BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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IENG SARY'S APPEAL AGAINST PROVISIONAL DETENTION ORDER

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I. INTRODUCTION

1. IENG Sary, through his Counsel, pursuant to Rules 63(4) and 74(3) of the ECCC Internal Rules ("Rules") hereby files this Appeal of the Provisional Detention Order ("Detention Order") issued by the Office of the Co-Investigating Judges ("OCIJ") on 14 November 2007, whereby the OCIJ ordered Mr. IENG Sary to be placed in provisional detention for a period not exceeding one year.[1]

2. Essentially, the OCIJ determined that provisional detention was necessary because a. there are documents supporting "well-founded reasons to believe" that Mr. IENG Sary committed the charged crimes,[2] b. to avoid the risk to public order,[3] c. he poses a danger to himself[4] and others,[5] d. he is a flight risk,[6] e. the unavailability of sufficient bail conditions to eliminate the risk of flight or danger to himself or others,[7] and f. based on the then available medical records, Mr. IENG Sary's state of health is not "incompatible with detention".[8]

3. In addition to stating the reasons for which they believed provisional detention was necessary, the Co-Investigating Judges discussed in the Detention Order two additional issues which were not directly the subject of the adversarial hearing of 14 November 2007: a. *ne bis in idem*[9] and b. the scope of the 1996 Royal Decree pardoning and granting amnesty to Mr. IENG Sary.[10] Prior to the adversarial hearing no advance notice was provided to Counsel for Mr. IENG Sary, and subsequent to the adversarial

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[1] Provisional Detention Order, No. 002/19-09-2007-ECCC/OCIJ, 14 November 2007, p. 7.
[2] *Id.* para. 15.
[3] *Id.* para. 16.
[4] *Id.*
[5] *Id.* para. 17.
[6] *Id.* para. 18.
[7] *Id.* para. 19.
[8] *Id.* para. 20.
[9] *Id.* paras. 5-10.
[10] *Id.* paras. 5-6, 11-14.

hearing the Co-Lawyers for Mr. IENG Sary were not invited to brief these issues prior to the issuance of the Detention Order.

II. SUMMARY OF ARGUMENT

4. In seeking appellate review four principal questions must be considered. First, is Mr. IENG Sary's detention necessary to preserve public order? Second, is Mr. IENG Sary's detention necessary to preserve his personal safety? Third, is Mr. IENG Sary's detention necessary to prevent him from fleeing? Fourth, is Mr. IENG Sary's detention necessary because there are no available bail conditions to sufficiently eliminate any perceived danger to himself or others and risk of flight?

5. Without addressing the OCIJ's findings under Rule 63(3)(a) that there is well founded reason to believe that Mr. IENG Sary may have committed the crimes specified in the Introductory Submissions, this appeal will nonetheless show that the OCIJ erred in exercising its discretion in its findings under Rule 63(3)(b). Additionally, in light of the OCIJ's findings concerning Mr. IENG Sary's medical condition, further medical documentation is provided which reasonably demonstrate that under the current detention conditions and facilities, Mr. IENG Sary's health is at a significant risk, and consequently, a more compatible and less restrictive detention environment is, at a minimum, warranted.

6. Mr. IENG Sary will not address – as part of his appeal of the Detention Order - any issues concerning *ne bis in idem* and the Royal Decree pardoning and granting amnesty to Mr. IENG Sary, thus reserving the right to raise any and all objections to the OCIJ legal analysis and findings on these matters at a more appropriate time. Mr. IENG Sary's decision not to specifically address the issues *ne bis in idem* and the Royal Decree pardoning and granting amnesty should not be viewed as a waiver.

III. ARGUMENT

A. ***There is no actual risk to public order***

7. There is no credible evidence to suggest that releasing Mr. IENG Sary pending trial would *actually* disturb public order. The Co-Investigating Judges state without any concrete evidence and rather speculatively, that:

> "These crimes are of a gravity such that, 30 years after their commission, they still profoundly disrupt public order to such a degree that it is not excessive to conclude that a decision to leave the Charged Person at liberty would, in the fragile context of today's Cambodian society, risk provoking protests of indignation which could lead to violence and perhaps imperil the very safety of the Charged Person, given that the situation is clearly no longer perceived in the same way since the official prosecution has commenced."

8. The Co-Investigating Judges provide no guidance as to what constitutes "the fragile context". If what is meant is that Cambodian society continues to be in a post-conflict state of existence and as a consequence any sort of provisional release would result in mass protests and violence, then the question that begs to be answered is: how is it then possible in other post-conflict areas, where the fabric of society is flagrantly fragile, that International Tribunals have – despite the gravity of crimes charged or positions held by the accused – provisionally released accused prior to and during the trial.

9. If today's Cambodian society is as fragile as the Co-Investigating Judges claim it is, then it stands to reason that anything other than guilty verdicts and life sentences resulting from the trials – irrespective of the evidence to the contrary – could provoke protests of indignation leading to violence. This very notion – if true – manifestly calls into question and casts doubt as to whether any of the accused before the ECCC can realistically expect a fair and impartial trial given the weight of the pressure purportedly

to be suffered by the Judges to avoid protests of indignation and violence that may result from rending anything but convictions and life sentences.

10. Without conceding whether today's Cambodian society is fragile, it is worth recalling the absence of *protests of indignation leading to violence* in what must have been the much more fragile context of yesterday's Cambodian society when Mr. IENG Sary returned to Cambodia after the much publicized 1996 Royal Decree pardoning and granting amnesty to him.

11. According to international standards, the public order justification can only be used where facts show that releasing the suspect would *actually* disturb public order and where detention is the only means of addressing an actual disturbance.[11]

12. There is no convincing evidence to support any assertion that Cambodian society is fragile and liable to erupt in violent protest. The anti-Thai riots of 2003 cited as evidence by the Office of the Co-Prosecutors ("OCP") that Cambodia is a volatile society[12] is unpersuasive. Isolated examples of public disturbances do not necessarily make a society 'fragile' or volatile.

13. Many countries suffer from some level of public disorder. For example, over the last five years the former Cambodian colonial power, France, has seen massive public disturbances in 2003, 2005 and again in 2007. In neighboring Thailand, in 2006 after weeks of massive demonstrations, the Military overthrew the democratically elected government. Recently, Italy has experienced riots resulting from football matches. Racially motivated riots are not uncommon in the United States of America as well as in the United Kingdom. And of course, periodic public disturbances occur in the republics and autonomous regions of the former Yugoslavia (Serbia, Croatia, Bosnia and

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[11] *Letellier v. France*, ECHR, 26 June 1991.

[12] Co-Prosecutor's Response to NUON Chea's Appeal Against Provisional Detention Order of 19 September 2007, 3 December 2007, para. 38.

Herzegovina, Kosovo) due to perceived injustices resulting from the ongoing trials at the International Tribunal for the former Yugoslavia ("ICTY"). Compared to these examples, Cambodia is a picture of peace and stability.

14. Even in societies that are unquestionably fragile, International Courts have granted provisional release to people charged with violations of humanitarian law. For example, in Kosovo, in March 2004, "a wave of riots swept through Kosovo'', involving 51,000 persons.[13] An estimated 730 houses belonging to minorities were damaged or destroyed and over 4000 Kosovo Serbs were displaced.[14] Notwithstanding this ethnic-based violence, in 2005 the ICTY granted provisional release to Ramush Haradinaj, the former leader of the Kosovo Liberation Army, despite the fact that the charges against him are related to the ethnic conflict between Kosovo's Serbs and Albanians.[15]

15. Likewise, the Co-Investigating Judges provide no factual basis for their finding that releasing Mr. IENG Sary may lead to public protests and violence. It remains a mystery how the Co-Investigating Judges determined that the alleged crimes "still profoundly disrupt public order". The Co-Investigating Judges did not cite a single report relating to instability and did not refer to any incidence of public protest relating to the Khmer Rouge. Although numerous alleged former leaders of the Khmer Rouge - including Mr. IENG Sary - have been living freely and openly in Phnom Penh for many years, the Co-Investigating Judges did not cite a single example of public protest due to their freedom of movement in and around Cambodia.

16. It is respectfully submitted that the picture of Cambodian society is very different than the one painted by the OCP and the Co-Investigating Judges. Government sources as well as independent international agencies recognize that Cambodia is now a country of

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[13] *See* OSCE, "Kosovo, The Response of the Justice System to the March 2004 Riots", December 2005, pp.5-6.
[14]For data on March 2004 riots and follow-up actions *see*: http://www.ian.org.yu/kosovo-info/english/files-index/Fact%20Sheet%20Measures%20after%20March%20updated%20March%202005.pdf
[15] *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005 (*Haradinaj* Release Decision).

peace and stability. For example, Samdech Hun Sen, Prime Minister of the Royal Government of Cambodia ("RGC"), recently stated:

> "Cambodia has gone through a sweeping change not only in political and security, but also in economic and social landscape. This stable safe and secure environment is an essential precondition to Cambodia realizing its economic and social potential in a peaceful and prosperous nation."[16] (Emphasis added)

17. A recent report by the Ministry of Planning and UNDP stated:

> "Cambodia has recorded impressive achievements in recent years, especially in light of some of the challenges of the past decades. Most importantly, peace and stability have been largely restored, thereby greatly increasing human security. This, combined with a robust regional and global economy, has enabled steady to high economic growth rates for the past ten years."[17] (Emphasis added)

18. The above views are consistent with the World Bank, which stated:

> "Over the last one-and-a-half decades, Cambodia has achieved high rates of economic growth and significant poverty reduction ... [The Paris Peace Accords of 1991] marked the beginning of a transition from conflict to peace, bringing most of the parties to the low-intensity civil war of the 1980s into an agreement to compete for power through elections rather than military

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[16] Speech made on 22 February 2007 at the Cambodia Economic Outlook Conference: Opportunities for Growth, Development and shared prosperity.

[17] Cambodia Human Development Report 2007: Expanding Choices for Rural People (NHDR)", p. 11.

struggle (although full peace was only achieved in 1999 with the final collapse of the Khmer Rouge insurgency)."[18] (Emphasis added)

19. And with the opinion of USAID:

"Cambodia is now a country in transition at many levels. Politically, it has shifted from communism toward democracy. Economically, it has moved from being one of the most closed economies in the world to one of the most open. After years of conflict there is now relative stability and peace. [...] The social, political and economic fabric of the country has changed radically over the past decade, creating many new opportunities."[19] (Emphasis added)

20. Undoubtedly, the RGC has been highly successful in restoring peace and stability over the past decade. Moreover, contrary to the views of the OCP and adopted by the Co-Investigating Judges, Cambodian society is not 'fragile', the alleged crimes do not still 'profoundly disrupt public order', and granting Mr. IENG Sary provisional release *would not* 'provoke protests of indignation' and violence. To suggest that Cambodian society is so fragile that it would explode into violence if a court were to grant provisional release to a person presumed innocent underestimates both the maturity of Cambodian society and the success of the RGC in bringing peace and stability.

21. In sum, the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on facts. In doing so, they made factual errors and breached international standards of justice.

B. *There is no actual risk to Mr. IENG Sary's personal safety*

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[18] "Sharing Growth: Equity and Development in Cambodia", Report launched on June 12, 2007 at a joint Royal Government of Cambodia and World Bank conference, and held at the InterContinental Hotel in Phnom Penh, pp. 1 and 2.

[19] *See*, http://www.usaid.gov/kh/development_challenge.htm.

22. The Co-Investigating Judges in noting that releasing IENG Sary "could lead to violence and perhaps imperil the very safety of the Charged Person,"[20] provided no factual or evidential basis in support of this finding.

23. Mr. IENG Sary's security is not a valid reason to keep him in detention, particularly when, as noted below, the present detention conditions are highly detrimental (if not fatal) to Mr. IENG Sary's fragile state of health.

24. Mr. IENG Sary has been living freely and openly in central Phnom Penh for nearly a decade. Throughout this period, it was common knowledge that Mr. IENG Sary was associated with and part of the former senior leadership of the Khmer Rouge and that he lived in Phnom Penh. The location of his house was well known. No security guards – armed or unarmed – were employed to watch over his residence, to protect his person or to protect his family members living with him. Mr. IENG Sary lived a very normal life in a non-bunkered house free from barbed wire and electric fences. Indeed, Mr. IENG Sary has not once been insulted, threatened or attacked over the past ten years while demobilizing with the RGC.

25. The Co-Investigating Judges noted, again without providing any factual or evidential basis in support of its claims, that "the situation is clearly no longer perceived in the same way since the official prosecution has commenced".[21] This seems unlikely. Commentators and the media have long accused Mr. IENG Sary of being involved in the crimes allegedly committed during Democratic Kamphuchea.[22] Both regular Cambodians and international scholars appear to presume that he is guilty. Indeed, it would not be hyperbole to note that in the court of public opinion, fueled over the years by statements, press releases, and academic literature from various Cambodian "experts" (including those who presently work at the OCP and OCIJ), it is forgone conclusion that

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[20] Provisional Detention Order, para. 16.
[21] *Id.*
[22] *See,* e.g. "Seven Candidates for Prosecution" by Steve Heder.

all high ranking members of the Khmer Rouge are guilty. Thus, to suggest that the situation is perceived differently just because the official prosecution has commenced, runs contrary to reality and common sense.

26. In sum, the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on facts. In doing so, they made factual errors and breached international standards of justice.

C. *There is no actual risk to Mr. IENG Sary interfering with witnesses*

27. In finding that there is a risk Mr. IENG Sary will interfere with the witnesses should he not be in detention, the Co-Investigating Judges noted:

> "[I]t may be feared that, if the Charged Person were to remain at liberty, he might attempt, and would be in a position to organize such pressure. Indeed, henceforth, IENG Sary will have access to all of the elements in the case file of the judicial investigation, including the written records of interviews with specific witnesses, complaints and civil party applications. Whereas the nature of the alleged crimes makes it difficult for a suspect to identify and influence the very large number of potential witnesses before the judicial investigation begins, the same is not true once the Charged Person has knowledge of the identity of the inculpatory witnesses and victims involved in the proceedings. In view of this new situation, the fear of pressure being exercised would be particularly justified if the Charged Person was in a position to have uncontrolled communication with these people, given that IENG Sary has numerous family members and former subordinates in the regions of Phnom Malai, Pailin and Phnom Penh, some of whom currently hold influential positions and even have armed guards."

28. A decision to detain an accused on the ground that he or she may interfere with witnesses *must* be based on specific facts and evidence vis-à-vis the accused; the court

should not rely on abstract perceptions.[23] Further, the fact that an accused has power and influence *does not* automatically mean that he will exercise it unlawfully.[24]

29. If indeed the test for pre-trial provisional release is that the accused are free of any real or perceived power and influence, then how is it that at the ICTY numerous highly influential and potentially powerful accused have been provisionally released not only during the pre-trial stage but also during winter and summer recess periods while in trial. This can readily be seen by the examples set out in Annex A.

30. Lastly, it bears recalling that in the over ten years since his demobilization with the RGC, Mr. IENG Sary has not once insulted, threatened or attacked any potential witness, even though he knew (as did everyone else in Cambodia) that the national and international communities were engaged in setting up a Tribunal with the aim of prosecuting, at a minimum, alleged high ranking Khmer Rouge leaders.

31. In sum, the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on facts. In doing so, they made factual errors and breached international standards of justice.

D. *There is no actual risk that Mr. IENG Sary will flee*

32. In finding that there is a risk that Mr. IENG Sary will flee, the Co-Investigating Judges noted:

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[23] *Haradinaj* Release Decision, paras. 22, 47:"[t]he assessment whether the accused would pose a danger cannot be made only *in abstracto*; a concrete danger has to be identified. [...] "[I]t has not been shown that the Accused could pose a concrete danger to anyone, including victims and witnesses, the Trial Chamber is not satisfied that a negative impact on the public perception of the safety of potential witnesses suffices as a ground for denying provisional release. [...] [N]othing in the evidence to suggest that the Accused interfered or would interfere with the administration of justice."

[24] *Haradinaj* Release Decision, para. 47 (citing *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order on Provisional Release of Bruno Stojić, 30 July 2004, para. 28).

> "Furthermore, numerous elements show that IENG Sary (who has a residence abroad and has made numerous voyages outside Cambodia) has the material means necessary to facilitate his flight to another country, especially those with which Cambodia does not have any extradition agreements. The Charged Person, who faces a maximum sentence of life imprisonment if convicted, has made a number of public statements to the effect that he refuses to appear before the Extraordinary Chambers. These statements severely undermine the value of any statements which indicate his intention to be available at trial. It may, thus, be feared that he will be tempted to flee the legal process."

33. Just as in assessing whether an accused is a danger to himself or others if provisionally released, a decision to detain an accused on the ground that he or she may be a flight risk *must* be based on specific facts and evidence and not abstract perceptions and speculative innuendo. A *perceived* risk of flight must be adequately established by facts; it *may not* be assessed solely on - and thus axiomatically assumed from - the basis of the gravity of the offense.[25] Reference *must* be made to the specific factors which either confirm or refute the danger.[26] As was found by the European Court of Human Rights, these include the accused's character, state of health, family ties, material and financial resources, and other links to the jurisdiction.[27]

34. Where the risk of flight is the only legitimate ground for provisional detention, release pending trial *should* be ordered if it is possible to obtain a guarantee from the charged

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[25] *Bernard v. France*, ECHR, 26 September 2006, para. 45; *Muller v. France*, ECHR, 18 February 1997, para. 42; *Tomasi v. France*, ECHR, 27 August, 1992, para. 98; *Lettellier v. France*, ECHR, 26 June 1991, para. 43; *Neumeister v. Autriche*, ECHR, 27 June 1968, para. 10.
[26] *Yagci & Sargin v. Turkey*, ECHR, 23 May 1995, para. 52.
[27] *Neumeister v. Autriche*, ECHR, 27 June 1968, para. 10.

person that he will appear for trial.[28] Such guarantee, it is respectfully submitted, is bolstered and should be accepted, when supported by further guarantees provided by legitimate authorized authorities, such as the local police, with, as in this case, the approval of the RGC.[29]

35. Simply stating that Mr. IENG Sary may have wealth, foreign friends, and a passport, is not a sufficient justification to deny him provisional release. As noted above, it was widely known throughout Cambodia that the national and international communities were engaged in setting up a tribunal with the aim of prosecuting, at a minimum, alleged high ranking Khmer Rouge leaders. It was also widely known that Ta Mok as well as KAING Guek Eav (aka "DUCH"), were in detention for years while awaiting the establishment of the ECCC.[30] Unquestionably, these facts were known to Mr. IENG Sary. Against this backdrop, if the Co-Investigating Judges' reasoning is to have any credible weight, then it can be assumed that some demonstrative evidence must exist, however tenuous, showing that Mr. IENG Sary availed himself to his presumed wealth, foreign friends, and passport in order to leave Cambodia and/or secrete himself – particularly after the much publicized establishment of the ECCC. No evidence was proffered by the OCP just as no evidence was relied upon by the Co-Investigating Judges, since no such evidence exists.

36. In sum, the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on facts. In doing so, they made factual errors and breached international standards of justice.

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[28] *Tomasi v. France*, ECHR, 27 August, 1992, para. 98; *Lettellier v. France*, ECHR, 26 June 1991, para. 46; *Wemhoff v. Germany*, ECHR, 27 June 1968, para. 15.

[29] Under 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, 6 June 2003, Articles 24, the RGC is responsible to "take all effective and adequate actions which may be required to ensure the security, safety and protections" of the accused.

[30] The fact that RGC did not try these two alleged former Khmer Rouge leaders after years of incarceration, especially knowing of Ta Mok's advance age and precarious health condition, is indicative of its intent to wait until the establishment of the ECCC, for these and other potentially alleged accused to be tried.

E. ***There are available bail conditions ensuring against any perceived risks***

37. Aside from imposing stringent conditions on Mr. IENG Sary if provisionally released, such as those imposed by the ICTY, the most obvious and most risk-free condition for provisional release is a modification of the present detention conditions to house arrest, which, for all intents and purposes is simply another form of detention.

38. House arrest is also viewed as form of bail. Articles 223-230 of the Cambodian Criminal Procedure (2007) set out the provisions for bail. The OCP's claim that "[t]here is no precedent, practical experience or proven capacity to provide either safeguards or enforcement mechanisms for suspects who may be released on bail"[31] is irrelevant and unpersuasive. Aside from the fact that the OCP offers no basis for this assertion, if this argument is to be accepted it follows that no suspect or accused can avail himself/herself of the bail provisions since there is no tried and tested precedent: the proverbial *chicken and egg* conundrum.

39. Despite the findings of the Pre-Trial Chamber in its 3 December 2007 Decision on Appeal Against Provisional Detention Order of KAING Guerk Eav allias "Duch",[32] it bears revisiting this alternative form of detention, which, as is widely known, proved most successful in the Biljana Plavšić case at the ICTY.[33] Though charged on the basis

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[31] *Supra* note 12, at para. 41.

[32] Para. 60.

[33] *Prosecutor v. Plavšić*, IT-00-39 & 40/1, Decision on Biljana Plavšić's Application for Provisional Release, 5 September 2001. The following conditions for house arrest were imposed on Plavšić:

a) to remain within the confines of the city of Belgrade;
b) to surrender her passport to the Ministry of Justice;
c) to report each day to the local police in Belgrade;
d) to report the address at which she will be staying to the Ministry of Justice and to the Registrar of the International Tribunal;
e) to consent to having the Ministry of Justice check with the local police about her presence and to the making of occasional, unannounced visits to the Accused by the Ministry of Justice or by a person designated by the Registrar of the International Tribunal;
f) not to have any contact with any other co-accused in the case;
g) not to have any contact whatsoever or in any way interfere with victims or potential witnesses or otherwise interfere in any way with the proceedings or the administration of justice;

of individual criminal responsibility (Article 7(1) of the Statute of the Tribunal) and superior criminal responsibility (Article 7(3)) with Genocide and/or, Complicity to Commit Genocide (genocide, Article 4), Extermination, Murder, Persecutions on political, racial and religious grounds, Deportation, alternatively of Inhumane Acts (crimes against humanity, Article 5), and Murder (violations of the laws or customs of war, Article 3), Biljana Plavšić, a high ranking civilian authority in the Republika Srbska of Bosnia and Herzegovina, was provisionally released to house arrest in Belgrade, Serbia on 5 September 2001, even thought at the time the Serbian Government was most notably uncooperative with the ICTY. Ms. Plavšić remained under house arrest even while waiting to be sentenced after having publicly entered a guilty plea pursuant to an agreement with the Prosecution, requiring her to fully cooperate and to provide relevant incriminating information against herself and others.[34]

40. To suggest that the RGC is incapable of providing security to Mr. IENG Sary or periodically transporting him safely to the Chambers during the investigative/pre-trial stage of the proceedings, is simply to ignore the Herculean efforts made by the RGC, and in particular Samdech Hun Sen, Prime Minister of the RGC, to bring peace and tranquility to Cambodia.

41. In sum, the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on facts. In doing so, they made factual errors and breached international standards of justice.

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h) not to discuss her case with anyone, including the media, other than her counsel;
i) to continue to cooperate with the International Tribunal;
j) to comply strictly with any requirements of the authorities of the Republic of Serbia necessary to enable them to comply with their obligations under this Order and their guarantees;
k) to return to the International Tribunal at such time and on such date as the Trial Chamber may order; and
l) to comply strictly with any order of the Trial Chamber varying the terms of or terminating her provisional release.

[34] *Prosecutor v. Plavšić*, IT-00-39 & 40/1, Order for Continuation of Provisional Release, 18 December 2002.

F. There is an actual risk to Mr. IENG Sary's life under the detention conditions

42. Mr. IENG Sary's health condition is known to be precarious. He has undergone heart surgery. The attached medical documentation in Annex B[35] sufficiently demonstrate that he is in need of not only constant and appropriate medical assistance, but also of a living environment most suited for his fragile health. While medical treatment is being made available to Mr. IENG Sary, the detention conditions are sub-standard for someone of Mr. IENG Sary's ill-health.

43. Recognizing that the ECCC detention facilities are under the jurisdiction of the RGC,[36] the international community funding the ECCC and in particular the United Nations which was insistent on establishing this Tribunal, can not ignore the fact that should the health of any of the accused be in jeopardy due to the detention conditions (or by ignoring less restrictive modes of provisional detention), resulting in a premature and preventable death, they will be held equally accountable. It simply bears recalling the international frenzy over the death of Slobodan Milošević while being detained by the ICTY UN Detention Unit – irrespective of the real or perceived reasons for his death.

44. While maintaining that there are no reasons why he should not be provisionally released, Mr. IENG Sary respectfully asserts that given his health condition a more appropriate form of provisional detention would be house arrest.

IV. CONCLUSION & RELIEF SOUGHT

45. Under the formulation set out by the Co-Investigating Judges for denying Mr. IENG Sary provisional release, no one subject to the ECCC's jurisdiction would ever be entitled to conditional release. An interpretation of the Rules which does not allow for it

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[35] Currently the medical records are being translated by the OCIJ and to be filed confidentially.
[36] *See* Agreement, Articles 14 and 24.

to effect its purpose must be rejected as patently unreasonable. The only reasonable interpretation is that if there is some meaningful concrete evidence that the persons release would causes a significant disruption, then there may be a ground for denying release. However, where as here, the record is devoid of any evidence that the stable, and orderly society of Cambodia cannot ably survive a sickly 82 year old man being confined to his home to await trial, then the only basis for the Court's conclusion is the substitution of its own subjective judgment for evidence.

46. For all of the reasons stated herein, the Defense respectfully requests this Chamber to vacate the Detention Order and order that the conditions of provisional detention be modified to house arrest under restrictions deemed necessary by the Pre-Trial Chamber.

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 **January, 2008**