



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des Tribunaux cambodgiens

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Case File No: 002/19-09-2007-ECCC-OCIJ

Before: YOU Bunleng
Marcel LEMONDE
Date: 10 November 2009
Original language: Khmer/English

Classification: Public [REDACTED VERSION]

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Order on Extension of Provisional Detention

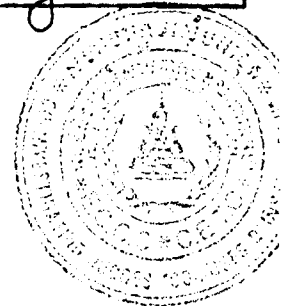
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du dossier: C.A. 2/09



We, **You Bunleng ឬ ប៊ុនហ្គុន** and **Marcel LEMONDE**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC"),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the "ECCC Law"),

Noting Rule 63 of the ECCC Internal Rules (the "Internal Rules"),

Noting the ongoing judicial investigation against **IENG Sary អៀងសារី and others**, in relation to charges of **Crimes Against Humanity** and **Grave Breaches of the Geneva Conventions of 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law,

Noting our Provisional Detention Order, dated 14 November 2007 (C22),

Noting the Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Ieng Sary, dated 17 October 2008 (C22/I/73),

Noting our Order on Extension of Provisional Detention, dated 10 November 2008 (C22/4),

Noting the Pre-Trial Chamber's Decision on Appeal of Ieng Sary Against OCIJ's Order on Extension of Provisional Detention, dated 26 June 2009 (C22/5/38),

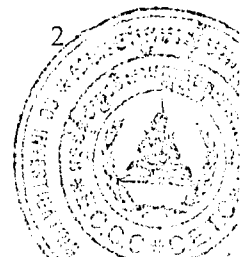
Noting that, on 5 October 2009, we duly notified the Charged Person and his Co-Lawyers that we were considering whether to extend the term of provisional, and that they had fifteen days to submit observations (C22/6),

Noting Ieng Sary's Motion Against Extension of Provisional Detention, dated 20 October 2009,

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission in which they named IENG Sary and four other persons suspected of having committed crimes within the jurisdiction of the ECCC.¹
2. On 12 November 2007, the Co-Investigating Judges notified IENG Sary that he was charged with Crimes Against Humanity (Murder, Imprisonment, Persecution, Extermination and Other Inhumane Acts), and Grave Breaches of the Geneva Conventions of 1949 (Wilful Killing, Wilfully Causing Great Suffering or Serious

¹ Introductory Submission, 18 July 2007, D3.



Injury to Body or Health, Wilful Deprivation of Rights to a Fair Trial of Prisoners of War, Unlawful Confinement of a Civilian, and Unlawful Deportation or Transfer).²

3. On 14 November 2007, following an adversarial hearing, the Co-Investigating Judges ordered that IENG Sary be held in provisional detention for a term not exceeding one year.³
4. On 17 October 2008, following hearings held on 30 June and 1, 2 and 3 July 2008, the Pre-Trial Chamber unanimously confirmed the Order, substituting its own reasoning for that of the Co-Investigating Judges.⁴
5. On 10 November 2008, the Co-Investigating Judges ordered the extension of IENG Sary's provisional detention for a term not exceeding one year.⁵ On 26 June 2009, the Pre-trial Chamber unanimously confirmed the Order, again substituting its own reasoning for that of the Co-Investigating Judges.⁶
6. On 5 October 2009 the Co-Investigating Judges notified the Charged Person and his lawyers that the question of extending the term of provisional detention was being considered and that they had fifteen days to submit observations. The Co-Lawyers for IENG Sary submitted their observations on 20 October 2009.⁷

THE LAW

7. Internal Rule 63 provides, as regards the Co-Investigating Judges, that:

6. Provisional Detention may be ordered as follows:

- a) *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.*

...

7. Any decision by the Co-Investigating Judges concerning extension of Provisional Detention shall be in writing and shall set out the reasons for such an extension. An extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.

² Written Record of Arrest of Ieng Sary, 12 November 2007 (C12/I).

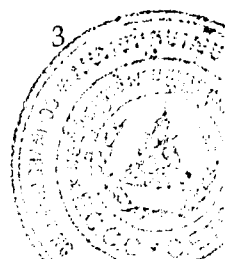
³ Order for Provisional Detention of Ieng Sary, 14 November 2007 (C22).

⁴ Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008 (C22I/73).

⁵ Order on Extension of Provisional Detention, 10 November 2008 (C22/4).

⁶ Decision on Appeal of Ieng Sary Against OCIJ's Order on Extension of Provisional Detention, 26 June 2009 (C22/5/138).

⁷ Ieng Sary's Motion Against Extension of Provisional Detention, 20 October 2009.



8. The Co-Investigating Judges may only provisionally detain a Charged Person when the following conditions, set out in Internal Rule 63(3), are met:
- a) *there is well founded reason to believe that a person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and*
 - b) *The Co-Investigating Judges consider the 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.*

OBSERVATIONS BY THE DEFENCE

9. In the Defence Observations, dated 20 October 2009, the Defence made the following legal arguments against the continued detention of the Charged Person:
- a) The continued detention of IENG Sary violates his right to liberty and his presumption of innocence because the following conditions for detention under Rule 63(3) have not been satisfied:⁸
 - i. The Charged Person is not a danger to victims or witnesses;⁹
 - ii. The Charged Person is not a flight risk;¹⁰
 - iii. The Charged Person does not require detention for his own safety¹¹; and
 - iv. Detention is not necessary to preserve public order.¹²
 - b) Detention is only permissible where there is well founded reason to believe that the Charged Person has committed the charged crimes based on evidence already on the Case File.¹³
 - c) Even if the conditions are met, the court must consider less restrictive alternatives before ordering an extension of IENG Sary's detention.¹⁴

REASONS FOR THE DECISION

10. The Co-Investigating Judges note that provisional detention is an exception to the general rule of liberty at the pretrial phase. Therefore, the provisional detention of a

⁸ Defence Observations, paras. 2-8.

⁹ Defence Observations, para. 14.

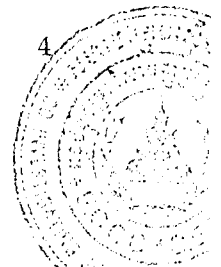
¹⁰ Defence Observations, paras. 15-16.

¹¹ Defence Observations, paras. 17-20.

¹² Defence Observations, paras. 21-23.

¹³ Defence Observations, para. 12.

¹⁴ Defence Observations, paras. 24-26.



Charged Person may only be maintained where it is established that the conditions set out in Internal Rule 63(3) are still met. For that reason, when considering the extension of provisional detention, the Co-Investigating Judges examine whether the abovementioned conditions still exist at the time of their decision, taking into consideration the results of the judicial investigation, notwithstanding the passage of time.¹⁵

Internal Rule 63(3)(a)

11. Internal Rule 63(3)(a) provides that to provisionally detain a Charged Person the Co-Investigating Judges must establish that there is well founded reason to believe that the person may have committed crimes specified in the Introductory Submission. The Pre-Trial-Chamber has noted that the threshold to be applied when extending provisional detention is the satisfaction of an objective observer that the Charged Person may have been responsible for the commission of the alleged crimes specified in the Introductory Submission.¹⁶
12. On 10 November 2008, in their Order on Extension of Provisional Detention of the Charged Person, the Co-Investigating Judges found there were well founded reasons to believe that IENG Sary may have committed the crimes with which he is charged.¹⁷
13. In the Decision on Appeal of IENG Sary Against OCIJ's Order on Extension of Provisional Detention, dated 26 June 2009, it was held, after reviewing the evidence on the case-file,¹⁸ that *"The Pre-Trial Chamber notes that it found that recent witness statements and documents placed in the case file add to the existing body of evidence that supports the well-founded reasons to believe that the Charged Person may have committed the crimes specified in the Introductory Submission."*¹⁹ Furthermore, *"The Pre-Trial Chamber, having looked at the case file afresh, did not find exculpatory evidence. The Co-Lawyers for the Charged Person did not provide any exculpatory in the Appeal. Under these circumstances, the Pre-Trial Chamber finds that "well founded reasons" that would satisfy an objective observer that the Charged Person may have been responsible for, or committed, the alleged crimes specified in the Introductory Submission not only exist, as ascertained by the Co-Investigating Judges in their Extension Order, but are, at present, also supported by the additional evidence."*²⁰
14. In this Appeal Decision concerning the Charged Person, the Pre-Trial Chamber stated that it would consider the evidence placed on the Case File up to and including 2 April

¹⁵ Para 12, Order on Extension of Provisional detention of Ieng Thirith, 10 November 2008, C20/4; para 22 C9/4/6.

¹⁶ This standard has been applied repeatedly by the Pre Trial Chamber, see for instance: para 46, C11/54; and para 24, C9/4/6.

¹⁷ Paras. 11-17, C22/4.

¹⁸ Para. 3, C22/5/38.

¹⁹ Para. 23, C22/5/38.

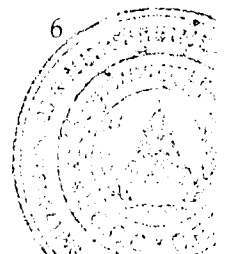
²⁰ Para. 24, C22/5/38.



2009, the last possible date for submissions by the parties.²¹ The Co-Investigating Judges consider that the findings of the Pre-Trial Chamber remain valid and will therefore limit their review to all inculpatory and exculpatory evidence relating to the Charged Person that has been placed on the Case File since 2 April 2009.

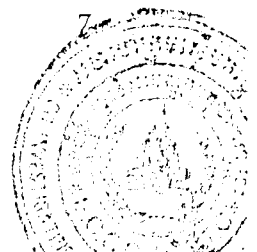
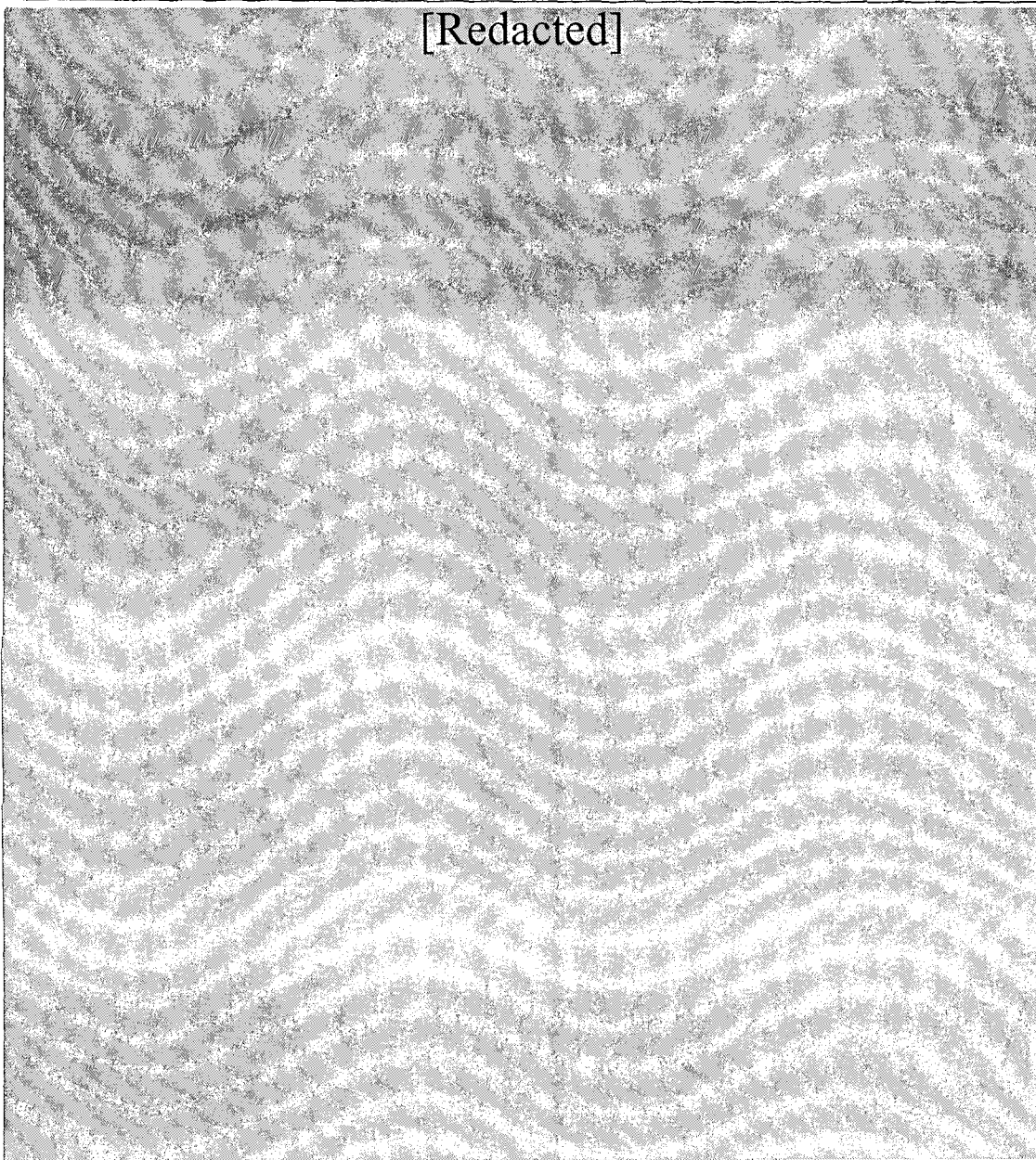
15. Since that date, the Co-Investigating Judges have continued to investigate the allegations contained in the Introductory Submission and to place evidence on the Case File.²² More than fifty new witness statements²³ have been added which assist in clarifying whether the Charged

²¹ Para. 3, C22/5/38

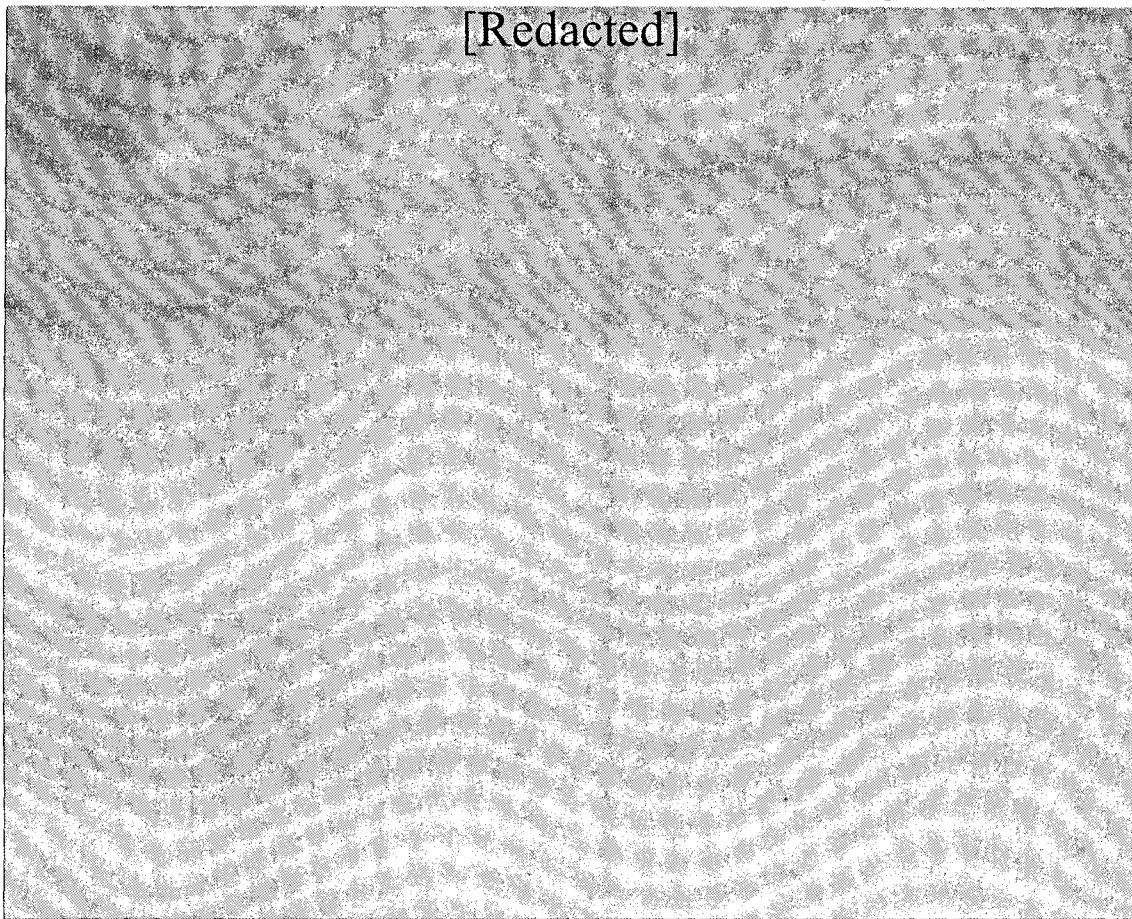


Person played any role in connection with the alleged crimes within the jurisdiction of the ECCC, and in particular clarifying:

- (a) The roles and functions IENG Sary allegedly held during the Democratic Kampuchea period including membership of Central Committee²⁴; membership of the Standing Committee²⁵; and Deputy Prime Minister for Foreign Affairs.²⁶
- (b) The roles and functions IENG Sary played in promoting and disseminating CPK policy nationally²⁷ and internationally including at the United Nations.²⁸
- (c) IENG Sary's knowledge of and participation in the arrests and disappearances of Ministry of Foreign Affairs cadre.²⁹



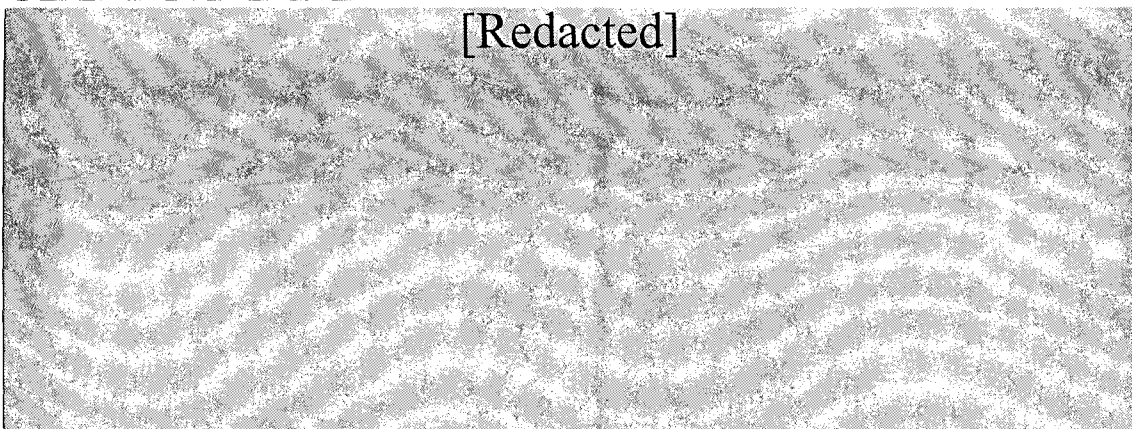
- (d) IENG Sary's knowledge of and participation in recalling diplomats and intellectuals from overseas.³⁰
- (e) IENG Sary visiting Boeng Trabek in or around 1978³¹; that some of its population was made up of persons who IENG Sary had recalled from overseas and who were being *examined*³² and that at one point it was placed under the direct control of the Ministry of Foreign Affairs.³³
- (f) Any link between Chrang Chamreh and the Ministry of Foreign Affairs.³⁴
- (g) IENG Sary's knowledge of an international armed conflict existing with Vietnam.³⁵
- (h) IENG Sary's knowledge of the living and working conditions in Cambodia through the reporting of his subordinates who visited the *base*,³⁶ comments he made to staff³⁷ and the fact that he may have personally visited hospitals,³⁸ the Trapeang Thma Dam,³⁹ I January Dam⁴⁰ and the Kampong Chhnang Airport⁴¹ where it appears some arrested Ministry of Foreign Affairs cadre were sent.⁴²



16. Some of the evidence collected during this period may appear to be exculpatory, either as regards IENG Sary's exact knowledge of the situation⁴³ or his role in any arrests planned or conducted within the Ministry of Foreign Affairs.⁴⁴
17. Nevertheless, the Co-Investigating Judges do not consider that this evidence is sufficient to invalidate the basis for the well founded reason to believe that the Charged Person may have committed crimes specified within the Introductory Submission.
18. Accordingly, the Co-Investigating Judges consider that, after a fresh review of the evidence on the Case File, at this stage of the judicial investigation, there are sufficient additional facts or information which would satisfy an objective observer that there is well founded reason to believe that IENG Sary, in one or more of his above-mentioned roles and functions, either planned, instigated, ordered, failed to prevent or otherwise aided and abetted in the commission of crimes specified in the Introductory Submission and, thus, that the condition set out in Internal Rule 63(3)(a) is still met, notwithstanding the passage of time.

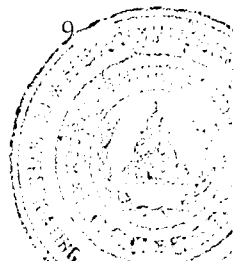
Internal Rule 63(3)(b)

19. The Co-Investigating Judges recall that, as clarified by the Pre-Trial Chamber, in order to justify a Provisional Detention Order, only one of the objectives set out in Rule 63(3)(b) needs to be satisfied and that, as such, there is no obligation to examine each of the criteria if the judges deem that they have sufficiently demonstrated the need for provisional detention in reference to one or more of the conditions stipulated in Rule 63(3)(b) at the relevant time.⁴⁵
20. The Co-Investigating Judges take note of the fact that the conditions set out in Internal Rule 63(3)(b) were carefully considered by the Pre-Trial Chamber in its Decision on Appeal of Ieng Sary Against OCIJ's Order on Extension of Provisional Detention.⁴⁶ The Co-Investigating Judges have considered whether these conditions are still satisfied currently in light of the findings of the Pre-Trial Chamber and all the circumstances up to the present time.



⁴⁵ See for example, Pre-Trial Chamber, Decision on Appeal Against Provisional Detention of Nuon Chea, 20/Mar/2008, CI 1/54, para. 83.

⁴⁶ Paras. 25-46, C22/5/38.



63(3)(b)(iii) Ensure the presence of the Charged Person during any proceedings

21. The Pre-Trial Chamber has held that “*in view of the gravity of the charges, the Charged Person could face a sentence of imprisonment from five years to life if he is found guilty. Nothing placed on the case file since this Chamber's previous decision on provisional detention leads to a conclusion that the circumstances have changed. Moreover, the new evidence added in the case file adds to the arguments supporting a connection between the alleged acts and the Charged Person, thus putting greater pressure on him.*”⁴⁷
22. The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead to a different conclusion. Provisional Detention still remains a necessary measure to ensure the Charged Person's presence during the proceedings.

63(3)(b)(iv) Protect the security of the Charged Person

23. On 26 June 2009, the Pre-Trial Chamber found, with reference to IENG Sary, that Provisional Detention still remains a necessary measure to protect the Charged Person's security⁴⁸ The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead to a different conclusion.
24. Accordingly, the Co-Investigating Judges consider that Provisional Detention still remains a necessary measure to protect the Charged Person's security.

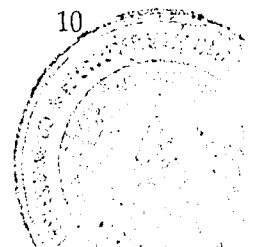
63(3)(b)(v) Preserve public order

25. The passage of time has not diminished the impact of the Democratic Kampuchea regime on society. As recalled by the Pre-Trial Chamber, a proportion of the population that lived through the period from 1975 to 1979 suffers from post-traumatic stress disorder. Specialists have stated that judicial activities before the ECCC “*may pose a fresh risk to the Cambodian society*” and may “*lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them*”⁴⁹. The Pre-Trial Chamber has also noted that the United Nations General Assembly has recognized that crimes committed during the Democratic Kampuchea period from 1975 to 1979 are still a matter of concern for Cambodian society. A great deal of interest has emerged concerning hearings involving the Charged Person, which demonstrates that the trial is still a matter of great concern for the Cambodian population today.

⁴⁷ Para. 27, C22/5/38.

⁴⁸ Paras. 30-34, C22/5/138.

⁴⁹ Rob Savage, Monthly South Eastern lobe, *Post Traumatic Stress disorder: A Legacy of Pain and Violence*, July 2007, pp. 24-27 (Co-Prosecutors' response to Nuon Chea's Appeal against Provisional detention Order of September 2007).



26. On 26 June 2009 the Pre-Trial Chamber found that the provisional detention of the Charged Person continued to remain necessary for the preservation of public order.⁵⁰ The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead to a different conclusion.
27. The Co-Investigating Judges find, therefore, that the Charged Person's release would disturb public order. Provisional Detention of the Charged Person thus continues to remain necessary in order to preserve public order.

PASSAGE OF TIME

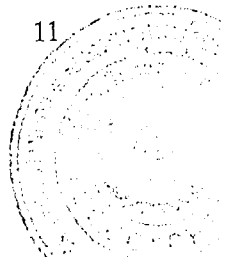
28. The Co-Investigating Judges recognize that the passage of time is relevant to determining the legitimacy of continued provisional detention of a Charged Person. The Pre-Trial Chamber has confirmed this analysis⁵¹. In assessing the manner in which the judicial investigation has been conducted, and by analogy with the case-law of the European Court of Human rights concerning reasonable time, the Co-Investigating Judges have taken account of the facts of the case as a whole, including its complexity, in terms of fact and law, the conduct of the judicial authorities and that of the parties⁵².
29. In the present case, the Charged Person has been in detention for nearly 24 months. The Co-Investigating Judges are conscious that this is a significant period. They reiterate, however, that the scope of the judicial investigation required by the Introductory Submission and the gravity of the crimes alleged therein with respect to the Charged Person require large-scale investigative action.
30. Since 2 April 2009, the Co-Investigating Judges have personally conducted interviews⁵³ and placed the Written Records of interviews with many witnesses⁵⁴ and Civil Parties⁵⁵ on the Case File. They have also added a large body of evidentiary materials, either at the request of the parties⁵⁶ or *proprio motu*⁵⁷, notably regarding the Charged Person's role during the DK regime.

⁵⁰ Paras. 35-37, C22/5/138.

⁵¹ Para. 45, C9/4/6.

⁵² ECHR, *Frydlender v. France*, 27 June 2000, Application No. 30979/96, para. 43; ECHR, *Pellissier and Sassi v. France*, 25 March 1999, Application No. 25444/94, para. 71; ECHR, *Vernillo v. France*, 20 February 1991, Application No. 11889/85, para. 34.

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Numerous Rogatory Letters are currently in the course of being executed and the resulting evidence placed on the Case File. In view of the foregoing, the Co-Investigating Judges do not consider that passage of time calls into question the need for continued provisional detention of the Charged Person.

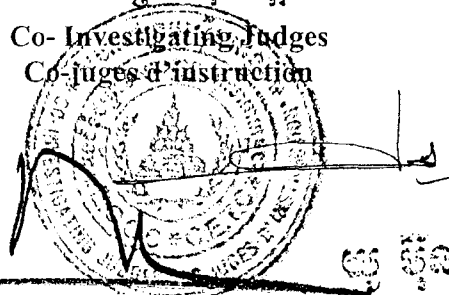
31. The Co-Investigating Judges find that, as stated above, the conditions for continued provisional detention of the Charged Person as set out in Rule 63(3), are still met to date. There is still well founded reason to believe that IENG Sary may have committed the crime or crimes specified in the Introductory Submission, and provisional detention is considered a necessary measure to: (i) ensure the presence of the Charged Person during the proceedings; (ii) protect the security of the Charged Person; and (iii) preserve public order.

FOR THESE REASONS,

HEREBY ORDER the extension of the Provisional Detention of IENG Sary for a maximum term of one year, pursuant to sub-Rule 63(6)(a) of the Internal Rules.

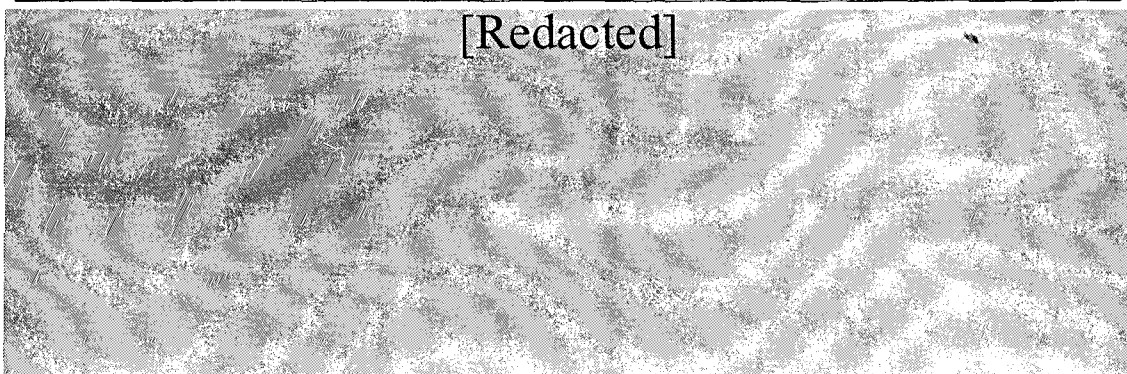
Done in Phnom Penh, on 10 November 2009

សហចៅក្រមស៊ើបអង្កេត
Co-Investigating Judges
Co-juges d'instruction



ឃុំ ហ៊ុនឡាន

Marcel LEMONDE



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