

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

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**Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the OCIJ Order on Extension of Provisional Detention**

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## I. PROCEDURAL BACKGROUND

1. On 10 November 2008, the Office of the Co-Investigating Judges (“OCIJ”) issued the Order on Extension of Provisional Detention (“*Extension Order*”).<sup>1</sup>
2. On 10 December 2008, the Co-Lawyers of the Charged Person filed the appeal<sup>2</sup> against the Extension Order and discussed therein the OCIJ’s findings under Rule 63 (3) (a) and (b) Internal Rules (“IR”). The Defence requests the Pre-Trial Chamber (“PTC”) to vacate the Extension Order and order the provisional release, or to order house arrest under specified conditions specified in their brief.<sup>3</sup>
3. On 12 December 2008, the Defence’ Appeal brief has been notified to the Co-Lawyers of the Civil Parties in English and Khmer.

## II. SUMMARY OF THE ARGUMENTS

4. The discretion of the OCIJ has been properly exercised and shows no unreasonable and unsustainable grounds. The Appeal of the Defence shows no error in the Extension Order. The Extension order is reasoned and justifiable.
5. Pursuant to Rule 63 (3) (a), there are well-founded reasons to believe that the Charged Person is strongly suspected of having committed the crimes detailed in the Introductory Submission. The investigations during the last year have been conducted expeditiously and with due diligence and have brought up new evidence.
6. Furthermore, the order of provisional detention is a necessary measure to prevent the Charged Person from interfering with victims and witnesses, to preserve evidence, to preserve the Public Order, to secure his safety and to ensure his presence in the upcoming trial. The order fulfils the requirements of Rule 63 (3) (b)(i-v).
7. House arrest under certain conditions may amount to a mode of detention, but cannot prevent all of the reasons given under Rule 63 (3) (b) IR, in particular to preserve public order, to secure the charged person’s safety and to preserve evidence.

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<sup>1</sup> *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ, Provisional Detention Order, 10 November 2008, Court Document No. C22/4.

<sup>2</sup> *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ(PTC 17), Ieng Sary’s Appeal Against Extension Order, 10 December 2008, Court Document No. C 22/5/1 (“*Appeal against Extension Order*”).

<sup>3</sup> Appeal against Extension Order, para 31.

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### III. RELEVANT FACTS

8. The OCIJ submitted seven pages of grounds for their decision to extend the detention. Related to Internal Rule 63 (3) (a), the OCIJ referred<sup>4</sup> mainly to the decision of the Pre-Trial Chamber<sup>5</sup> which published their decision recently. The OCIJ added other new evidence, taken after the PTC decision.<sup>6</sup>
9. Related to the conditions of Rule 63 (3) (b) the OCIJ pointed out that the conditions stated in the PTC Decision on the Appeal had not changed<sup>7</sup> and adopted the arguments of the PTC.
10. In particular, the OCIJ considered the passage of time and concluded that the on-going investigations included the conduct of more than 100 interviews of witnesses and thus taking into account the complexity of the case in its whole were in accordance with the requirements of the European Court of Human Rights.
11. Furthermore, the OCIJ holds up that house arrest is no reasonable alternative form of detention.<sup>8</sup>
12. The Defence states<sup>9</sup> that;
  - (i) the investigation has not been conducted with due diligence;
  - (ii) the burden of proof is on the OCIJ to demonstrate that the conditions of Rule 63 (3) (a) and (b) are met;
  - (iii) the OCIJ failed to add evidence in order to show that there is well found reason to believe that the charged person may have committed the crimes specified in the Introductory Submission;
  - (iv) imprisonment is not the only form of detention and that reasonable conditions of house arrest are available to the OCIJ;
  - (v) house arrest can protect the objectives set out in Rule 63 (3) (b) IR.

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<sup>4</sup> Extension Order, para 11-17.

<sup>5</sup> *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03) Decision on Appeal Against Provisional Detention Order of Ieng Sary, 17 October 2008, Doc.no: C22/I/73.

<sup>6</sup> see footnotes 10 and 17 of the Extension Order, i.e. Interviews of Duch on 30 June, 1, 2 and 3 July and interview of Laurence Picq on 29, 30 and 31 October 2008.

<sup>7</sup> Extension Order, para 18-31.

<sup>8</sup> Extension Order, para 32-36.

<sup>9</sup> Appeal against Extension Order, para 1.

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### III. RELEVANT LAW

13. Pursuant to Internal Rules 63 (3) (a) and (b), the Co-Investigating Judges may order the provisional detention of a Charged Person under the following conditions:

- a) there is well founded reason to believe that the defendant may have committed the crimes specified in the Introductory submission.
- 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.

14. Rule 63 (6) (a) IR stipulates:

Provisional Detention may be ordered as follows:

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.

15. Rule 63 (7) IR provides:

Any decision by the Co-Investigating Judges concerning extension of Provisional Detention [...] shall set out the reasons for such extension. [...]

### IV. SCOPE OF THE APPEAL AND ROLE OF THE PRE-TRIAL CHAMBER

16. The Co-Lawyers for the Civil Parties already comprehensively showed in the response<sup>10</sup> to the Appeal of Ieng Thirith that the Appeal is rather limited. These submissions are hereby incorporated by reference. Thus, the Pre-Trial Chamber may

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<sup>10</sup> *Case of Ieng Thirith*, case no. 002/19-09-2007-ECCC/OCIJ (PTC02), Civil Party Co-Lawyers' Joint Submission to the Appeal of Ieng Thirith against the Provisional Detention Order, Court Document no. C20/I/17, paras 6-13.  
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only overturn the OCIJ decision if the Judges erred and abused their discretion and – summarized- if the decision is “logically perverse or evidentially unsustainable”.<sup>11</sup>

17. The same standard applies to the Extension Order that the Order must be reasoned according to Rule 63 (7) IR.

## V. ARGUMENTS

### Rule 63 (3) (a) IR and the time factor

18. The order of provisional detention as well as the extension of the detention requires that (i) there are well- founded reasons to believe that the Charged Person may have committed crime(s) and for the extension order (ii) that the investigations were conducted with due diligence and expeditious to guarantee the right of a charged person to be tried with undue delay.<sup>12</sup>
19. Since the first provisional detention order based on the Introductory Submission, the Co-Investigating Judges issued numerous Rogatory Letters in order to identify witnesses, then to interview them and to find evidence. (e.g. D91 D92, D25, D40, D94, D107). The OCIJ interviewed more than 100 witnesses.
20. The testimonies show *for instance* that besides establishing S-21, Phnom Penh and other cities were evacuated,<sup>13</sup> that an enemy policy and a countrywide prison and re-education camp system was established and maintained, that alleged “enemies” were smashed for “betraying Angkar”, that people were arbitrarily arrested and killed,<sup>14</sup> that people were forced to work,<sup>15</sup> that monks were disrobed,<sup>16</sup> that people died of starvation and did not receive appropriate medical treatment,<sup>17</sup> that people were tortured (to death).<sup>18</sup>

As the Charged person was a member of the Standing Committee who met the Chiefs of the Zones and the Sectors regularly,<sup>19</sup> “an objective observer would be

<sup>11</sup> *Prosecutor v. Moinina Fofana*, Case No. SCSL-04-14-AR65, Appeal against Decision refusing bail, 1 March 2005, para 20.

<sup>12</sup> See e.g. Article 9 (3) of the International Covenant of Civil and Political Rights (“ICCPR”), Art. 5 of the European Convention on Human Rights (“ECHR”).

<sup>13</sup> Court Document no. D91/29.

<sup>14</sup> Court Document no. D25/38; D40/18; D40.

<sup>15</sup> Court Document no. D94/20.

<sup>16</sup> Court Document no. D40/25.

<sup>17</sup> Court Document no. D40/18.

<sup>18</sup> Court Document no. D25/37.

<sup>19</sup> Court Document no. D107/2.

satisfied by the investigations to believe that the Charged Person may have committed the crimes with which he is charged.

21. The lengthy detention does not constitute *per se* good cause that would warrant provisional release<sup>20</sup> and even less if the investigations were conducted expeditious and with due diligence in a complex case ( such complexity arising due to the special weather and infrastructure conditions in Cambodia, that led, for example during the rainy season, to the flooding of crime sites<sup>21</sup> or roads.
22. The extension of the provisional detention of one year and the extension of another year more is still proportional and justified<sup>22</sup> regarding the serious offences against the Charged Person and compared to other cases<sup>23</sup> of such complexity.

### **Rule 63 (3) (b) IR**

23. The Co-Lawyers for the Civil Parties note that the Cambodian Criminal Procedure Code (“CPC”) stipulates that liberty of a person is a rule and detention is the exception. Article 205 CPC states the prerequisites for a detention which are similar to Rule 63 (3) (b) IR. The Co-Lawyers submit that the existence of only one of these prerequisites justifies provisional detention.

#### **a) Public Order and Safety of the Charged Person.**

24. The Co- Lawyers for the Civil Parties incorporate by reference the submission contained in paragraph 46 of the Response<sup>24</sup> on the Appeal against the Detention Order against the charged person.
25. In addition, new facts have emerged. On 4 December 2008, after the hearing of the Appeal of Khieu Samphan, an incident between applicants / Civil Parties and the

<sup>20</sup> see e.g. *Prosecutor v. Casimir Bizimungu et al.*; TC II ; case no: ICTR-99-50-T; 4 November 2002, para 31 and *Prosecutor v. Joseph Kanyabashi*; AC; case no. ICTR-96-15-A, page 3, 13 June 2001.

<sup>21</sup> see Report of the execution of Rogatory letter; Court Document no. D25/37.

<sup>22</sup> e.g. in the Bizimungu case (see fn 20, it was three years at the time of the decision).

<sup>23</sup> see *Prosecutor v. Coric et al.* TC III; case no: IT-04-74-T; Decision On The Request For Provisional Release Of The Accused Coric, 8 April 2008, where nearly three years of provisional detention were held proportional; *Prosecutor v. Mile Mrksic*; TC II; Case no: IT-95-13/1-PT, Decision on Defense Motion For Provisional Release; 9 March 2005; where the Chamber held two years and ten months pretrial detention for proportional; *Prosecutor v. Dragomir Milosevic*, TC I; case no: IT-98-29/1-PT; Decision On Third Motion For Provisional Release, 16 August 2006; where the Chamber held one year and eight months pretrial detention for proportional.

<sup>24</sup> *Case of Ieng Sary*, Joint submission of the Co-Lawyers for Civil Parties, 20 May 2008, Court Document no. C22/I/35.

Defence occurred during a press conference, which resulted in the intervention by the security staff of the Court.<sup>25</sup>

This event clearly shows that even the Defence may be addressed by victims. Thus it can be concluded that a release of the Charged Person could incite the victims of the Khmer Rouge regime. Even if this clash was not directly related to this Appellant and his Defence, this situation clearly shows the high tension within the Cambodian society. This event provides evidence that in the case of release the public order and the safety of the charged persons are at risk.

**b) Exerting Pressure on Witnesses and preserving Evidence or Preventing the Destruction of Evidence**

26. The OCIJ Order is justifiable and reasonable. Since the Charged Person has full access to the file and knows the statements of witnesses and their names and addresses The risk is rather high that he will use his influence himself or by third parties to prevent them from testifying.

The Judges' Decision shows no abuse of discretion.

Furthermore, as the PTC has outlined, the powerful influence and authority of the Charged Person was, and is to this day, still in existence.<sup>26</sup>

The circumstances of his defection in 1996 and his obvious influence on the armed forces of the Khmer Rouge show his power. Activities such as regular visits to Pailin for meetings with 30 government officials to 'tell' them to abstain from armed movement<sup>27</sup> show his authority.

Even if the PTC could not find concrete evidence that the Charged Person used his authority, new events have emerged.

27. [Redacted]  
 28. [Redacted]  
 29. [Redacted]

<sup>25</sup> « Tribunal khmer rouge: l'exaspération des victimes intensifiée par un clash avec la défense » from Stéphanie Gée, 5 December 2008, Ka-set Site d'information sur le Cambodge, <http://ka-set.info/actualites/khmers-rouges/cambodge-tribunal-victimes-khmer-rouge-defense-avocat-verges-co-procureurs-cetc-081205.html>.

<sup>26</sup> *Case of Ieng Sary*, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03), Decision on the Appeal against Detention Order of Ieng Sary; 17 October 2008, para 97-98.

<sup>27</sup> "Ieng Sary satisfied with his reconciliation role in Cambodia", Asian Political News, 25 December 2000. Civil Party Co-Lawyers' Joint Response To The Appeal Of Ieng Sary Against The Extension Of Provisional Detention

30. As different bodies<sup>28</sup> have reiterated, there is no rule of law nor an independent judiciary or investigation authority in Cambodia. If something would happen to a victim or witness it can not be expected that any investigations would be conducted properly.

**c) The risk of flight**

31. The Defence's objections in this regard show no reason to overrule the OCIJ's Order. The Charged Person's backing in Pailin, the possession of the means to fly and of course the expected life imprisonment if convicted, are reasonable grounds to consider the flight risk.

The argument that the Charged Person did not flee, although he knew about the establishment of the ECCC, does not count for a great deal. The Charged Person, who enjoys a Royal Pardon, and a Royal Amnesty and the support of the Head of Government who commented that he [Ieng Sary] will not be tried, due to his key role in initiating peace and national reconciliation.<sup>29</sup>

Under these circumstances, the Charged Person would not have expected to be detained.

**House Arrest**

32. House arrest under specified conditions is held as a form of detention, though considered less rigorous than the incarceration in a detention facility. However, house arrest must guarantee that all prerequisites of Rule 63 (3) (b) are met i.e. that house arrest fulfils a comparable function to the detention centre of the Court.
33. After the recent events that are mentioned under paragraphs 22, 24-25 house arrest cannot guarantee the safety of the charged person nor the public order that would be disturbed.
34. In the rare cases where Charged Persons were set under house arrests before other international(ized) tribunals<sup>30</sup> one of the conditions was that the Charged Person bears all costs of the security arrangements.

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<sup>28</sup> Report of the Asian Human Rights Commission, 27 February 2008 which also refers to the statement of the UN special Representative for human rights, Yash Ghai ; Joint statement of Amnesty International and Human Rights Watch 16 September 2008; 'Donor: Pressure not key to Gov't Reform', by Tim Sturrock, Cambodia Daily 6-7 December 2008.

<sup>29</sup> 'Trial of Khmer Rouge's Ieng Sary would mean war: Hun Sen', Asian Political News, 15 January 2001. Civil Party Co-Lawyers' Joint Response To The Appeal Of Ieng Sary Against The Extension Of Provisional Detention



Given the Charged Person is considered indigent, he might not be able to pay for necessary and potential security measures. For the purposes of house arrest, the assessment of his assets should be renewed.

## VI. CONCLUSION

35. The Appeal must fail. The Extension Order of the OCIJ is reasonable, justifiable and the discretion is properly exercised.

**For these reasons,**

**may it please the Pre-Trial Chamber**

To reject the Defence' Appeal

Respectfully submitted

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<sup>30</sup> see only, *Prosecutor v. Blaskic*, Decision on the Motion of the Defense Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, Case No. IT-94-14-T, para 24; Blaskic surrendered voluntarily while at the time being the Croatian authorities did not possess the legal means necessary to surrender prisoners to the ICTY.  
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Signed on 26 December 2008

Phnom Penh