C22/9/3

BEFORE THE PRE-TRIAL CHAMBER

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CIVIL PARTY CO-LAWYERS' RESPONSE TO THE APPEAL OF IENG SARY AGAINST EXTENSION OF PROVISIONAL DETENTION

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I. PROCEDURAL BACKGROUND

1. On 10 November 2009, the Office of the Co-Investigating Judges *("OCIJ")* issued the Order on Extension of Provisional Detention *("Extension Order").*[1]
2. On 7 December 2008, the Co-Lawyers of the Charged Person filed the appeal[2] against the Extension Order and discussed therein the OCIJ's findings under Rule 63 (3) (a) and (b) Internal Rules *("IR")*. Co-Lawyers for Civil Parties note that the Defense' Appeal does not discuss if "well founded reason" exists because they see "flaws" in the investigations.[3] The Defense requests the Pre-Trial Chamber *("PTC")* to reverse the Extension Order and to "[t]erminate the provisional detention", in other words to release him. [4]
3. On 11 December 2008, the Defense' Appeal brief has been notified to the Co-Lawyers of the Civil Parties in English and Khmer.

II. SUMMARY OF ARGUMENTS

4. The discretion of the OCIJ has been properly exercised and shows no unreasonable and unsustainable grounds. The Appeal of the Defense shows no error in the Extension Order. The Extension order is reasoned and justifiable.
5. As the Appeal does not impugn the extension order with regard to the prerequisite of Rule 63 (3) (a) IR Co-Lawyers for Civil Parties likewise limit their arguments to the discussion of Rule 63 (3) (b) IR.
6. The order of provisional detention is a necessary measure to prevent the Charged Person from interfering with victims and witnesses, to preserve evidence, to preserve the Public Order, to secure his safety and to ensure his presence in the upcoming trial. Thus the order fulfils the requirements of Rule 63 (3) (b)(i-v).

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[1] *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, Order on Extension of Provisional Detention, 10 November 2009, Court Document No. C22/8.
[2] *Case of Ieng Sary* , Case No. 002/19-09-2007-ECCC-OCIJ(PTC 32), Ieng Sary's Appeal Against Extension Order, 7 December 2009, Court Document No. C 22/9/1 *("Appeal against Extension Order").*
[3] Appeal against Extension Order, para 14.
[4] Ibid, para 27.

7. House arrest under certain conditions may amount to a mode of detention, but cannot prevent all of the reasons given under Rule 63 (3) (b) IR, in particular to preserve public order, to secure the charged person's safety and to preserve evidence.

III. SCOPE OF THE RESPONSE AND FACTUAL HISTORY

8. As the Defense explicitly limited their Appeal to the requirements of Rule 63 (3) (b) IR Co-Lawyers for Civil Parties will limit their response likewise and refrain from discussing the question if there is "well-founded reason" to believe that the Charged Person has committed the crimes he is charged with. Co-Lawyers for Civil Parties are following this approach regardless for which reasons the Defense limits their scope of the Appeal.[5]

9. Therefore, Co-Lawyers for Civil Parties adopt the submission of OCIJ that numerous witness statements have been collected after the last public hearing on the extension of provisional detention on 2 April 2009. This evidence concerns the role of the Charged Person, his responsibilities and his knowledge of crimes committed during the Democratic Kampuchea regime ("*DK regime*").[6]

10. OCIJ considers that some exculpatory evidence might have existed referring to the witness statement of [redacted] Co-Lawyers for Civil Parties submit that this witness [redacted] and directly involved in identifying "enemies" and in arrests. Thus, any statement of his must be considered with utmost caution as he held a high position in the DK period; is personally and directly involved in the crimes and has a personal and familiar relationship with the Accused.

[5] Ibid, para 14.
[6] See in detail: Extension Order, para 15.

11. Related to the conditions of Rule 63 (3) (b) the OCIJ pointed out that the conditions stated in the Extension Decision had not changed and adopted the arguments of the PTC.[7]

12. In particular, the OCIJ considered the passage of time and concluded that the on-going investigations included the conduct of witness' and Civil Parties' interviews. Thus, taking into account the complexity of the case as a whole the investigations were conducted with due diligence.

13. OCIJ does not discuss alternatives to an extension such as house arrest under specific conditions, to be determined.

14. The Defense states[8] that;

(i) the requirements of Rule 63 (3)(b) are not met and argue in particular that a flight risk does not exist and thus, Mr. IENG Sary will appear in Court. Further, that detention is not needed to ensure his safety nor for public order to be preserved;

(ii) imprisonment is not the only form of detention and that reasonable conditions of house arrest are available to the OCIJ;

(v) house arrest can protect the objectives set out in Rule 63 (3) (b) IR.

III. RELEVANT LAW

15. Pursuant to Internal Rules 63 (3) (a) and (b), the Co-Investigating Judges may order the provisional detention of a Charged Person under the following conditions:

a) There is well founded reason to believe that the defendant may have committed the crimes specified in the Introductory Submission.

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;

[7] Extension Order, para 20-28.
[8] Appeal against Extension Order, para 1.

(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.

16. Rule 63 (6) (a) IR stipulates:

> Provisional Detention may be ordered as follows:
>
> > for genocide, war crimes and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the Provisional Detention for further 1 (one) year periods.

17. Rule 63 (7) IR provides:

> Any decision by the Co-Investigating Judges concerning extension of Provisional Detention [...] shall set out the reasons for such extension. [...]

IV. SCOPE OF THE APPEAL AND ROLE OF THE PRE-TRIAL CHAMBER

18. The Co-Lawyers for the Civil Parties already comprehensively showed in the response[9] to the Appeal of Ieng Thirith that an Appeal is rather limited. These submissions are hereby incorporated by reference. Thus, the Pre-Trial Chamber may only overturn the OCIJ decision if the Judges erred and abused their discretion and – summarized - if the decision is "logically perverse or evidentially unsustainable".[10]

19. The same standard applies to the Extension Order which must be reasoned according to Rule 63 (7) IR.

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[9] *Case of Ieng Thirith*, case no. 002/19-09-2007-ECCC/OCIJ (PTC02), Civil Party Co-Lawyers' Joint Submission to the Appeal of Ieng Thirith against the Provisional Detention Order, Court Document no. C20/I/17, paras 6-13.

[10] *Prosecutor v. Moinina Fofana,* Case No. SCSL-04-14-AR65, Appeal against Decision refusing bail, 1 March 2005, para 20.

V. ARGUMENTS

General Proportionality Aspects

20. The second extension of the provisional detention of one year is still proportional and justified[11] taking into consideration the serious offences against the Charged and compared to other cases[12] of such complexity.

It is worth mentioning that the Office of Co-Prosecutors requested life imprisonment for the Accused Mr. Kaing Guek Eav of which was then converted and demanded to be 45 years minus five years. The requested sentence included a credit for mitigating factors like cooperation with the Court, long and unlawful detention and admission of a great portion of facts making them not disputed.

Taking into account that Mr. Kaing Guek Eav is considered "only" as a person "most responsible" while Mr. IENG Sary, as member of the Standing Committee, is allegedly a senior leader, the question of proportionality between an expected sentence in the case of conviction and the crimes allegedly planned and committed justifies the extension of the provisional detention as it is still proportional.

Rule 63 (3) (b)

21. Co-Lawyers for Civil Parties note that the Cambodian Criminal Procedure Code *("CPC")* stipulates that liberty of a person is a rule and detention is the exception. Article 205 CPC states the prerequisites for a detention which are similar to Rule 63 (3) (b) IR. Co-Lawyers submit that the existence of only one of these prerequisites justifies provisional detention.

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[11] In the case *Prosecutor v. Casimir Bizimungu* et al.; TC II ; case no: ICTR-99-50-T; 4 November 2002, para 31, it was three years at the time of the decision.

[12] see *Prosecutor v. Coric et al.* TC III; case no: IT-04-74-T; Decision On The Request For Provisional Release Of The Accused Coric, 8 April 2008, where nearly three years of provisional detention were held proportional; *Prosecutor v. Mile Mrksic*; TC II; Case no: IT-95-13/1-PT, Decision on Defense Motion For Provisional Release; 9 March 2005; where the Chamber held two years and ten months pretrial detention for proportional; *Prosecutor v. Dragomir Milosevic,*TC I; case no: IT-98-29/1-PT; Decision On Third Motion For Provisional Release, 16 August 2006; where the Chamber held one year and eight months pretrial detention for proportional.

22. Co- Lawyers for Civil Parties incorporate by reference the submission contained in paragraph 24-34 of our Joint Response[13] on the Appeal against the Extension Order against the Charged Person.

23. In addition, Co-Lawyers for Civil Parties submit that in the course of the first trial against Mr. Kaing Guek Eav his request for release was rejected. The Trial Chamber found in the Decision on Request for Release ("*Release Request*"),

> "[t]hat the ruling of the PTC with respect to flight risk, the *necessity to preserve public order* and the *protection of the Accused's security* remains valid at this stage of the proceedings. These concerns have not abated since the last order, and remain unlikely to be adequately addressed by conditions imposed upon release.
>
> Finally, the Chamber finds, in accordance with Rule 21(2), that the detention of the Accused is justified by the requirements of the trial proceedings, in particular *the need to ensure his presence, and is proportionate to the gravity of the crimes for which he is accused.*" [14]

24. Co-Lawyers for Civil Parties note that the cases of Mr. Kaing Guek Eav and Mr. Ieng Sary are not equal but nevertheless can be compared in some ways as they are both similarly charged for serious crimes within the jurisdiction of the ECCC. The latter is charged with many more crimes than the former, as he is allegedly a senior leader. The former has admitted his responsibility[15] and offered his cooperation with the Court, which is not the case for Ieng Sary. Despite arguments in his favor to the Trial Chamber rejected Mr. Kaing Guek Eav request for release, stating that the prerequisites of Rule 63 (3) (b) serve as guidance at the trial stage.[16]

25. Therefore, Co-Lawyers for Civil Parties assert that the jurisprudence of the ECCC on detention matters suggests that the request for release of Mr. Ieng Sary must be rejected.

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[13] *Case of Ieng Sary,* Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the OCIJ Order on Extension of Provisional Detention 28 December 2008, Court Document no. C22/5/6.
[14] *Case of Kaing Guek Eav*, 001/18-07-2007/ECCC/TC, Decision on Request for Release, 15 June 2009, Doc. No.E39/5, para 24-25. (Emphasis added).
[15] The final request of the Accused for release and acquittal were submitted after the Trial Chamber's Decision.
[16] Release Request, fn 46.

26. Furthermore, the Charged Person still enjoys the support of the powerful Prime Minister Mr. Hun Sen who on the occasion of the start of the trial against Mr. Kaing Guek Eav publicly stated "[t]hat he hoped the UN-backed tribunal runs out of money so that the Cambodian judicial system can take over and speed up the existing cases."[17]

Continuing the proceedings of the Charged Person before a national Cambodian Court and abandoning the ECCC would mean that Article 40 new of the ECCC Law stating that amnesty and pardons have to be decided by the Extraordinary Chambers and Article 3 new on the extension of statute of limitation would not be applicable any longer. Thus, the demand of Prime Minister Hun Sen must be interpreted as a direct support for the Charged Person and demonstrates how his request for release in the Appeal could be realized.

27. In light of the foresaid, the personal influence of the Charged Person through his family, holding powerful positions, and who in addition enjoys the aid of the most powerful person in Cambodia the risk that he will not stand trial exists and that provisional detention is necessary.

VI. CONCLUSION

28. The Appeal must fail. The Extension Order of the OCIJ is reasonable, justifiable and the discretion is properly exercised.

For these reasons,

may it please the Pre-Trial Chamber

To reject the Defense' Appeal.

[17] Cambodia Daily, No more KR Prosecutions, Hun Sen says, by Yun Samean, 1 April 2009, p.1.

Respectfully submitted,

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Signed on 16 December 2009 in Phnom Penh.