



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

020/5/13

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

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C.A. Amy	

Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 16)

REPORT OF EXAMINATION

- I- Proceedings
- II- Examination of the case by the co-rapporteurs

I- PROCEEDINGS

A) Introduction

Pursuant to Rule 77(10) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia ("Internal Rules"), the President of the Pre-Trial Chamber has assigned Judges **Huot Vuthy** and **Rowan Downing** to set out the details of the Order on Extension of Provisional Detention issued by the Co-Investigating Judges, against which the present Appeal is lodged, and examine the Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 16).

Identification of the Charged Person

IENG Thirith, alias Phea, female, Cambodian, born on March 10, 1932, 5th quartier, Phnom Penh, Cambodia, residing before her arrest at N° 47B, Street 21, Tonle Bassac, Chamkamorn, city of Phnom Penh, father's name: Khieu On (deceased), mother's name: Ouk Ponn (deceased).

IENG Thirith is represented by Defence Co-Lawyers Mr. **PHAT POUV** Seang and Ms. **Diana ELLIS**.

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Charges

IENG Thirith is charged with crimes against humanity (murder, extermination, imprisonment, persecution and other inhumane acts), being crime(s) set out and punishable under Articles 5, 29(new) and 39(new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“ECCC Law”).

Purpose of this report

This report of the co-rapporteurs sets out the details of the decision appealed against and the facts at issue before this Court. It is to assist those who are not parties to the proceedings understand the matters before the Court.

B) Co-Investigating Judges’ Order on Extension of Provisional Detention

On 11 November 2008, the Co-Investigating Judges issued an Order extending provisional detention of Ieng Thirith, who had then been detained since 14 November 2007, for a period not exceeding one year, pursuant to Internal Rule 63(6)(a).¹

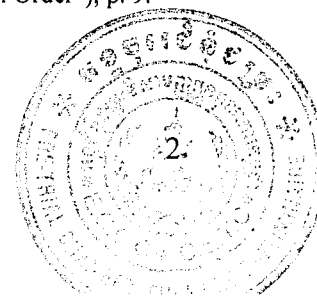
The Co-Investigating Judges found that the first criterion to order provisional detention, mentioned in Rule 63(3)(a), is still met as there are “well founded reasons to believe that the Charged Person committed the crimes with which she is charged”.² To reach this conclusion, they rely essentially on the analysis of the Case File that was undertaken by the Pre-Trial Chamber when seised of the Charged Person’s appeal against the initial order for provisional detention, whose conclusions have not been undermined by exculpatory evidence.

The Co-Investigating Judges found that there has been no change in circumstances since the Pre-Trial Chamber decided that provisional detention is a necessary measure to ensure the presence of the Charged Person during the proceedings, to protect her security and to preserve public order. They thus considered that these three grounds set out in Internal Rule 63(3)(b) continue to be met.³

¹ Order on Extension of Provisional Detention, 10 November 2008, C20/4 (“Extension of Detention Order”), p. 9.

² Extension of Detention Order, para. 13.

³ Extension of Detention Order, paras 21 to 34.



The Co-Investigating Judges considered that detention for nearly twelve months is not “excessive in view of the scope of the investigations, the complexity and gravity of the crimes of which the Co-Investigating Judges are seised”⁴ and added that the exercise of the right to remain silent by the Charged Person, although recognised and undisputed, “is not conducive to speedy proceedings”⁵.

C) Ieng Thirith’s Appeal Brief

On 9 December 2008, the Co-Lawyers for the Charged Person filed their Appeal Brief against the Order of the Co-Investigating Judges, in which they request the Pre-Trial Chamber to (1) hold that the strict requirements for the extension of the Charged Person’s detention are no longer met, (2) quash the Order extending the Charged Person’s provisional detention for another year and (3) immediately release the Charged Person, under conditions deemed appropriate by the Pre-Trial Chamber.⁶ They do so on the grounds that the decision of the Co-Investigating Judges is not adequately reasoned and the Co-Investigating Judges have not conducted their investigation with due diligence.

D) Co-Prosecutors’ Response

The Co-Prosecutors submit in response that the Appeal should be dismissed in its entirety as the Charged Person has not demonstrated any material change in circumstances since she was originally detained upon order of the Co-Investigating Judges.

II- EXAMINATION BY THE CO-RAPPORTEURS

A) Insufficiently reasoned decision

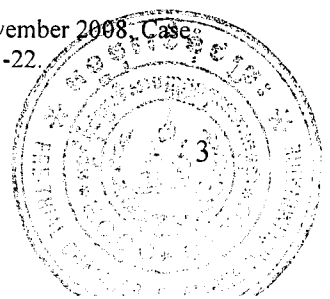
The Co-Lawyers submit the following:

“Given that the [Co-Investigating Judges] (i) failed to provide adequate reasoning for its allegations, (ii) provided incorrect information relating to alleged evidence against the Charged Person, and (iii) provided incorrect or inadequate information concerning the Charged Person’s

⁴ Extension of Detention Order, para. 36.

⁵ Extension of Detention Order, para. 37.

⁶ Ieng Thirith Defence Appeal Against “Order on Extension of Provisional Detention” of 10 November 2008. Case No. 002/19-09-2007-ECCC-OCIJ-PTC(16), 9 December 2008, C20/5/1 (“Appeal Brief”), pp. 21-22.



access to the Case File, the Extension Order lacks sufficient reasoning in contravention of Rule 63(7) of the [Internal Rules] and the aforementioned general principle of law. This failure should lead to the quashing of the Extension Order.”⁷

The Co-Prosecutors submit that “[t]he Extension Order by [the Co-Investigating Judges] is sufficiently and adequately reasoned: the [Co-Investigating Judges] set out the legal grounds and facts taken into account before coming to their Extension Order and are not obliged to indicate a view on all the factors. Contrary to what the Defence allege, the Extension Order does not contain any incorrect information and the Appellant has indeed access to all elements of the Case File, through her lawyers”.⁸

B) Diligence in the conduct of the investigation

The Co-Lawyers for the Charged Person submit that the Co-Investigating Judges have not conducted their investigation with “special diligence”, as they have failed to gather any evidence supporting the charges mentioned in the Introductory Submission during the year that the Charged Person has spent in detention.⁹ They argue that the diligence exercised by the Co-Investigating Judges should be seen in light of the evidence gathered during the Charged Persons’ detention, not the scope of the investigation.¹⁰

The Co-Lawyers state that “[a]rguably, the investigations cover a complex area of facts, but if the [Co-Investigating Judges have] been unable to bring any incriminating evidence – more than merely confirming that she was a Minister of Social Action – against her in this one year of detention, the complexity or scope of the investigations is not relevant, or at least an insufficient standard.”¹¹

They further argue that “[t]he Extension Order, by putting the blame for [...] delay on the defence, thus infringes the right to remain silent.”¹²

⁷ Appeal Brief, para 25.

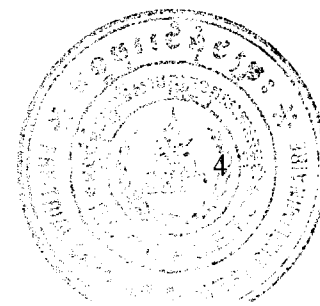
⁸ Co-Prosecutors’ Response to Ieng Thirith Defence Appeal against the “Order on Extension of Provisional Detention of 10 November 2008”, 9 January 2009, C20/5/7 (“Co-Prosecutors’ Response”), para. 2a.

⁹ Appeal Brief, para. 32 and 33.

¹⁰ Appeal Brief, para. 36.

¹¹ Appeal Brief, para. 36.

¹² Appeal Brief, para. 56.



The Co-Prosecutors submit in response that “the Defence have not shown how the length of detention has prejudiced the [Charged Person’s] case in such a manner as to prevent a fair trial and / or to demonstrate how it can, in and of itself, justify a reconsideration of detention.”¹³ They further argue that the length of pre-trial detention is reasonable given the gravity of the crimes charged, the complexity of the case and the extent of ongoing investigations being carried out by the Co-Investigating Judges.¹⁴

The Co-Prosecutors also submit that “[t]he alleged infringement of the [Charged Person’s] right to remain silent appears to be based on an erroneous reading of the Extension Order; the right to remain silent is recognized and undisputed by the [Co-Investigating Judges]. However, the absence of cooperation of the [Charged Person] does not assist the [Co-Investigating Judges] in discovering exculpatory evidence.”¹⁵

C) Well founded reasons to believe that the Charged Person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

The Co-Prosecutors submit that “the principal issue in the determination of the appeal against an Extension Order is whether the conditions set out in Rule 63(3) are still met”.¹⁶ They further submit that, considering that the Pre-Trial Chamber can undertake its own analysis and cure any defect in the Order by substituting its own reasons, most of the arguments raised by the Charged Person in her Appeal are of no material relevance.

The Co-Prosecutors point out that the Defence does not challenge the existence of a well-founded reason to believe that the Charged Person may have committed the crimes specified in the Introductory Submission.¹⁷ In their views, the Pre-Trial Chamber’s finding that the condition set out in Internal Rule 63(3)(a) is met has been reinforced by new evidence gathered since the decision was issued.¹⁸

¹³ Co-Prosecutors’ Response, para. 30.

¹⁴ Co-Prosecutors’ Response, para. 30.

¹⁵ Co-Prosecutors’ Response, para. 2c.

¹⁶ Co-Prosecutors’ Response, para. 5.

¹⁷ Co-Prosecutors’ Response, para. 36.

¹⁸ Co-Prosecutors’ Response, para. 39.



D) Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b))

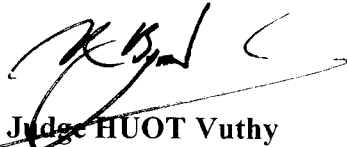
The Co-Lawyers submit that the Co-Investigating Judges failed to provide any reasoning or evidence for their conclusion that there is a “real risk” that witnesses might refuse to take part in proceedings if the Charged Person were released.¹⁹ They state that the initial standard of proof is no longer sufficient after one year in pre-trial detention.²⁰

The Co-Prosecutors respond that “[t]he [Charged Person] does not identify any material change of circumstances to show that conditions necessitating her detention under Rule 63(3)(b) are no longer met” and does not contest that four of the five alternative conditions are met.²¹

The Co-Prosecutors submit that the “offensive attitude” of the Charged Person at the Pre-Trial Chamber hearings of 21 May 2008 and 9 July 2008, “consisting in threats and attempts to intimidate the parties and / or the judges”, should be taken into account when considering the risks to witnesses and victims and the personal security of the Charged Person under Rule 63(b)(iv) and (v).²² The Co-Prosecutors further state that “the recent statements and behaviour of some victims or civil parties show that any release of the five charged persons might degenerate into violence directed against the former Khmer Rouge leaders, including the [Charged Person], the defence teams or the ECCC.”²³

Phnom Penh, 19 February 2009

CO-RAPPORTEURS


Judge HUOT Vuthy


Judge Rowan DOWNING

¹⁹ Appeal Brief, para. 60.

²⁰ Appeal Brief, para. 60.

²¹ Co-Prosecutors' Response, paras 45 and 46.

²² Co-Prosecutors' Response, paras 47-51.

²³ Co-Prosecutors' Response, para. 52.

