



ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia

Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

**Extraordinary Chambers in the
Courts of Cambodia**

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត

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

សំណុំរឿងព្រហ្មទណ្ឌ

Criminal Case File /Dossier pénal

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ដីកាសម្រេចលើសក្ខីកម្មនៃការឃុំខ្លួន

Ordonnance sur les conditions de détention provisoire

Order concerning Provisional Detention Conditions

ឯកសារបញ្ជាក់ថាសម្រេចតាមច្បាប់ដើម
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We, You Bunleng ឬ ប៊ុនហ្គេង and Marcel Lemonde, Co-Investigating Judges of the Extraordinary Chambers,

Noting the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004,

Noting Rules 55(5) and 63 of the Internal Rules of the Extraordinary Chambers

Noting the judicial investigation opened against
NUON Chea and others,

Charged with 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 Law on the establishment of the Extraordinary Chambers, dated 27 October 2004.

Noting the requests filed by the lawyers for the detainees, IENG Thirith and NUON Chea, dated 14 and 21 March 2008 respectively,

Noting the decision of the Pre-Trial Chamber handed down on 30 April 2008 on appeal by the detainee IENG Sary,

Noting our Memorandum dated 8 May 2008 concerning meetings between the detainees IENG Thirith and IENG Sary,

Noting the absence of any clear regulations concerning the precise conditions of detention of charged persons and, in particular, the fact that the draft ECCC Detention Regulations have not yet come into force,

Considering it necessary to specify the reasons for separating the detainees from each other and to set out their conditions of detention as follows:

REASONS FOR THE DECISION

A. Separation of the detainees

1. First, it is important to recall that the charged persons are under investigation for particularly serious, complex crimes, which may engage their individually responsibility for a multitude of acts alleged to have been committed by them collectively, throughout Cambodian territory over 3 years, 8 months and 20 days.

2. International case law, and especially that of the European Court of Human Rights, unambiguously accepts that a pre-trial detention regime may be justified, *inter alia*, by the need to prevent any collusion between co-accused¹. Thus, in the ECHR decision in *Bak v. Poland*, "[t]he Court observes that the present case (...) was a classic example of organised crime, by definition presenting more difficulties for the investigation authorities and, later, for the courts in determining the facts and the degree of responsibility of each member of the group. It is obvious that in cases of this kind, continuous control and limitation of the defendants' contact among themselves and with other persons may be essential to avoid their absconding, tampering with evidence and, most importantly of all, influencing, or even threatening, witnesses. Accordingly, longer periods of detention than in other cases may be reasonable" (para. 56). In particular, while such separation should, as a matter of principle, be reviewed with the passage of time, it is precisely this kind of case that can justify prolonged separation, when required by the interests of a complex judicial investigation².

3. The isolated decision handed down by the ICC Pre-Trial Chamber in *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*³ cannot suffice to bring the pertinence of this reasoning into question. In fact, that decision, dated 13 March 2008, which allowed the co-accused "the right... to discuss the evidence on which the Prosecution intends to rely at the confirmation hearing in order to properly prepare their Defences", was based on the absence of any concrete evidence that the co-accused colluded in fabricating testimony or evidence and could, thus, prejudice the outcome of the proceedings against them. However, having regard to the ECHR case law cited in the preceding paragraph, it cannot be argued that pre-trial detention, and the allied conditions of detention, must be justified by proof of specific action; on the contrary, the only element to be taken into account is a risk assessment. Moreover, the ICC

¹ See, for example, *W. v. Switzerland*, Judgment of 26 January 1993, Series A no. 254-A, p. 15, para. 35; Gérard Bernard v. France, no. 27678/02, 26 September 2006; *Bak v. Poland*, no. 7870/04, 16 January 2007, paras. 56-60; *Laszkiewicz v. Poland*, no. 28481/03, 15 January 2008, para. 59; and *Celejewski v. Poland*, no. 17584/04, 4 May 2006, p.37.

² *Kemmache v. France* Judgment of 27 November 1991, Series A no. 218, para. 54; *Muller v. France* Judgment of 17 March 1997, Reports of Judgments and Decisions 1997-II, para. 40; and see *Górski v. Poland*, no. 28904/02, 4 October 2005, para. 58.

³ ICC-01/04-01/07-322.

Pre-Trial Chamber handed down a very different decision in the same case, on 21 April 2008, justifying the continued detention of Germain Katanga on the basis that such detention was necessary in order to guarantee that he would not obstruct or endanger the ongoing judicial investigation.

4. Second, it should be recalled that, in a decision dated 20 March 2008, on appeal by NUON Chea against his Provisional Detention, the ECCC Pre-Trial Chamber explained that the first and second grounds for provisional detention under ECCC Internal Rule 63(3)(b)⁴ may be analysed together, "since they are supported by the same arguments" (para. 59). Evidently, the same reasoning applies *a fortiori* to both elements of the first ground for provisional detention, which are so complementary that the Internal Rules do not even separate them: it is clear, thus, that when the Co-Investigating Judges referred to the need to "prevent the Charged Person from exerting pressure on any witnesses or Victims" for each Charged Person, it went without saying that the detainees could not communicate amongst themselves, since collusion would clearly facilitate pressure, given the cumulative effect of the respective influence networks of each of the co-Charged Persons.

5. It is true that approximately 30 years have passed between the alleged acts and the arrest of the Charged Persons, during which time they have had the opportunity to contact each other. However, the potential for prejudicial collusion increases considerably once the persons in question are arrested and charged: from that time, they have access to the case file, which not only sets out the nature of the individual responsibility relating to the specific charges against each of them, but also informs the co-Charged Persons of the direction and content of the judicial investigation.

6. In view of all these elements, it is thus necessary to maintain the strict separation between the detainees (except as regards the spouses IENG Sary and IENG Thirith, as detailed below). It is true that, in practice, this separation amounts, *de facto*, to the segregation of all the detainees in the facility. Whether this segregation amounts to a breach of the fundamental rights invoked by the detainees is examined below.

B. Inhuman and degrading treatment

7. In view of the consistent case law of the European Court of Human Rights, the exclusion of a detainee from the prison community (including to avoid collusion⁵), is not, in itself, a form of inhuman treatment⁶, especially in the context of organised crime⁷.

⁴ Under ECCC Rule 63(3)(b), provisional detention may be ordered if it is necessary, in particular, 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;

⁵ *G. Ensslin, A. Baader, J. Raspe v. German Federal Republic*, Decision of 8 July 1978, Request N° 7572/76, 7586/76 and 7587/76, p. 84.

⁶ *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, para. 432, ECHR 2004-VII; *Ocalan v. Turkey*, judgment of 12 May 2005, no. 46221/99, para. 191; *Ramirez Sanchez v. France*, Judgment of 4 July 2006, no. 59450/00, para. 123.

⁷ See in this respect, the cases against Italy relating to "Article 41 bis of law no. 354 dated 26 July 1975 on prison administration", such as *Messina (no. 2) v. Italy* (dec), no. 25498/94, CEDH 1999-V; *Cavallo v. Italy*, Judgment, 4 March 2008, no. 6786/03; *Guidi v. Italy*, Judgment, 27 March 2008, no. 28320/02; and *Argenti v. Italy*, Judgment, 10 February 2006, no. 56317/00.

Of course, it has been found that if, having regard to "the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned", the detention leads to "complete sensory isolation coupled with total social isolation", it may constitute "a form of inhuman treatment that cannot be justified by the requirements of security"⁸.

8. That is clearly not the case here. The Charged Persons are all allowed to receive visits from close family members (children, grand children over the age of 18 and the spouses of such persons), as well as their lawyers and assistants, and they meet doctors as often as required. Non-family members may also request visits. The detainees have books, the newspapers, a radio and the television at their disposal. They have regular contact with prison staff and may communicate with the outside world by telephone and by letter.

9. It is thus not possible to argue that the separation of the co-Charged Persons constitutes a violation of the prohibition of inhuman or degrading treatment.

C. Private and family life

10. Given the legitimate aim of the restrictions as well as their precise nature, this interference with the detainees' right to private life (including the external aspect of social exchange) and family life can be considered proportionate to the imperative of maintaining the integrity of the judicial investigation⁹, with one exception in the case of Ieng Sary and Ieng Thirith.

11. The position of these two co-Charged Persons must be, and has been, distinguished in order to take account of the fact that they are a married couple. Whereas the Co-Investigating Judges could not authorise visiting rights until certain investigative actions had been completed¹⁰, since that time, they were authorised to meet within the ECCC Detention Facility, initially once a week¹¹, then, following the decision of the Pre-Trial Chamber dated 30 April 2008, once a day¹²: the fact that they are married is considered a sufficiently weighty factor to tip the balance between the competing interests at issue in favour of a degree of controlled contact between the two co-Charged Persons. It should be specified that these meeting may, indeed, include joint family visits.

D. Right to be presumed innocent

12. The co-defence lawyers argue that this separate detention regime constitutes a violation of the presumption of innocence of the detained persons, as a form of punitive measure despite the fact that they have not been found guilty of any offence. Such reasoning cannot be entertained. Each Charged Person is

⁸ See, for example, *G. Ensslin, A. Baader, J. Raspe v. German Federal Republic*, *op. cit.*, and *Ocalan v. Turkey*, *op.cit.*,
⁹ See, in particular, *Messina v. Italy* (no 2) judgment of 28 December 2000, no. 25498/94, paras. 61-74, as well as the cases against Italy relating to "Article 41 bis of law no. 354 dated 26 July 1975 on prison administration", *op. cit.*; *Cavallo v. Italy*, *Guidi v. Italy* and *Argenti v. Italy*.
¹⁰ See Letter from the Co-Investigating Judges, A104/I, dated 22 January 2008 refusing any modification of visiting rights (ERN 00159511).
¹¹ See our Internal Memorandum to the Head of the Detention Facility, A104/III, dated 17 March 2008.
¹² See our Internal Memorandum to the Head of the Detention Facility, A104/IV, dated 8 May 2008.

currently detained for the reasons set out in his or her Provisional Detention Orders¹³, in compliance with directives from the Co-Investigating Judges to the Head of the ECCC Detention Facility. They are separated from each other due to the requirements of the judicial investigation, in conditions that comply with international standards of justice, as set out above. There is, thus, no question of any punitive measure and, as a result, no violation of the right to the presumption of innocence.

E. Right to silence

13. Finally, it has been argued that the separation of the detainees constitutes pressure on the Charged Persons with a view to making them cooperate fully and obtain confessions. This argument is without pertinence: a Charged Person clearly has the right to remain silent since he or she is presumed innocent throughout the judicial investigation¹⁴ and, in this case, neither the principle of provisional detention, nor the detention regime, have any relation to the fact that a person refuses to answer the questions put to him or her.

14. In light of all these elements, it is appropriate to maintain the prohibition on communication between the detainees, with the exception of IENG Sary and IENG Thirith, in respect of whom our Memorandum dated 8 May 2008 is confirmed, with the clarification that common family visits are authorised.

On these grounds, we hereby

- Confirm that the detainees in the ECCC Detention Facility have not the right to communicate amongst themselves,
- Declare that, exceptionally, the detainees IENG Sary and IENG Thirith are authorised to meet under the conditions defined in our Memorandum dated 8 May 2008, with the clarification that common family visits are authorised.

Dated the 20th day of May 2008 in Phnom Penh

សហចៅក្រមស៊ើបអង្កេត

**Co-Investigating Judges
Co-juges d'instruction**

This Order was written in Khmer and French and then translated into English.

¹³ See the Provisional Detention Orders for Mrs IENG Thirith: OCIJ Detention Order dated 14-11-2007, Doc. No. C21 (ERN 00153250-00153252); Mr. NUON Chea: OCIJ Detention Order dated 19-09-2007, Doc. No. C9 (ERN 00148717-00148721); and Mr. IENG Sary: OCIJ Detention Order dated 14-11-2007, Doc. No. C22 (ERN 00153284-00153290).

¹⁴ *Dumont-Maliverg v. France*, nos 57547/00 and 68591/01, 31 May 2005, para. 68.

We, _____, have given a copy of this order to the below-mentioned persons on

Charged Person	Lawyer of Charged Person	Co-Prosecutors	Office of the Administration	Delivering Agent
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Through this notification, the Charged Person is informed that:

- S/He has the right to appeal this order, pursuant to the conditions outlined in Rule 75 of the Internal Rules of the Extraordinary Chambers ;
- S/He has the right to be personally brought before the Co-Investigating Judges at least every 4 (four) months and to be given an opportunity to discuss his or her treatment and conditions during Provisional Detention ;
- During his or her presentation before the Co-Investigating Judges, s/he may formulate a request, upon which the Co-Investigating Judges shall decide ;
- S/He may submit an application for release to the Co-investigating Judges at any moment during the period of Provisional detention;
- If his or her conditions have changed since his or her last application, the Charged Person may file a further application not less than 3 (three) months after the final determination of the previous application for release.