



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ

Case File/Dossier No. 002/19-09-2007/ECCC/TC

ឯកសារដើម
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/Date de reception): 12 / 05 / 2011
ម៉ោង (Time/Heure): 14:50
មន្ត្រីទទួលបន្ទុកសំណុំរឿង/Case File Officer/L'agent chargé du dossier: Uch Arun

Before: Judge NIL Nonn, President
Judge Silvia CARTWRIGHT
Judge YA Sokhan
Judge Jean-Marc LAVERGNE
Judge THOU Mony

Date: 12 May 2011
Original language(s): Khmer/English
Classification: PUBLIC

DECISION ON IENG SARY'S REQUEST FOR RELEASE

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Accused
NUON Chea
IENG Sary
IENG Thirith
KHIEU Samphan

Civil Party Lead Co-Lawyers
PICH Ang
Elisabeth SIMONNEAU FORT

Lawyers for the Defence
SON Arun
Michiel PESTMAN
Victor KOPPE
ANG Udom
Michael G. KARNAVAS
PHAT Pouy Seang
Diana ELLIS
SA Sovan
Jaques VERGÈS
Philippe GRÉCIANO

1. INTRODUCTION

1. The Chamber is seised of an oral application by IENG Sary (“the Accused”) of 4 May 2011 requesting provisional release as a remedy for his alleged unlawful detention and seeking bail in the form of house arrest as an alternative to detention in the ECCC Detention Facility.¹

2. PROCEDURAL HISTORY

2. On 15 September 2010, the Co-Investigating Judges (“CIJs”) issued their Closing Order in Case No. 002/19-09-2007/ECCC (“Case 002”) and ordered the continued provisional detention of the Accused until he is brought before the Trial Chamber.² The Pre-Trial Chamber (“PTC”) was seised of the case file following an appeal of the Closing Order filed by the four Defence teams.³ The Accused separately appealed the detention order contained in the Closing Order.⁴

3. On 13 January 2011, the PTC issued two separate decisions without reasoning on the Accused’s two appeals against the Closing Order (“Decision on the Closing Order” and “Decision on the detention appeal”) as well as on the appeals of the other Defence teams, indicating that reasons would follow.⁵ The PTC ordered that the provisional detention of the Accused and his three co-accused continue until they were brought before the Trial Chamber. On 21 and 24 January respectively, the PTC issued its reasons for its Decision on the detention appeal and for the detention portion of its Decision on the Closing Order, finding that the detention of the Accused was necessary to ensure his presence at trial, to protect his security and to preserve public order.⁶ The PTC provided the reasons for its Decisions on the Closing Order appeals in respect of IENG Sary’s three co-accused on 21 January and

¹ Transcript (“T.”), 4 May 2011, p. 3.

² “Closing Order”, D427, 15 September 2010 (“Closing Order”), “Part Six: Maintenance in Detention”.

³ “Appeal against the Closing Order”, D427/3/1, 18 October 2010; “Ieng Thirith Defence Appeal from the Closing Order”, D427/2/1, 18 October 2010; “Ieng Sary’s Appeal against the Closing Order”, D427/1/6, 25 October 2010; “Appeal against the Closing Order”, D427/4/3, 18 October 2010.

⁴ “Ieng Sary’s Appeal against the Closing Order’s Extension of his Provisional Detention”, D427/5/1, 22 October 2010.

⁵ “Decision on Ieng Sary’s Appeal against the Closing Order”, D427/1/26, 13 January 2011, p. 4; “Decision on Ieng Sary’s Appeal against the Closing Order’s Extension of his Provisional Detention”, D427/5/9, 13 January 2011, p. 3.

⁶ “Decision on Ieng Sary’s Appeal against the Closing Order’s Extension of his Provisional Detention”, D427/5/10, 21 January 2011, paras. 35 to 38; “Decision on Ieng Sary’s Appeal against the Closing Order: Reasons for Continuation of Provisional Detention”, D427/1/27, 24 January 2011, para. 6 (adopting the reasons given by the Co-Investigating Judges for continuing provisional detention in the Closing Order, para. 1624).

Nun g

15 February 2011.⁷ In response to urgent applications for release from these three Defence teams, the Trial Chamber ruled on 16 February 2011 that certain defects in these Closing Order decisions neither invalidated the manner in which the Trial Chamber was seised of Case 002 nor justified the release of the accused.⁸ On 11 April 2011, the PTC issued its reasons for its Decision on IENG Sary's appeal against the Closing Order.⁹

4. On 4 May 2011, the Accused was brought before the Chamber pursuant to Rule 68(3). During this hearing, the IENG Sary Defence requested the release of the Accused on bail in the form of house arrest.

3. SUBMISSIONS

5. The Defence submits that the maximum period of provisional detention permitted under the ECCC legal framework before an Accused shall be brought before the Trial Chamber is three years. As IENG Sary was first detained on 12 November 2007, he has been unlawfully detained since 11 November 2010. The Accused's detention is therefore unlawful.¹⁰ Pursuant to Rules 68(2) and 77(14), the Defence alleges that the PTC was obliged to issue a reasoned decision on the appeal against the Closing Order within four months of either the Closing Order itself or the appeal. As the 13 January 2011 decision was unreasoned and therefore defective, and as reasons only followed on 11 April 2011, the PTC was in breach of Rule 68(2) by failing to issue a decision within the four-month deadline. The Defence accordingly seeks the annulment of the Accused's detention as procedurally defective pursuant to Rule 48, or in the alternative release on bail in the form of house arrest.¹¹

6. In support of its application for release on bail, the Defence submits that it made initial contact with the Royal Government of Cambodia in 2008 concerning the feasibility of house arrest, which indicated that any measures involving the Accused were within the authority of the ECCC.¹² The Defence further contends that in the event house arrest was granted by the

⁷ "Decision on Khieu Samphan's Appeal against the Closing Order", D427/4/15, 21 January 2011; "Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order", D427/2/15, 15 February 2011.

⁸ Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, E50, 16 February 2011 ("Trial Chamber Detention Decision"), paras. 34-35.

⁹ "Decision on Ieng Sary's Appeal against the Closing Order", D427/1/30, 11 April 2011.

¹⁰ T., 4 May 2011, pp. 4-5 (citing Internal Rules 63(6)-(7) and 68(1), as well as Article 210 of the Code of Criminal Procedure).

¹¹ T., 4 May 2011, pp.5-10, 14 (alleging that the reasons which followed on 11 April 2011 was in substance a new decision).

¹² See Letter from the Deputy Prime Minister and Minister of Interior to Ieng Sary's Defence, E79/1.1, 9 June 2008 (filed subsequent to the hearing).



Trial Chamber, it would fall to the Royal Government of Cambodia to provide security and transportation from Phnom Penh to the ECCC in collaboration with the Trial Chamber.¹³

7. The Co-Prosecutors oppose the application. The three-year maximum detention period under Rule 63 applies only to the period prior to the issuance of a Closing Order. It follows from Rule 68(3) that an additional four-month detention period commences once the Trial Chamber is seized of the case, which occurred on 13 January 2011.¹⁴ The Prosecution further contends that continued provisional detention is appropriate pursuant to Rule 63(3). Following the issuance of the Closing Order, there are well-founded reasons to believe that the Accused may have committed the crimes with which he is charged. Detention is also necessary to ensure the Accused's presence at trial. As he is charged with extremely serious crimes subject to severe penalties in the event of conviction, the Accused has a motive to flee. Various media reports on the case file attest to his ability and means to leave the country, as shown by his material resources and frequent past travel abroad. The Accused also has influential contacts in the border region and possesses a Cambodian passport, in addition to a Chinese passport under a false identity. Further, prior statements illustrate his lack of cooperation with the ECCC. The Defence has also not met the burden of establishing that house arrest is appropriate.¹⁵

8. The Defence counters that the criteria for provisional detention contained in Rule 63(3) are not satisfied. The Chinese passport dates from 1979. Although noting that the information cited by the Prosecution mainly comprises hearsay press accounts, the Defence did not otherwise contest the Co-Prosecutor's claim that the Accused possesses significant means. The Accused travelled to Thailand for medical treatment, which is no longer necessary in view of the "excellent" medical care provided by the ECCC.¹⁶ Further, the Defence argues that the Accused's alleged wealth equally demonstrates that he could have left the country before his arrest had he intended to do so. In any case, it alleges that house arrest is capable of ensuring the Accused's presence at trial and is an adequate safeguard against any risk of flight.¹⁷

¹³ T., 4 May 2011, pp. 25-29.

¹⁴ T., 4 May 2011, pp 15-22, 30 (further noting the Accused's lack of timeliness in alleging the illegality of detention, which was challenged by his three co-Accused on similar grounds in January 2011 (*see* Trial Chamber Detention Decision, paras. 9, 11)).

¹⁵ T., 4 May 2011, pp. 30-31, 37-42

¹⁶ T., 4 May 2001, p. 43.

¹⁷ T., 4 May 2011, p.10, 42-45.



4. FINDINGS

9. Pursuant to Rule 82(2), the Trial Chamber may “at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these IRs”. The Defence application comprises in substance two requests: release on the basis of the Accused’s alleged unlawful detention and in the alternative, a request for bail in the form of house arrest.

1. Request for release (alleged unlawfulness of the Accused’s detention)

a. Maximum length of detention (alleged unlawful detention)

10. The Defence alleges that Rule 63(6) and (7), read together with Rule 68(1) and Article 210 of the Code of Criminal Procedure (CCP), establishes an absolute limit of three years on provisional detention unless the Accused is brought before the Trial Chamber within that time. The Chamber finds that reference to the CCP is unnecessary given that Rules 63(6) and (7), which must be read together with Rules 68 (1) and (3), state that at the time of the issuance of the closing order, provisional detention may be extended for up to four months. This four month period is independent of the three-year maximum time limit envisaged in Rule 63(6) and (7) and a further four-month period during which, in case of an appeal against the indictment, the Pre-Trial Chamber may decide to continue to hold the Accused in provisional detention. The Pre-Trial Chamber decided on the Accused’s appeal in the four months following the issuance of the Closing Order and a further four-month provisional detention period therefore commenced on 14 January 2011 (the date upon which the Trial Chamber received notification of the Decision on the Closing Order and was thus seised of the case file). This period had not expired by the time the Accused was brought before the Chamber on 4 May 2011 pursuant to Rule 82(1).

b. Lack of reasoning (alleged violation of Rule 68(2))

11. The Trial Chamber determined, in relation to IENG Sary’s three co-accused, that it was validly seised of the case file in Case 002 notwithstanding certain defects in the Pre-Trial Chamber decisions on appeals against the Closing Order.¹⁸ Although the reasons for the PTC

¹⁸ Trial Chamber Detention Decision, paras 30-35, 43 (upholding also the lawfulness of the detention of KHIEU Samphan, IENG Thirith and NUON Chea and noting that this defect had been remedied by the time the Chamber



Decision on IENG Sary's Closing Order appeal followed 88 days after the decision¹⁹, the Chamber finds that this has no impact on its finding that it was validly seized of the indictment against all Accused on 14 January 2011.²⁰

12. The Chamber recalls its earlier finding in relation to the other three accused that the PTC's deferral of reasons on its Decisions on the Closing Order nonetheless constituted a procedural defect breaching the Accused's fundamental fair trial rights.²¹ It accordingly finds that IENG Sary's rights were breached by the delay in providing the reasons for the Decision on the Closing Order, the detention portions of the Decision on the Closing Order and the Decision on the detention appeal.²² Although in the present case, this breach in relation to the Decision on the Closing Order persisted for longer than in the case of his co-accused, the Chamber considers that immediate release would not amount to a proportionate remedy to the violation of IENG Sary's rights. The Chamber may consider the appropriateness of other remedies at the conclusion of the trial, after hearing the parties' submissions.

c. Detention criteria under Rule 63(3)

13. The Trial Chamber has considered whether the provisional detention of the Accused is warranted pursuant to the criteria contained in Rule 63(3). It finds that following the issuance of the Closing Order and confirmation of the indictment by the PTC, there are well-founded reasons to believe that the Accused has committed the charged crimes pursuant to Rule 63(3)(a). The Trial Chamber further notes that the seriousness of the offences for which the Accused is charged, and their applicable penalties in the event of conviction, create a considerable risk that he would abscond if released. There are therefore sufficient grounds to detain the Accused under Rule 63(3)(b)(iii).

considered the issue.). The reasons followed eight days after the decision with respect to KHIEU Samphan and 32 days later in relation to IENG Thirith and NUON Chea.

¹⁹ While the Pre-Trial Chamber issued two documents dated 13 January 2011 and 11 April 2011 under the same title "Decision on Ieng Sary's Appeal against the Closing Order" (D427/1/26 and D427/1/30), it is clear that the latter does not constitute a new decision as such, but merely contains the reasoning of a single decision initially issued with the indication that "the reasons [would] follow in due course".

²⁰ Trial Chamber Detention Decision, paras. 34 and 43.

²¹ Trial Chamber Detention Decision, paras. 29-30, 34 (noting, in relation to IENG Sary's co-accused, that this breach had been remedied by the subsequent issuance of the full reasoning by the time of the Trial Chamber Detention Decision)

²² Trial Chamber Detention Decision, para. 36. The reasons for detaining the Accused were provided on 21 January, on the same date as the other accused.

Nun gt

2. Request for release on bail (house arrest)

14. Although provided with limited practical particulars in support of the Defence request for bail, the Chamber has nonetheless considered information presented at the hearing regarding possible alternatives to detention, in particular the feasibility and appropriateness of house arrest. The letter from the Ministry of Interior dated 9 June 2008 (E79/1.1) filed by the Defence since the hearing does not materially assist the Chamber in this regard. At the hearing, the Defence merely expressed the hope that either the Royal Government of Cambodia or the ECCC would be in a position to provide security, transportation and medical care for the Accused if he were detained outside the ECCC Detention Facility. It has not provided any details as to the precise location of the house in which the Accused would reside or any guarantee that the Accused would respect summons to appear in court. The Chamber therefore finds continued detention at the ECCC to be necessary to ensure the presence of the Accused during trial proceedings and to guard against any flight risk. It accordingly orders the continuation of his detention pursuant to Rule 63(3)(b)(iii).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

FINDS that the PTC's delay in issuing reasons for the Decision on the Closing Order, Decision on the detention appeal and for the detention portion of its Decision on the Closing Order has resulted in a breach of the Accused's rights;

DECLARES that the nature of the remedy in consequence of these violations may be assessed at the end of the trial, after hearing the parties on this issue;

REJECTS the Accused's request for release;

REJECTS the Accused's request for release on bail in the form of house arrest;

NOTES that the Accused has been brought before the Chamber pursuant to Rules 68(3) and 82(1) and that he shall remain in detention until the Chamber's judgement is handed down, subject to a fresh application for release pursuant to Rule 82(4). *mur at*

Phnom Penh, 12 May 2011
President of the Trial Chamber

