

BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S EXPEDITED APPEAL
AGAINST OCIJ'S REFUSAL TO ACCEPT DEFENCE RESPONSE TO OCP'S FINAL
SUBMISSION AND REQUEST FOR STAY OF PROCEEDINGS**

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I. SUMMARY OF ARGUMENT

1. The Internal Rules (“Rules”) provide an exhaustive list of orders and decisions of the Co-Investigating Judges that can be appealed to the Pre-Trial Chamber by the Charged Persons. Other orders of the Co-Investigating Judges are subject to control through the annulment procedure. Notices of deficient filings by the Greffiers are not “orders or decisions of the Co-Investigating Judges” and, as such, are non-appealable.
2. The Rules create a *sui generis* procedural system for this Court based on the unique circumstances of this Court. They, therefore, constitute the primary instrument to which reference should be made in determining procedure before this Court.¹ The Rules do not provide for an opportunity to the Charged Persons to respond to the Co-Prosecutors’ Final Submission. Final Submissions, like the Introductory and Supplementary Submissions, are filed by the Co-Prosecutors in exercise of their unique role of representing the “interests of justice” and of initiating criminal action “in the general interest of the society”.² Introductory and Supplementary Submissions are recommendations delineating the factual matrix of the investigation, and the Final Submissions contain recommendations that do not bind the Co-Investigating Judges.³ These documents are unique to the role of the Co-Prosecutors and, as such, warrant no mandatory responses from other parties.
3. Fair trial rights of the Charged Persons are not violated by an absence of a provision for a response to the Final Submission as the Charged Persons have every possibility to argue their submissions of facts, law, and requests for investigative action during the judicial investigation and they have recourse to annulment or appellate provisions against actions of the Co-Investigating Judges. In addition, the Co-Investigating Judges are not bound by the legal characterisation of the Co-Prosecutors and the Trial Chamber, in turn, is not bound by the legal characterisation of the Closing Order. If indicted, the Accused will, therefore, have an opportunity to challenge before the Trial Chamber the contents of the Closing Order.

¹ Decision on Nuon Chea’s Appeal Against Order Refusing Request for Annulment, Appeal No. 002/19-09-2007-ECCC/OCIJ (PTC 06), 26 August 2008, D55/I/8, para. 14.

² Decision on Civil Party Co-Lawyers’ Joint Request for a Ruling on the Standing of Civil Party Lawyers to Make Submissions on Sentencing and Directions Concerning the Questioning of the Accused, Experts and Witnesses Testifying on Character, Case No. 001/18-07-2007-ECCC/TC, 9 October 2009, E72/3, para. 20.

³ Internal Rules, REV.5, 9 February 2010 (“Rules”), rules 55(2), 67(1).

4. The Rules also do not provide for a stay of judicial investigation by the Pre-Trial Chamber. A unique procedural feature of the Rules, like the absence of a requirement to file a response to the Final Submission, created by the Judicial Plenary, cannot be a ground for stay of proceedings, as sought by the Defence. In any event, it does not amount to an abuse of process to compel the Pre-Trial Chamber to disown its jurisdiction and stay the proceedings. The Appeal, therefore, should be dismissed as procedurally inadmissible and substantively devoid of merit.⁴

II. DEFENCE APPEAL IS INADMISSIBLE

5. The Rules provide for a number of orders and decisions of the Co-Investigating Judges that can be appealed to the Pre-Trial Chamber by the Charged Persons.⁵ The list is exhaustive and the Pre-Trial Chamber has jurisdiction to decide only on appeals against those enumerated orders and decisions.⁶ Other orders of the Co-Investigating Judges are subject to control through the annulment procedure which ensures that a Charged Person may request that a proceeding affected by procedural defects, which infringes his/her rights, be annulled.⁷ Notices of deficient filings by the Greffiers of the Office of the Co-Investigating Judges are not “orders or decisions of the Co-Investigating Judges” and are, as such, non-appealable.
6. By their impugned action, the Greffiers have not made an order or a decision. They have simply “returned” a deficient filing for correction which can be filed subsequently in its correct form.⁸ The filing was both impermissible and deficient. It was of sixty-six pages (substantially more than the permitted fifteen pages allowed by the Practice Directions⁹) and it was filed despite an order of refusal of the Co-Investigating Judges to receive it. It is noteworthy that the Charged Person has not chosen to appeal the Refusal Order of 19 August 2010.¹⁰ The Greffiers’ communication, therefore, is not an order or decision that is amenable to be

⁴ Ieng Sary’s Expedited Appeal Against the OCIJ’s Decision Refusing to Accept the Filing of Ieng Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations and Request for Stay of the Proceedings, 6 September 2010 (“Appeal”).

⁵ Rules, rules 73, 74(3).

⁶ Decision on Ieng Sary’s Appeal Against the OCIJ’s Order on Translation Rights and Obligations of the Parties, Appeal No. 002/19-09-2007-ECCC/OCIJ (PTC 12), 20 February 2009, A190/II/9 (“Translation Rights Decision”), para. 28.

⁷ Translation Rights Decision, para. 28; Rules, rule 76.

⁸ Practice Directions on Filing of Documents Before the ECCC, REV.4, 5 June 2009 (“Practice Directions”), article 10.2.

⁹ Practice Directions article 5.1.

¹⁰ Letter of the Co-Investigating Judges to the Ieng Sary Defence Team, Case No. 002/19-09-2007-ECCC/OCIJ, 19 August 2010, D390/II.

appealed before the Pre-Trial Chamber. The Appeal should, therefore, be dismissed as procedurally barred.

III. DEFENCE HAS NO RIGHT TO FILE A RESPONSE TO A FINAL SUBMISSION

7. The ECCC Law and Rules provide no provision for the Defence to file a response to the Co-Prosecutors' Final Submission. Rules 66 and 67 establishes the procedure where at the end of the judicial investigation the Co-Prosecutors are required to file a Final Submission and consequently the Co-Investigating Judges issue their Closing Order independently, not bound by the Co-Prosecutors' Final Submission. The detailed nature of the rights and obligations of the Co-Prosecutors and the Co-Investigating Judges contained in these Rules, in contrast to the absence of any corresponding Charged Persons' rights or obligations on the same issue, indicates that there is no right for the Defence to respond to a Final Submission. The fact that the Rules expressly grant rights for the Defence to participate in the judicial investigation under Rule 55 (10) and to appeal in specific circumstances orders and decisions under Rule 74 and in contrast to their absence under Rule 66 and 67 demonstrate that the drafters intended no such right to respond to the Final Submission be granted to the Defence.
8. Moreover, the Practice Directions on the Filing of Documents before the ECCC authorized pursuant to Rule 20 differentiate the rights of the Charged Person to file responses to pleadings and applications by providing time¹¹ and page limits¹² for such filings against their absence of rights to respond to Introductory, Supplementary and Final Submissions. The Directions provide no recognition of that right or time or page limits to do so.¹³ Consequently, the Practice Directions are consistent with the Rules in that they both consider Introductory, Supplementary and Final Submissions separately and independently to other pleadings and applications with different corresponding rights and obligations.

IV. DEFENCE FAIR TRIAL RIGHTS ARE PROTECTED

9. Aside from the Rules and the Practice Directions not conferring a right to the Defence to respond to the Final Submission, in contrast to the Defence's claims, the action of the Greffiers of the Co-Investigating Judges to reject the Charged Persons response to the Final Submission does not infringe the Charged Person's fair trial rights. In short, the right to a fair trial does not

¹¹ Practice Directions article 8.

¹² Practice Directions article 5.1.

¹³ Practice Directions article 5.5.

mandate that each party have identical rights at every stage of the process, especially here where the Co-Prosecutors' have a unique role during the pre-trial stage.

10. The jurisprudence of the Pre-Trial Chamber reflects the notion that Rule 21, which states that proceedings "shall be fair and adversarial and preserve the rights of the parties," does not require that all parties be treated exactly the same at all times. For example, the Pre-Trial Chamber has ruled that the Charged Person's right to a fair trial does not include translation of the entire case file.¹⁴ Similarly, in a recent decision, the Pre-Trial Chamber declined to admit an appeal challenging the Co-Investigating Judges decision to reject the Defence's request that Co-Investigating Judges identify and verify the chain of custody and authenticity of each item in a particular set of materials.¹⁵ In determining that declining to admit the appeal would not infringe the Defence's fair trial rights, the Pre-Trial Chamber took into account the fact that the rejection of the Appeal would not leave the Charged Person without recourse to develop or defend his case.¹⁶ Broad interpretations have been given to Rule 74(3) where there is no further avenues of recourse to redress the affected right to appeal.¹⁷ In this case, however, no exercise of discretion to allow the Appeal is warranted since the Charged Person has further avenues of recourse.
11. A holistic examination of the ECCC procedural system clearly demonstrates that the absence of a right for the Defence to respond to the Final Submission does not infringe the principle of equality of arms or the Charged Persons's rights "to make a record and thus prepare a defence."¹⁸ In fact, the Rules provide substantial opportunity for the Defence to challenge the legal and factual conclusions made by the Co-Investigating Judges after the Closing Order is issued and throughout the Trial.¹⁹ Indeed, the fact that there is no specific provision for the Defence to respond to the Final Submission until after the Closing Order is issued makes good

¹⁴ Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A1901I120, paras. 34-50.

¹⁵ Decision on Appeal Against OCIJ Order on Nuon Chea's Sixteenth (D253) and Seventeenth (D265) Requests for Investigative Actions, 6 April 2010, para. 11.

¹⁶ *Id.* (stating that "once the Closing Order is issued, were it to indict the Appellant and rely on such material, he could then challenge the authenticity of the material in question before the Trial Chamber.").

¹⁷ *See, e.g.* Decision on Appeal Against OCIJ Order on Nuon Chea's Eighteenth Request for Investigative Action, 10 June 2010, paras. 10-11 (adopting a broad interpretation of the Accused's right to appeal where the issue concerned the alleged failure to place exculpatory evidence on the case file; the PTC determined that the allegation, if established, could have "serious consequences on the right of the Charged Person to a fair trial").

¹⁸ *See Appeal*, para. 37.

¹⁹ *See, e.g.* Rules 67(5), 74, 89.

law as the Final Submission is only a *recommendation* made by the Co-Prosecutors and precedes any appealable *decision* of the Co-Investigating Judges.²⁰

12. International fair trial standards do not require that each party be afforded precisely the same rights. Rather, they mandate only that each party be afforded a *reasonable* opportunity to present his case under conditions that do not place her/him at a substantial disadvantage.²¹ The Co-Prosecutors submit that this standard must be applied with due consideration to the overall structure and specifically drafted procedural mechanisms established in the Agreement, the Law and the Rules.
13. In the ad hoc Tribunals the confirmation of an indictment, a process not unlike the issuance of a closing order in this court, is carried out by a single judge reviewing only the evidence and submissions of the Prosecution.²² At the ICTY and ICTR the Defence play no part in the investigation, the confirmation submissions or the confirmation hearing.²³ The rules of the ICTY and the ICTR have been held to comply with fair trial rights.²⁴ In the ECCC, as explained in paragraph 7 above, the Defence fully participates in the investigation and can appeal, albeit on limited grounds, the closing order.²⁵ Lastly, at trial, the Defence has rights of preliminary objection under Rule 89, the right to make submissions on any matter to the Trial Chamber under Rule 92, the right to call witnesses and to present documents. Disallowing the Defence to respond to the final submission does not in any way infringe on their fair trial rights.
14. The Defence proposition that the *Ruiz-Mateos Case* decided by the European Court of Human Rights (“ECHR”) in a civil suit provides support that Ieng Sary has a right to respond to the Co-Prosecutors’ Final Submission is off point. The appellant in the ECHR case participated in a completely different judicial process, civil in nature, with an array of different rights and obligations that interplay from beginning to the end. In that case, the ECHR held that fair trial

²⁰ See Rule 66(5) (stating that the “Co-Prosecutors may *request* the Co-Investigating Judges to either indict the Charged Person and send him or her for trial, or to dismiss the case.”) (emphasis added).

²¹ See, e.g. *Prosecutor v. Tadic*, Appeals Chamber Judgement, IT-94-1-A, 15 July 1999, D390/1/2/1.1.1, para. 48

²² See Rule 47 of RPE of ICTR and ICTY.

²³ See Rules 39 and 47 of RPE of ICTR and ICTY.

²⁴ See Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 Colum. J. Transnat’l L. 635, 655 (2007) (stating that “the due process guarantees incorporated into the ICTY Statute roughly reflect those found in Article 14 of the ICCPR, an instrument cited by the Secretary-General as reflective of the internationally recognized standards of the rights of criminal defendants”).

²⁵ See Rule 74.

rights required the opportunity to respond to a prosecutor's written submissions.²⁶ There the appellant's family company was expropriated by a legislative decree, leaving him without recourse. This case is in stark contrast to the rights afforded to the Charged Person to challenge the legal process and the facts throughout the judicial investigation and trial.

15. Similarly, the Defence argument that the Charged Persons fair trial rights have been infringed because he has not been treated equally before the law misunderstands the nature of the principle. The right to be treated equally before the law is a fundamental right guaranteed in the international law of human rights and Cambodian *domestic law*. However, the right to equal protection of the law is only *meant* to prevent discrimination between people in the application of the law. The principle of equal treatment before the law does not prevent change in legislation nor the ongoing legitimate interpretation of the law by judges. The fact that the Co-Investigating Judges did not object to KANG Guek Eav's ("Duch") response to the Final Submission in Case 001 should not be regarded as discrimination against this Charged Person in relation to Case 002 but be regarded as a further development of the law. In relation to the current status of the law as articulated by the Co-Investigating Judges in their decision both KANG Guek Eav and IENG Sary have been treated equally.

V. A STAY OF PROCEEDINGS IS NOT WARRANTED

16. The Rules do not provide for a stay of proceedings. Given the *sui generis* procedural system of this Court, there other means through which Parties can seek redress against the actions of the Co-Investigating Judges during the judicial investigation and trial. These actions include appeals and annulment proceedings. The Rules expressly provide that pending appeal proceedings, the judicial investigation may continue.²⁷ The Pre-Trial Chamber has held that the proceedings can only be stayed if it concludes, relying on the abuse of process doctrine, that the rights of the Charged Person have been egregiously violated.²⁸

²⁶ Appeal; *See also Ruiz-Mateos v. Spain*, Eur. Ct. H.R., 16 E.H.R.R. 505, Judgement, 23 June 1993, Application No. 12952/87, paras. 63-68.

²⁷ Rule 77(1).

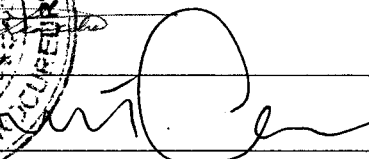
²⁸ Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for the Stay of Proceedings on the Basis of Abuse of Process (D264/1), Appeal No. 002/19-09-2007-ECCC/OCIJ (PTC 42), 10 August 2010, D264/2/6, para. 26.

17. The Defence has failed to cite any case law that supports a stay of proceedings.²⁹ In fact, in none of the cases cited by the Defence did the court actually impose a stay of proceedings.³⁰ Indeed, it can hardly be considered that the rejection by the Co-Investigating Judges greffier of a Defence filing because it was 51 pages over the limit allowed under the Practice Directions results in the *impossibility* of a fair trial for the Charged Person.³¹ It is particularly true that the present situation falls short of the rigorous standard set out for stay of proceedings in light of the fact that the Rules provide for the Defence to participate fully in the investigative and trial process. The Defence provide no allegation, or even a contention, of an abuse of process. The Appeal does not even seek a relief of stay of proceedings in its final section entitled “Relief Sought.” This submission should therefore be dismissed.

VI. RELIEF SOUGHT

18. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeal.

Respectfully submitted,

Date	Name	Place	Signature
8 September 2010	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor	Phnom Penh	

²⁹ See IENG Sary’s Expedited Appeal Against the OCIJ’s Decision Refusing to Accept the Filing of IENG Sary’s Response to the Co-Prosecutors’ Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 002/19-09-2007-ECCC/OCIJ (PTC 71), 6 September 2010, D330/1/2/1, ERN:00598683-00598696, para. 5 (citing five ICTY rulings).

³⁰ See *Prosecutor v. Prlić et al.*, IT-04-74-T, Decision on Request for a Temporary Adjournment Filed by the Praljak Defence, 16 April 2010, p. 6; *Prosecutor v. Tadić*, IT-94-I-A, Judgement, 15 July 1999, para. 55 (stating only that the court could “conceive of situations where a fair trial is not possible”); *Prosecutor v. Nikolic*, IT-94-2-T, Decision on Request for a Temporary Adjournment Filed by the Praljak Defence, 16 April 2010, paras. 106-15; *Prosecutor v. Bobetko*, IT-02-62-AR54bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, 29 November 2002, para. 15; *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, 7 November 2003.

³¹ See Defence Expedited Appeal, para. 5 (“At the ICTY, jurisprudence has established that a stay of proceedings may be imposed when a fair trial is impossible.”).