

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/OCIJ(PTC 152) **Party Filing:** The Defence for IENG Sary**Filed to:** The Pre-Trial Chamber**Original language:** ENGLISH**Date of document:** 3 December 2010**CLASSIFICATION****Classification of the document suggested by the filing party:** PUBLIC**Classification by OCIJ or Chamber:** សាធារណៈ / Public ^{OK}**Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

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IENG SARY'S REQUEST FOR LEAVE TO REPLY IN LIEU OF AN ORAL HEARING**&****REPLY TO THE CO-PROSECUTOR'S RESPONSE TO IENG SARY'S APPEAL AGAINST THE CLOSING ORDER'S EXTENSION OF HIS PROVISIONAL DETENTION**

Filed by:**The Co-Lawyers:**ANG Udom
Michael G. KARNAVAS**Distribution to:****The Pre-Trial Chamber Judges:**Judge PRAK Kimsan
Judge NEY Thol
Judge HUOT Vuthy
Judge Catherine MARCHI-UHEL
Judge Rowan DOWNING**Co-Prosecutors:**CHEA Leang
Andrew CAYLEY

Mr. IENG Sary, through his Co-Lawyers (“the Defence”), hereby requests leave to file a written Reply to the Co-Prosecutors’ Response¹ to his Appeal against the Closing Order’s Extension of his Provisional Detention,² in lieu of holding an oral hearing. Mr. IENG Sary, having been fully informed of his right to a public oral hearing, wishes to waive his right in this instance. Should leave be granted to file a written Reply, the Defence herein submits its Reply to the Response.

I. REPLY

A. The OCIJ failed to comply with the requirement in Rule 68 that extension of provisional detention must be ordered by a specific, reasoned decision

1. The OCP asserts that “[t]he Co-Investigating Judges have satisfied the Rule 68(1) ‘specific, reasoned decision’ requirement.”³ The OCP asserts that the requirement has been met because there was a “specific” decision within the Closing Order to maintain Mr. IENG Sary in provisional detention. The OCP fails to explain how it considers that the decision was “reasoned.” It only notes that the decision refers to past reasoning.⁴ This is not enough to comply with a requirement to issue a reasoned decision. As the Pre-Trial Chamber has explained in the context of a Rule 55 requirement for a reasoned order:

First, for the Charged Person’s right to appeal under Rule 74(3)(b) to be meaningful, s/he must know why the Co-Investigating Judges rejected his/her request. This requires the Co-Investigating Judges to reason their rejection with sufficient detail to disclose the basis of a decision and thus place the Charged Person in a position to be able to decide whether and against which of the Co-Investigating Judges’ reasons an appeal may be brought and to draw appropriate submission in support of any appeal. Second Rule 77(14) requires the Pre-Trial Chamber to issue a ‘reasoned’ decision on appeal against the Co-Investigating Judges’ exercise of discretion under Rule 55(10). The Pre-Trial Chamber is prevented from affirming the Co-Investigating Judges’ exercise of discretion under Rule 55(10). The Pre-Trial Chamber is prevented from affirming the Co-

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ(PTC 152), Co-Prosecutors’ Response to IENG Sary’s Appeal against the Closing Order’s Extension of his Provisional Detention, 8 November 2010, D427/5/5, ERN: 00622317-00622323 (“Response”).

² *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.

³ Response, para. 4.

⁴ *Id.*

Investigating Judges' exercise of discretion to reject a request if the Pre-Trial Chamber does not know why the Co-Investigating Judges rejected it. This also requires the Co-Investigating Judges to reason its rejection with sufficient detail to allow the Pre-Trial Chamber to conduct an effective appellate review.⁵

The Defence submits that similar reasoning should apply in the instant case.

B. There is no requirement for the Defence to put forth new evidence to support its Appeal

2. The OCP asserts that the Defence has failed to demonstrate any change in circumstance that would trigger a requirement to review the necessity of his detention.⁶ The Defence does not bear the burden of proving that Mr. IENG Sary must be released. The general rule is that an Accused should enjoy liberty and may only in exceptional circumstances be provisionally detained.⁷ The presumption of innocence is a fundamental human right protected by the Cambodian Constitution and Cambodian law, as well as international instruments to which Cambodia is a party.⁸ If the OCIJ wishes to extend Mr. IENG Sary's provisional detention, it is absolutely required to thoroughly consider whether evidence exists to support the extension of detention. It may not simply avoid this obligation by referring to past decisions. If there had been an error in an earlier decision, or if circumstances had changed since the earlier decision and yet no new analysis were ever carried out, an Accused could remain in detention in violation of his right to liberty and the presumption of innocence. It is the OCIJ's obligation, and not the Defence's, to ensure that this does not happen. This is yet another reason that Rule 68(1) requires a "specific, reasoned decision."

⁵ *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ(PTC62), Decision on the Ieng Thirith Defence Appeal against 'Order on Requests for Investigative Action by the Defence for Ieng Thirith' of 15 March 2010, D353/2/3, ERN: 00531848-00531867, para. 23.

⁶ Response, para. 9.

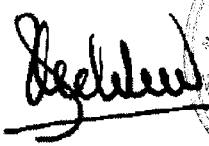
⁷ See Appeal, paras. 2-8.

⁸ *Id.*, paras. 2-4.

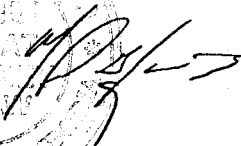
II. RELIEF REQUESTED

WHEREFORE, for all the reasons stated in the Appeal and further addressed herein, the Defence respectfully requests the Pre-Trial Chamber to **REVERSE** the Closing Order's continuation of Mr. IENG Sary's detention and to terminate the provisional detention of Mr. IENG Sary.

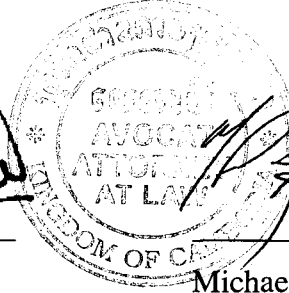
Respectfully submitted,



ANG Udom



Michael G. KARNAVAS



Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this **3rd** day of **December, 2010**