



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

022/5/17

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File No. 002/12-09-2007-ECCC/OCIJ (PTC17)

ឯកសារដើម	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de réception):	
..... 23, 02, 2009	
ពេលវេលា (Time/Heure):	
..... 15:00	
មន្ត្រីទទួលបន្ទុកឯកសារ (Case File Officer/L'agent chargé du dossier):	
..... C.A. Amy	

REPORT OF EXAMINATION

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

ឯកសារចម្លងត្រឹមត្រូវតាមស្នូលដើម	
CERTIFIED COPY/COPIE CERTIFIÉE CONFORME	
ថ្ងៃ ខែ ឆ្នាំ បញ្ជាក់ (Certified Date/Date de certification):	
..... 23, 02, 2009	
មន្ត្រីទទួលបន្ទុកឯកសារ (Case File Officer/L'agent chargé du dossier):	
..... C.A. Amy	

I- PROCEEDINGS

A) Introduction

Pursuant to Rule 77(10) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“the Internal Rules”), the President of the Pre-Trial Chamber has assigned Judges **Ney Thol** and **Katinka Lahuis** to set out the details of the decision of the Co-Investigating Judges to issue an Order on Extension of Provisional Detention on 11 November 2008¹, which is appealed against, and the relevant facts of Case File No. 002/19-09-2007-ECCC-OCIJ (PTC 17).

Identification of the Charged Person

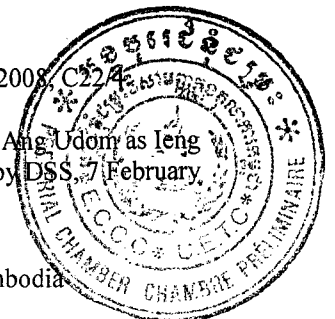
Ieng Sary, alias Van, male, born 24 October 1925, in Loeung Va Village, Loeung Va Commune, Tra Vinh District, Tra Vinh Province, Kampuchea Krom, Cambodia, nationality Khmer, residence No. 47B, Street 21, Group 36, Zone 4, Tonle Bassac Quarter, Chamkamorn District, Phnom Penh Town, father’s name Kim Riem (deceased), mother’s name Tram Thi Loi (deceased).²

Ieng Sary is represented by Co-Lawyers Ang Udom and Michael Karnavas.³

¹ Order on Extension of Provisional Detention (“Extension of Detention Order”), 11 November 2008, C22/4.

² Detention Order, 14 November 2007, C23, p. 1.

³ Assignment of Ang Udom as Ieng Sary’s Lawyer by DSS, 12 November 2007; Assignment of Ang Udom as Ieng Sary’s Lawyer by DSS, 9 January 2008; Re: Ieng Sary: Permanent Assignment of Co-Lawyers by DSS, 7 February 2008 and Lawyers’ Recognition Decision by the Co-Investigating Judges, 7 February 2008.



Charges

Ieng Sary is charged with crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949, being crimes set out and punishable under articles 5, 6, 29 (new) and 39 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia (“the ECCC”) dated 27 October 2004.⁴

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 of the ECCC issued an Order extending the provisional detention of the Charged Person, who has been detained since 14 November 2007, for another term not exceeding one year.⁵

The Co-Investigating Judges found that the first criterion to order provisional detention mentioned in Rule 63(3)(a) is met as there are “well founded reasons to believe that the Charged Person committed the crimes with which he is charged”.⁶ To reach this conclusion, they rely essentially on the analysis of the Case File that was undertaken by the Pre-Trial Chamber when seized 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 his security and to preserve public order. They thus considered that these three grounds set out in Internal Rule 63(3)(b) are still met.⁷

⁴ Detention Order, 14 November 2007, C23, p. 1.

⁵ Extension of Detention Order.

⁶ Extension of Detention Order, para. 11.

⁷ Extension of Detention Order, paras 20 to 31..



C22/5/17

The Co-Investigating Judges further found that “no *reasonable* conditions of house arrest could be imposed which would guarantee the objectives of Rule 63(3)(b)(iii-v) to the same extent as provisional detention”.⁸

They 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”⁹ 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”¹⁰.

C) Ieng Sary’s Appeal Brief

On 10 December 2008, the Co-Lawyers for the Charged Person filed their Appeal Brief against the Order of the Co-Investigating Judges¹¹, in which they request the Pre-Trial Chamber to vacate the Order and order provisional release for the Charged Person or, subsidiarily, order the Co-Investigating Judges to modify the conditions of detention and impose house arrest¹². They do so on the grounds that the Co-Investigating Judges have not conducted their investigation with due diligence and have not respected the Charged Person’s fundamental rights.¹³

D) Civil Party Co-Lawyers’ Joint Response

On 26 December 2008, the Co-Lawyers for the Civil Parties filed a Joint Response¹⁴ to the Appeal in which they request the Pre-Trial Chamber to dismiss the Appeal, as “[t]he Extension Order of the Co-Investigating Judges is reasonable, justifiable and the discretion is properly exercised”¹⁵.

E) Co-Prosecutors’ Response

On 9 January 2009, the Co-Prosecutors filed their Response¹⁶, requesting the Pre-Trial Chamber to dismiss the Appeal on the main ground that the Charged Person “has failed to

⁸ Extension of Detention Order, paras 35 and 36.

⁹ Extension of Detention Order, para. 38.

¹⁰ Extension of Detention Order, para. 41.

¹¹ Ieng Sary’s Appeal against the OCIJ Order on Extension of Provisional Detention (“Appeal Brief”), 10 December 2008, C22/5/1.

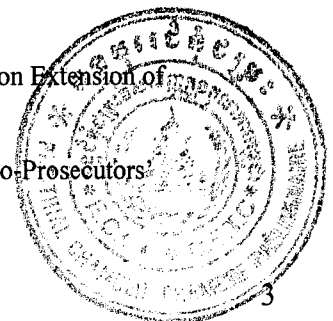
¹² Appeal Brief, p. 19.

¹³ Appeal Brief, para. 1.

¹⁴ Civil Party Co-Lawyers’ Joint Response to the Appeal of Ieng Sary against the OCIJ Order on Extension of Provisional Detention (“Civil Parties’ Joint Response”), 26 December 2008, C22/5/6.

¹⁵ Civil Parties’ Joint Response, para. 35.

¹⁶ Co-Prosecutors’ Response to Ieng Sary’s Appeal on Extension of Provisional Detention (“Co-Prosecutors’ Response”), 9 January 2009, C22/5/7.



022/5/17

demonstrate any material change in circumstances since he was originally detained by the Co-Investigating Judges on 14 November 2007”¹⁷.

II- EXAMINATION BY THE CO-RAPPORTEURS

A) Diligence in the conduct of the investigation

The Co-Lawyers for the Charged Person submit that the investigation has not been conducted with due diligence as “very little evidence has been placed on the case file relating to Mr. IENG Sary or the other Charged Persons”.¹⁸ This results “in a breach of the obligation to hold a trial within a reasonable time”¹⁹ and the Charged Person cannot be deprived of this right for the mere reason that he has chosen to exercise his right to remain silent²⁰. The age and ill health of the Charged Person should also be taken into account.²¹

The Co-Prosecutors and the Civil Parties submit that the accumulation of evidence on the Case File since the filing of the Introductory Submission negates a claim of missing due diligence.²²

In any event, the Co-Prosecutors state that a lack of due diligence on the part of the Co-Investigating Judges “is not relevant to the determination of provisional detention under Rules 63(3)(a) and (b)”.²³ They further observe that the exercise of the right to remain silent has not been held against the Charged Person, adding that “a Charged Person can – better than anybody else – assist the Co-Investigating Judges in discovering exculpatory evidence”.²⁴

B) Burden of proof

The Co-Lawyers for the Charged Person contend that “[t]he burden of proof is on the Co-Investigating Judges to demonstrate that the conditions of Rule 63(3)(a) and (b) have been fulfilled”²⁵ and that “[h]uman rights jurisprudence has consistently found the risks which justify initial detention diminish over time”²⁶.

¹⁷ Co-Prosecutors’ Response, para. 2.

¹⁸ Appeal Brief, para. 10.

¹⁹ Appeal Brief, para. 12.

²⁰ Appeal Brief, para. 11.

²¹ Appeal Brief, para. 12.

²² Co-Prosecutors’ Response, para. 36; Civil Parties’ Joint Response, para. 19.

²³ Co-Prosecutors’ Response, para. 38.

²⁴ Co-Prosecutors’ Response, para. 27.

²⁵ Appeal Brief, para. 1.

²⁶ Appeal Brief, para. 20.



C22/5/17

The Co-Prosecutors, in contrast, state that it is the Appellant who has to identify a material change of circumstance to necessitate a reconsideration of his detention or a change in detention conditions, but that the Charged Person failed to do so.²⁷

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-Lawyers for the Charged Person submit that “a higher level of evidence is required to satisfy Rule 63(3)(a) after Mr. IENG Sary has spent a year in detention while still under investigation. By failing to identify new evidence relating to whether Mr. IENG Sary may have committed the crimes with which he is charged, to supplement the evidence already identified by the Pre-Trial Chamber, the Co-Investigating Judges have not satisfied its burden of persuasion outlined above in relation to Rule 63(3)(a).”²⁸

The Co-Prosecutors and Civil Parties respond that since the first detention order, the Co-Investigating Judges’ judicial investigation has progressed.²⁹ The evidence on the Case File incriminating the Charged Person has increased both in volume and gravity in the recent months.³⁰ “Witnesses have implicated the [Charged Person] in crimes committed throughout the period of Democratic Kampuchea”³¹ and “no significant exculpatory evidence has been found to undermine the determination of the existence of ‘well founded reasons’”³².

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

The Co-Lawyers for the Charged Person submit that house arrest is a form of detention permitted by the Internal Rules and must be considered.³³ Reasonable conditions could be attached to house arrest in order to protect the objectives of Rule 63(3)(b).³⁴

The Co-Lawyers contend that the risk of flight identified by the Co-Investigating Judges is hypothetical³⁵, since “there is no evidence that he undertook activity to flee or interfere with the

²⁷ Co-Prosecutors’ Response, para. 17.

²⁸ Appeal Brief, para. 22.

²⁹ Co-Prosecutors’ Response, para. 20; Civil Parties’ Joint Response, paras 19 and 20.

³⁰ Co-Prosecutors’ Response, para. 23.

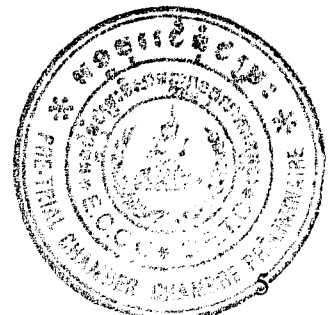
³¹ Co-Prosecutors’ Response, para. 24.

³² Co-Prosecutors’ Response, para. 26.

³³ Appeal Brief, para. 27.

³⁴ Appeal Brief, para. 32.

³⁵ Appeal Brief, para. 37.



C22/5/17

administration of justice”³⁶. Conditions such as (1) confinement to his residence, (2) confiscation of his passport and (3) placing his residence under armed guard would ensure the Charged Person’s presence at trial.³⁷

The Co-Lawyers for the Charged Person point out that “there is no actual risk to Mr. IENG Sary’s personal security”.³⁸ The Co-Investigating Judges’ assumption that imprisonment is the necessary form of detention once it becomes public that there is an alleged nexus between Duch and the Charged Person, is entirely based on a presumption of his guilt, “as it takes as certain that (a) such a nexus exists, and (b) the alleged guilt of Duch is borne equally by Mr. IENG Sary”.³⁹

Concerning the objective to preserve public order (Rule 63(3)(b)(v)), the Co-Lawyers for the Charged Person refer to reports that, in their view, demonstrate that “the situation in Cambodia is actually far more stable and peaceful”.⁴⁰ The Co-Investigating Judges did not consider what the Court as a whole could do to ensure that a risk to public order would not materialise, and the Co-Lawyers suggest that if the extensive outreach and public relations facilities of the ECCC properly explain that house arrest is a form of detention, no threat to public order would materialise.⁴¹

The Co-Prosecutors respond that no new evidence was provided since the Pre-Trial Chamber decided, on 17 October 2008, that provisional detention is necessary.⁴² The Rules do not provide for alternative forms of detention other than detention at the ECCC Detention Facility. Only Rule 65(1) provides a release on bail, but a charged person cannot be released on bail if any of the conditions under Rule 63(3)(b) are met.⁴³

The Co-Prosecutors submit that “[e]ven if a charged person were to be put under house arrest or ‘hospital detention’, this would not satisfactorily mitigate risks to his personal safety. He would be required to come to the ECCC premises on different occasions and it would be difficult to ensure his safety during transportation from the hospital or his house to the ECCC to attend publicly scheduled hearings. The ECCC Detention Facility, on the other hand, is ‘properly equipped to provide medical assistance, as required’”.⁴⁴

The Co-Lawyers for the Civil Parties respond that the incident that occurred between the Civil Parties and the Co-Lawyers for KHIEU Samphan during a press conference after the hearing

³⁶ Appeal Brief, para. 38.

³⁷ Appeal Brief, para. 40.

³⁸ Appeal Brief, para. 47.

³⁹ Appeal Brief, paras 41 and 42.

⁴⁰ Appeal Brief, para. 49.

⁴¹ Appeal Brief, paras 50 and 51.

⁴² Co-Prosecutors’ Response, para. 29.

⁴³ Co-Prosecutors’ Response, para. 31.

⁴⁴ Co-Prosecutors’ Response, para. 32.



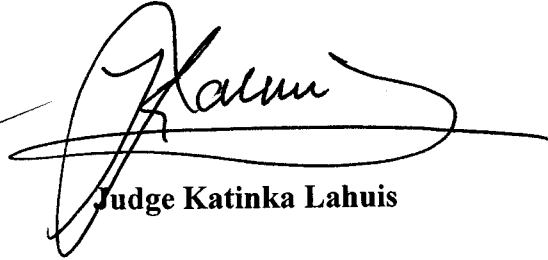
shows the “high tension within the Cambodian society”⁴⁵ and the risk for the Charged Person’s safety if he were to be released.

Phnom Penh, 23 February 2009

CO-RAPPORTEURS



Judge Ney Thol



Judge Katinka Lahuis

⁴⁵ Civil Parties’ Joint Response, para. 25.

