

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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**IENG SARY'S RESPONSE TO THE CO-PROSECUTORS' PRELIMINARY
OBSERVATIONS IN RESPECT OF IENG SARY'S SEPARATE APPEALS
AGAINST THE CLOSING ORDER ON PROVISIONAL DETENTION AND
JURISDICTION**

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Mr. IENG Sary through his Co-Lawyers (“the Defence”) hereby responds to the Office of the Co-Prosecutors’ (“OCP”) Preliminary Observations in Respect of the Defence’s Separate Appeals against the Closing Order on Provisional Detention¹ and Jurisdiction² (“Observations”).³ The OCP complains that the Defence contravened the practice and jurisprudence of the Pre-Trial Chamber⁴ by filing the Detention Appeal and Closing Order Appeal (together, the “Appeals”) to the Closing Order. Bluntly put, the Observations are meaningless. Not only is the OCP (or any other party to Case 002) not prejudiced by the filing of these two Appeals separately, it is in fact aided by having additional time to respectively respond to the Appeals. Such dilatory tactics by the OCP are counterproductive and petty. The Observations should summarily be dismissed.

I. BACKGROUND

1. On 15 September 2010, the Co-Investigating Judges issued the Closing Order,⁵ which was notified to the Defence on 16 September 2010.
2. On 17 September 2010, the Defence filed a Request to extend the page limit to Appeal the jurisdictional issues raised by the Closing Order to 180 pages in total in English.⁶ On 1 October 2010, the Pre-Trial Chamber granted this Request.⁷
3. Due to the extraordinary circumstances caused by the flooding around the ECCC building, the Pre-Trial Chamber granted an extension of the time limit for filing the appeal until 26 October 2010.⁸

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 152), IENG Sary’s Appeal Against the Closing Order’s Extension of his Provisional Detention, 22 October 2010, D427/5/1, ERN: 00611347-00611354 (“Detention Appeal”).

² *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), IENG Sary’s Appeal Against the Closing Order, 25 October 2010, D427/1/6, ERN: 00617486-00617631 (“Closing Order Appeal”).

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75 & 152), Co-Prosecutors’ Preliminary Observations in Respect of Ieng Sary’s Separate Appeals Against the Closing Order on Provisional Detention and Jurisdiction, 27 October 2010, D427/5/2, ERN: 00618779-00618781.

⁴ *Id.*, para. 2.

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246.

⁶ *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, 17 September 2010, D427/1/1, ERN: 00607672-00607674.

⁷ *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.

⁸ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 75), 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

4. On 22 October 2010, the Defence filed the Detention Appeal, which is 7 pages long.⁹ On 25 October 2010, the Defence filed the Closing Order Appeal, which is 144 pages long.¹⁰

II. RESPONSE

5. The Appeals, taken together, fall within the allotted page limit of 180 pages (151 pages in total) and were both timely submitted. The Observations plainly prioritize form over substance: **a.** the Appeals were not made to the detriment of the fundamental rights of any of the Charged Persons, the Civil Parties, the OCP, or the Pre-Trial Chamber and **b.** did not seriously – if at all – infringe on the strict procedural provisions aimed at safeguarding the fairness and expeditiousness of Case 002.¹¹
6. Filing the Appeals separately facilitates the expeditious progress of Case 002. Separating discrete issues provides clarity and ease to the Pre-Trial Chamber and the OCP. Indeed, the Defence submits that the filing of the Appeals separately was the most judicially efficient manner to appeal. In light of the pressing events ahead in Case 002, one may have thought that the OCP, having been given advance notice of the contents of the Detention Appeal, would have welcomed additional time to spend on substantive matters rather than make frivolous Observations.
7. The Defence acted in good faith and was merely attempting to facilitate the expeditiousness of the proceedings. If, however, the Defence has caused such befuddlement and disquietedness to the OCP that there has been a serious procedural infringement which jeopardizes the delivery of fair and expeditious justice, the Defence can only express its remorse. If called upon by the Pre-Trial Chamber, the Defence will cheerfully endeavor to assist the OCP in regaining its equilibrium and curing its disorientation by re-filing the Appeals jointly.
8. The Observations appear to be nothing more than a veiled attempt for an extension of time to respond. Such dilatory tactics are gratuitous. The Defence would graciously non-

Closing Order and Consequent Extension of Page Limit, 28 October 2010, D427/1/8, ERN: 00617697-00617702.

⁹ Detention Appeal.

¹⁰ Closing Order Appeal.

¹¹ 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.”

oppose a modest extension of time for the OCP to file its responses to the Appeals. Likewise, the Pre-Trial Chamber has demonstrated reasonableness in granting extensions,¹² while also expressing its distaste for the niggling.¹³

9. While the Observations seem to convey a concern for technical excellence and punctiliousness – which would be of immense gratification to the Defence if they were in fact grounded in “the practice and jurisprudence of the Pre-Trial Chamber”¹⁴ – regrettably, such is not the case. The OCP misapplies the Pre-Trial Chamber’s “Decision on the Expedited Request of [the Defence] for a Reasonable Extension of Time to File Challenges to the Jurisdictional Issues.”¹⁵ That Decision was concerned with: **a.** whether the Defence had waived Mr. IENG Sary’s right to raise any challenge to jurisdiction; and / or **b.** whether the Defence should be granted an extension of time to file submissions on jurisdictional issues. Whether Mr. IENG Sary has waived his right to challenge the jurisdictional issues raised in the Closing Order is not in issue. The Defence never sought to postpone its challenge to the jurisdictional issues arising from the Closing Order. Both Appeals were filed within the time limit set by the Pre-Trial Chamber.

WHEREFORE, for all of the reasons stated herein, the Pre-Trial Chamber should summarily **DISMISS** the Observations without further consideration.

Respectfully submitted,

ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary
Signed in Phnom Penh, Kingdom of Cambodia on this 3rd day of **November, 2010**

¹² *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.

¹³ *See e.g., 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, 11 June 2010, A371/2/12, ERN: 00531173-00531191; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Your Request to conduct audio/video recording of IENG Sary in the detention facility, 9 April 2010, A371/1, ERN: 00495263-00495264.

¹⁴ Observations, para. 2.

¹⁵ *Id.*, fn. 2 citing *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC 03), Decision on the Expedited Request of the Co-Lawyers for a Reasonable Extension of Time to File Challenges to the Jurisdictional Issues, 3 March 2008, C22/I/15, ERN: 00165305-00165307.