

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S APPEAL AGAINST THE CLOSING ORDER'S EXTENSION OF HIS PROVISIONAL DETENTION

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Mr. IENG Sary, through his Co-Lawyers (“the Defence”), pursuant to Rule 74(3)(f) of the ECCC Internal Rules (“Rules”), hereby appeals the decision in the Closing Order to extend his provisional detention until he appears before the Trial Chamber.¹ The OCIJ has failed to set out a specific, reasoned decision as to why extension of detention is required and has further erred in determining that the conditions necessary for detention as enumerated in Rule 63(3) have been met. Because this is a matter which affects Mr. IENG Sary’s fundamental right to liberty, the Defence requests an oral hearing.

I. SUMMARY OF ARGUMENT

1. The Defence will show that:

- 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;
- b. Even if the Closing Order is considered to contain a specific, reasoned decision ordering the extension of Mr. IENG Sary’s detention, his detention must not be extended because the OCIJ erred in finding that the extension of detention was necessary:
 - i. Detention is not necessary to ensure Mr. IENG Sary’s presence at trial;
 - ii. Detention is not necessary to protect the security of Mr. IENG Sary; and
 - iii. Detention is not necessary to preserve public order.

II. RELEVANT LAW

A. The Right to Liberty and the Presumption of Innocence

2. According to Article 32 of the Cambodian Constitution,² “[e]very Khmer citizen shall have the right to life, personal freedom, and security.” Article 38 of the Constitution ensures the presumption of innocence. “The accused shall be considered innocent until the court has judged finally on the case.”³

¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Closing Order, 15 September 2010, D427, ERN: 00604508-00605246, paras. 1622-24.

² 1993 Constitution of the Kingdom of Cambodia, as amended 4 March 1999.

³ *Id.*

3. The fundamental right to liberty and the presumption of innocence are also enshrined in the International Covenant on Civil and Political Rights (“ICCPR”), whose standards the ECCC must fully respect.⁴ Article 9(3) of the ICCPR states in part that “[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.”⁵ Article 14(2) of the ICCPR states that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”
4. These fundamental principles are also provided for by the Rules and by the Cambodian Code of Criminal Procedure (“CPC”). Rule 21(1)(d) states that “[e]very person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established.” Article 203 of the CPC states that “[i]n principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section.”
5. At the ICTY, it has been held that these principles must only be restricted:
- in service of a ‘sufficiently important objective’ and must ‘impair the right ... no more than necessary to accomplish the objective.’ ... [T]he ICTY has been guided by a ‘general principle of proportionality’ in assessing defendants’ suitability for provisional release, noting that a restriction on the fundamental right to liberty is acceptable only when it is ‘(1) suitable, (2) necessary and when (3) its degree and scope remain in a reasonable relationship to the envisaged target.’⁶
6. Despite the importance of the right to liberty and the presumption of innocence, detention has been justified⁷ at international tribunals based on the seriousness of the

⁴ According to Article 31 of the Cambodian Constitution, “[t]he Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” *Id.* According to Article 13(1) of the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the period of Democratic Kampuchea, “[t]he rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process.”

⁵ Emphasis added.

⁶ *Milošević v. Prosecutor*, IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004, para. 17.

⁷ “A policy in favor of provisional release is a natural outgrowth of the presumption of innocence. To presume that an accused is innocent means, among other things, that punishment cannot begin until the accused is

crimes charged and on the grounds that the international tribunals do not have the power to execute their own arrest warrants but must instead rely on local authorities to act on their behalf.⁸ Even so, international tribunals have held “that detention is the most severe measure that can be imposed on an accused and is to be used when no other measures can achieve the effect of detention, [although] it is recognised that this does not preclude the use of detention in an appropriate case.”⁹

7. The ECCC, as a domestic court established within the national court system, does not have the same concerns that the international tribunals have regarding the lack of power to execute and enforce warrants. The ECCC has judicial police which are authorized to carry out its arrest warrants.¹⁰
8. The OCIJ has recognized that “provisional detention is an exception to the general rule of liberty at the pre-trial phase.”¹¹ Because of the fundamental rights at stake and the severity of imposing detention, a decision to impose detention pursuant to Rule 63(3) must be made with due consideration of the Cambodian Constitution, ICCPR, other international human rights conventions and existing international jurisprudence.

B. Relevant Internal Rules

9. Rule 63(3) states that:

The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

- a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and

convicted. Thus, detention must serve some other distinguishable goal.” Daniel J. Rearick, *Innocent until Alleged Guilty: Provisional Release at the ICTR*, 47 HARV. INT’L L.J. 577, 577 (2003) (emphasis added).

⁸ *Prosecutor v. Brđanin & Talić*, IT-99-36, Decision on Motion by Radoslav Brđanin for Provisional Release, 25 July 2000, para. 18.

⁹ VLADIMIR TOCHILOVSKY, *JURISPRUDENCE OF THE INTERNATIONAL CRIMINAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS* 621 (Martinus Nijhoff Publishers 2008), citing, *Prosecutor v. Boškoski & Tarčulovski*, IT-04-82-PT, Decision on Second Motion for Provisional Release, 29 June 2006, para. 18. As evidence of the severity of this measure, note a speech recently given by the Registrar at the ICTY Diplomatic Seminar held 10 June 2008 in which he discussed the adverse impact of the prison environment on detainees’ health. “Whilst the UNDU is a remand institution, the average period of detention is significantly longer than the one of national jurisdictions and possibly even closer to many penitentiary institutions ... This inevitably has a detrimental affect [sic] upon the mental state of the detainees...”

¹⁰ Rule 45(2).

¹¹ *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Extension of Provisional Detention, 10 November 2009, C22/8, ERN: 00399377-00399388, para. 10.

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b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:

- i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
- ii) preserve evidence or prevent the destruction of any evidence;
- iii) ensure the presence of the Charged Person during the proceedings;
- iv) protect the security of the Charged Person; or
- v) preserve public order.

10. Rule 63(3) thus sets out a two-pronged test to determine when provisional detention may be ordered. The condition in part (a) must be met before determining whether any one of the conditions in part (b) is satisfied. However, even if both parts of this test are met, Rule 63(3) does not require the OCIJ to order provisional detention. This is clear from the language used in the Rule: “the Co-Investigating Judges may order the Provisional Detention...”¹²

11. Rule 68(1) states that:

The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Order have expired. However, where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail under Rules 63 and 65 are still met, they may, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.¹³

III. ARGUMENT

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

12. Rule 68 clearly states that the issuance of a Closing Order puts an end to provisional detention unless the OCIJ sets out a “specific, reasoned decision” in the Closing Order explaining how the conditions for ordering detention under Rule 63 are still

¹² Emphasis added.

¹³ Emphasis added.



met. The OCIJ failed to do this. The portion of the Closing Order dealing with the extension of detention is only three paragraphs long and does not give a reason decision as to why detention remains necessary. It states:

Considering that, in light of the evidence set out in this Closing Order in support of sending **Nuon Chea, Ieng Sary, Ieng Thirith** and **Khieu Samphan** for trial, the conditions laid out in Internal Rule 63(3)(a) are satisfied;

Considering further, having regard to the conditions laid down in Internal Rule 63(3)(b), that ... the reasoning adopted by the Pre-Trial Chamber in its latest decisions on the appeals against renewal of provisional detention by **Ieng Sary, Ieng Thirith** and **Khieu Samphan** ... retain their full force, the only new element being the indictment of the abovementioned persons, which only reinforces the reasons for the aforementioned decisions and renders continued detention all the more necessary;

Considering, accordingly, that it is necessary to maintain the Accused in Provisional Detention until they appear before the Trial Chamber, pursuant to Internal Rule 68: ... Regarding **Ieng Sary**: in order to ensure the presence of the Accused at trial, protect the security of the Accused and preserve public order; ...¹⁴

13. The Closing Order does refer to prior reasoning, but only in the most general sense and it does not explain why provisional detention remains necessary when considering the passage of time. Simply listing three of the five grounds for provisional detention under Rule 63(3) is not enough to constitute a specific, reasoned decision as to why Mr. IENG Sary must remain in detention.

B. Even if the Closing Order is considered to contain a specific, reasoned decision ordering the extension of Mr. IENG Sary's detention, his detention must not be extended because the OCIJ erred in finding that the extension of detention was necessary

14. Mr. IENG Sary has a fundamental right to liberty and to the presumption of innocence. Detention must not be ordered unless it is strictly necessary. In this case, the OCIJ erred in ordering the continuation of Mr. IENG Sary's provisional detention as the conditions stipulated in Rule 63(3) have not been met.

1. Detention is not necessary to ensure Mr. IENG Sary's presence at trial

¹⁴ Closing Order, paras. 1622-24.



15. The OCIJ has erred by failing to fully consider the situation that exists at this time: Mr. IENG Sary is 86 years of age. He has serious health problems which greatly limit his mobility.¹⁵ He can hardly walk, let alone flee. His family lives in Cambodia. His wife, Ms. IENG Thirith remains in custody. He has stated in past conditions of detention hearings that he wishes to be able to comfort her when she cries.¹⁶ He could hardly be expected to flee the country and leave her. If he were free, he would visit her frequently, as her family does. Should the Pre-Trial Chamber find that measures are necessary to ensure Mr. IENG Sary's presence at trial, less restrictive measures than detention, such as house arrest, should be imposed.

2. Detention is not necessary to protect the security of Mr. IENG Sary

16. The OCIJ has provided no recent reasoning as to why it finds that detention is necessary to protect Mr. IENG Sary's security. There are many measures, such as employing security guards, which could alleviate this concern. Indeed, the ECCC employs many security guards for members of the Court. House arrest would be another option which would ensure his safety. The OCIJ has not explained why measures could not be taken which are less restrictive than detention, given that Mr. IENG Sary enjoys the presumption of innocence and does not feel that detention is a necessary measure to protect his safety.

3. Detention is not necessary to preserve public order

17. The OCIJ and Pre-Trial Chamber previously found that Mr. IENG Sary's detention is necessary to preserve public order. The OCIJ previously stated that it continues to be necessary because the passage of time has not diminished the impact of the

¹⁵ See e.g., *Case of IENG Sary*, 002/19-09-07-ECCC/OCIJ, Detention Facility of the ECCC letter to the OCIJ re: On the Health Condition of the Charged Person IENG Sary, 28 July 2009, B31, ERN: 00369424-00369425; *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Request for installation of handrails in the detention cell of Mr. IENG Sary, 6 August 2009; *Case of IENG Sary*, 002/19-09-07-ECCC/OCIJ, Request to hold interview with Mr. IENG Sary on 11 August 2009 in his cell at the Detention Facility, 6 August 2009. "As stated in the Report on the health condition of charged person IENG Sary completed by the Head of the Detention Facility on 28 July 2009, and following on from our recent letter to the OCIJ regarding the installation of handrails in the cell of our client, Mr. IENG Sary is currently suffering from a serious back condition. This has incapacitated him, to the extent that he is unable to walk or stand without assistance." *Case of IENG Sary*, 002/19-09-07-ECCC/OCIJ, Request to hold interview with Mr. IENG Sary on 11 August 2009 in his cell at the Detention Facility, 6 August 2009, para. 3.

¹⁶ See *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Written Record of Interview on Conditions of Detention, 6 April 2010, C60, ERN: 00495277-00495279, p. 2; *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ, Written Record of Interview on Conditions of Detention, 5 August 2010, C64, ERN: 00581370-00581372, p. 2.



