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BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S REPLY TO CO-PROSECUTOR'S RESPONSE TO IENG SARY'S TWO NOTICES OF APPEAL AGAINST THE TRIAL CHAMBER'S DECISIONS REFUSING THE EXTENSION OF TIME AND PAGE LIMITS FOR THE FILING OF PRELIMINARY OBJECTIONS

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby replies to the Co-Prosecutors' Response to IENG Sary's Two Notices of Appeal against the Trial Chamber's Decisions Refusing the Extension of Time and Page Limits for the Filing of Preliminary Objections ("Response").[1] This Reply is made necessary because the Response is inadmissible, it contains errors of law, and it seeks relief which is not provided by the Rules or applicable Cambodian law.

I. REPLY

1. The Response is inadmissible. The Practice Direction for the Filing of Documents at the ECCC ("Practice Direction") allows for responses to Applications and Pleadings,[2] not to Notices of Appeal. The Response has furthermore not been filed within the time limit provided for responses. The Response refers to two Notices of Appeal filed by the Defence. The first, IENG Sary's Notice of Appeal against Trial Chamber's Decision Entitled Trial Chamber's Disposition of Requests for Extension of Deadline (E9/7 and E9/4/9), was filed on 2 March 2011[3] and was notified on 4 March 2011. If this could be considered a pleading to which a response is allowed, such response must be filed within 10 calendar of notification of the Notice. The Response was filed on 18 March 2011 – 14 calendar days after notification of the Notice. The OCP has not provided reasons why this filing is late, as required by Article 9 of the Practice Direction.

2. The Response errs in considering that Rule 104 is the sole Rule which confers the Supreme Court Chamber with jurisdiction to hear appeals.[4] The two Appeals for which the Notices of Appeal were filed are admissible pursuant to Rule 21. Rule 21(1) states, "The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in

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[1] *Case of IENG Sary*, 002/19/09-2007/ECCC/SC, Co-Prosecutors' Response to IENG Sary's Two Notices of Appeal against the Trial Chamber's Decisions Refusing the Extension of Time and Page Limits for the Filing of Preliminary Objections, 18 March 2011, E9/7/1/1/1/1, ERN: 00655029-00655033.
[2] *See* Practice Direction on the Filing of Documents Before the ECCC, Practice Direction ECCC/01/2007/Rev.6, Art. 8.3.
[3] *Case of IENG Sary*, 002/19/09-2007/ECCC/TC, IENG Sary's Notice of Appeal against Trial Chamber's Decision Entitled Trial Chamber's Disposition of Requests for Extension of Deadline (E9/7 and E9/4/9), 2 March 2011, E9/7/1/1, ERN: 00649214-00649215.
[4] Response, paras. 2-3.

the ECCC Law and the Agreement."[5] Rule 21 thus requires the Chambers to always safeguard Mr. IENG Sary's interests. The Pre-Trial Chamber has previously determined that Rule 21 would require it to find appeals admissible in order to ensure that fair trial rights were safeguarded where there was otherwise no Rule granting a right to appeal.[6] The Defence submits that the Supreme Court Chamber must follow this precedent set by the Pre-Trial Chamber in order to ensure that Mr. IENG Sary's fundamental fair trial rights are safeguarded.

3. The Response further errs in failing to recognize that the Appeals are admissible pursuant to Rule 104. Rule 104(1) states in relevant part: "[A]n immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant."[7] As explained in the Appeals, the Trial Chamber erred in the exercise of its discretion and caused prejudice to Mr. IENG Sary. The OCP erroneously states that immediate appeals are limited by Rule 104(2).[8] Rule 104(2) simply states: "The Supreme Court Chamber may either confirm, annul or amend decisions in whole or in part, as provided in Rule 110." Immediate appeals are governed by Rule 104(4). The Appeals do qualify as immediate appeals, pursuant to Rule 104(4)(a) and (d), for reasons explained in more detail in the actual Appeals.

4. The Response is inadmissible and has no basis. The OCP asserts that admissibility of the Appeals should be addressed before the Appeals are actually filed and their arguments concerning admissibility can be analyzed.[9] The OCP asserts that this is necessary because the Supreme Court Chamber must be able to "filter the *prima facie* merits of an appeal by an analysis of the content of the Notices of Appeal and without the need to consider the full appeal submissions."[10] The OCP asserts that if admissibility is not determined now, "a pleading practice will develop which will unnecessarily consume the resources and time of this Chamber, the Parties and the Interpretation and Translation

[5] Emphasis added.
[6] *See Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 71), Decision on IENG Sary's Appeal against the Co-Investigating Judges' Decision Refusing to Accept the Filings of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations, and Request for Stay of the Proceedings, 20 September 2010, D390/1/2/4, ERN: 00601705-00601717, para. 13.
[7] Emphasis added.
[8] Response, para. 2.
[9] *Id.*, para. 6.
[10] *Id.*

Unit ("ITU")."[11] The OCP fails to recognize that the Response is an unnecessary drain on the resources of the Supreme Court Chamber, the Parties, and ITU. The Supreme Court Chamber is perfectly capable of determining the admissibility of the Appeals once it actually receives the Appeals and considers their admissibility sections. Obviously, if it finds that they are inadmissible, it need not consider the merits of the Appeals. There is no waste of resources which would result from allowing the Appeals to be filed.

5. The OCP refers to the Cambodian Code of Criminal Procedure ("CPC") to support its assertion that the Appeals should be dismissed as inadmissible before they are even received by the Supreme Court Chamber.[12] The CPC does not require this. Moreover, Article 345 of the CPC, cited by the OCP, provides no support. It states:

> The court may declare an interlocutory question inadmissible only by a judgment with statement of reasons. If the objection is dismissed, the trial hearing shall proceed. If an interlocutory question is raised and admitted by the court, the court shall adjourn the hearing and set the time for the objecting party to clarify the issue with the competent court.

6. Article 345 refers simply to the procedure which will follow if an interlocutory appeal is accepted or is dismissed. It does not authorize the Chamber to refuse to accept the filing of an appeal out of a belief formed without reading the appeal that the appeal is likely inadmissible. In fact, the requirement that an interlocutory appeal may be declared inadmissible "only by a judgment with statement of reasons" supports the opposite conclusion: the Supreme Court Chamber must allow the Appeals to be filed and consider their arguments as to admissibility so that it may issue a reasoned decision. The OCP's reference to ICTY jurisprudence is inapposite, as the ICTY procedure concerning appeals differs from that of the ECCC. The OCP made no efforts to reconcile the differences and to show why ICTY procedure should be used to supplant or circumvent ECCC procedure.

7. Finally, the OCP implies that the Appeals are "manifestly ill-founded"[13] and "have no regard for the Internal Rules of the Court or its Practice Directions."[14] It asserts that "[t]he judges of the ECCC have a duty to ensure that precious time and resources are not consumed on manifestly ill-founded submissions that detract them from their primary

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[11] *Id.*
[12] *Id.*, paras. 8-9.
[13] *Id.*, para. 11.
[14] *Id.*, para. 12.

duty of ensuring a fair and expeditious trial."[15] Again, it is the Response – and not the Appeals – which wastes judicial resources. It is furthermore the OCP, and not the Defence, which appears to have no regard for applicable procedure. Responses are not envisaged in the Practice Direction for Notices of Appeal.[16] The Response is inadmissible and need not be considered.

8. If the OCP had wished to have an actual debate as to the admissibility of the Appeals, it could have responded to the admissibility arguments raised in the Appeals once they were filed. Instead, it chose to assert, without ever even seeing the Appeals, that they are "manifestly ill-founded" and to argue that the Defence should not even be permitted to file the Appeals or to Reply to its Response.[17] How convenient it would be for the OCP, if the Defence were not permitted to file appeals simply based upon the OCP's assertion that they were ill-founded, and if the OCP did not need to trouble itself with considering the Defence's actual arguments.

II. RELIEF REQUESTED

WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Supreme Court Chamber to REJECT the Response and accept the filing of the Appeals.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **22nd** day of **March, 2011**

[15] *Id.*

[16] *See* Practice Direction on the Filing of Documents Before the ECCC, Practice Direction ECCC/01/2007/Rev.6, Art. 8.3.

[17] The OCP "request[s] that the Chamber order that the Defence be prohibited from filing any further appeal submission arising from these two notices on the basis that they are manifestly ill-founded and would lead to a waste of the Chamber's, Parties' and ECCC resources." Response, para. 1.