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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File N°: 001/18-07-2007-ECCC-OCIJ (PTC02)

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**IENG SARY'S MOTION FOR RECONSIDERATION OF RULING ON THE FILING
OF A MOTION BY THE CHARGED PERSON IENG SARY IN THE CASE AGAINST
THE CHARGED PERSON "DUCH"**

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby moves for reconsideration of the Pre-Trial Chamber’s Ruling on the Filing of a Motion by the Charged Person IENG Sary in the case against the Charged Person “Duch”, issued on 21 November 2008 (“Ruling”). In assessing the standard for reconsideration, the Pre-Trial Chamber has previously followed the approach of the ICTY in holding that the power of a Chamber to reconsider its previous decisions is inherent,¹ and may be exercised if: 1) there is a change of circumstances which include new facts or arguments; 2) the previous decision was erroneous; or 3) the previous decision caused an injustice.² For the following reasons, this Ruling: (1) misunderstands the difference between denying a motion and declaring it to be inadmissible; and (2) violates the right of Mr. IENG Sary to a public and transparent judicial process. As such the Defence is obliged to seek reconsideration of this Ruling.

I. INTRODUCTION

1. The Pre-Trial Chamber is engaged in a process that may result in creating legal precedent – the adoption of Joint Criminal Enterprise forms of liability (“JCE”) by the ECCC – which will have far-reaching implications for Mr. IENG Sary. Any notion of justice requires that Mr. IENG Sary be afforded an opportunity to be heard. The unreasonable and unfair decisions of the Pre-Trial Chamber seek not only to deny him this opportunity but to also deprive him of his right to even establish a judicial record of his concerns. For strategic reasons of its own, the Defence of Charged Person “Duch” has elected not to challenge JCE. Thus, the community of charged persons, including Mr. IENG Sary, is left without anyone to plead the Defence case concerning the issue of JCE. Yet, as sure as day follows night, if JCE is accepted in the case of Charged Person “Duch”, the Prosecution will surely pursue it against Mr. IENG Sary, with a declaration that the decision is settled by *stare decisis*, and immune to any challenges. For the reasons set forth below, the Pre-Trial Chamber should reconsider the rulings that unfairly impeded Mr. IENG Sary from making a judicial record on this issue of great import to him and to the quest for substantial justice.

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on the Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, 28 August 2008, para. 25.

² *Id.*

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II. ARGUMENT

A. The difference between denial of a motion and admissibility

2. The Defence filed a request to make submissions in response to the Office of the Co-Prosecutors' ("OCP") Appeal against the Closing Order,³ on 15 September 2008.⁴ This Request was accepted and filed in the case file by the greffier of the Pre-Trial Chamber. By a decision of 6 October 2008 the Pre-Trial Chamber denied this motion on the merits.⁵
3. The Defence diligently prepared a motion for reconsideration of this decision, a procedural remedy permitted by the Pre-Trial Chamber,⁶ which it attempted to file before the Pre-Trial Chamber on 20 November 2008.⁷ This Motion was not rejected by the greffier of the Pre-Trial Chamber. However, on 21 November 2008 the Pre-Trial Chamber issued its Ruling, declaring that the Defence was not entitled to file the Motion. The Motion was physically returned to the Defence team and it was not entered into the case file.
4. As explained in the motion for reconsideration filed by the Defence, the amicus briefs submitted by Professor Antonio Cassese,⁸ Professor Kai Ambos⁹ and the McGill Center for Human Rights and Legal Pluralism¹⁰ constitute a change in circumstances from the Intervention Decision as they significantly widen the scope of the issue on appeal which will be adjudicated upon by this Pre-Trial Chamber. Moreover, the

³ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" dated 8 August 2008, 5 September 2008, ("OCP Appeal").

⁴ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Ieng Sary's Expedited Request to Make submissions on the application of joint criminal enterprise liability in the Co-Prosecutors' appeal of the closing order against Kaing Huek Eav "Duch", 15 September 2008 ("Request")

⁵ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order against Kaing Guek Eav "Duch", 6 October 2008 ("Decision").

⁶ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC03), Decision on the Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, 28 August 2008, para. 25.

⁷ The title of the purported motion is 'Ieng Sary's Motion for Reconsideration of Decision on Ieng Sary's Request to Make Submissions on the Application of the Theory of Joint Criminal Enterprise in the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch", dated 20 November 2008 ("Motion).

⁸ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* Brief of Professor Antonio Cassese and Members of the *Journal of International Criminal Justice* on Joint Criminal Enterprise Doctrine, 27 October 2008 ("Cassese Brief").

⁹ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC02), 27 October 2008 ("Ambos Brief").

¹⁰ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), *Amicus Curiae* Brief Submitted by the Centre for Human Rights and Legal Pluralism, McGill University Montreal (Québec) Canada ("McGill Brief"). Interestingly, this brief is co-authored by Payam Akhavan, who also co-authored the ICTY Prosecution Appeal Brief in *Prosecutor v. Tadić*, IT-94-1-A, where JCE, under the denomination of "common purpose" theory was advocated.

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Duch Defence team's tactical decision not to meaningfully respond to any of the substantive arguments on the application of JCE submitted by the Co-Prosecutors ("OCP")¹¹ results in a manifest injustice to Mr. IENG Sary. The *non-opposition* by the Duch Defence substantively affects all Defence teams: effectively, this issue will be decided without any Defence submissions. The Pre-Trial Chamber recognised the effect of its decision on Mr. IENG Sary. With reference to JCE, it held that "a decision in one case on a legal issue will guide the court in future similar cases." Therefore, although Mr. IENG Sary will theoretically be able to "challenge the application of the theory of joint criminal enterprise" in Case File 002, the decision will, to all intents and purposes, already have been taken.¹² However, in its Ruling, the Pre-Trial Chamber "considers that the Charged Person IENG Sary is not entitled to file the Motion in the case file 001/18-07-2007-ECCC/OCIJ (PTC02)."¹³

5. By rejecting the Motion, and yet simultaneously refusing to allow the Motion to be admitted into the case file, the Ruling fundamentally misapprehends the distinction between denying a motion and declaring it inadmissible.
6. Denial of a motion is an option available to the Pre-Trial Chamber after admission of the filing into the case file. It requires an examination of the merits of the motion and may require a response from the other parties to the case.¹⁴ If sections of a motion are not relevant as they relate to the substance or merits of an issue rather than the procedural remedy being sought, they may simply be disregarded.¹⁵
7. By contrast, a filing may be declared inadmissible by the Pre-Trial Chamber, or the greffier thereof, if it has not complied with the relevant technical provisions of the Practice Direction on the filing of documents.¹⁶ Such was not the case here.¹⁷ But,

¹¹ *Case of Kaing Guek Eav alias "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Réponse de la Défense a l'Appel des Co-Prosecuteurs Contre l'Ordonnance de Clôture, datée du 8 aout 2008, 16 September 2008. In this five page response, the Defence team representing Duch deliberately elected not to respond to Ground 2 of the Co-Prosecutors' appeal. In this sense Duch's response must be considered to be non-opposition to this ground of appeal.

¹² See Intervention Decision, paras, 12, 14.

¹³ Ruling, para. 5.

¹⁴ *Case of Kaing Guek Eav "Duch"*, 001/18-07-2007-ECCC-OCIJ (PTC02), Directions to the Parties Concerning IENG Sary's Request to Make Submissions on Joint Criminal Enterprise Liability, 16 September 2008.

¹⁵ See *Situation in Uganda*, Decision on Prosecutor's Application to Appeal in Part Pre-Trial Chamber II's Decision on the Applications for Warrants of Arrest under Article 58, 19 August 2005, para. 22.

¹⁶ Practice Direction on the Filing of Documents, ECCC/01/2007/Rev.3, 8 October 2008 ("Practice Direction").

¹⁷ The Motion was 30 pages long with two accompanying annexes. The two annexes contained: (1) a review of the law of joint criminal enterprise liability as applied by the ICTY, ICTR and Special Court for Sierra Leone; and (2) a review of comparative law and doctrine on the direct application of customary international law before domestic courts. The annexes did not include any argument. The Motion was also accompanied by a 13 page

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had there been such a procedural flaw engendering a rejection, the Defence would be entitled to remedy the defect upon which the rejection was premised and resubmit the filing.

8. The Pre-Trial Chamber has inexplicably combined these two distinct options to the irrevocable detriment of the Defence. It has refused to admit the Motion into the case file and yet has ruled on the substance of the Motion. In so doing, the Pre-Trial Chamber has prevented the Defence from creating a judicial record.¹⁸ Moreover, the rejection of the filing deprives the Supreme Court Chamber from, in the future, properly reviewing the Ruling. The Supreme Court Chamber will not be able to review the rejected filing to verify whether the Pre-Trial Chamber was correct to deny it. As such the Ruling infringes upon the fundamental principle that first instance decisions of this kind must be susceptible to appellate review under the same conditions as those faced by the first instance court.¹⁹ Moreover, the Pre-Trial Chamber has also prevented the Defence from re-submitting the Motion, as would be the case with a rejection by the greffier, as it has already taken a decision on the merits of the Motion.
9. The reason for the denial of the Motion appears, in part, to be based on a fact that the Motion and its annexes contain, in addition to the request for reconsideration, the Co-Lawyers "substantive response to Ground 2 of the OCP appeal of the Closing Order".²⁰ However, as explained in the Motion, the elucidation of such arguments was necessary to adequately demonstrate the prejudice caused to Mr. IENG Sary by the Decision.²¹ The substantive arguments against the application of JCE were thus inextricable from the submissions relating to reconsideration of the Decision. To the extent the substantive arguments need not be considered by the Pre-Trial Chamber, they may simply be ignored; they do not invalidate the filing.

Table of Authorities detailing the 126 authorities referenced in the Motion. As such the Motion complies with the applicable provisions of the Practice Direction.

¹⁸ "The general procedure in appeals is to rely on the record of proceedings in the court below. It is not usually a *viva voce* rehearing of the evidence through witnesses as in the court from which the appeal is received. Since the Appeal Court relies on the record and depends for its decision on the challenge of the errors of law or fact made in the court below, the determination of the record on appeal is of crucial importance to the hearing of the appeal." GABRIELLE KIRK McDONALD & OLIVIA SWAAK-GOLDMAN, *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS* 653 (BRILL Publishers, 2000).

¹⁹ See *Prosecutor v. Lubanga*, ICC-01/04/01/06, Redacted Version of "Decision on the Prosecution's Application to Lift the Stay of Proceedings", 3 September 2008, para. 33.

²⁰ Ruling, para. 2.

²¹ Motion, p. 1.

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B. The violation of the right to a public and transparent judicial process

10. The Pre-Trial Chamber has recognised the importance of “public scrutiny of fairness of the proceedings.”²² Public scrutiny requires that all decisions and their underlying motions be subject to public examination, unless publication would compromise the confidentiality of the ongoing investigation. By logical extension it also requires that underlying motions are actually entered into the case file so that they may be reviewed by the public.
11. The need for public scrutiny of the judicial process means that the Pre-Trial Chamber may certainly deny the Motion on its merits, after having admitted it into the case file. It does not permit the Chamber to simply elect to reject filings with which it disagrees. Such an approach is an exercise of power and not of law.
12. Indeed, the establishment of the ECCC reflects the undeniable necessity of public scrutiny of the proceedings. This court was established to “bring the perpetrators to justice, but also so that justice could be seen to be done.”²³ However, it is “difficult to achieve these goals if the important pre-trial process is conducted completely in private.”²⁴

III. CONCLUSION & RELIEF SOUGHT

13. The application of JCE at the ECCC is an issue that the Office of Co-investigating Judges has recognised as being “clearly important” and which “is not of concern only to IENG Sary’s defence, but also to that of the other Charged Persons.”²⁵ The Motion was a legitimate attempt filed in good faith by the Defence of IENG Sary to seek reconsideration of a prior decision of the Pre-Trial Chamber denying IENG Sary the right to file submissions on this important issue. The outright rejection by the Pre-Trial Chamber of this good faith request calls in to question its commitment to a fair and transparent criminal process. Thus, it bears recalling the oft cited aphorism of Lord Hewart from *Rex v. Sussex Justices; Ex parte McCarthy*: “... it is not merely of some importance but is of fundamental importance, that justice should not only be

²² *Case of KHIEU Samphan*, 002/19-09-2007-ECCC/OCIJ(PTC11), Decision on Khieu Samphan’s Request for a Public Hearing, 4 November 2008, para. 8.

²³ Holly Telerant & Pen Rany, *Must Justice be Seen to be Done? Public Scrutiny and Participation in the KRT*, VOICE OF JUSTICE RESEARCH BULLETIN, Year 14, Issue 136, March-April 2007, p. 15-18.

²⁴ *Id.* See also Internal Rule 21(1) which emphasises the “legal certainty and transparency of proceedings.”

²⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008, p.2.

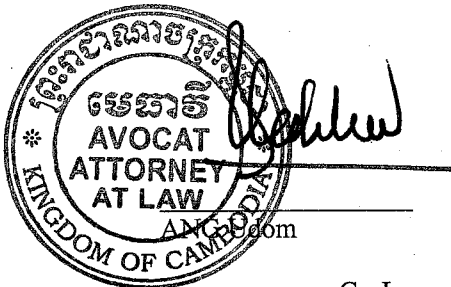
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done, but should manifestly and undoubtedly be seen to be done.”²⁶ Rejecting a proper filing and preventing the making of a judicial record is, unquestionably, antithetical to this principle.

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

- a. RECONSIDER its Ruling on the Filing of a Motion by the Charged Person IENG Sary in the case against the Charged Person “Duch”, issued on 21 November 2008
- b. ACCEPT the submissions set out as an annex to this Motion as part of the case file and as substantive response to Ground 2 of the Office of the Co-Prosecutors’ Appeal of the Closing Order Against Kaing Guek Eav “Duch”; and
- c. DECLARE that all three forms of Joint Criminal Enterprise liability are not forms of liability within the jurisdiction of the ECCC.



Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary
Signed in Phnom Penh, Kingdom of Cambodia on this 24th day of November, 2008

²⁶ *R v. Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259. See also *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeal Judgment, 21 July 2000, (“*Furundžija* Appeal Judgment”), para. 195. See also A comprehensive historical treatment is given by Chief Justice Burger in *Richmond Newspapers Inc. v. Virginia*, 448 US 555, 564-75 (1980); See also Nettheim “The Principle of Open Justice” (1984-1986) 8 *University of Tasmania Law Rev* 28; Baylis “Justice Done and Justice Seen to be Done” (1991) 21 *Victoria University Law Rev* 177; Kelly “Reviewing the Observer of Bias” (1993) 67 *ALJ* 340 at 346.