

**BEFORE THE PRE-TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS**Case No: 002/19-09-2007-ECCC/OCIJ(PTC 75) **Party Filing:** The Defence for IENG Sary

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**IENG SARY'S REPLY TO THE CO-PROSECUTOR'S OBSERVATIONS ON IENG  
SARY'S REQUEST FOR AN EXTENSION OF PAGE LIMIT TO APPEAL THE  
CLOSING ORDER**

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Mr. IENG Sary through his Co-Lawyers (“the Defence”) hereby submits this Reply to the Office Co-Prosecutor’s (“OCP”) Observations to the Defence’s Request<sup>1</sup> for an extension of page limit to appeal the Closing Order (“Observations”).<sup>2</sup> Although on 1 October 2010 the Pre-Trial Chamber granted the Defence’s request for an extension of pages<sup>3</sup> – thus making the matter moot – the scope of the OCP’s Observations requires the Defence to reply. Simply, the OCP in its Observations – inappropriately – takes the opportunity to influence the Pre-Trial Chamber as to the admissibility of the Appeal. This is outside the scope of observations to a page extension request and should not be taken into account by the Pre-Trial Chamber. The Defence is entitled to reply to these newly raised arguments and to make its record as part of its due diligence obligations.

### I. Background

1. The Defence made the Request on the grounds that the Closing Order raises several complex jurisdictional issues and these cannot substantively be addressed in 30-pages. The OCP’s Observations did not solely address the issue of whether the page extension should be granted.<sup>4</sup> The OCP further attempted to address the admissibility of the Appeal in stating: **a.** “the PTC has not confirmed in what circumstances such an appeal [a decision confirming jurisdiction] would be admissible;”<sup>5</sup> **b.** “if jurisdictional issues intended to be raised by an Appellant have been previously confirmed by the Co-Investigating Judges and the Appellant has chosen not to appeal that jurisdictional issue at the earlier stage they are consequently barred from raising such issues now;”<sup>6</sup> **c.** “Ieng Sary had 30 days [from being charged] to challenge these jurisdictional decisions before the PTC;”<sup>7</sup> and **d.** “the PTC and Trial Chamber have extensively ruled on different occasions on all these issues.”<sup>8</sup>

### II. Reply

<sup>1</sup> *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 (“Request”), 17 September 2010, D427/1/1, ERN: 00607672-00607674.

<sup>2</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), Co-Prosecutors’ Observations IENG Sary’s Request for an Extension of Page Limit to Appeal the Closing Order, 27 September 2010, D427/1/2, ERN: 00609966-00609970.

<sup>3</sup> *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.

<sup>4</sup> Observations, para. 9.

<sup>5</sup> *Id.*, para. 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, para. 6.

<sup>8</sup> *Id.*, para. 8.



2. The OCP states, “the PTC has not confirmed in what circumstances such an appeal [a decision confirming jurisdiction] would be admissible.”<sup>9</sup> If this argument is to be followed, due diligence dictates that everything which could count as a jurisdictional challenge must be argued and therefore more pages are necessary.
3. The OCP errs in stating “if jurisdictional issues intended to be raised by an Appellant have been previously confirmed by the Co-Investigating Judges and the Appellant has chosen not to appeal that jurisdictional issue at the earlier stage they are consequently barred from raising such issues now.”<sup>10</sup> Again, this observation falls outside the scope of the page limit of a document and should not be taken into account by the Pre-Trial Chamber. The Pre-Trial Chamber has found that the Defence may appeal “if the Closing Order confirms the jurisdiction of the ECCC.”<sup>11</sup> The Closing Order confirms the jurisdiction of the ECCC and is therefore is subject to appeal.
4. Previous jurisdictional challenges have been made by the Defence and have been met with a note from the OCIJ Greffier stating that the OCIJ “will take due consideration of the submissions ... as part of the full legal analysis that will be included in the Closing Order.”<sup>12</sup> Therefore, the OCIJ order to these jurisdictional challenges is the Closing Order. Hence, now is the time to appeal these jurisdictional challenges as no order on these jurisdictional challenges has been rendered at any earlier stage. In general, Appeals can only be made once an order has been issued.<sup>13</sup> Not to allow an appeal to these jurisdictional issues would be a misuse of the procedures of the Pre-Trial Chamber and bring the administration of justice into disrepute.
5. The OCP interprets Rule 75(3) so that Mr. IENG Sary has 30 days from being charged to challenge jurisdictional issues before the Pre-Trial Chamber.<sup>14</sup> Yet again, this argument is outside the scope of observations on the page limit of a document and should not be

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<sup>9</sup> *Id.*, para. 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 60), Decision on IENG Sary’s Appeal Against the Co-Investigating Judge’s Order on IENG Sary’s Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, ERN: 00528364-00528370.

<sup>12</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from OCIJ Greffier to the Defence re: Motion Against the Applicability of Crimes Against Humanity at the ECCC, 7 May 2010, D378/1, ERN: 00511620-00511620. *See also Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from OCIJ Greffier to the Defence re: Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (national crimes) at the ECCC, 16 June 2010, D382/1, ERN: 00534062-00534062; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from OCIJ Greffier to the Defence re: Motion Against the Applicability of Grave Breaches at the ECCC, 7 May 2010, D379/1, ERN: 00511617-00511617.

<sup>13</sup> Although, for example, appeals against constructive denials can only be made if no order to appeal is forthcoming.

<sup>14</sup> Observations, para. 6.



taken into account by the Pre-Trial Chamber. The OCP's interpretation is inconsistent with that of the OCIJ, which has specifically stated to most of the jurisdictional challenges raised by the Defence that it will take due consideration of them at the Closing Order.<sup>15</sup> The OCP's interpretation of Rule 75(3) demonstrates a complete lack of respect for the rights of the Accused. On 14 November 2007, Mr. IENG Sary had just been charged and brought into detention, and was in no way afforded, within 30 days of being charged, adequate time and facilities to prepare such complex legal challenges.<sup>16</sup>

6. The OCP errs in stating that the Pre-Trial Chamber and the Trial Chamber have extensively ruled on different occasions on jurisdictional issues.<sup>17</sup> The Pre-Trial Chamber has not ruled on these issues as the matters have not come before it.<sup>18</sup> Indeed, the Pre-Trial Chamber effectively deferred the Defence's appeal on command responsibility to an appeal of the Closing Order when it held: "if the Closing Order confirms the jurisdiction of the ECCC over Command Responsibility, the Charged Person may consider the effect of Internal Rule 67(5) when read in conjunction with Internal Rule 74(3)(a)."<sup>19</sup> The principle established by the Pre-Trial Chamber is that if the Closing Order confirms the jurisdiction of the ECCC, an appeal on that jurisdictional issue is permissible.
7. The Trial Chamber has not extensively ruled on these issues. The defence in Case 001 only made very limited challenges to the jurisdiction of the ECCC and therefore the Trial Chamber was denied an extensive and necessary debate on the jurisdictional issues

<sup>15</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from OCIJ Greffier to the Defence re: Motion Against the Applicability of Crimes Against Humanity at the ECCC, 7 May 2010, D378/1, ERN: 00511620-00511620; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from OCIJ Greffier to the Defence re: Motion Against the Application of Crimes Listed in Article 3 new of the Establishment Law (national crimes) at the ECCC, 16 June 2010, D382/1, ERN: 00534062-00534062; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Letter from OCIJ Greffier to the Defence re: Motion Against the Applicability of Grave Breaches at the ECCC, 7 May 2010, D379/1, ERN: 00511617-00511617.

<sup>16</sup> Article 13(1) of the Agreement states in pertinent part: "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..." (emphasis added). 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." (emphasis added).

<sup>17</sup> Observations, para. 8.

<sup>18</sup> Only the issues of Joint Criminal Enterprise, *ne bis in idem* and the Royal Pardon and Amnesty have been before the Pre-Trial Chamber in Case 002. *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC35), Decisions on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, D97/14/15, ERN: 00486521-00486589; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on Appeal against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/74, ERN: 00232976-00233004.

<sup>19</sup> *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 60), Decision on IENG Sary's Appeal Against the Co-Investigating Judge's Order on IENG Sary's Motion Against the Application of Command Responsibility, 9 June 2010, D345/5/11, ERN: 00528364-00528370.



surrounding the ECCC. The Trial Chamber was even not seized with the jurisdictional issues of genocide, *ne bis in idem* or Mr. IENG Sary's Royal Pardon and Amnesty. Only if and when the Trial Chamber becomes seized with Case 002 will it have the opportunity to extensively hear and rule upon the jurisdictional issues facing the ECCC.<sup>20</sup>

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to refuse to take into account the OCP's Observations.

Respectfully submitted,

ANG Udom

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Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 4<sup>th</sup> day of **October, 2010**

<sup>20</sup> Rule 89(1) states in pertinent part: "A preliminary objection concerning: a) the jurisdiction of the Chamber ... shall be raised no later than 30 (thirty) days after the Closing Order becomes final, failing which it shall be inadmissible;" Observations, para. 7.