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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
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ដីកាសម្រេចអំពីការបន្តចេះចេញនៃ
ការឃុំឃាំងបណ្តោះអាសន្ន
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 Sary**, charged with **Crimes
Against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949**,
offences defined in and punishable by Articles 5, 6, 29 (new) and 39 (new) of the ECCC
Law,

NOTING our Order, dated 14 November 2007, for the provisional detention of IENG
Sary,

NOTING the Decision of the Pre-Trial Chamber, dated 17 October 2008,

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ 1

NOTING that, on 13 October 2008, we duly notified the Charged Person and his 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,

NOTING the observations presented by the lawyers for the Charged Person in their Motion dated 28 October 2008,

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission in which they named Ieng Sary 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 Sary that he was charged with Crimes against Humanity (murder, extermination, imprisonment, persecution, and other inhumane acts); and Grave Breaches of the Geneva Conventions of 1949 (wilful killing, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian)².
3. On 14 November 2007, following an adversarial hearing, the Co-Investigating Judges ordered that Ieng Sary be held in provisional detention for a term not exceeding one year³.
4. On 12 December 2007, Ieng Sary filed a notice of appeal (“appeal”) against the order of provisional detention⁴. Following the hearing held on 30 June and 1, 2, and 3 July 2008, the Pre-Trial Chamber unanimously confirmed the Order, substituting its own reasoning for that of the Co-Investigating Judges⁵.
5. On 13 October 2008, the Co-Investigating Judges duly notified the Charged Person and his 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.
6. On 28 October 2008, Ieng Sary’s co-lawyers filed a motion against any extension (“motion”), requesting the release of their client or the the replacement of provisional

¹ D3, Introductory Submission, 18 July 2007, 00197410-00197545, Par. 8.
² C12/I, Written Record of Arrest of Ieng Sary, 12 November 2007, 00152165 (KH)
³ C22, Order for Provisional Detention of Ieng Sary, 14 November 2007, 00153284-00153290.
⁴ C22/I/5, Defence Appeal Against Provisional Detention Order of Ieng Sary dated 14 November 2007, 12 December 2007, 00159025-00159041.
⁵ C22/I/73, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, 00232830-00232861.
⁶ C22/2, Notification (Rule 63.7), 13 October 2008, 00231622-00231623.

detention by house arrest under conditions which would protect the objectives set out in Internal Rule 63⁷.

THE LAW

7. Rule 63(6)-(7) gives the Co-Investigating Judges power to extend provisional detention:

- 6. Provisional detention may be ordered as follows:
 - a) for genocide, war crimes and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the Provisional Detention for further 1 (one) year periods

...

7. 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. An extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-Investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.

8. The Co-Investigating Judges may order the provisional detention of a charged person only when the following conditions set out in Rule 63(3) 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.

9. The Pre-Trial Chamber’s decision on the appeal of Nuon Chea’s provisional detention sets out what constitutes a “well founded reason” for the purposes of Rule 63(3)⁸:

⁷ C22/3, Defence Motion Against any Extension of the Provisional Detention of Ieng Sary, 28 October 2008, 00235370-00235379.

The Pre-Trial Chamber will, as the ICC has done, interpret the words “well-founded reason” by seeking guidance in the above-mentioned jurisprudence of the ECHR. This means that the Pre-Trial Chamber has to decide whether facts or information exist which would satisfy an objective observer that the person concerned may have committed the offence.

OBSERVATIONS BY THE DEFENCE

10. In his motion⁹, Ieng Sary submits that:

- (a) the Co-Investigating Judges have an obligation to provide detailed factual and legal reasoning when ordering provisional detention. By explaining and justifying the order, the detained person is able to properly and fairly appeal;
- (b) as provisional detention may only be ordered if necessary, the Co-Investigating Judges are prohibited from ordering provisional detention in preference over bail with conditions if bail would sufficiently achieve the objectives of detention; and
- (c) if the correct test for provisional detention under Rule 63(3)(b) is applied, Ieng Sary should be released on bail with conditions.

REASONS FOR THE DECISION

Rule 63(3)(a) of the Internal Rules

11. In their provisional detention order of 14 November 2007, the Co-Investigating Judges found there were well founded reasons to believe that the Charged Person committed the crimes with which he is charged. On appeal, the Pre-trial Chamber undertook a detailed analysis of the case-file up to the date of the hearing.¹⁰ The evidence it referred to included:

- (a) various admissions by Ieng Sary that he was Minister of Foreign Affairs and a member of the Standing Committee of the Communist Party of Kampuchea¹¹;
- (b) admissions by the other charged persons, including statements by [REDACTED], who claimed Ieng Sary was a full rights member of the Standing Committee¹²;

⁸ C11/54, Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, 00172907-00172934, Par. 46.

⁹ C22/3, Defence Motion Against any Extension of the Provisional Detention of Ieng Sary, 28 October, 00235370-00235379, Par. 1.

¹⁰ 30 June and 1, 2 and 3 July 2008.

¹¹ *Ibidem*, Par. 75-76.

¹² *Ibidem*, Par. 75-77.

- (c) prisoner lists from S-21 in which more than 100 persons are noted to be arrested “from the Ministry of Foreign Affairs”¹³;
- (d) the book by Laurence Picq, former employee of the Ministry of Foreign Affairs in which she claimed to have observed Ieng Sary inciting others to denounce traitors at a meeting she attended¹⁴; and
- (e) documentary evidence including records purported to be of Ieng Sary’s speeches where he called for enemies to be “wiped out;” directives of the Central Committee; minutes of the Standing Committee; and S-21 confessions by staff of the Ministry of Foreign Affairs whose confessions were allegedly sent to Ieng Sary¹⁵.

12. Following a review of this evidence the Pre-Trial Chamber found 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 specific crimes for which he is currently under investigation. Therefore the Pre-Trial Chamber finds that the requirement of Rule 63(3)(a) is met.¹⁶

13. Since the hearing of the appeal, the Co-Investigating Judges have continued to investigate the allegations contained in the Introductory Submission. During this time, no exculpatory evidence has been placed on the case-file which tends to materially undermine the above evidence relied on by the Pre-Trial Chamber and thus invalidate its reasoning. On the contrary, the witness [REDACTED] has confirmed and detailed the accusations¹⁷.

14. Due to the relatively recent nature of the Pre-Trial Chamber’s analysis of the case file, the Co-Investigating Judges do not consider it necessary to further elaborate on the key evidence, considering it sufficient to note that they endorse the above analysis as an accurate summary of the case against Ieng Sary.

15. The Co-Investigating Judges also note that Ieng Sary has never sought to challenge that Rule 63(3)(a) is demonstrated by the evidence.

16. 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 Sary, in his capacity as Minister of Foreign Affairs, may have:

¹³ *Ibidem*, Par. 81.

¹⁴ *Ibidem*, Par. 93.

¹⁵ *Ibidem*, Par. 82, 87, 92.

¹⁶ *Ibidem*, Par. 94.

¹⁷ [REDACTED].

- (a) exercised authority and effective control over the Ministry and all its constituent and subordinate organs; and
- (b) as a full rights member of the Central and Standing Committees of the Communist Party of Kampuchea, instigated, ordered, failed to prevent to punish, or otherwise aided and abetted in the commission of the crimes for which he is charged.

17. Further, it appears that the crimes with which Ieng Sary is accused were committed as part of an international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam; and a widespread and systematic attack against a civilian population.

Rule 63(3)(b) of the Internal Rules

18. It is noted that 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. It is further noted that the Co-investigating Judges accept Ieng Sary’s submission that provisional detention may only be ordered if it is considered *necessary* to meet one or more of the objectives set out in Rule 63(3)(b). It follows that, if these objectives could be achieved by some other reasonable means, then they must be considered.

19. Before considering the objectives of Rule 63(3)(b), the Co-Investigating Judges note that each of them were carefully considered by the Pre-Trial Chamber in its judgement. Although the Co-Investigating Judges must consider whether it is necessary to extend provisional detention in all the circumstances which exist at the time of the expiry of the initial order, they consider themselves guided by the findings of the Pre-Trial Chamber. The five judges enjoyed the benefit of the detailed written and oral submissions of the parties over four days of hearing, and had the opportunity to evaluate evidence filed specifically in relation to provisional detention which was not available to the Co-Investigating Judges in November 2007.

20. Of course if new evidence has been placed before the Co-Investigating Judges which was not available to the Pre-Trial Chamber and which suggests a change in circumstances, then this approach would have to be revised. However, this is presently not the case.

To Ensure the Presence of the Charged Person During Any Proceedings

21. After a review of the evidence, it appeared that:

- (a) Ieng Sary used to reside in Pailin where has connections with the Governor and Deputy Governor who are likely to be in a position to assist him should he wish to flee to Thailand;¹⁸
- (b) In the face of Ieng Sary’s past travels, there is a reasonable inference that he has the financial means to facilitate his escape;¹⁹
- (c) Ieng Sary has a passport or passports, including one not issued by the Cambodian authorities which contains a false name and incorrect place of birth. He also has allies abroad who are capable of assisting him to leave Cambodia.²⁰
- (d) While it is true that Ieng Sary could have fled before his arrest but chose not to, this does not demonstrate that he would not flee now. The situation is no longer the same now that he is under investigation²¹.

22. For these reasons, the Pre-Trial Chamber found provisional detention was necessary to ensure Ieng Sary’s presence during the proceedings²².

23. In his observations, Ieng Sary does not submit any new evidence on this point, but refers to and reiterates his submissions before the Pre-Trial Chamber. He suggests that there are a number of “highly relevant” factors not referred to by the Chamber, including that his wife is over 80 and is unwell, and that should he flee overseas, he would not be able to maintain contact with her²³.

24. These claims do not amount to a submission that circumstances have changed since the Pre-Trial Chamber issued its decision, the reasoning of which the Co-Investigating Judges adopt. Accordingly, the Co-Investigating Judges refer to the facts set out above and find that provisional detention is necessary to ensure the presence of Ieng Sary at any proceedings.

To Protect the Security of the Charged Person

25. The Pre-Trial Chamber found that Ieng Sary “is a well-known former political figure in Cambodia and considered to be one of the leaders of the Democratic Kampuchea Regime.”²⁴ Further the fact that there have not been any attempted acts of revenge or violent protest prior to his arrest is of limited relevance. His arrest “diminished his

¹⁸ C22/I/73, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, 00232830-00232861, Par. 102.

¹⁹ *Ibidem*, Par. 103.

²⁰ *Ibidem*, Par. 104.

²¹ *Ibidem*, Par. 105.

²² *Ibidem*, Par. 106.

²³ C22/3, Defence Motion Against any Extension of the Provisional Detention of Ieng Sary, 28 October 2008, 00235370-00235379, Par. 16.

²⁴ C22/I/73, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, 00232830-00232861, Par. 107.

perceived protection in this respect.”²⁵ The Chamber also noted the threats made against Duch during the first public hearing of the Pre-Trial Chamber, stating “...after establishing well founded reasons to believe that the Charged Person may have committed crimes which are related to the crimes with which Duch is charged, this aggression could also be vented towards this Charged Person.”²⁶

26. Therefore the Pre-Trial Chamber considered that provisional detention was a necessary measure to protect Ieng Sary’s safety²⁷.

27. Ieng Sary observed that the Pre-Trial Chamber’s findings are “based on nothing more than analogy with Duch and yet no account it taken of the differences between Mr Ieng Sary and Duch.”²⁸ Like the Pre-Trial Chamber, the Co-Investigating Judges consider that once it becomes public that there is an alleged nexus between the purported crimes of Duch and the allegations against Ieng Sary, those who feel they have reason to threaten Duch’s security may feel those same reasons now apply to Ieng Sary, and might therefore feel inclined to threaten him too²⁹.

28. The Co-Investigating Judges therefore consider that for the reasons set out above, including those put forward by the Pre-Trial Chamber, provisional detention is required to ensure Ieng Sary’s security.

To Preserve Public Order

29. Following a review of the evidence, the Pre-Trial Chamber made the following findings of fact in respect to this objective:

- (a) The passage of time has not diminished the impact of the Democratic Kampuchea regime on society. A proportion of the population suffer from post-traumatic stress disorder. The proceedings before the ECCC may pose a fresh risk to Cambodian Society and could lead to the resurfacing of anxieties and negative social consequences.³⁰
- (b) The General Assembly of the United Nations has recognised that the crimes committed during the Democratic Kampuchea period are still a matter of concern to Cambodian society.³¹

²⁵ *Ibidem*, Par. 108.

²⁶ *Ibidem*, Par. 109.

²⁷ *Ibidem*, Par. 110.

²⁸ C22/3, Defence Motion Against any Extension of the Provisional Detention of Ieng Sary, 28 October 2008, 00235370-00235379, Par. 19.

²⁹ C22/I/73, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, 00232830-00232861, Par. 109.

³⁰ *Ibidem*, Par. 113.

³¹ *Ibidem*, Par. 114.

(c) The proceedings before the ECCC have generated a great deal of interest amongst the Cambodian population, demonstrating that the events of 1975 to 1979 are still a matter of great concern today for the Cambodian population and the international community.³²

(d) The perceived threat to security is real.³³

30. For these reasons the Pre-Trial Chamber concluded that Ieng Sary’s release would actually disturb public order. Accordingly it found that provisional detention was necessary to preserve public order³⁴.

31. The Co-Investigating Judges adopt these findings and note the absence of any evidence suggesting that the situation has changed since the hearing date. Therefore they find that provisional detention is necessary to preserve public order.

House Arrest

32. Ieng Sary’s central submission before the Pre-Trial Chamber was that any concerns that might exist under Rule 63(3)(b) would be met by hospitalisation or house arrest.

33. The Pre-Trial Chamber found that the Internal Rules do not specifically provide for an alternative form of detention and interpreted Ieng Sary’s request “as a request for release under the condition of hospitalisation or house arrest.”³⁵

34. It went on to find that:

(a) In light of its findings that provisional detention was necessary to ensure Ieng Sary’s safety, his presence at proceedings, and to preserve public order, he cannot be released on bail, since any of the conditions proposed by the Charged Person are outweighed by the necessity for his provisional detention.³⁶

(b) Even if Ieng Sary were to be hospitalised or put under house arrest, there may still be high risks to his personal safety. He will be required to come to the ECCC on different occasions and it will be very difficult to ensure his safety during the transportation from the hospital or his house to the Chambers to attend publically scheduled hearings.³⁷

35. In his observations Ieng Sary notes that if he is placed under house arrest with the appropriate conditions there will no longer be any concerns for his safety, his presence

³² *Ibidem*, Par. 115.

³³ *Ibidem*, Par. 116.

³⁴ *Ibidem*, Par. 117.

³⁵ C22/I/73, Pre-Trial Chamber Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, 00232830-00232861, Par. 119-120.

³⁶ *Ibidem*, Par. 121.

³⁷ *Ibidem*, Par. 122.

at proceedings, or the preservation of public order³⁸. Ieng Sary does not present any new evidence in support of these submissions and simply refers to and builds upon his submissions before the Pre-Trial Chamber, and takes issue with its findings.

36. The Co-Investigating Judges endorse the unequivocal findings of the Pre-Trial Chamber and by way of elaboration note that, in their view, no *reasonable* conditions of house arrest could be imposed which would guarantee the objectives of Rule 63(3)(b)(iii-v) to the same extent as provisional detention. The Co-Investigating Judges further note that while only one of the five objectives listed under Rule 63(3)(b) needs to be demonstrated, they have found that provisional detention is necessary to guarantee three of them.

PASSAGE OF TIME

37. 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 European Court of Human Rights 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.³⁹

38. 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 seized.⁴⁰

39. Since the opening of the judicial investigation proceedings, the Co-Investigating Judges have undertaken large-scale investigations into crimes. Since the provisional detention of the Charged Person, the Co-Investigating Judges have collected a large body of evidence, at the request of the parties or *proprio motu*, and have interviewed other persons, notably regarding Ieng Sary’s potential role. Also, over 100 Written Records of Interview of witnesses have been placed on the Case File; some of the witnesses concerned have given evidence on the Charged Person’s possible role in the Regime.

40. In particular, in the interviews conducted [REDACTED], the witness [REDACTED] has reaffirmed, among other things, that Ieng Sary had extensive knowledge about the

³⁸ C22/3, Defence Motion Against any Extension of the Provisional Detention of Ieng Sary, 28 October 2008, 00235370-00235379, Par. 18, 22, 26.

³⁹ 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..

⁴⁰ 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].

purges at the Ministry of Foreign Affairs and played a decisive role in organising them⁴¹.

41. Additionally, numerous rogatory letters are in the course of being executed. Lastly, the Charged Person was also interviewed until he decided to exercise his right to remain silent. The right to remain silent is recognised and undisputed, but it is not conducive to speedy proceedings.

42. In view of the foregoing, the passage of time does not call into question the necessity of continued provisional detention.

43. The Co-Investigating Judges consider that there are well founded reasons to believe that Ieng Sary may have committed the crimes for which he is charged, and for the reasons set out above, it is necessary to extend Ieng Sary’s provisional detention.

FOR THESE REASONS,

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

Done in Phnom Penh on 10 November 2008

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges

Co-juges d’instruction

⁴¹ [REDACTED].