

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

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**OBSERVATIONS BY CIVIL PARTY CO-LAWYERS REGARDING THE
APPEALS BY NUON CHEA, IENG SARYAND IENG THIRITH AGAINST
THE CLOSING ORDER**

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I. INTRODUCTION

1. Civil Party Co-Lawyers wish to file the Observations in respect of three Appeals (“the Appeals”)¹, which were filed separately by NUON Chea, IENG Sary, and IENG Thirith (“the Appellants”), against the entire Closing Order and some parts of the Closing Order of the Co-Investigating Judges which was issued on 15 September 2010.² Civil Party Co-Lawyers find that the three Appeals mentioned above should be rejected because they were filed not in appropriate circumstances and not admissible.
2. Civil Party Co-Lawyers respectfully request to the Pre-Trial Chamber (PTC) that the Observations are filed in one language, Khmer original language, while their translated versions will be filed to the PTC at a later time after the Interpretation and Translation Unit of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) has finished translating.

II. PROCEDURAL BACKGROUND

3. On 15 September 2010, the Co-Investigating Judges issued a Closing Order charging the Accused NUON Chea, IENG Sary, and IENG Thirith with crimes against humanity, crime of genocide, grave breaches of the Geneva Conventions of 12 August 1949 and violations of the 1956 Cambodian Penal Code.³
4. The Appellant, NUON Chea, filed his appeal against the Closing Order dated 18 October 2010;⁴ the Appellant, IENG Thirith, filed her appeal against the Closing Order dated 18 October 2010;⁵ the Appellant, IENG Sary, filed his appeal against the Closing Order dated 25 October 2010.⁶

¹ IENG Thirith’s Appeal against the Closing Order, dated 18 October 2010, D427/2/1. NUON Chea’s Appeal against the Closing Order, dated 18 October 2010, D427/3/1. IENG Sary’s Appeal against the Closing Order, dated 25 October 2010, D427/1/6.

² The Closing Order, dated 15 September 2010, D427.

³ The Closing Order dated 15 September 2010, D427, para. 1613.

⁴ NUON Chea’s Appeal against the Closing Order, dated 18 October 2010, D427/3/1.

⁵ IENG Thirith’s Appeal against the Closing Order, dated 18 October 2010, D427/2/1.

⁶ IENG Sary’s Appeal against the Closing Order, dated 25 October 2010, D427/1/6.

5. The Co-Prosecutors filed the joint response to the three Appellants' appeals on 19 November 2010.⁷ The Co-Lawyers for Civil Parties had five days to file their observations related to the Appellants' appeals by supporting the Co-Prosecutors' response. The period of five days started from the date which the Co-Prosecutors notified parties of the response.⁸

III. ADMISSIBILITY OF THE OBSERVATIONS

6. As stated in paragraph 4 above, Co-Lawyers for Civil Parties could file their observations within five days from the date of notification of the Co-Prosecutors' Response to parties in accordance with the decision of the Pre-Trial Chamber dated 28 October 2010.⁹ The Co-Prosecutors' Response was notified electronically to parties on 24 November 2010. Therefore, the deadline for filing the observations by the Co-Lawyers for Civil Parties expired on Monday 29 November 2010. According to this, the observations are filed on 29 November 2010, the filing deadline. Thus, the observations are admissible.

IV. SUMMARY OF ARGUMENTS IN THE APPEALS AGAINST THE CLOSING ORDER

7. Civil Party Co-Lawyers observed that the Appellants presented arguments in their appeals against the Closing Order by basing mainly on these points:

A. Arguments of NUON Chea

1. The Co-Investigating Judges erred in the law. The Appellant, NUON Chea, submitted that the ECCC did not have the jurisdiction over international crimes since the ECCC is a national criminal court¹⁰ (NUON Chea's Appeal).

⁷ Co-Prosecutors' Joint Response to NUON Chea, IENG Sary and IENG Thirith's Appeals against the Closing Order, dated 19 November 2010, D427/1/17.

⁸ Decision on Co-Prosecutors' Request to File a Joint Response to the Appeal Briefs of NUON Chea, IENG Sary, KHIEU Samphan, and IENG Thirith against the Closing Order and Consequently Extension of Page Limit dated 28 October 2010, D427/1/8.

⁹ *Ibid.*

¹⁰ NUON Chea's Appeal against the Closing Order, dated 18 October 2010, D427/3/1, paras. 24-26.

2. The 1956 Cambodian Penal Code did not define crime of genocide, crimes against humanity, and war crimes as criminal offences¹¹ (NUON Chea's Appeal).

3. The ECCC Law did not define crime of genocide, crimes against humanity, and war crimes as criminal offences¹² (NUON Chea's Appeal).

4. International principle of legality did not set forth national criminal offences¹³ (NUON Chea's Appeal).

5. The retroactive legal classification of criminal offences violates the national principle of legality¹⁴ (NUON Chea's Appeal).

6. The ECCC is a national court. Thus, it does not have the jurisdiction over international crimes and the forms of liability charged against the Charged Person because the crimes and the forms of liability are not national law applied during the period of Democratic Kampuchea regime¹⁵ (NUON Chea's Appeal).

B. Arguments of IENG Sary

1. The ECCC does not have the jurisdiction over IENG Sary because:

- IENG Sary was already tried and convicted of crimes which the ECCC charges against him¹⁶ (IENG Sary's Appeal).
- He was granted the amnesty and pardon for crimes which the ECCC charged against him¹⁷ (IENG Sary's Appeal).
- The duration of the alleged crimes has exhausted and the delay to the charges is a retroactive principle which the ECCC violates the principle of legality and equality of the appellant before the law¹⁸ (IENG Sary's Appeal).
- The ECCC is a national court. Thus, it does not have the jurisdiction over international crimes and the forms of liability charged against the Charged Person because the crimes and the forms of liability are not

¹¹ NUON Chea's Appeal against the Closing Order, dated 18 October 2010, D427/3/1, paras. 27-29.

¹² NUON Chea's Appeal against the Closing Order, dated 18 October 2010, D427/3/1, paras. 30-32.

¹³ NUON Chea's Appeal against the Closing Order, dated 18 October 2010, D427/3/1, paras. 33-34.

¹⁴ NUON Chea's Appeal against the Closing Order, dated 18 October 2010, D427/3/1, paras. 35-37.

¹⁵ NUON Chea's Appeal against the Closing Order, dated 18 October 2010, D427/3/1, paras. 24-37.

¹⁶ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 42-102.

¹⁷ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 21-102.

¹⁸ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 138-179.

national law applied during the period of Democratic Kampuchea¹⁹ (IENG Sary's Appeal).

2. The Co-Investigating Judges erred in applying the law of crime of genocide because the crime of genocide was erroneously defined. Furthermore, the Co-Investigating Judges erred in applying the law of crimes against humanity because some of the alleged crimes against humanity are not part of the international customary law during the period between 1975 and 1979²⁰ (IENG Sary's Appeal).

3. The form of liability stemming from the Joint Criminal Enterprise was erroneously defined and the Co-Investigating Judges erred in applying the form of liability²¹ (IENG Sary's Appeal).

4. The liability for joint planning, instigating, aiding and abetting, and ordering was mistakenly defined. Therefore, the Co-Investigating Judges applied it erroneously²² (IENG Sary's Appeal).

C. Arguments of IENG Thirith

1. The ECCC is a national court and does not have the jurisdiction over national crimes whose statute of limitation over the offences has exhausted, and the delay to the charges is a retroactive principle which the ECCC violates the principle of legality and equality of the appellant before the law²³ (IENG Thirith's Appeal).

2. The ECCC does not have the jurisdiction over international crimes and the alleged forms of liability because the ECCC is a national court and the crimes and forms of liability are not part of national law applied during the period between 1975 and 1979²⁴ (IENG Thirith's Appeal).

3. The Co-Investigating Judges erred in applying crimes against humanity which were erroneously defined, and crimes against humanity are not part of international customary law during the period between 1975 and 1979²⁵ (IENG Thirith's Appeal).

¹⁹ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 103-135.

²⁰ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 180-231.

²¹ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 249-272.

²² IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, paras. 273-282.

²³ IENG Thirith's Appeal against the Closing Order, dated 18 October 2010, D427/2/1, paras. 73-78.

²⁴ IENG Thirith's Appeal against the Closing Order, dated 18 October 2010, D427/2/1, paras. 12-72.

²⁵ IENG Thirith's Appeal against the Closing Order, dated 18 October 2010, D427/2/1, paras. 95-101.

4. The Closing Order was issued in violation of the Appellant's rights in receiving a fair trial²⁶ (IENG Thirith's Appeal).

V. ARGUMENTS OF CIVIL PARTY CO-LAWYERS AGAINST THE APPEALS

8. Civil Party Co-Lawyers find that all arguments presented in the Appellants' Appeals as shown in paragraph 7 above are not acceptable, and we wish to declare that we support all arguments presented by the Co-Prosecutors in their joint Response²⁷ to NUON Chea, IENG Sary, and IENG Thirith's Appeals against the Closing Order, dated 19 November 2010.

VI. PUBLIC ORAL HEARING IS NOT NECESSARY

9. The Appellants, IENG Sary and IENG Thirith, request the PTC to conduct public oral hearing in deciding these appeals.²⁸ The Appellants failed to rationalize the necessity for the public hearing of the Appeals. They only stated that there were great complexities concerning the credibility of the ECCC. The Internal Rule 77(3)(b) states that after having considered the views of the parties, the PTC may decide the appeal or the application on the basis of written submissions of the parties only. This means that the right of the appellant to receive public oral hearing is not compulsory that the PTC conduct public oral hearing. Besides, since the conducting of hearing of any appeal was deemed unnecessary, the PTC should use this valuable time to review the written arguments and responses of both parties as the basis in making the decision. This can ensure the timely progress of work as required by the law and avoid wasting too much resources of the ECCC.
10. In this case, Civil Party Co-Lawyers submit that the decision on the Appeals by the PTC be done on the basis of written submissions only.

²⁶ IENG Thirith's Appeal against the Closing Order, dated 18 October 2010, D427/2/1, paras. 60-63.

²⁷ Co-Prosecutors' Joint Response to NUON Chea, IENG Sary, IENG Thirith's Appeals against the Closing Order, dated 19 November 2010, D427/1/17.

²⁸ IENG Sary's Appeal against the Closing Order, dated 25 October 2010, D427/1/6, para. 4. IENG Thirith's Appeal against the Closing Order, dated 25 October 2010, D427/2/1, para. 102.

VII. CONCLUSION AND REQUEST

11. Civil Party Co-Lawyers submit that such inappropriate Appeals be declared inadmissible by the PTC.

Civil Party Co-Lawyers would like to request the PTC to:

1. Declare the appeals inadmissible, and
2. Expeditiously send the Closing Order to the Trial Chamber.

Respectfully submitted,

Done in Phnom Penh on 29 November 2010

CHET Vanly

Ty Srinna

VEN Pov