

BEFORE THE TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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SUMMARY OF IENG SARY'S RULE 89 PRELIMINARY OBJECTIONS

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**NOTICE OF INTENT OF NONCOMPLIANCE WITH FUTURE INFORMAL
MEMORANDA ISSUED IN LIEU OF REASONED JUDICIAL DECISIONS
SUBJECT TO APPELLATE REVIEW**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby submits, pursuant to Trial Chamber Senior Legal Officer Susan Lamb’s 14 February 2011 Memorandum,¹ and related 18 February memorandum² this “single, consolidated document containing an outline of all [his] preliminary objections.”³ The Defence submits that the requirement of a single consolidated outline of all preliminary objections is a violation of Mr. IENG Sary’s fundamental right to be heard and to prepare a defence. It effectively gives him no voice and turns him into a mere object to the present proceedings, rather than a vital participant. The Defence is deeply concerned that such a violation of Mr. IENG Sary’s fundamental rights was directed by the Senior Legal Officer, and that no official reasoned decision has been provided by the Trial Chamber concerning this matter. The Defence hereby gives notice that it does not intend to comply with any future informal memoranda which would infringe upon Mr. IENG Sary’s fundamental fair trial rights. The Defence submits that the Trial Chamber must accept full supplementary submissions from the Defence concerning each of the objections below.⁴ The Trial Chamber may not decide fundamental issues such as whether the ECCC has jurisdiction to try Mr. IENG Sary without allowing the Defence to submit substantive arguments.

I. BACKGROUND OF THE PROBLEMS THE DEFENCE HAS FACED IN RAISING ITS PRELIMINARY OBJECTIONS

1. The Defence is entitled by Internal Rule 89 to file preliminary objections before 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.⁵ Matters such as

¹ See Memorandum – Trial Chamber: Trial Chamber’s Amended Procedures for the Filing of Preliminary Objections and Clarification of Envisaged Response Deadlines, 14 February 2011 (“14 February Memorandum”).

² Memorandum – Trial Chamber: Preliminary objections, 18 February 2011.

³ 14 February Memorandum, p. 2.

⁴ These summary preliminary objections are provided subject to the proviso that the Defence has not been provided with the Pre-Trial Chamber’s reasoning for its rejection of similar jurisdictional challenges raised before it. The Pre-Trial Chamber’s Decision was issued with reasons to “follow in due course.” *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. The final preliminary objections may change once the Defence has the opportunity to review the Pre-Trial Chamber’s reasoning.

⁵ Practice Direction for the Filing of Documents, Art. 5.1.



jurisdiction are often quite complex and it is quite difficult to adequately develop the necessary arguments in 15 pages.⁶

2. On 16 September 2010, the OCIJ filed the Closing Order in Case 002.⁷
3. On 17 September 2010, the Defence filed a Notice of Appeal⁸ and also filed a Request for Extension of Pages to Appeal the Closing Order.⁹
4. On 1 October 2010, this Request was accepted by the Pre-Trial Chamber.¹⁰ 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...”¹¹
5. 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.¹²
6. 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,

⁶ The Pre-Trial Chamber, at least, has recognized this. It stated that the jurisdictional issues raised in the appeals against the Closing Order (which are the same as many of the preliminary objections raised before the Trial Chamber) “raise[] 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 ... the rights of the Parties would be most egregiously affected by failing to properly thoroughly assess and address all issues raised.” *Case of NUON Chea*, 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.

⁷ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246.

⁸ *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.

⁹ *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.

¹⁰ *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.

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

¹² *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.

dismissed certain grounds of appeal, and partially granted other grounds of appeal. The Decision was issued with reasons to “follow in due course.”¹³

7. On 14 January 2011, the Trial Chamber became seized with the Case File. This started the time period for filing preliminary objections, making the due date 15 February 2011.¹⁴
8. On 17 January 2011, the Defence filed a request to the Trial Chamber for the time period to file Rule 89 preliminary motions 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.¹⁵ 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. 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 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.
9. On 3 February 2011, the 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.”¹⁶ 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.”¹⁷ The memorandum stated that the Trial Chamber will in due course address whether limited,

¹³ *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.

¹⁴ *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.

¹⁵ *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.

¹⁶ *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”).

¹⁷ *Id.*

supplementary submissions will be required and accepted once the reasons are issued. The memorandum also rejected all requests to extend page limits for filing preliminary objections and requested the parties to present arguments in summary form.

10. 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.¹⁸
11. 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.¹⁹ 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.
12. On 9 February 2011, the Defence emailed 6 of its 8 preliminary objections to the Senior Legal Officer, as requested.²⁰ It informed her that one other preliminary objection was currently being proofread and could be sent to her the following day and that the other preliminary objection was expected to be translated by the deadline and so did not need to be sent to the Trial Chamber in advance. 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 team generally proofreads and makes small changes to the original language version of motions while these are in translation. These

¹⁸ *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.

¹⁹ Memorandum – Trial Chamber, Re: Interim Procedure Before the Trial Chamber where Translation Constraints Preclude Compliance by the Parties with Filing Deadlines, 8 February 2011 (“8 February Memorandum”).

²⁰ See email from Tanya Pettay to Ms. Lamb, 9 February 2011.

changes are then made to the translated version before filing. It is often necessary to 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.

13. On 10 February 2011, the Defence emailed the Senior Legal Officer two additional preliminary objections.²¹

14. On 14 February 2011, two of the Defence's preliminary objections were filed, as their translations were complete.²² These two objections were notified to the parties on 14 February and 15 February 2011.

15. 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."²³ 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

²¹ See email from Tanya Pettay to Ms. Lamb, 10 February 2011.

²² 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.

²³ 14 February Memorandum.

of the maximum page limit.²⁴ 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.”²⁵ The Senior Legal Officer stated that the Trial Chamber would notify the parties as to which of these filings, or portions of filings, are considered inadmissible as preliminary objections by 18 February 2011. 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 may at a later date request further, more detailed submission in relation to those preliminary objections which the Chamber believes “warrants more detailed consideration before the Chamber.”²⁶

16. On 16 February 2011, the Defence sent a letter to the Office of Administration, which was copied to the Trial Chamber and the parties.²⁷ The Defence informed the Office of 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.²⁸ 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

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Letter to Office of Administration, Re: The Trial Chamber’s Amended Procedures for Filing Preliminary Objections, 16 February 2011.

²⁸ *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.

Officer.²⁹ The Senior Legal Officer's emailed response did not lead the Defence to believe that it was only allowed one single filing. The Defence never received any official decision from the Trial Chamber concerning this request.

b. The Trial Chamber appears 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." 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. The Defence must never be considered as a joint group. 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.³⁰

c. The Trial Chamber Judges are failing to perform their required duties. According to the 14 February Memorandum, the Trial Chamber will decide which preliminary objections are admissible before these filings are even translated into Khmer. Almost all 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 are 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.

²⁹ 3 February Memorandum.

³⁰ *Id.*, p. 2.

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

17. On 17 February 2011, the Defence filed a letter to the Senior Legal Officer detailing the above complaints.³¹

18. 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

³¹ *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.

English or French and 50 pages in Khmer.”³² 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.”³³

II. NOTICE OF INTENT OF NONCOMPLIANCE WITH FUTURE INFORMAL MEMORANDA

19. As is clear from the background set out above, the Defence has received absolutely no reasoned decisions from the Trial Chamber relating to the issue of preliminary objections. It has received only emailed memoranda from the Senior Legal Officer.³⁴ The Defence has made no attempt to disrupt proceedings or circumvent the Rules or Orders of the Trial Chamber. It has simply attempted to diligently represent Mr. IENG Sary by filing valid preliminary objections, as provided by the Rules. The Defence recognizes that translation constraints may occasionally require special interim procedures. This is why the Defence requested to be allowed to file its preliminary objections in English with the Khmer translation to follow. The Defence was also willing to comply with the Senior Legal Officer’s alternate solution of emailing courtesy copies of preliminary objections to the Trial Chamber, although it noted some flaws with this procedure.
20. Now, however, through the 14 February and 18 February Memoranda, the Senior Legal Officer has attempted to prevent the Defence from filing anything other than a single consolidated summary of all its preliminary objections. She justifies this blatant violation of Mr. IENG Sary’s fundamental right to be heard and to prepare a defence by referring to translation constraints. Mr. IENG Sary’s rights may not be violated simply because ITU has not hired enough translators. Furthermore, Mr. IENG Sary’s rights must not be restricted without a reasoned decision by the Trial Chamber grounded in applicable law.

³² Memorandum – Trial Chamber, Re: Preliminary Objections, 18 February 2011.

³³ *Id.*

³⁴ The Defence notes that the Trial Chamber has the capacity to issue decisions quickly when it so desires. Merely one day after the parties received notification that Judge Nil Nonn would not respond to the application for his disqualification, the Trial Chamber issued its Decision on the matter. *See Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Email from Judge Nil Nonn to Members of the Trial Chamber Bench Regarding Motion to Disqualify Him, 26 January 2011, E5/2, ERN: 00640285-00640285; *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary’s Application to Disqualify Judge Nil Nonn and Related Requests, 28 January 2011, E5/3, ERN: 00640427-00640435. In contrast, the Defence has received no decisions from the Trial Chamber concerning the filing of preliminary objections.

21. The Defence has endeavored to comply with the Senior Legal Officer's latest Memoranda – although these informal, unreasoned, and contradictory memoranda have created countless extra hours of work for all involved. The Defence submits that in addition to this summary, it must be afforded the opportunity to present full, reasoned arguments for each of the preliminary objections set out below. The Defence furthermore gives notice that it does not intend to comply with future informal memoranda and insists that it receive reasoned decisions from the Trial Chamber.

III. OUTLINE OF PRELIMINARY OBJECTIONS

22. The ECCC does not have jurisdiction over Mr. IENG Sary, due to his validly granted and applicable Royal Amnesty and Pardon. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), 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, ERN: 00177265-00177280;
- b. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, paras. 160-69;
- c. *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, paras. 42-102;
- d. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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, ERN: 00629968-00630043.

23. The ECCC does not have jurisdiction over Mr. IENG Sary due to the principle of *ne bis in idem*. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), 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, ERN: 00177265-00177280;

- b. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, paras. 145-59;
- c. *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, paras. 21-41;
- d. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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, ERN: 00629968-00630043.

24. The ECCC does not have jurisdiction to apply international crimes and forms of liability against Mr. IENG Sary. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Applicability of the Crime of Genocide at the ECCC, 30 October 2009, D240, ERN: 00401925-00401940;
- b. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Application of Crimes Against Humanity at the ECCC, 13 April 2010, D378, ERN: 00498540-00498552;
- c. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion against the Application of Grave Breaches at the ECCC, 7 May 2010, D379, ERN: 00511576-00511589;
- d. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application at the ECCC of the Mode of Liability Known as Joint Criminal Enterprise, 28 July 2008, D97, ERN: 00208225-00208240;

- e. *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, paras. 103-35;
- f. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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, ERN: 00629968-00630043.

25. The ECCC does not have jurisdiction to apply Grave Breaches of the Geneva Conventions against Mr. IENG Sary. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, para. 66;
- b. *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, paras. 136-37;
- c. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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, ERN: 00629968-00630043;
- d. *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.

26. The ECCC does not have jurisdiction to apply command responsibility against Mr. IENG Sary. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 15 February 2010, D345/2, ERN: 00475513-00475527;

- b. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Command Responsibility at the ECCC, 15 February 2010, D345/3, ERN: 00475746-00475757;
- c. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 60), IENG Sary's Appeal Against the OCIJ's Order on IENG Sary's Motion Against the Application of Command Responsibility at the ECCC, 13 April 2010, D345/5/1, ERN: 00491231-00491261;
- d. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, paras. 25-27, 127-43;
- e. *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, paras. 283-324;
- f. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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, ERN: 00629968-00630043.

27. The ECCC has limited jurisdiction to apply crimes against humanity against Mr. IENG Sary, should it have jurisdiction to apply them at all. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning the Crime of Enforced Disappearance & Request for Extension of Page Limitation, 6 August 2009, D180/4, ERN: 00373977-00373994;
- b. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Lawyers of Civil Parties' Investigative Request Concerning Forced Marriage and Forced Sexual Relations, 11 August 2009, D188/3, ERN: 00362834-00362848;

- c. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Alternative Motion on the Limits of the Applicability of Crimes Against Humanity at the ECCC, 23 June 2010, D378/2, ERN: 00542117-00542132;
- d. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, paras. 29-64;
- e. *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, paras. 184-231.

28. The ECCC does not have jurisdiction to apply national crimes against Mr. IENG Sary. For further explanation, please see, *inter alia*:

- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (National Crimes) at the ECCC, 10 June 2010, D382, ERN: 00532798-00532812;
- b. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, 1 September 2010, D390/1/2/1.3, ERN: 00599293-00599359, para. 104;
- c. *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, paras. 138-79;
- d. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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, ERN: 00629968-00630043.

29. The Trial Chamber's refusal to stay the 30 day time period to file preliminary objections until after the Pre-Trial Chamber gives reasons for its Decision on IENG Sary's Appeal

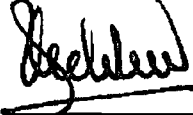
against the Closing Order must be annulled for procedural defect. For further explanation, please see, *inter alia*:

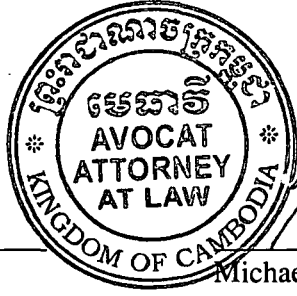
- a. *Case of IENG Sary*, 002/19-09-2007-ECCC/TC, IENG Sary's Rule 89 Preliminary Objection (Rule 89(1)(c)), 14 February 2011, E48, ERN: 00644260-00644265.

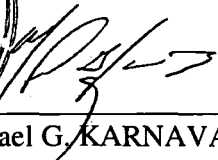
IV. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Trial Chamber to FIND that the ECCC does not have jurisdiction over Mr. IENG Sary or alternatively that jurisdiction must be limited, as explained in the filings referenced herein. The Defence furthermore URGES the Trial Chamber to issue reasoned decisions on all motions relating to this matter.

Respectfully submitted,


 ANG Udom




 Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 25th day of February, 2011