

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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(PTC 152)

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**CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPEAL AGAINST THE
CLOSING ORDER'S EXTENSION OF HIS PROVISIONAL DETENTION**

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A. INTRODUCTION

1. The Appellant Ieng Sary has filed an appeal (“Appeal”)¹ seeking a reversal of the Co-Investigating Judges’ Order (“Maintenance in Detention Decision”)² to maintain his provisional detention until he is brought before the Trial Chamber.³ The Appellant claims that: (1) the Co-Investigating Judges failed to comply with the Rule 68 requirement that an order extending provisional detention be specific and reasoned; and (2) even if the order satisfies such requirements, the Co-Investigating Judges erred in ruling that the extension of detention was necessary.⁴ The Co-Prosecutors submit that the Co-Investigating Judges have correctly applied the Internal Rules and the law of the ECCC in exercising their powers under Rule 68 to maintain the Appellant in provisional detention until he is brought before the Trial Chamber. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeal against the Maintenance in Detention Decision on the following grounds:

(a) The Co-Investigating Judges, in maintaining the provisional detention of the Appellant, complied with and correctly applied ECCC Internal Rules 63(3) and 68(1); and

(b) The Appellant has failed to demonstrate a “change of circumstances” warranting review of the necessity of his detention.

2. In a separate decision included in the Closing Order for Case 002, the Co-Investigating Judges ordered “that the Accused remain in Provisional Detention until they are brought before the Trial Chamber.”⁵ Noting ECCC Internal Rules 63, 64, 66, 68 and 82 the Co-Investigating Judges reasoned:

Considering that, in light of the evidence set out in this Closing Order in support of sending Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan for trial, the conditions laid out in Internal Rule 63(3)(a) are satisfied;

Considering further, having regard to the conditions laid down in Internal Rule 63(3)(b), that the reasons set out in our last Order on the extension of Nuon Chea’s provisional detention (which was not appealed), on the one hand, and the reasoning adopted by the Pre-Trial

¹ Ieng Sary’s Appeal Against the Closing Order’s Extension of his Provisional Detention, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 152), 22 October 2010, D427/5/1 (“Closing Order Detention Appeal”).

² Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of the Co-Investigative Judges, 15 September 2010, D427 (“Closing Order”), paras. 1622-1624.

³ Closing Order, para. 1624.

⁴ Closing Order Detention Appeal, para. 1.

⁵ Closing Order, para. 1624.

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Chamber in its latest decisions on the appeals against renewal of provisional detention by Ieng Sary, Ieng Thirith and Khieu Samphan, on the other hand, retain their full force, the only new element being the indictment of the abovementioned persons, which only reinforces the reasons for the aforementioned decisions and renders continued detention all the more necessary;

Considering, accordingly, that it is necessary to maintain the Accused in Provisional Detention until they appear before the Trial Chamber, pursuant to Internal Rule 68 [...]⁶

B. THE CO-INVESTIGATING JUDGES HAVE COMPLIED WITH AND CORRECTLY APPLIED INTERNAL RULE 68.

3. ECCC Internal Rule 68(1) provides that:

The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Order have expired. However, where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail under Rules 63 and 65 are still met, they may, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.⁷

4. The Co-Investigating Judges have satisfied the Rule 68(1) “specific, reasoned decision” requirement. The Maintenance in Detention Decision, which is included in the Closing Order, is a specific decision to maintain the Appellant in provisional detention. Further, this specific decision expressly references the “evidence set out in this Closing Order”⁸—which is the most comprehensive account by the Co-Investigating Judges of the Appellant’s background, roles, functions, and participation in the indicted crimes.⁹ And, as explained by the Co-Investigating Judges, “the reasoning adopted by the Pre-Trial Chamber in its latest decisions on the appeals against renewal of provisional detention [...] retain their full force, the only new element being the indictment of the [Accused], which only reinforces the

⁶ Closing Order, paras. 1622-1624.

⁷ Internal Rules of the Extraordinary Chamber in the Courts of Cambodia, Rev. 6, 17 September 2010 (“Rules”), rule 68.

⁸ Closing Order, para. 1622.

⁹ See, e.g., Closing Order, paras. 994-1125.

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reasons for the aforementioned decisions and renders continued detention all the more necessary[.]”¹⁰

5. The Pre-Trial Chamber and the Co-Investigating Judges have repeatedly held, in accordance with Rule 63(3)(a), that there are “well founded reasons to believe that [the Appellant] may have committed the crimes with which [he is] charged.”¹¹ The Closing Order, which indicts the Appellant with genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the 1956 Cambodian Penal Code,¹² comprehensively embodies such “well founded reasons.”¹³ In their Maintenance of Detention Decision, the Co-Investigating Judges identify the previous jurisprudence of the ECCC as retaining full force and employ this catalogue of reasoned decisions to support their Decision. The Co-Investigating Judges have thus complied with the Rule 68 requirement that an order to maintain the Appellant in provisional detention must be specific and reasoned. The first limb of Appellant’s Appeal therefore is baseless and accordingly must be rejected.

C. NO NEW CIRCUMSTANCES HAVE BEEN PLEADED THAT CHALLENGE THE FINDINGS OF THE PRE-TRIAL CHAMBER AND THE CO-INVESTIGATING JUDGES THAT DETENTION IS NECESSARY.

6. ECCC Internal Rule 63(3) provides that:

The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met: a) There is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and 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; ii) preserve evidence or prevent the destruction of any evidence; iii) ensure the presence of the Charged Person during the proceedings;

¹⁰ Closing Order, para. 1623 (citing Decision on Ieng Sary’s Appeal Against Order on Extension of Provisional Detention, Pre-Trial Chamber, 30 April 2010, C22/9/14 (“Detention Appeal Decision”), paras. 33-56).

¹¹ Detention Appeal, para. 17 (citing Order on Extension of Provisional Detention, Pre-Trial Chamber, 10 November 2008, C22/4 (“Detention Extension Order”).

¹² Closing Order, para. 1613.

¹³ Closing Order, para. 1622 (“[I]n light of the evidence set out in this Closing Order in support of sending Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan for trial, the conditions laid out in Internal Rule 63(3)(a) are satisfied[.]”).

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iv) protect the security of the Charged Person; or v) preserve public order.¹⁴

7. The Co-Investigating Judges have acknowledged that provisional detention is an exception to the general rule of liberty at the pre-trial phase and therefore “the provisional detention of a Charged Person may only be maintained where [...] the conditions set out in Internal Rule 63(3) are still met.”¹⁵ It is the practice of this Court to conduct this review from the platform of previous valid findings and examine only new evidence.¹⁶ Where there has been no clear change in circumstances since the previous detention decision that could lead to a different conclusion on the necessity of detention, provisional detention will continue to be considered a necessary measure.¹⁷
8. The Pre-Trial Chamber and the Co-Investigating Judges have already held, in accordance with Rule 63(3)(b), that the Appellant’s provisional detention is a “necessary measure to ensure the presence of the Charged Person during the proceedings, to protect the security of the Charged Person, and to preserve public order.”¹⁸ The Co-Investigating Judges reaffirmed this position in their Maintenance in Detention Decision, explaining that “it is necessary to maintain the Accused in Provisional Detention until they appear before the Trial Chamber [...] in order to ensure the presence of the Accused at trial, preserve public order and avert the risk of the Accused exerting pressure on witnesses or victims or destroying evidence if released.”¹⁹ The Co-Investigating Judges are not required to re-examine all evidence *ab initio* to find that provisional detention continues to be a necessary measure.
9. The decision to impose provisional detention and subsequent decisions to both extend and maintain detention have been founded upon a valid assessment of Rule 63(3) criteria. The Co-Prosecutors submit that the Appellant has failed to demonstrate any “change in circumstance” that would trigger a requirement to review the necessity of his detention.²⁰

¹⁴ Internal Rules of the Extraordinary Chamber in the Courts of Cambodia, Rev. 6, 17 September 2010, rule 63(3).

¹⁵ Detention Extension Order, para. 10.

¹⁶ Detention Extension Order, para. 14.

¹⁷ Detention Extension Order, para. 22.

¹⁸ Decision on Ieng Sary’s Appeal Against Order on Extension of Provisional Detention, para. 33 (citing Detention Extension Order).

¹⁹ Closing Order, para. 1624.

²⁰ Detention Appeal Decision, paras. 33-34 (affirming the “no change in the circumstances” standard).

The Co-Investigating Judges explain that “the only new element” between the Pre-Trial Chamber’s last decision concerning the extension of the Appellant’s provisional detention (April 2010) and the Maintenance in Detention Decision (September 2010) was the indictment of the Appellant.²¹ Both limbs of the argument advanced by the Appellant in the present Appeal were rejected by the Pre-Trial Chamber earlier this year.²² Since the Appellant “did not put before the Co-Investigating Judges or the [Pre-Trial] Chamber any argument or change in circumstances indicating [that continued detention is not necessary],”²³ the earlier conclusions of the Pre-Trial Chamber and the Co-Investigating Judges regarding the necessity of continued detention remain. The Appellant must assert a clear change in circumstances that either vitiates or alters the previous conclusions of this Court in respect of the necessity of continued detention, or presents tangible new evidence to be considered. The only tangible new evidence indicating a change in circumstance is the indictment of the Appellant. This development only serves to strengthen a finding that continued detention is necessary.

10. While an important consideration in determining the legitimacy of continued detention, the passage of time, in and of itself, is not a factor indicating a change in circumstances that would vitiate or alter previous findings relating to conditions under Rule 63(3)(b). Similarly, the gravity of the indictment in the Closing Order and the undisturbed judicial holdings by the Pre-Trial Chamber and the Co-Investigating Judges regarding threats to the public order must lead to the only conclusion that the second limb of Ieng Sary’s Appeal is without merit and must fail.

²¹ Closing Order, para. 1623 (citing Detention Appeal, paras. 33-56).

²² The Appellant argues against the extension of detention on the grounds that it is not necessary to (1) “ensure Mr. Ieng Sary’s presence at trial”; (2) “protect the security of Mr. Ieng Sary”; or (3) “preserve public order.” Closing Order Detention Appeal, paras. 14-18. The Pre-Trial Chamber expressly rejected each of these arguments in a previous appeal by the Appellant. Detention Appeal Decision, paras. 35-56.



²³ Detention Appeal Decision, para. 56.

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D. CONCLUSION

11. The Co-Prosecutors, therefore, respectfully request that the Pre-Trial Chamber uphold the Co-Investigating Judges' Maintenance in Detention Decision as the Appellant has failed to demonstrate either 1) that the Co-Investigating Judges did not comply with Rule 68, or 2) any clear change in the circumstances that informed the previous conclusions of the Pre-Trial Chamber or the Co-Investigating Judges of the necessity of the continued detention of the Appellant.

Respectfully submitted,

Date	Name	Place	Signature
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