

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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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

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Mr. IENG Sary, through his Co-Lawyers ("the Defence"), hereby submits, pursuant to Rule 21 of the ECCC Internal Rules ("Rules"), this expedited Appeal against the OCIJ's decision to instruct its Greffier to refuse to accept the filing ("the Impugned Decision")¹ of IENG Sary's Response to the Co-Prosecutors' Rule 66 Final Submission and Additional Observations ("Response").² This expedited Appeal is made necessary because the OCIJ has violated Mr. IENG Sary's fundamental fair trial rights of: a) equality of arms by allowing the Office of the Co-Prosecutors ("OCP") to submit a 931-page Final Submission setting out what it believes the applicable law to be while denying the Defence the right to file a meaningful Response, which, in this case is 66 pages; b) equal treatment before the law, as demonstrated by a comparison of the OCIJ treatment of Mr. KAING Guek Eav in Case 001 with the treatment the Defence received in the Impugned Decision; and c) entitlement to prepare a defence and make a record by refusing to place the Response on the Case File. In order to respect Mr. IENG Sary's fundamental fair trial rights, his Response must be placed on the Case File and considered along with the Co-Prosecutors' Rule 66 Final Submission ("Final Submission").³ A stay of the proceedings is necessary to avoid manifest injustice. A public hearing is requested to more fully and transparently develop the arguments presented herein.

I. PRELIMINARY MATTERS

A. ADMISSIBILITY OF THE APPEAL

1. This Appeal is admissible pursuant to Rule 21. Rule 21 provides that:

[t]he applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of ... Charged Persons ... In this respect: a) ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties ... b) Persons who find themselves in a similar situation and prosecuted for the same offences shall be treated according to the same rules; d) Every person suspected or prosecuted ... has the right ... to be defended ...⁴

2. The Pre-Trial Chamber has previously stated that with respect to its jurisdiction it "will examine whether Internal Rule 21 requires that it adopts a broader interpretation of the

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, OCIJ Greffier's Notice of Deficient Filing, 2 September 2010. *See* Annex 1.

² *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. *See* Annex 2.

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Rule 66 Final Submission, 16 August 2010, D390, ERN: 00591062-00591992.

⁴ Emphasis added.



Charged Person's right to appeal in order to ensure that proceedings during the investigation are fair and adversarial and that a balance is preserved between the rights of the Parties."⁵ Rule 21 thus confers an inherent jurisdiction on the Pre-Trial Chamber to hear appeals relating to the Charged Persons' fundamental fair trial rights. The Pre-Trial Chamber has jurisdiction to hear this Appeal because it relates to Mr. IENG Sary's fundamental right to equality of arms, to equal treatment before the law, and to prepare a defence.

B. REQUEST FOR A STAY OF THE PROCEEDINGS PENDING A DECISION ON THIS APPEAL

3. Neither the Cambodian Code of Criminal Procedure nor the Internal Rules set out the requirements necessary to stay proceedings. The OCIJ, however, has stated that it "consider[s] that the principles governing the law applicable to a request for annulment and those governing the law applicable to a request for a stay of proceedings are the same, especially where the requests are essentially based on the same facts."⁶
4. Accordingly, a stay of proceedings may be granted where there has been (or will be if a stay is not granted) a procedural defect and "where the defect infringes the rights of the party making the application."⁷ The Pre-Trial Chamber has explained that requests for stays of proceedings can fall "within the general ambit of an application falling within Article 33 New of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia which relevantly provides that 'trials are fair' and conducted 'with full respect for the rights of the accused...'"⁸
5. At the ICTY, jurisprudence has established that a stay of proceedings may be imposed when a fair trial is impossible.⁹ A Chamber has an inherent power to stay the proceedings

⁵ *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC 11), Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, 20 February 2009, A190/I/20, ERN: 00283249-00283262, para. 36. *See also Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 64), Decision on IENG Sary's Appeal against Co-Investigating Judges' Order Denying Request to Allow Audio/Video Recording of Meetings with IENG Sary at the Detention Facility, A371/2/12, ERN: 00531173-00531191, paras. 13-14.

⁶ *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Order Rejecting the Request for Annulment and the Request for Stay of Proceedings on the Basis of Abuse of Process Filed by Ieng Thirith, 31 December 2009, D264/1, ERN: 00422607-00422618, para. 30.

⁷ *Id.*, referring to annulment of investigative or judicial action.

⁸ *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Decision on IENG Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, ERN: 00543781-00543799, para. 13.

⁹ *See Prosecutor v. Tadić*, IT-94-1-A, Judgement, 15 July 1999, para. 55.



when to continue would violate the fundamental rights of an Accused.¹⁰ “The Trial Chamber ... examines whether the continuation of proceedings might jeopardize the fair conduct and integrity of the trial as guaranteed by Article 20 (1) ... of the Statute.”¹¹ A stay of proceedings would be in order where, for instance, the moral integrity of the proceedings has been undermined.¹²

6. The proceedings must be stayed until the Pre-Trial Chamber has issued a Decision on this Appeal. The OCIJ has repeatedly made clear that it intends to issue the Closing Order in September.¹³ If the proceedings are not stayed and the Closing Order is issued before the Pre-Trial Chamber’s decision on this Appeal, the Closing Order will be drafted without the OCIJ having received the benefit of the Defence’s submissions on many important areas of law. The OCIJ will have only received input from one side, despite the requirement that proceedings at the ECCC be fair and adversarial.¹⁴ The Closing Order will be based on judicial action which violates Mr. IENG Sary’s right to equality of arms, his right to equal treatment, and his right to an effective defence; thus, a fair trial will be impossible.

¹⁰ *Prosecutor v. Bobetko*, IT-02-62-AR54bis, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, 29 November 2002, para. 15. See also *Prosecutor v. Blagojević*, IT-02-60-AR73.4, Public and Redacted Reasons for Decision on Appeal by Vidoje Blagojević to Replace His Defence Team, para. 7.

¹¹ *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. 4.

¹² *Prosecutor v. Nikolić*, IT-94-2-T, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 89.

¹³ On 14 January 2010, the OCIJ announced that “Subject to the parties’ exercise of their procedural rights the Co-Investigative Judges will endeavor to issue a Closing Order in September 2010.” See Press Release, Conclusion of Judicial Investigation in Case 002/19-09-2007-ECCC-OCIJ, available at http://www.eccc.gov.kh/english/cabinet/press/141/ECCC_OCIJ_PR14Jan2010-Eng.pdf (emphasis added). On 8 June 2010, Co-Investigating Judge You Bunleng sent a letter to Co-Investigating Judge Marcel Lemonde stating, “I would like to give you back the draft of the rogatory letters which bore your signature, mine being crossed out, and we will discuss any possible actions with regards to the case files 003 and 004 in the month of September 2010, when we will complete our closing order for the case file number 002, which is considered to be the core of the tribunal.” See Press Release, Statement from the Co-Investigating Judges, 9 June 2010, p. 3 (emphasis added, unofficial translation). On 16 July 2010, the Phnom Penh Post, partially quoting court spokesman Lars Olsen, stated, “It is now the last phase of Case 002 before there will be a decision on whether there will be indictments,” and the UN-backed court was on schedule to issue closing orders in Case 002 by a court-mandated September deadline, he said.” See Sebastian Strangio, KRT on Track for Case 002 Indictments, PHNOM PENH POST, 16 July 2010 (emphasis added). On 17 August 2010, the Cambodia Daily and the Phnom Penh Post each published articles which stated that the OCIJ would issue a Closing Order in September. The Cambodia Daily quoted Lars Olsen as stating, “They are working on a schedule to issue a closing order in September” See Julia Wallace, Prosecutors Seek to Indict Remaining KR Leaders, CAMBODIA DAILY, 17 August 2010, p. 1. See also James O’Toole, Prosecutors File Final Case 002 Submission, PHNOM PENH POST, 17 August 2010, p. 3.

¹⁴ See Rule 21(1)(a).



7. The Defence is aware that if the OCIJ does not issue the Closing Order before 19 September 2010, NUON Chea may need to be released from provisional detention.¹⁵ This is not a valid reason for the Pre-Trial Chamber to refuse a request for a stay of proceedings. It is not in the interests of justice to give weight to such considerations over the fair trial rights of Mr. IENG Sary. To do so would violate another fundamental fair trial right of Mr. IENG Sary's: the right to be tried by an independent and impartial tribunal. This right necessarily means that the judges involved in his case must base their decisions only upon the legal issues at hand.

C. REQUEST FOR A PUBLIC HEARING

8. This Appeal addresses a violation of Mr. IENG Sary's fundamental fair trial rights. This violation must be addressed in an open and transparent manner. Issues of such importance must be transparently debated to ensure benefit to the public at large, especially when these issues are likely to impact the legitimacy and credibility of the ECCC.

II. BACKGROUND

9. On 18 July 2008, the OCP filed its Rule 66 Final Submission in Case 001 ("Case 001 Final Submission") with the OCIJ. The Case 001 Final Submission is 86 pages long.¹⁶
10. On 24 July 2008, the Defence team for Mr. KAING Guek Eav filed its Response to the Case 001 Final Submission ("Case 001 Response"). The Case 001 Response is 12 pages long.¹⁷
11. On 16 August 2010, the OCP filed its Final Submission in Case 002 with the OCIJ. The Final Submission is 931 pages long.
12. On 17 August 2010, the Defence filed IENG Sary's Expedited Request for Extension of Page and Time Limit to File his Response to the OCP's Final Submission ("Request").¹⁸ The Request stated that the Defence could not "respond meaningfully to a 931-page Final Submission in 15 pages... According to Article 5.4 of the Practice Direction on Filing

¹⁵ Pursuant to Rule 63(7).

¹⁶ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ, Rule 66 Final Submission, 18 July 2008, D108/55, ERN: 00206175-00206361.

¹⁷ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ, Defence Submission, 24 July 2008, D96/1, ERN: 00224323-00224332.

¹⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary's Expedited Request for Extension of Page and Time Limit to File his Response to the OCP's Final Submission, 17 August 2010, D390/1, ERN: 00593542-00593543.

Documents Before the ECCC, the OCIJ may extend the applicable 15 page limit in exceptional circumstances... In keeping with the due diligence obligations imposed on the Co-Lawyers, a meaningful response cannot be submitted within the 15 page and 15 day limitations.”¹⁹

13. On 19 August 2010, the OCIJ rejected the Request on the grounds that it “would appear that there has been another misunderstanding concerning the way in which the procedural system at the ECCC functions. Indeed, nothing in the Internal Rules provides for a response to the Co-Prosecutors’ Final Submission. Should the case be sent for trial, it is before the Trial Chamber that the adversarial debate characteristic of a fair trial will be possible, in light of the Closing Order, and not before the issue of the Closing Order on the basis of the Co-Prosecutors’ Final Submission...”²⁰
14. On 1 September 2010, the Defence filed the Response. The filing was made within the 15 day deadline, however not within the 15-page limit. The Defence requested that the “OCIJ accept this Response despite its deviation from the applicable page limit, in the interest of equality of arms.”²¹
15. On 2 September 2010, the Response was rejected by the OCIJ as a “Deficient Filing” in the Impugned Decision. The OCIJ Greffier, under instructions from the OCIJ, notified the Defence that:

the request for extension of page limit has been refused for the following reasons:

- The document [sic] is four times longer than the imposed page length as set out in Article 5.1 of the Practice Direction on Filing of Documents before the ECCC, which was respected by the submission filed by counsel in Case File No. 001, referred to by the Defence(D96/1 – 12 pages);
- The request did not refer to any exceptional circumstances, simply advocating the introduction of an adversarial procedure that, as already stated in a previous rejection of this request (D390/1/1), is not provided for at this stage of the proceedings before the ECCC.²²

III. APPLICABLE LAW

A. FAIR TRIAL RIGHTS

1. THE RIGHT TO EQUALITY OF ARMS

¹⁹ *Id.*

²⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from the Co-Investigating Judges to the Defence Regarding IENG Sary’s Expedited Request for Extension of Page and Time limit to File his Response to the OCP’s Final Submission, 19 August 2010, D390/1/1, ERN: 00593547-00593547.

²¹ Response, opening.

²² Impugned Decision.



16. Equality of arms is the principle in law that “the defence and the prosecution must have procedural equality to ensure that the conduct of judicial proceedings is fair.”²³ This principle is fundamental to various international human rights instruments, including the International Covenant of Civil and Political Rights (“ICCPR”)²⁴ which, in accordance with the Cambodian Constitution, the Establishment Law and the Agreement, the ECCC must respect.²⁵ It is also required by Rule 21(1)(a), which provides that “ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties...” The Trial Chamber in Case 001 has confirmed that “the fundamental nature of this principle is acknowledged in the Internal Rules...”²⁶ At the ICTY, the right to equality of arms has been held to go “to the heart of the fair trial guarantee.”²⁷

2. THE RIGHT TO EQUAL TREATMENT BEFORE THE LAW

17. The right to equal treatment before the law is guaranteed by the Cambodian Constitution as well as Cambodian Criminal Procedure and a number of international instruments. Article 31 of the Cambodian Constitution provides that “[e]very Khmer citizen shall be equal before the law...”
18. Article 3 of the Cambodian Code of Criminal Procedure provides that “[c]riminal actions apply to all natural persons or legal entities regardless of race, nationality, color, sex,

²³ *Case of KAINING Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary’s Request to Make Submission in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, ERN: 00345178-00345180, para. 4.

²⁴ Adopted and opened for signature, ratification and accession by United Nations General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49. According to Article 14(1): “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal...” See also *Fei v. Colombia*, Communication No. 514/1992, U.N. Doc. CCPR/C/53/D/514/1992 (1995), para. 8.4: “The concept of a ‘fair trial’ within the meaning of article 14, paragraph 1... also includes other elements. Among these, the Committee has had the opportunity to point out ... are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings.”

²⁵ See 1993 Cambodian Constitution, as amended in 1999, Art. 31. This Article requires that requires that Cambodian courts “shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.”

²⁶ *Case of KAINING Guek Eav alias “Duch”*, 001/18-07-2007-ECCC/TC, Decision on IENG Sary’s Request to Make Submission in Response to the Co-Prosecutors’ Request for the Application of Joint Criminal Enterprise, 3 July 2009, E90, ERN: 00345178-00345180, para. 4.

²⁷ *Prosecutor v. Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 44. See also *Prosecutor v. Delalić et al.*, IT-96-21-T, Decision on the Prosecution’s Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence, 4 February 1998, para. 45, where the Trial Chamber held that the equality of arms “is the most important criteria of a fair trial. This principle requires the maintenance of a fair balance between the parties and applies to both civil and criminal cases.”



language, creed, religion, political tendency, national origin, social status, resources or other status.”²⁸

19. Article 7 of the Universal Declaration of Human Rights (“UDHR”) provides that “[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”²⁹
20. Article 14(1) of the ICCPR provides that “[a]ll persons shall be equal before the courts and tribunals.” Article 26 provides that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

3. THE RIGHT TO PREPARE A DEFENCE

21. Article 38 of the Cambodian Constitution provides that “[e]very citizen shall enjoy the right to defense through judicial recourse.”
22. Article 13(1) of the Agreement provides that:

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...³⁰

23. Article 35 new of the Establishment Law provides that:

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...³¹

24. Article 14(3) of the ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (b) To have adequate time and facilities for the preparation of his defence...³²

25. Article 11(1) of the UDHR provides that: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”³³

²⁸ 2008 Code of Criminal Procedure of the Kingdom of Cambodia.

²⁹ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess. at 71, U.N. Doc. A/810 (1948).

³⁰ Emphasis added.

³¹ Emphasis added.

³² Emphasis added.



B. PRACTICE DIRECTION ON FILING DOCUMENTS BEFORE THE ECCC

26. Article 5.1 of the Practice Direction on Filing Documents before the ECCC (“Practice Direction on Filing”) provides that “[a] document filed to the Investigating Judges or the Trial Chamber of the ECCC shall not exceed 15 pages in English or French or 30 pages in Khmer, unless otherwise provided in the Internal Rules or this Practice Direction or ordered by the ECCC.”
27. Article 5.4 of the Practice Direction on Filing provides that “[t]he Co-Investigating Judges or the relevant Chamber may, at the request of a participant, extend the page limit in exceptional circumstances.”
28. Article 5.5 of the Practice Direction on Filing provides that “[t]here shall be no page limits for the following documents: ... c. Final Submissions (Rule 66 of the Internal Rules).”
29. Article 10(1) of the Practice Direction on Filing provides that: “The relevant greffier shall be responsible for verifying compliance with the provisions of this Practice Direction.”

IV. ARGUMENT

A. THE IMPUGNED DECISION VIOLATES MR. IENG SARY’S RIGHT TO EQUALITY OF ARMS

30. The Impugned Decision violates Mr. IENG Sary’s right to equality of arms, a fundamental fair trial right. The Practice Direction on Filing allows the OCP to file a Final Submission without imposing any page limit whatsoever.³⁴ The Final Submission is meant to be a filing “requesting the Co-Investigating Judges to make a specific Closing Order in a particular case,”³⁵ which should “request the Co-Investigating Judges to either indict the Charged Person and send him or her for trial, or to dismiss the case.”³⁶
31. Nothing in the Rules specifies that the Final Submission shall set out what the OCP believes the applicable law at the ECCC to be. Since the OCP did this, however, the Defence must be entitled to respond. Nothing in the Rules prohibits the Defence from responding to a Final Submission,³⁷ and the parties have regularly been allowed to

³³ Emphasis added.

³⁴ Practice Direction on Filing, Art. 5.5.

³⁵ Rules, glossary.

³⁶ Rule 66(5).

³⁷ Although this appears to be what the OCIJ has suggested. The Impugned Decision stated that the Request was “simply advocating the introduction of an adversarial procedure that ... is not provided for at this stage of the proceedings” and the letter denying the Defence Request for extension of time and pages stated that “nothing



respond to any range of issues.³⁸ The Defence request for additional pages to respond was not, as the OCIJ has claimed, based on a “misunderstanding of the way in which the procedural system in force at the ECCC functions.”³⁹ It was based on Mr. IENG Sary’s fundamental right to equality of arms. “Just as it would not have been fair to give one contestant in a trial by battle a lance and a shield and the other only a knife, equality of arms is essential to the pursuit of fairness and truth.”⁴⁰

[T]he principle of equality of arms not only provides an opportunity for equal participation by the parties, but also it helps advance accuracy by ensuring the sources of information brought to the attention of the tribunal are not overly skewed by one party ... These principles do not require that common law procedures are fully adopted; rather they provide a means of transcending the limitations of traditional adversarial and inquisitorial procedure that can become overly dependent ... in the case of civil law inquisitorial procedure upon the cognitive shortcomings of an investigating or presiding judge.⁴¹

32. The Impugned Decision states that the Request does “not refer to any exceptional circumstances,” as required for an extension of a page limit pursuant to Article 5.4 of the Practice Direction on Filing. In fact, the Request did refer to exceptional circumstances. The Request stated that the Defence could not “respond meaningfully to a 931-page Final Submission in 15 pages.”⁴² The Request also expressly referred to the OCIJ’s discretion to extend the page limit in exceptional circumstances. In this context, the 931 page length

in the Internal Rules provides for a response to the Co-Prosecutors’ Final Submission.” See *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from the Co-Investigating Judges to the Defence Regarding IENG Sary’s Expedited Request for Extension of Page and Time Limit to file his Response to the OCP’s Final Submission, 19 August 2010, D390/1/1, ERN: 00593547-00593547. Rule 21 clearly mandates that “ECCC proceedings shall be fair and adversarial.” The OCIJ was incorrect to find in the Impugned Decision that “adversarial procedure ... is not provided for at this stage of the proceedings.” That the ECCC’s proceedings are adversarial at this stage was made clear in Case 001 by the decision made to accept the filing of Mr. KAING Guek Eav’s Response to the Case 001 Final Submission.

³⁸ See, e.g., *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 56), Co-Prosecutors’ Observations on Defence Counsel’s Appeal on Warning by the Co-Investigating Judges, 9 April 2010, D367/1/2, ERN 00495289-00495291; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC25), Co-Prosecutors’ Combined Response to the Appeals by Ieng Thirith, Nuon Chea, Khieu Samphan and Ieng Sary Against the Co-Investigating Judges’ Order Denying a Joint Request Defence Request for Investigative Action to seek Exculpatory Evidence in the Shared Materials Drive, 10 August 2009, D164/3/2, ERN:00360910-00360929; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 64), Co-Prosecutors’ Observations on IENG Sary’s Appeal on Using Audio-Video Recording in the Detention Unit, 6 May 2010, A371/2/2, ERN: 00511628-00511631.

³⁹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Letter from the Co-Investigating Judges to the Defence Regarding IENG Sary’s Expedited Request for Extension of Page and Time Limit to File his Response to the OCP’s Final Submission, 19 August 2010, D390/1/1, ERN: 00593547-00593547.

⁴⁰ Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1037 (1990).

⁴¹ John Jackson, *Finding the Best Epistemic Fit for International Criminal Tribunals; Beyond the Adversarial-Inquisitorial Dichotomy*, 7(1) J. INT’L CRIM. JUST. 17, 23-24 (2009) (emphasis added).

⁴² Emphasis added.



of the Final Submission plainly constituted an exceptional circumstance justifying an extension of the page limit for the Response. To find otherwise, as the OCIJ has done, is to prioritize the requirements of form over the substance of Mr. IENG Sary's fundamental fair trial rights. Such an approach is not appropriate in a case such as this when important human rights, such as the right to equality of arms, are at stake.⁴³

33. Considering the length of the Final Submission – 931 pages – to allow the filing of 66 pages in Response⁴⁴ would be the bare minimum that the OCIJ could have done to satisfy this fundamental requirement. The Response was not disproportionately long, and its filing would not have had a detrimental impact on the expeditious progress of the case being brought against Mr. IENG Sary.
34. The European Court of Human Rights has found fair trial rights to have been violated when an applicant was denied an opportunity to reply to written submissions filed by State Counsel.⁴⁵ In *Ruiz-Mateos v. Spain*, the Applicants alleged a violation of the principle of equality of arms on the basis that Counsel for the Government of Spain, their opponent in civil proceedings, was able to submit to the Constitutional Court written observations on the lawfulness of a statute, whereas they were not allowed to do so because they were held to lack *locus standi*.⁴⁶ The court held that “persons must as a rule be guaranteed free access to the observations of the other participants in these proceedings and a genuine opportunity to comment on those observations.”⁴⁷ This case is analogous to the scenario faced by Mr. IENG Sary because Mr. IENG Sary has been denied a genuine opportunity to comment on the OCP's Final Submission. The

⁴³ See Special Tribunal for Lebanon, Order Assigning Matter to the Pre-Trial Judge, CH/PRES/2010/01, 15 April 2010, para. 16. In this Order, Judge Cassese found that rules of form may be relaxed in “international criminal proceedings to the extent that such application (i) is not made to the detriment of the fundamental rights of the accused, the victims or the witnesses or any other person appearing before international criminal courts, and (ii) does not amount to a serious infringement of strict procedural provisions aimed at safeguarding the principle of fair and expeditious justice.”

⁴⁴ Mr. IENG Sary's fundamental fair trial right to equality of arms explains why he has elected to file this Appeal as opposed to re-filing a shortened, 15-page Response with the OCIJ, as permitted under Article 10(2) of the Practice Direction on Filing. In these exceptional circumstances, it would be a violation of Mr. IENG Sary's right to equality of arms to shorten the filing to 15 pages, considering the number of important legal issues which must be addressed in response to the Final Submission. In addition, Article 9 of the Practice Direction on Filing grants the OCIJ discretion to reject the re-filing. Due to the irrational and arbitrary approach of the OCIJ to this issue so far, the Defence considers the most expeditious course to be to file this Appeal with the Pre-Trial Chamber.

⁴⁵ *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.

⁴⁶ *Id.*, para. 61.

⁴⁷ *Id.* (emphasis added), para. 63.

opportunity to comment on a 931 page submission in 15 pages is not a genuine opportunity.

B. THE IMPUGNED DECISION VIOLATES MR. IENG SARY'S RIGHT TO BE TREATED EQUALLY BEFORE THE LAW

35. Mr. IENG Sary has a fundamental right to be treated equally before the law. This right is guaranteed to him by Article 31 of the Cambodian Constitution and the Cambodian Code of Criminal Procedure.⁴⁸ This right is also enshrined in the UDHR⁴⁹ and the ICCPR,⁵⁰ which the ECCC must respect pursuant to the Cambodian Constitution.⁵¹
36. The Impugned Decision violates Mr. IENG Sary's right to equality before the law because it treats Mr. IENG Sary differently from Mr. KAING Guek Eav, who was permitted to respond to the Case 001 Final Submission. The OCIJ explains this disparate treatment based on the fact that Mr. KAING Guek Eav's response to the Case 001 Final Submission was within the 15-page limit for filings before the OCIJ.⁵² However, it bears emphasis that the Case 001 Final Submission was 86 pages long and did not contain a separate section setting out what the OCP believed the applicable law at the ECCC to be.⁵³ In Case 002, the Final Submission is 931 pages long. Mr. KAING Guek Eav responded in 12 pages to a Final Submission of 86 pages, i.e. 1 page in Response for every 7 pages of the Case 001 Final Submission. Mr. IENG Sary's Response equates to 1 page for every 14 pages filed by the OCP in the Final Submission. If the principle of equal treatment before the law is to be respected, Mr. IENG Sary must be allowed to respond proportionately to the case being made against him.

C. THE IMPUGNED DECISION VIOLATES MR. IENG SARY'S RIGHT TO PREPARE A DEFENCE

37. The Impugned Decision results not only in a simple rejection of Mr. IENG Sary's Response, but in a denial of his very right to make a record and thus prepare a defence.

⁴⁸ Cambodian Code of Criminal Procedure, Art. 3.

⁴⁹ UDHR, Art. 7.

⁵⁰ ICCPR, Arts. 14(1), 26. Article 26 states in part that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law."

⁵¹ Cambodian Constitution, Art. 31. The ECCC must also respect the rights enshrined in the ICCPR pursuant to Article 13 of the Agreement and Article 35 new of the Establishment Law.

⁵² Impugned Decision.

⁵³ It contained a section on the legal characterization of the facts, but not on the law itself. The Final Submission in Case 002 contained a separate section on the applicable law, as well as a section on the legal characterization of the facts. *See* Case 001 Final Submission.



The OCIJ Greffier upon instructions from the Co-Investigating Judges,⁵⁴ refused to even accept the Defence filing. The Response should have first been placed on the Case File and the OCIJ could have then either relied on it or issued a decision rejecting it because of its deviation from the applicable page limit (although, as explained above, a rejection should not be allowed due to the fact that it would violate Mr. IENG Sary's fundamental fair trial rights). This outright refusal to place the Response on the Case File prevents the Defence from making a record, and thereby Mr. IENG Sary's right to prepare a defence has been denied, in violation of the Cambodian Constitution,⁵⁵ the Agreement,⁵⁶ the Establishment Law,⁵⁷ the ICCPR,⁵⁸ and the UDHR.⁵⁹

38. In other courts which purportedly have jurisdiction over similar crimes as the ECCC, the Registry, of which the Court Management Service ("CMS") is a fundamental part, has been considered an indispensable pillar of the judicial process precisely due to its neutrality vis-à-vis the other organs of the court. In these courts, the Registry may not simply reject a filing submitted by one of the parties. It is obliged to accept a filing in its entirety which is then entered into the record of the case. The Chamber adjudicating upon the litigation may then dismiss such a motion, or even decide not to take submissions contained therein into account as they may relate to irrelevant matters. Such a dismissal or refusal to take submissions into account does not have the effect of retroactively expunging such a motion from the Case File.
39. The approach of the OCIJ in instructing its Greffier not to accept the Response is *ultra vires*, as it is claiming jurisdiction over a task of the Greffier.⁶⁰ It appears that the Greffier of the OCIJ, straddling the divide between CMS and the OCIJ, is actually being improperly instructed by the Co-Investigating Judges to reject filings simply because certain filings may complicate the OCIJ's decision making process. Such improper use of the Greffier violates not only Mr. IENG Sary's rights, but also the rights of all persons charged before the ECCC.

V. RELIEF SOUGHT

⁵⁴ See Impugned Decision.

⁵⁵ Cambodian Constitution, Art. 38.

⁵⁶ Agreement, Art. 13(1).

⁵⁷ Establishment Law, Art. 35 new.

⁵⁸ ICCPR, Art. 14(3).

⁵⁹ UCHR, Art. 11(1).

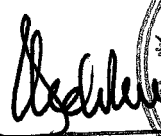
⁶⁰ See Practice Direction of Filing, Art. 10(1).



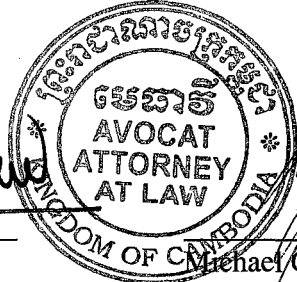
WHEREFORE, for all the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

- a. DECLARE that the current appeal is admissible under Rule 21;
- b. QUASH the Impugned Decision; and
- c. MANDATE that the Response be accepted by the OCIJ Greffier, placed on the Case File, and considered by the OCIJ along with the Final Submission.

Respectfully submitted,



ANG Udom



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 6th day of September, 2010