articles 33 new and 35 new of the Establishment Law.
20. Guidance on this issue can be sought from the European Court of Human Rights (“ECtHR”). Article 4 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) states, “1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State ... 3. No derogation from this Article shall be made under Article 15 of the Convention.” Commentary to Article 4 of Protocol No. 7 to the ECHR states that it “is not confined to the right not to be *punished*

³¹ *Prosecutor v. Tadić*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 6.

³² Agreement, Art. 12(1); Establishment Law, Art. 33 new.

³³ The Trial Chamber has previously taken guidance from the ECtHR on issues of substance. *See* Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, 26 October 2011, E95/8, n. 54.

³⁴ Emphasis added.

twice, but extends to the right not to be *tried* twice.”³⁵ According to leading academic (now serving as an ICTY Judge) Stefan Trechsel, “[*ne bis in idem*] is not a guarantee which requires a specific quality of the trial, but leads to the consequence that there should be no trial at all in specific circumstances.”³⁶

III. CONCLUSION AND RELIEF SOUGHT

21. As set out in the background section, *supra*, the Defence has raised the issues of the RPA and *ne bis in idem* in a timely and diligent manner.³⁷ It is no fault of Mr. IENG Sary that these issues remain outstanding and are subject, as a matter of right, to further appeal.³⁸ While the Trial Chamber has indicated that a desire to start the substantive trial in 2011 is a determinative factor in previous legal reasoning,³⁹ this is not a factor to be considered, let alone to be determinative, in justifying any infringements or abridgements to Mr. IENG Sary’s fundamental fair trial rights.

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to STAY the commencement of the Trial Proceedings, i.e. the presentation of opening statements and taking of evidence, until the final determination of the issues of whether the RPA and/or *ne bis in idem* prohibit the prosecution of Mr. IENG Sary at the ECCC.

Respectfully submitted,

ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4TH day of **November**, 2011

³⁵ VAN DIJK ET AL., THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 982 (INTERSENTIA, 2006 4th Ed.). (Emphasis in original).

³⁶ TRESCHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 385 (OXFORD UNIVERSITY PRESS 2005) (emphasis added).

³⁷ “**Due diligence.** 1. The diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation.” BLACK’S LAW DICTIONARY 468 (7TH Ed.).

³⁸ Rule 104(4)(a) of the ECCC Rules.

³⁹ “In the exercise of its duty to ensure an expeditious trial, the Chamber has declined to reconsider this Order or to hold a hearing, which would ensure that the substantive trial could instead not open before 2012.” Decision on Co-Prosecutors’ Request for Reconsideration of the Terms of the Trial Chamber’s Severance Order (E124/2) and related motions and annexes, 18 October 2011, E124/7, para. 6 ; “The Co-Prosecutors’ request for a hearing on this issue is further denied, in the interests of permitting the Trial Chamber to retain its current schedule by commencing the trial of the substance in Case 002 in 2011.” *Id.*, para. 12.