

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

<b>Case No:</b>	<b>002/19-09-2007-ECCC-OCIJ (PTC02)</b>
<b>Filed to:</b>	<b>Pre-Trial Chamber</b>
<b>Date of Filing :</b>	<b>08 January 2008</b>
<b>Party Filing:</b>	<b>Defence of Ieng Thirith</b>
<b>Original Language:</b>	<b>English and Khmer</b>
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**DEFENCE OF IENG THIRITH REQUEST TO REPLACE ITS APPEAL AGAINST  
THE PROVISIONAL DETENTION ORDER, FILED ON 02 JANUARY 2008**

**Filed by:**  
**Defence of Ieng Thirith**  
 Phat Pouy Seang  
 Diana Ellis

**Distribution to:**  
**Pre-Trial Chamber**  
 Prak Kimsan  
 Ney Thol  
 Huot Vuthy  
 Rowan Downing  
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**Co-prosecutors**  
 Chea Leang  
 Robert Petit

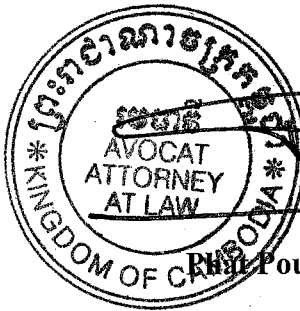
**បានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**  
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**ក្រឡាបញ្ជី/ Greffier ...SANN RADA...**

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1. We, the defence of Ieng Thirith, respectfully request that the Appeal Against Provisional Detention Order, filed with the Pre-Trial Chamber on 02 January 2008 be replaced by the New Appeal Against Provisional Detention.
2. The Appeal Against Provisional Detention, filed on 02 January 2008, was not in compliance with Article 3.8 of Practice Direction 01/2007.

Respectfully submitted,

Made in Phnom Penh, on this 8<sup>th</sup> day of January 2008



*[Signature]*  
Phat Pouv Seang

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## 1. INTRODUCTION

On 14<sup>th</sup> November 2007 the Co-Investigating Judges (CIJs) ordered the Provisional Detention of the Charged Person, Ieng Thirith, for a period not exceeding one year. The defence appeals against the imposition of the Provisional Detention Order pursuant to the provisions of Rule 63(4) and Rule 74(3)(f) of the Internal Rules of the ECCC of 2007 ('the Internal Rules'). The defence seeks the Provisional Release of the Charged Person subjects to any conditions it may be thought proper to impose.

Notice of Intention to Appeal the said Order was lodged with the Registry on 12<sup>th</sup> December 2007 pursuant to Rule 75 of the Internal Rules.

## 2. SUMMARY OF THE ARGUMENTS

The grounds for imposing a Provisional Detention Order (PDO) as set out in Rule (63)(3) have not been satisfied. There was no proper evidential basis upon which the CIJs could base their decision. Further, the Co-Investigating Judges failed to provide well-founded reasons for the imposition of the PDO. In the circumstances, the Provisional Detention Order should be set aside and the Charged Person should be Provisionally Released subject to any conditions considered appropriate.

## 3. RELEVANT FACTS

On 12<sup>th</sup> November 2007 the Charged Person was arrested at her home address in Phnom Penh pursuant to a warrant issued by the Co-Investigating Judges. Some days prior to the execution of the warrant the Charged Person had been informed by the Defence Support Section that her arrest was imminent.

4. The Introductory Submission prepared by the Co-Prosecutors on 18<sup>th</sup> July 2007 sets out the case alleged against the five Charged Persons. The Co-Prosecutors contend that they, with others, were part of a joint criminal enterprise to commit, or cause to be committed, offences which amount to crimes against humanity. In a section dedicated to the Charged Person at paragraphs 98 to 103 specific allegations are made against her. The Charged Person held the office of Minister of Social Affairs during the period from April 1976 to January 1979.

5. At paragraph 24 of the Introductory Submission it is stated

‘Whilst the CPK Statute vested “the highest power rights throughout the country” in the hands of the CPK General Conference which was to be convened every four years, the Statute identified the CPK Central Committee as the “highest operational unit throughout the country for the intervening four year period. In practice, a sub- committee of the CPK known as the CPK Standing Committee acted as the highest and most authoritative unit within the CPK and in Democratic Kampuchea.’

6. The Charged Person is not among those named at paragraph 28 of the Introductory Submission as having been a member of the CPK Standing Committee, nor as having been one of those who attended their meetings.

7. At paragraph 81 of the Introductory Submission the Charged Person is said to have been given instructions by Nuon Chea.

8. The Charged Person may be said to have had less authority than the four co-Charged Persons on the evidence as presented by the Co-Prosecutors.

9. At the adversarial hearing before the CIJs on 14<sup>th</sup> November 2007, the Co-Prosecutors submitted that the Charged Person should be made the subject of a Provisional Detention Order.

10. The Co-Prosecutors contended that the charged Person should be detained on the following grounds:

- i) that the Charged Person was in possession of a passport and so could easily flee the country, a risk made more likely as, if convicted, she was at risk of life imprisonment;
- ii) to prevent disturbing public disorder in circumstances where victims might seek revenge were she granted her liberty;

- iii) to ensure her security;
  - iv) to avoid witnesses being put under pressure
11. The Charged Person informed the CIJs that the facts relied upon by the Co-Prosecutors were "100% false" and she denied responsibility for the criminal acts alleged. The Charged Person claimed that she had at all times worked for the benefit of the people.
12. The Defence provided CIJs with the following documents relevant to the matters in issue for the purposes of the hearing, namely:
- i) a medical certificate which stated that the Charged Person suffers from an 'organic mental disorder';
  - ii) proof of ownership by her daughter of the house in which the Charged Person was living in Phnom Penh at the time of her arrest;
13. The Co-Investigating Judges in their decision of 14<sup>th</sup> November 2007 stated at paragraph 5 that-
- 'In the light of the many documents and witness statements implicating Ieng Thirith, contained in the Introductory Submission, there are well-founded reasons to believe that she committed the crimes with which she is charged'.
14. Further, the Co-Investigating Judges refused the provisional release of the Charged Person on 4 grounds:-
- i) it would risk provoking protests of indignation which could lead to violence and perhaps imperil her safety.
  - ii) she might attempt, and would be in a position to organize pressure on witnesses and victims whose identity is now known.

- iii) the family or sympathizers of the Charged Person, some of whom are in positions of influence, in Malai, Pailin and Phnom Penh might interfere with witnesses.
  - iv) she had the financial means and might flee Cambodia, possibly to a country with whom there is no extradition treaty.
15. The CIJs were not of the opinion that the documents produced by the defence showed the Charged Person's state of health to be incompatible with detention.
16. The Co-Investigating Judges concluded that there were no bail conditions rigorous enough to ensure the above-cited concerns could be met.
17. **Personal Circumstances of the Charged Person**
- i) The Charged Person is a Cambodian National.
  - ii) She is now 75 years of ages.
  - iii) The Charged Person has been resident in Cambodia for most of her life.
  - iv) The Charged Person has resided in Phnom Penh or Pailin for many years. She is known by the name of Ieng Thirith and by her nickname 'Phea'.
  - iv) The Charged Person suffers from chronic ill health – with mental and physical disabilities requiring constant medical treatment;
  - v) The current passport of the Charged Person shows that she has travelled from Cambodia to Thailand. Her visits have been short and occasioned by the need for medical attention.
  - vi) The Charged Person has close members of her family living in Phnom Penh and elsewhere in Cambodia.

## 18. THE LAW

**Right to a fair trial: the Presumption of Innocence**

- a) The presumption of innocence is enshrined as one of the guarantees that the trial process will be fair. Recognition is given to this right in the Law on the Establishment of the Extraordinary Chambers 2004.

## Chapter X – Trial Proceedings of the Extraordinary Chambers:

Art 33-

The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures that are in force, with full respect for the rights of the accused.... If necessary, and if there are lacunae in these existing procedures, guidance may be sought in procedural rules established at the international level.

Art 35

The accused shall be presumed innocent as long as the court has not given its definitive judgement.

- b) This gives effect to the provisions set out in Art 13 of the Agreement between The UN and The Royal Government of Cambodia Concerning The Prosecution Under Cambodian Law of Crimes Committed During The Period Of Democratic Kampuchea 2003 at Art 13(1)–

The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process....

Such rights shall in particular include the right...to be presumed innocent until proved guilty..

- c) Furthermore, Article 38 of the Constitution of the Kingdom of Cambodia provides the accused shall be considered innocent until the court has judged finally on the case.



- d) Internal Rules of ECCC Rule 21(1)  
a) .....
- d) Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established..
- e) In determining issues of detention due regard must be paid to the presumption of innocence and the arguments for and against release must form part of a reasoned ruling – Letellier v France ECHR 26 June 1991

19. **Provisional Release**

- a) Rule 63 of the Internal Rules of the ECCC provides-

2. An order for Provisional Detention shall:

- a) set out the legal grounds and factual basis for detention, based on sub-rule 3 below

3. The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

- a) there is a 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;
- v) preserve public order.

b) Cambodian Code of Criminal Procedure 2007  
Section 5 Provisional Detention  
Art 203

En principe, le mis en examine reste libre. Il peut, a titre exceptionnel, etre place en detention proviso ire dans les conditions prevues par la presente section.

Art 205 provides the conditions which must be satisfied reflecting Rule 63(3).

c) Art 14 UNTAC Criminal Code 1992 Pre-trial detention-

1. Only the judge, if so petitioned by the prosecutor, may decide to keep an accused in prison, and only if the accused is likely to escape and has not demonstrated an interest to in remaining available to appear, such as a job, a family, a home, or if there is reason to believe that the accused will influence witnesses or the conduct of the investigation.

20. **Preservation of Public Order**

The *ad hoc* International Criminal Tribunals have not addressed this matter in their jurisprudence.

Guidance can be found in the decisions of the European Court of Human Rights. Article 5(3) of the European Convention on Human Rights does not guarantee an absolute right to bail pending trial. A person must be released unless there are 'relevant and sufficient reasons to justify his/her detention – Wemhoff v Germany ECHR 27 June 1968.

21. In the leading case of Letellier v France (supra) which has been followed in many other cases, it has been held that if release is refused on the basis that it would lead to public disorder this ground must be factually based and it must be shown that the release would actually disturb public order. In Gerard Bernard v France 26.9.2006 the ECHR affirmed the importance of there being an evidential basis for refusing release in consideration of public disorder.

22. Article 144 of the French Code of Criminal Procedure as amended in 2007 states-

Pre-trial detention may only be ordered or extended if it is proved in the light of the precise elements of the procedure and in the given circumstances that it is the only way..to put an end to an exceptional and persistent disruption of public order caused by the gravity of the offence, the circumstances in which it was committed, or the gravity of the harm that it has caused. This disruption cannot be the result only of the mediatic effect of the matter.

23. The Human Rights Committee in 2003 in General  
Comment No 8 noted that

‘..if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, ie it must not be arbitrary, and must be based on grounds and procedures established by law..’

24. **Interference with witnesses and victims**

In the case of The Prosecutor v Haradinaj 6 June 2005 para 44-47 the Trial Chamber of the ICTY stated that the risk of interfering with witnesses or victims should be based on specific facts and evidence. In this instance the prosecutor provided ample evidence of intimidation of witnesses. However, since “it had not been shown that the accused himself posed a concrete danger to anyone, including victims and witnesses, the Trial Chamber [was] not satisfied that a negative impact on the public perception of safety of potential witnesses suffice[d] as a ground for denying provisional release.

25. Another example is provided from the jurisprudence of the ECHR where it was noted, in respect of a claim that the applicant might put pressure on witnesses or interfere with evidence, that

‘..the judicial authorities ...did not point to any factor capable of showing that the risks relied on actually existed and failed to establish that the applicant..posed a danger.’

The Court found the grounds were not sufficient to justify the accused being kept in detention -

Labita v Italy ECHR 6 April 2000 para 162-163

26. **Risk of Absconding**

The following principles emerge from the jurisprudence of the ECHR

- i) The risk that a person will abscond should be adequately established. The risk should be a ‘real risk’.  
Muller v France ECHR 18 February 1997 para 42
- ii) The risk of absconding ‘cannot be based solely on the severity of the sentence faced’  
Letellier v France ECHR 26 June 1991 para 43
- iii) if the only reason for continued detention is that an accused may abscond, release must be ordered if it is possible to obtain guarantees to ensure future attendance at trial.  
Wemhoff v Germany ECHR 27 June 1968 para 15
- iv) a perceived danger of absconding must be assessed in relation to relevant factors which may confirm the danger or make it seem so slight that detention pending trial cannot be justified. It is necessary to explain why there is a danger of absconding if such is found.

27. There are precedents in recent decisions of courts dealing with international criminal law which show that provisional release of an accused pending trial is sometimes granted.

The ICTY has granted provisional release to a number of accused who have been charged with crimes against humanity and war crimes.

28. In the revised version of the Rules of Procedure and Evidence of the ICTY issued in 1999, Rule 65 provides:

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person.

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

29. As is customary under international criminal law, the burden is on the accused to prove that he can satisfy the conditions. This burden has often been found to be satisfied, despite the gravity of the crimes in question.

In the case of Prosecutor v Brdjanin & Momir Talic IT-99-36-T 20 September 2002, Provisional Release pending trial was allowed on compassionate grounds. Talic was suffering from terminal cancer which made it unlikely he would survive more than a year. Two doctors appointed by the court agreed that he was, in the short term, fit to remain in detention and stand trial. In deciding to grant provisional release, the Trial Chamber stressed that at para 29:

[...] the *rationale* behind the institution of detention on remand is to ensure that the accused will be present for his/her trial. Detention on remand does not have a penal character, it is not a punishment as the accused, prior to his conviction, has the benefit of the presumption of innocence.

30. It should be noted that courts such as the ICTY, which are not part of the judicial structure of a state and have no police force or other enforcement mechanism to rely on for the protection on evidence or the production of an accused, are required to be more cautious in allowing provisional release. This is often made explicit in their jurisprudence – Prosecutor v Ademi IT-01-46-PT Order on Motion for Prov Rel 20 February 2002-:

Para 24

[...] the Tribunal lacks its own means to execute a warrant of arrest, or to re-arrest an accused who has been provisionally released. It must also rely on the co-operation of States for the surveillance of accused who have been released. This calls for a more cautious approach in assessing the risk that an accused may abscond. It depends on the circumstances whether this lack of enforcement mechanism creates such a barrier that provisional release should be refused. It could alternatively call for the imposition of strict conditions on the accused or a request for detailed guarantees by the government in question.

31. **Lacunae in procedures**

Both Article 23 and Article 33 of the Law On The Establishment of the Extraordinary Chambers 2004 provide that the Investigating Judges and the Extraordinary Chambers shall follow existing procedures in force

‘If necessary and if there are lacunae in these existing procedures, the COJ may seek guidance in procedural rules established at the international level’.

32. **Submissions**

#### **General Principles for Provisional Release**

33. It is submitted that the CIJs have erred in finding that the conditions set out in Rule 63(3) have been met sufficient to justify the Provisional Detention of the Charged Person.

34. As a general principle, in accordance with Cambodian Law and the Law of the ECCC, a Charged Person has a right to Provisional Release.
35. Provisional Detention may be ordered where Rule 63(3) (a) and at least one of the conditions set out in Rule 63(3)(b) are satisfied. However, the Charged Person may be provisionally released even where the CIJs find that some or all of the conditions of Rule 63(3) have been met.
36. A decision to place the Charged Person in detention must be founded on a proper evidential basis and not be based on hypothetical considerations.
37. It is for the Co-Prosecutors to provide a proper evidential foundation to support the grounds advanced to withhold Provisional Release.
38. The jurisprudence of the ICTY has determined that the accused has the burden of proving he/she can satisfy the conditions. This reasoning has applicability where those on trial are nationals of another country and different considerations apply. It is contrary to Cambodian Law where the burden rests on the Co-Prosecutors.
39. The CIJs have found that the conditions for refusing provisional release set out at paragraph have been satisfied in the absence of cogent evidence to support such a conclusion.
40. Further the Co-Investigating Judges have failed to provides adequate reasons based on evidence for their decision.
41. **Presumption of Innocence**

At paragraph 5 of the Decision of the CIJs of 14<sup>th</sup> November 2007 it is stated that 'there are well-founded reasons to believe that she committed the crimes with which she is charged'. In making this finding the CIJs have failed to have regard to the presumption of innocence.

42. The failure of the CIJs to have regard to the presumption of the innocence of the accused is relevant at this stage in that it may have affected their considerations as to whether the conditions have been satisfied pursuant to Rule 63(3).

43. **Public Order and Personal Safety**

It is submitted that there was no material before the CIJs upon which they could properly conclude that if the Charged Person is Provisionally Released this 'risks provoking protests of indignation which could lead to violence and perhaps imperil the safety of the Charged Person'.

44. If the Charged Person is to be denied her liberty on this ground, it must be upon a proper factual basis and not on hypothetical or speculative concerns. The CIJs decided no more than that if the charged Person was at liberty this 'could lead to violence..'

45. The Charged Person has lived openly in her area of origin Malai, Pailin and in Phnom Penn since 1979 without any threat to her safety. She has not been the subject of any attack.

46. Many books and articles have been published over the years on the topic of Democratic Kampuchea and the period between 1975 and 1979. Mention has been made of the Charged Person as having been the Minister for Social Affairs. There have been no repercussions to her.

47. No evidence has been placed before the CIJs to indicate that the release of the Charged Person would lead to public disorder.

48. **Interference with witnesses and victims By the charged Person or her sympathizers**

The existence of the ECCC has been anticipated for a number of years. Much has been written and spoken about the trials which were to take place before the ECCC.



49. The CIJs did not make their decision that the Charged Person might interfere with witnesses or victims on the basis of any evidence of such interference having taken place in the past. They expressed the concern that 'it might be feared..that she might attempt' to put pressure on witnesses (para 7 Decision of 14 November 2007)
50. The Charged Person has not been shown to have attempted to interfere with witnesses or victims at any time in the past.
51. A perception that witnesses might at some future date be interfered with is no basis for refusing Provisional Release.
52. There must be a risk which can be shown to exist and the Charged Person must be shown to pose a danger.
53. Furthermore, no members of the Charged Person's family nor any 'sympathizers' have been shown to have done any act to impede justice or interfere with witnesses.
54. The Provisional Detention of the Charged Person could in no way prevent any other party from seeking to interfere with witnesses or victims and is not a basis upon which to deprive the Charged Person of her liberty.
55. **Failure to attend trial**

The fact that the Charged Person faces a very lengthy term of imprisonment if convicted of the offences alleged is not of itself a reason for refusing Provisional Release.

56. The fact that the Charged Person is accused of very grave offences is not a proper reason of itself to refuse Provisional Bail.
57. The Charged Person has shown by her actions that she is not likely to avoid attending her trial if granted Provisional Release.

58. The Charged Person has regularly travelled to Thailand for medical treatment but has always returned.
59. The Charged Person has known for a significant period of time that the ECCC was to be established. She has remained in Cambodia and not sought to hide, nor to live under a false name.
60. The Charged Person was well aware that her arrest was imminent and did not seek to evade the arresting authorities. On the contrary she was arrested from her home address in Phnom Penh.
61. The Charged Person is 75 and in need of regular medical treatment. She suffers from a number of debilitating and chronic conditions, both mental and physical. A copy of a report on the Charged Person's Medical condition is appended as Annexe A.
62. The family of the Charged Person reside in Cambodia. Her ties with the country are very strong.
63. The Prosecutors are in possession of an old passport of the Charged Person. A copy of her current passport is appended as Annexe B. These documents show the length and frequency of her visits to Thailand.
64. Thailand has diplomatic relations with Cambodia and there is an extradition treaty between the two countries.
65. In the circumstances, there is no real prospect that the Charged Person would abscond and fail to attend her trial.
66. The CIJs failed to pay proper regard to these features of the Charged Person's case.
67. In deciding that all the conditions for refusing Provisional Release as set out in Rule 63(3) had been met, the CIJs failed to adequately or fairly have regard to the need to have a factual basis for so finding rather than just automatically taking a decision based on the hypothetical considerations.

68. The CIJs failed to set out the reasons for their findings of fact.

69. **Conclusion**

In the premises, it is submitted that the Detention Order allowing the Provisional Detention of the Charged Person should be set aside.

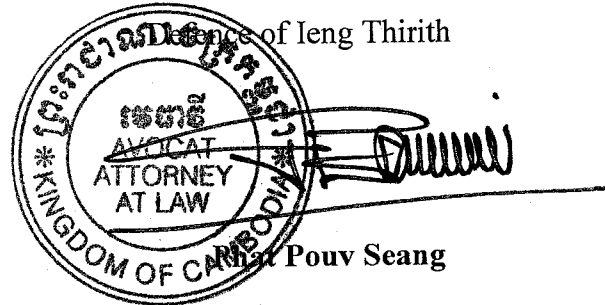
70. The Charged Person should be Provisionally Released subject to any such conditions as the Pre-Trial Chamber considers may be necessary. The defence sets out at Annexe C proposed conditions for the Pre-Trial Chamber's consideration.

Made in Phnom Penh, on this 2<sup>nd</sup> day of January 2008

Having read and agreed



**Ieng Thirith**

Defence of Ieng Thirith  
  
\*KINGDOM OF CAMBODIA\*  
AVOCAT  
ATTORNEY  
AT LAW  
Pouv Seang

Annexe A

**Medical report of Madame Ieng Thirith**

Annexe B

**Copy of the Current Passport of Madame Ieng Thirith**



## Annexe C

**Proposed Bail Conditions for Madame Ieng Thirith**

I, **Ieng Thirith**, respectfully submit that the following conditions might be attached to a Bail Order:

- a) to reside and sleep each night at the home address of the daughter of the Charged Person situated in Phnom Penh;
- b) 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;
- c) that all travel documents be surrendered to the ECCC authorities and that the Charged Person undertakes not to apply for any new travel documents;
- d) to abide by a curfew between the hours of 8pm and 7am;
- e) to report daily to the local police station;
- f) not to contact directly or indirectly any witnesses, victims or potential witnesses, or any other such persons as directed;
- g) to attend all proceedings held before the ECCC.

Made in Phnom Penh, on this 2<sup>nd</sup> day of January 2008.



**Ieng Thirith**

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**CAMBODIAN LAW**

1. Law on the ECCC 2004
2. Agreement between the UN and The Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During The Period of Democratic Kampuchea 2003
3. The Constitution of the Kingdom of Cambodia
4. Cambodian Code of Criminal Procedure 2007
5. UNTAC Criminal Code 1992

**INTERNATIONAL LAW**

6. International Covenant on Civil and Political Rights
7. European Convention on Human Rights
8. Rules of Procedure and Evidence of the ICTY 1999
9. French Code of Criminal Procedure as amended 2007

**Case Law**

10. Letellier v France ECHR 26 June 1991
11. Wemhoff v Germany ECHR 27 June 1968
12. Gerard Bernard v France 26 September 2006
13. The Prosecutor v Haradinaj ICTY 6 June 2005



14. Labita v Italy ECHR 6 April 2000
15. Muller v France ECHR 18 February 1997
16. The Prosecutor v Brdjanin and Momir Talic IT-99-36-T 20 September 2002
17. The Prosecutor v Ademi IT-01-46-PT 20 February 2002

**Commentaries**

18. Human Rights Committee in 2003 in General Comment No 8