

**BEFORE THE OFFICE OF THE CO-INVESTIGATING JUDGES  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**Criminal Case File N°:** 002/19-09-2007-ECCC/OCIJ

**Filed to:** Co-Investigating Judges

**Date:** 7 August 2008

**Party Filing:** The Defense for IENG Sary

**Language:** English

**Type of Document:** Public

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception):	
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ម៉ោង (Time/Heure):..... ០៨ : ២៥ .....	
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**IENG SARY'S REQUEST FOR AN ORAL HEARING, OR, IN THE ALTERNATIVE, REQUEST FOR EXTENSION OF TIME TO REPLY TO THE OFFICE OF THE CO-PROSECUTORS' RESPONSE TO IENG SARY'S MOTION AGAINST THE APPLICATION AT THE ECCC OF THE FORM OF LIABILITY KNOWN AS JOINT CRIMINAL ENTERPRISE**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Article 8.4 of the Practice Direction on the Filing of Documents (“Practice Direction”), hereby Requests an Oral Hearing on *IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known As Joint Criminal Enterprise*.<sup>1</sup> In the alternative, pursuant to Internal Rule 39(4)(a), the Defence Requests an Extension of Time to Reply to the Office of the Co-Prosecutors’ (“OCP”) Response to *IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known As Joint Criminal Enterprise* (“Request”).

## I. SUMMARY OF ARGUMENTS

1. The Defence submits that an oral hearing on the JCE Motion is warranted due to the complexity of the issues regarding the application of the JCE form of liability before the ECCC, because it is an issue of *first instance* and because an oral hearing would advance greater transparency and understanding to the public at large.
2. In the alternative and for the same reasons, the Defence respectfully requests an extension of time to reply to the OCP Response to the JCE Motion.<sup>2</sup> This request is based additionally on the requirement to file the reply in two languages which renders a meaningful reply impossible within the shortened deadline available. No prejudice would be caused to the OCP in permitting such an extension.

## II. LAW

3. Under Article 8.4 of the Practice Direction, “[a] reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification” [...] of the response to which the participant is replying”. Under Article 8.5 of the Practice Direction “[t]ime limits commence at the time of service of the Notification Instruction.”

<sup>1</sup> *Case of IENG Sary*, Case No. 002/19-09-2007-ECCC/OCIJ, IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, 28 July 2008 (“JCE Motion”).

<sup>2</sup> At time of filing, the OCP Response to *IENG Sary’s Motion Against the Application at the ECCC of the Form of Liability Known As Joint Criminal Enterprise* had not yet been filed.

4. Under Internal Rule 39(4)(a), “[t]he Co-Investigating Judges or the Chambers may, at the request of the concerned party: a) extend any time limits set by them”.

### III. FACTS

5. Mr. IENG Sary filed the JCE Motion on 28 July 2008. The parties were notified of this motion the same day. Accordingly, pursuant to the prescribed deadline under the Practice Direction, the OCP was given until 11 August 2008 to respond, if it so desired. Thus far, there is no indication whether an invitation to respond will be extended to the Civil Parties.
6. The Defence was informed on 1 August 2008 that an extension of either 7 or 10 days would be sought by the OCP to file a response to the JCE Motion. The OCP indicated that a request to that effect would probably be filed on Monday 4 August 2008. The Defence indicated that it would not oppose such a request, though it did express an interest to be afforded the same additional time as an extension in filing its reply. The OCP agreed that the extension should apply equally to the Defence.
7. The OCP contacted the Defence on Monday 4 August 2008, indicating that it had reversed its prior held position and that no request for an extension of time would be sought in filing its response.

### IV. ARGUMENT

#### A. REQUEST FOR ORAL HEARING

8. The application of JCE liability is a notoriously complex and contentious issue since its creation in *Tadić* at the ICTY.<sup>3</sup> This complexity and contentiousness has not diminished over time.<sup>4</sup>
9. The OCP must respond, *inter alia*, to the issues of whether JCE liability was part of Cambodian law in 1975, whether it was part of international law in 1975 binding on

<sup>3</sup> *Prosecutor v. Tadić*, IT-94-1-A-Judgement, 15 July 1999.

<sup>4</sup> See JCE Motion, paras. 1-6. Due to the page limitation, the controversy and diversity of opinions surrounding the creation, existence and applicability of the JCE liability as concocted by *Tadić* is only briefly touched upon.

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Cambodia and also whether it falls within the ECCC's jurisdiction. The Defence would then have the right to reply to these points either orally or by way of a written reply.

10. The JCE Motion is also the first time that the applicability and scope of JCE liability is being litigated at the ECCC. Due to this inherent complexity of the issues involved and the fact that said issues are of *first impression* before the ECCC (novel), the Defence respectfully submits that an oral hearing would not only be appropriate but of immense assistance to the OCIJ in flushing out all of the nuances related to JCE liability.
11. Lastly, it is respectfully submitted that an oral hearing - which would only take a day at best - would benefit the public at large in furthering its understanding of the significant issues raised in the JCE Motion. Undoubtedly, the victims of the alleged crimes stand to gain significant understanding of the forms of liability to be applied during the trial(s) from such a detailed and public discourse that only an oral hearing can offer. Anything that promotes greater understanding to those most concerned to this complex process which the ECCC has embarked upon should be embraced unreservedly. It is beyond cavil that the OCP would find it not in the best interest of the ECCC and all those concerned to address, debate and resolve one of the most highly contentious issues in this case through the most transparent approach: an oral hearing.

**B. ALTERNATIVE REQUEST FOR AN EXTENSION OF TIME OF 15 DAYS**

12. In the alternative and notwithstanding the decision by the OCP not to request an extension of time to file a response to the JCE Motion, in the circumstances of this case it would be appropriate, indeed necessary, to grant the Defence a modest extension of 15 days to reply to the OCP Response.
13. Under Article 8.4 of the Practice Direction the party filing a reply has 5 days from the date of notification of the response to which the participant is replying to do so. The day of notification is included within this 5 day deadline, as is the day of filing. As such, if a response is notified to the parties at 4pm on a Friday afternoon, the reply must be filed on the following Tuesday. Moreover, since the recent amendment to the Practice Direction requires that "[a]ll documents shall be filed in Khmer as well as in English and/or

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French”<sup>5</sup> the reply must be filed in both English and Khmer within that 5 day period. To research, draft and then translate a reply on a substantive issue such as the application of joint criminal enterprise liability is quite frankly impossible within the given time period. It is precisely because of the shortness of this deadline that compels the Defence to seek an extension of time even before the OCP has filed its Response, thus assisting the OCIJ to issue a decision on this matter as expeditiously as possible.

14. A reply is unquestionably a substantive document as it amounts to the equivalent of an oral hearing under the Practice Direction. No distinction is made between motions, responses and replies with regards to the length of the document.<sup>6</sup> As such, although the deadline is shorter for replies than responses, they are both intended to be substantive submissions of equal importance.
15. Throughout August, there appears to be a form of judicial recess at the ECCC mirroring the procedure at the other *ad hoc* tribunals. At this time, when it seems unlikely that no decision will be issued on the JCE Motion until well into September, there can be no possible prejudice to the OCIJ in granting an extension to the Defence. Furthermore, an extension to the deadline for filing a reply causes no prejudice to the OCP, as no further filing in sur-reply is permitted; the moving party always has the last word within the scope of the response.
16. No opposition was recently filed by the Defence to an OCP request for extension of time.<sup>7</sup> The Defence is confident that a similar level of magnanimity and flexibility will be shown by the OCP in the present case.
17. The Defence submits that having filed this Request, the OCIJ is seized of the question of whether an oral hearing should be held on this issue. As such, until a decision on the Request is rendered, the Defence will respectfully abstain from filing a reply, unless otherwise instructed by the OCIJ. Naturally, for scheduling purposes, an expedited decision is respectfully being sought.

<sup>5</sup> Article 7.1, Practice Direction.

<sup>6</sup> Article 5.1 of the Practice Direction provides that “[a] document filed to the Investigating Judges or the Trial Chamber of the ECCC shall not exceed 15 pages in English”. Motions, Responses and Replies are all considered to be documents within the meaning of this provision.

<sup>7</sup> Case of IENG Sary, Case No. 002/19-09-2007-ECCC/OCIJ(PTC12), IENG Sary’s Response to the Office of the Co-Prosecutors’ Application for an Extension of Time to File Their Response to *IENG Sary’s Appeal on Translation Rights and Obligations of Parties*, 4 August 2008.

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**V. RELIEF SOUGHT**

**WHEREFORE**, for all of the reasons stated herein, the Defence respectfully requests:

- a. an oral hearing on the application of JCE liability at the ECCC; or, in the alternative,
- b. an extension of 15 days to reply to the Office of the Co-Prosecutors' Response to the JCE Motion.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 7<sup>th</sup> day of August, 2008

*[Handwritten signature]*