



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

**Chambres Extraordinaires au sein
des Tribunaux Cambodgiens**

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

សំណុំរឿងព្រហ្មទណ្ឌ

Dossier pénal/Criminal Case File

លេខ/No: 002/14-08-2006

លេខស៊ើបអង្កេត/Instruction/Investigation

លេខ/No: 002/19-09-2007-ECCC-OCIJ

ដីកាសម្រេចអំពីការបន្តថែរទ្រព្យ

ការឃុំខ្លួនបណ្តោះអាសន្ន

**Ordonnance sur la prolongation de la détention
provisoire**

Order on Extension of Provisional Detention

We, **You Bunleng ឬ ប៊ុនហ្គេង** and **Marcel Lemonde**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia,

NOTING the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”),

NOTING Rule 63(7) of the Internal Rules of the Extraordinary Chambers,

NOTING the continuing judicial investigation against **Ieng Thirith**, charged with **Crimes Against Humanity**, offences defined in and punishable by Articles 5, 29 (new) and 39 (new) of the ECCC Law,

NOTING our Order, dated 14 November 2007, for the provisional detention of Ieng Thirith for a term not exceeding one year (C20),

NOTING the Decision of the Pre-Trial Chamber on appeal against the provisional detention of Ieng Thirith, dated 9 July 2008 (C20/I/26),

NOTING that, on 13 October 2008, we duly notified the Charged Person and her lawyers that we were considering whether to extend the term of provisional detention, due to expire on 14 November 2008, and that they had fifteen days to submit observations (C20/2),

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ 1

ទូរស័ព្ទលេខ +៨៥៥(០)២៣ ២១៨៩១៤ ទូរសារលេខ +៨៥៥(០)២៣ ២១៨៩៤១។

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NOTING the observations presented by the lawyers for the Charged Person on 27 October 2008 (C20/3),

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission in which they named Ieng Thirith and four other persons suspected to have committed crimes within the jurisdiction of the ECCC¹.
2. On 12 November 2007, the Co-Investigating Judges notified Ieng Thirith that she was charged with Crimes against Humanity (murder, extermination, imprisonment, persecution, and other inhumane acts)².
3. On 14 November 2007, following an adversarial hearing, the Co-Investigating Judges ordered that Ieng Thirith be held in provisional detention for a term not exceeding one year³.
4. On 12 December 2007, Ieng Thirith filed a notice of appeal (“appeal”) against the provisional detention order⁴.
5. On 9 July 2008, following the hearing held on 21 May 2008, the Pre-Trial Chamber unanimously confirmed the Order, substituting its own reasoning for that of the Co-Investigating Judges⁵.
6. On 13 October 2008, the Co-Investigating Judges notified the Charged Person and her lawyers that the question of extending the term of provisional detention, due to expire on 14 November 2008, was being considered and that they had fifteen days to submit observations⁶.
7. On 27 October 2008, Ieng Thirith’s co-lawyers filed their observations⁷, requesting the release of their client on bail under the conditions set out in Annex C to their Appellate brief⁸, as follows:

- to reside and sleep each night at the home address of the daughter of the Charged Person situated in Phnom Penh;

¹ Introductory Submission, 18 July 2007, Par. 8. (D3).
² Written Record of Initial Appearance, 12 November 2007 (D39).
³ Order for Provisional Detention of Ieng Thirith, 14 November 2007 (C20).
⁴ Appeal Against Provisional Detention Order, 12 December 2007 (C20/I).
⁵ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26).
⁶ Notification (Rule 63.7), 13 October 2008 (C20/2).
⁷ Defence Observations concerning possible extension of provisional detention of Mrs Ieng, 27 October 2008 (C20/3).
⁸ Conditions set out in Annex C to Appellate brief against provisional detention order, 2 January 2008 (C20/I/3).

- to remain in the city of Phnom Penh at all times, subject to receiving prior permission from the ECCC authorities if the Charged Person desires to travel elsewhere;
- that all travel documents be surrendered to the ECCC authorities and that the Charged Person undertakes not to apply for any new travel documents;
- to abide by a curfew between the hours of 8pm and 7am ;
- to report daily to the local police station;
- not to contact directly or indirectly any witnesses, victims or potential witnesses, or any such persons as directed;
- to attend all proceedings held before the ECCC.

THE LAW

8. ECCC Internal Rule 63(6)(a) provides that, as regards Crimes against Humanity, the Co-Investigating Judges have the power to extend provisional detention by one-year terms.
9. ECCC Internal Rule 63(7) specifies that 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.
10. ECCC Rule 63(3) provides that “The Co-Investigating Judges may order the provisional detention of a charged person only when 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;
 - iv) protect the security of the Charged Person; or
 - v) preserve public order.

OBSERVATIONS BY THE DEFENCE

11. In their observations⁹, the co-lawyers for the Charged Person request the Co-Investigating Judges not to prolong Ieng Thirith’s provisional detention and to release her upon reasonable conditions, for the following reasons:

1. The conditions for extension are not met in the case at hand:
 - a) Rule 63 of the Internal Rules does not specify the requirements for an extension of the initial period of one year;
 - b) According to the jurisprudence of the European Court of Human Rights (“ECHR”), after one year of detention, evidence of the existence of well founded reasons to believe that the person may have committed an offence no longer suffices and the threshold should be higher;
 - c) The investigations have not been conducted diligently over the last year and no additional evidence has been gathered to support the contention that there are well founded reasons to believe that the Charged Person committed (any of) the alleged crimes with which she has been charged.
2. After one year in provisional detention and taking into account the effect of a possible extension particularly on the reasonable period in detention, the existence of a well-founded reason to believe that the Charged Person has committed the crimes with which she has been charged is insufficient to support an extension of detention.

REASONS FOR THE DECISION

12. The Co-Investigating Judges consider that the extension of provisional detention beyond a one-year term may only be ordered where it is established that the conditions set out in ECCC Internal Rule 63(3) are still met. These conditions must still be satisfied with the passage of time and the progress of the judicial investigation.

RULE 63(3)(A) OF THE INTERNAL RULES

13. ECCC Rule 63(3)(a) provides that the Co-Investigating Judges must establish that there is well founded reason to believe that the person may have committed the crime or crimes specified in the introductory or supplementary submissions.

14. In their provisional detention order dated 14 November 2007, the Co-Investigating Judges found there was well founded reason to believe that Ieng Thirith may have committed the crimes with which she is charged.¹⁰

⁹ Defence Observations concerning possible extension of provisional detention of Mrs Ieng, 27 October 2008 (C20/3), Par. 10, 13 and 34.

15. On appeal, the Pre-trial Chamber undertook a detailed analysis of the case file up to the date of the hearing on 21 May 2008.¹¹ The Chamber considered, in its 9 July 2008 decision, that “*the Case File contains evidence capable of satisfying an objective observer, at this stage of the investigation, that the Charged Person may have committed the crimes for which she has been placed under judicial investigation.*”¹²
16. Since the hearing of the appeal, the judicial investigation has continued. Nevertheless, no exculpatory evidence has been placed on the case-file during this time which tends to materially undermine the above evidence relied on by the Pre-Trial Chamber and thus invalidate its reasoning.
17. On the contrary, despite the arguments by Ieng Thirith’s co-lawyers,¹³ the Co-Investigating Judges have collected additional evidentiary materials since 21 May 2008, at the request of the parties or *proprio motu*, some of which provide specific information regarding the Charged Person’s potential role within the regime.¹⁴
18. For these reasons, the Co-Investigating Judges consider that, having looked at the totality of the evidence on the case file afresh, there continues to be, at this stage of the investigation, facts or information which would satisfy an objective observer that Ieng Thirith, in her capacity as Minister of Social Action, may have:
 - (a) exercised authority and effective control over the Ministry and all its constituent and subordinate organs; and
 - (b) instigated, ordered, failed to prevent or punish, or otherwise aided and abetted in the commission of the crimes for which she is charged.
19. Further, it appears that the crimes with which Ieng Thirith is accused were committed as part of a widespread and systematic attack against a civilian population.
20. For the reasons set out above, well-founded reason still exists to believe that Ieng Thirith may have committed the crime or crimes specified in the introductory or supplementary submissions and, thus, that the condition set out in ECCC Internal Rule 63(3)(a) is still met.

RULE 63(3)(B) OF THE INTERNAL RULES

21. At the outset, the Co-Investigating Judges note that the co-lawyers for Ieng Thirith did not introduce any arguments concerning Internal Rule 63(3)(b) in their observations.

¹⁰ Order for Provisional Detention of Ieng Thirith, 14 November 2007 (C20), Par. 5.
¹¹ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26), Par. 6 and 20.
¹² Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26), Par. 41.
¹³ Defence Observations concerning possible extension of provisional detention of Mrs Ieng, 27 October 2008 (C20/3), Par. 8-10 and 30-31.
¹⁴ See, in particular: [Redacted].

- 22. The Co-Investigating Judges recall that, as established by the Pre-Trial Chamber,¹⁵ for an order of provisional detention to be justified, only one of the objectives set out in Rule 63(3)(b) needs to be satisfied and that, as such, they are not obliged to examine each of the criteria if they deem that they have sufficiently demonstrated the necessity of provisional detention in reference to one or more of the conditions stipulated in Rule 63(3)(b) at the relevant time.
- 23. The Co-Investigating Judges note that each of the conditions set out in Internal Rule 63(3)(b) were carefully considered by the Pre-Trial Chamber in its 9 July 2008 decision.¹⁶
- 24. The Co-Investigating Judges shall consider whether these conditions are currently satisfied in light of the findings of the Pre-Trial Chamber and all the circumstances at the time of expiry of the initial order.

63(3)(b)(i) prevent the Charged Person from exerting pressure on any witnesses or victims; and ii) preserve evidence or prevent the destruction of evidence

- 25. Referring to the reasons they gave in their Provisional Detention Order of 14 November 2007, developed in paragraphs 43 to 52 of the Pre-Trial Chamber decision,¹⁷ the Co-Investigating Judges recall that it is absolutely essential for the continuing investigations to prevent any pressure on witnesses and victims and to preserve evidence.¹⁸
- 26. In this respect, the Co-Investigating Judges stress the fact that the Charged Person has access to all the elements in the case file, including the written records of interviews with specific witnesses, as well as complaints and civil party applications. Now, whereas the nature of the alleged crimes makes it difficult for a suspect to identify or influence the very large number of potential witnesses before the judicial investigation begins, the same is not true once the Charged person has knowledge of the identity of the inculpatory witnesses and victims involved in the proceedings. Clearly, the Charged Person already has access to a large body of evidence containing details on her possible role within the regime. There is a real risk that witnesses might refuse to participate in the proceedings in the future if Ieng Thirith were released. Moreover, many of these witnesses might be re-interviewed during the investigation, and, in their statements, have given other leads and named other potential witnesses who have not yet been interviewed at this stage of the judicial investigation. There are reasons to believe that these witnesses could be subjected to pressure, either because they were the Charged Person’s subordinates or, in a broader sense, because of the senior positions the

¹⁵ See for example, Pre-Trial Chamber, Decision on Appeal Against Provisional Detention of Nuon Chea, 20 March 2008 (C11/54), para. 83.

¹⁶ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26), Par. 43-72.

¹⁷ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26),.

¹⁸ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26),, Par. 15.

Charged Person held. The risk is real and is corroborated by the Charged Person’s behaviour and public statements.¹⁹

27. There is thus a real risk of pressure being exerted on witnesses, and it must be averted in order to ensure the smooth conduct of the ongoing judicial investigation. The passage of time since the provisional detention of the Charged Person has not eliminated the risk, on the contrary, the risk is more acute.

63(3)(b)(iii) Ensure the Presence of the Charged Person During Any Proceedings

28. In their Order dated 14 November 2007, the Co-Investigating Judges considered that provisional detention was a necessary measure to ensure the presence of the Charged Person during any proceedings. Indeed, numerous elements show that Ieng Thirith has significant material resources that could facilitate her flight, including to foreign countries, especially those with which Cambodia has not signed any extradition treaty. It may thus be feared that she would be tempted to avoid justice now that she faces a maximum penalty of life imprisonment if convicted.

29. The Pre-Trial Chamber confirmed this analysis in paragraphs 53 to 59 of its 9 July 2008 decision²⁰ and nothing placed on the case file since that time might lead to the conclusion that the circumstances have changed.

63(3)(b)(v) To Preserve Public Order

30. The Co-Investigating Judges refer to the reasons set out in their Provisional Detention Order of 14 November 2007, as developed in paragraphs 64 to 72 of the Pre-Trial Chamber decision.²¹

31. Adopting the interpretation of the Pre-Trial Chamber, the Co-Investigation Judges note that the condition of preserving public order is met if facts showing that the Charged

¹⁹ See for example the letter sent by Ieng Thirith on 7 January 1999 to Mr Chris Decherd, Editor of the Cambodia Daily, published under the title “Ieng Thirith says she only wanted to serve her people”, *The Cambodia Daily* 12 February 1999; and also “Khmer Rouge Inc: Former Communist Embrace the Market Economy in Malai District”, Thet Sambath and Erika Kinetz, *The Cambodia Daily* 17 February 2007, quoted by the Pre-Trial Chamber in Para. 49 and 50 of its 9 July 2008 decision (C20/I/26).

²⁰ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26).

²¹ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/26).

Person’s release would actually disrupt public order exist.²² In addition, detention will continue to be legitimate only if public order remains actually threatened.²³

32. In the instant case, it is worth noting that 30 years on, the impact of the Khmer Rouge regime on Cambodian society is still being felt and that a whole segment of Cambodia’s population suffers from post-traumatic stress disorder.²⁴ The interest of the population and the media in the Extraordinary Chambers and the ongoing proceedings are proof that this is still a major preoccupation for Cambodians. The Co-Investigating Judges are cognizant that the gravity of the crimes for which the Charged Person is under investigation is not in itself an obstacle to release. Nonetheless, this factor is relevant in assessing the criteria for deciding continued detention and its legitimacy.

33. In light of the above, the Co-Investigating Judges consider that it is not excessive, considering the gravity of the crimes charged against the Charged Person, to conclude that a decision to grant release within the fragile context of today’s Cambodia could provoke protests of indignation which could lead to violence.

34. In conclusion, the Co-Investigating Judges consider that there is still a genuine risk that the Charged Person could exert pressure on victims and witnesses; they consider her continued provisional detention to be necessary to preserve evidence and prevent its destruction, ensure the presence of the Charged Person during any proceedings and preserve public order, and thus that the conditions set out in Internal Rule 63(3)(b) is still met.

REGARDING THE REASONABLENESS OF THE LENGTH OF DETENTION

35. The Co-Investigating Judges acknowledge that the passage of time is relevant to determining the legitimacy of continued provisional detention of a Charged Person. The time spent in provisional detention cannot be deemed unjustified if it is demonstrated that due diligence is shown in conducting the proceedings. In assessing the manner in which the judicial investigation is conducted, and by analogy with the case-law of the ECHR concerning reasonable time, the Co-Investigating Judges take the view that it is necessary to take 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 parties.²⁵

²² The phrase “facts showing” necessarily involves a measure of prediction particularly in the context of crimes within the jurisdiction of the ECCC; see for example Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008 (C22/I/73), para.112.

²³ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008 (C11/54) para. 76; Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/I/27), para. 64.

²⁴ See for example Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008 (C22/I/73), para. 113.

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

- 36. In the instant case, the Charged Person has been in detention for nearly 12 months. This cannot be considered excessive in view of the scope of the investigations, the complexity and gravity of the crimes of which the Co-Investigating Judges are seised.²⁶
- 37. The Co-Investigating Judges recall that the right to remain silent is recognised and undisputed. The right of the Charged Person’s lawyers not to cooperate actively with the judicial authorities during the judicial investigation is also undisputed. Nevertheless, this attitude is not conducive to speedy proceedings.
- 38. Finally, the Co-Investigating Judges note that, since the opening of the judicial investigation, they have undertaken large-scale investigations into crimes of which they are seised and collected a large body of evidence, at the request of the parties²⁷ or *proprio motu*,²⁸ some of which provide specific information on the potential role played by the Charged Person in the regime. As of 4 November 2008, over 100 Written Records of Interview of witnesses have been placed on the Case File, some of whom have given evidence on the role played by Ieng Thirith. Additionally, numerous rogatory letters are in the course of being executed.
- 39. In view of the foregoing, the passage of time does not call into question the necessity of continued provisional detention.
- 40. Therefore, the Co-Investigating Judges consider that, in view of the reasons of fact and law set out above, there continue, today, to be well founded reasons to believe that Ieng Thirith may have committed the crimes for which she is charged, and that to avoid her exerting pressure on victims and witnesses, to preserve evidence and prevent its destruction, to ensure the presence of the Charged Person during any proceedings and preserve public order, it is necessary to extend the provisional detention.

FOR THESE REASONS,

HEREBY ORDER the extension of provisional detention of **Ieng Thirith** for a term not exceeding one year, pursuant to ECCC Internal Rule 63(6)(a).

Done in Phnom Penh on 10 November 2008

សហចៅក្រមស៊ើបអង្កេត

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

²⁶ In their Introductory Submission and Supplementary Submission, the Co-Prosecutors opened investigations against five persons, in respect of crimes allegedly committed throughout the territory of Cambodia, within the *rationae temporis* of the ECCC and allege numerous complex national and international crimes [redacted].

²⁷ [Redacted].

²⁸ [Redacted].