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BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File No: 002/19-09-2007-ECCC-OCIJ (PTC17)

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**IENG SARY'S RESPONSE TO THE PRE TRIAL CHAMBER'S DIRECTIONS
CONCERNING THE CO-PROSECUTORS' REQUEST TO DETERMINE THE
APPEAL ON WRITTEN SUBMISSIONS ALONE**

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I. INTRODUCTION

Pursuant to the Directions of the Pre-Trial Chamber Concerning the Co-Prosecutors' Request to Determine the Appeal on Written Submissions Alone ("Directions") the Defence hereby requests an oral hearing on Mr. IENG Sary's Appeal Against the OCIJ Order on Extension of Provisional Detention ("Appeal").¹

II. SUMMARY OF ARGUMENT

1. An oral hearing is required on this Appeal because:
 - A. The presumption is in favour of oral hearings on appeals concerning provisional detention and the Co-Prosecutors ("OCP") have adduced insufficient arguments to justify departing from this presumption in the present appeal;
 - B. Since filing the Appeal, Mr. IENG Sary has repeatedly been taken into hospital due to his chronic health problems which has an impact on his provisional detention. Only an oral hearing will adequately permit the Defence to raise this new argument and the OCP to sufficiently respond to it; and
 - C. The argument raised by the Civil Parties in their Joint Response to the Appeal regarding the threat to public order occasioned by the Civil Parties themselves, warrants a public hearing.

III. LAW

2. Internal Rule 77(3) sets out the procedure for pre-trial appeals.² It provides:
 - (a) The President of the Chamber shall verify that the case file is up to date and set a hearing date.
 - (b) The Pre-Trial Chamber may, after considering the views of the parties, decide to determine an appeal or application on the basis of the written submissions of the parties only.
 - (c) The Greffier of the Chamber shall notify the Co-Investigating Judges, the parties and their lawyers of the hearing date or the decision to proceed on the basis of written submissions only.

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Directions to the Parties concerning Co-Prosecutors' Request to Determine the Appeal on Written Submissions Alone, 14 January 2009.

² Internal Rules (Rev.2), as revised on 5 September 2008.

3. It appears from this Rule that the presumption for all pre-trial appeals is that there will be an oral hearing. The Pre-Trial Chamber may exercise its discretion to determine when an exception to this principle is permitted. No criteria are set out in the Internal Rules as to when to depart from the presumption of an oral hearing.
4. There have been various appeals decided upon written submissions alone, generally due to agreement between the parties that an oral hearing was not required.³ The Pre-Trial Chamber has granted a request for an oral hearing in an appeal for which there was disagreement between the parties.⁴

IV. ARGUMENT

A. The OCP have provided insufficient arguments to depart from the presumption in favour of an oral hearing

5. The OCP asserts that the “Appellant has not asked for an oral hearing of this Appeal.”⁵ However, the OCP does concede, and rightly so, that “hearings determinative of detention should be heard orally.”⁶ Consequently, an oral hearing is presumed; there is no requirement on the Defence to request such a hearing. The OCP’s assertion to the contrary is spurious.
6. As to the question of whether there are sufficient reasons to depart from the presumption of an oral hearing, the OCP simply seeks to minimise the importance of the Appeal. According to the OCP, “the current Appeal concerns only an extension of a recently confirmed detention and, as such, raises no new factual or legal arguments that need to be addressed in an oral hearing.”⁷ This assertion amounts to little more than a thinly veiled attempt to belittle the importance of the liberty of Mr .IENG Sary. An appeal against a judicial order extending Mr. IENG Sary’s detention for another year is of fundamental importance. Despite the verdict pronounced in the court of public opinion - as can be

³ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC10), Decision on the Requests to Determine IENG Sary’s Appeal on Appointment of Expert on the Basis of Written Submissions Only, 7 August 2008.

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

⁵ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Co-Prosecutors’ Response to IENG Sary’s Appeal on Extension of Provisional Detention, 9 January 2009, para. 3 (“OCP Response”).

⁶ *Id.* (emphasis added)

⁷ *Id.*

seen by much of what the OCP cites as a basis for confinement - Mr. IENG Sary continues to enjoy the presumption and assumption of innocence. The Pre-Trial Chamber should not ignore this fundamental right simply because the OCP seeks to do so.

7. The Appeal raises new factual and legal arguments, which, quite simply, must be explained and elaborated upon in a very transparent manner through oral submissions. If, as the OCP claims, the Appeal does not raise any new factual or legal arguments, then clearly the OCP would not have felt the need to not only file a substantial response to the Appeal, but also request an extension of time in which to do so.

B. An oral hearing is required for the discussion of events subsequent to the filing of the Appeal

8. Since the Appeal was filed on 10 December 2008, Mr. IENG Sary has repeatedly been admitted to hospital due to severe problems with his health.⁸ The Defence wishes to raise this issue before the Pre-Trial Chamber as it obviously has a considerable impact on the appropriateness of Mr. IENG Sary's continued detention. If this issue is raised orally it will provide the OCP and Civil Parties with an adequate opportunity to respond especially as notice is provided by the Defence of its intention to raise these issues far in advance of the oral hearing.
9. An oral hearing will also be in the interests of judicial economy. It will allow the Pre-Trial Chamber to receive and consider oral submissions from all parties on these developments right up to the date of the oral hearing instead of issuing a decision based on written briefs that may be out of date.⁹

⁸ Since the filing of the Appeal, Mr. IENG Sary has been admitted to hospital on three separate occasions. First, he was admitted on 23 December 2008 and discharged the next day. Second, he was admitted on 28 December 2008 and discharged on 2 January 2009. Third, he was admitted on 11 January 2009 and discharged on 14 January 2009.

⁹ According to the Pre-Trial Chamber, it will next meet on 23-27 February 2009. If the oral hearing is held that week, submissions on Mr. IENG Sary's health up to that point may be made rather than requiring a written reply to the OCP Response which would likely be filed much earlier. *See* Interoffice Memorandum, Pre-Trial Chamber Sessions for the first half of 2009, 19 December 2008.

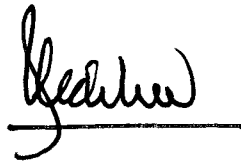
C. A public oral hearing is required due to the inflammatory arguments of the Civil Parties

10. An oral hearing on this appeal is required to adequately respond to some of the disturbing arguments put forward by the Civil Parties in their Joint Response to the Appeal.¹⁰ The Civil Parties rely upon their own aggressive and outrageous conduct in threatening Counsel representing KHIEU Samphan to justify that Mr. IENG Sary continue to be detained.¹¹ This argument needs to be rebutted publicly, in a forum where most Civil Parties and applicants will be aware of the response, rather than in a written brief which is far less accessible.

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

- a. REJECT the OCP's request to determine the Appeal on written submissions alone; and
- b. SCHEDULE an oral hearing on the Appeal for the week of 23-27 February 2009.

Respectfully submitted,



ANG Udom

Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 19th day of **January, 2009**

¹⁰ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC17), Civil Parties Joint Response to the Appeal of IENG Sary Against the OCIJ Order on Extension of Provisional Detention, 26 December 2008 ("Joint Response").

¹¹ Joint Response, para. 25.