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អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គបុរេជំនុំជម្រះ
PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File No. 002/19-09-07-ECCC/OCIJ (PTC03)

REPORT OF EXAMINATION

I- PROCEEDINGS

A- Introduction

Pursuant to Rule 77(10) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia ("the Internal Rules"), the President of the Pre-Trial Chamber has assigned Judges Ney Thol and Katinka Lahuis to set out the details of the decision of the Co-Investigating Judges to issue a Provisional Detention Order on 14 November 2007, which is appealed against, and the relevant facts of the Case File.

In which the Charged Person

Ieng Sary, alias Van, male, born 24 October 1925, in Loeung Va Village, Loeung Va Commune, Tra Vinh District, Tra Vinh Province, Kampuchea Krom, Cambodia, nationality Khmer, residence No. 47B, Street 21, Group 36, Zone 4, Tonle Bassac Quarter, Chamkamorn District, Phnom Penh Town, father's name Kim Riem (deceased), mother's name Tram Thi Loi (deceased).[1]

Ieng Sary is represented by Co-Lawyers Ang Udom and Michael Karnavas.[2]

[1] Detention Order, 14 November 2007, p. 1.
[2] Assignment of Ang Udom as Ieng Sary's Lawyer by DSS, 12 November 2007; Assignment of Ang Udom as Ieng Sary's Lawyer by DSS, 09 January 2008; Re: Ieng Sary: Permanent Assignment of Co-Lawyers by DSS, 07 February 2008 and Lawyers' Recognition Decision by the Co-Investigating Judges, 07 February 2008.

Ieng Sary is charged with crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949, being crimes set out and punishable under articles 5, 6, 29 (new) and 39 (new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004.[3]

- Purpose of this report

This report of the co-rapporteurs sets out the details of the decision appealed against and the facts at issue before this court. It is to assist those who are not parties to the proceedings understand the matters before the court.

B- Introductory Submission of Co-Prosecutors

On 18 July 2007, the Co-Prosecutors of the ECCC filed an Introductory Submission in which they asked the Co-Investigating Judges to open a judicial investigation against five suspects, including Ieng Sary, and asked that all five suspects be arrested and detained.[4]

The Co-Prosecutors requested that Ieng Sary be placed in provisional detention on the grounds that there are well founded reasons to believe that Ieng Sary has committed the aforementioned crimes and that such detention is necessary to prevent pressure on witnesses, ensure his presence at the trial, protect his personal safety and preserve public order.[5]

C- The decision of the Co-Investigating Judges

1) Factual situation and legal issues raised in the Decision

The Provisional Detention Order states that the Charged Person is "Charged with Crimes against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, crimes defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004. Noting today's adversarial hearing, [...]

[3] Detention Order, 14 November 2007, p. 1.
[4] Introductory Submission, 18 July 2007, para. 124.
[5] Introductory Submission, 18 July 2007, para. 118.

hereby order that **IENG Sary** be placed in provisional detention for a period not exceeding one year. Done at Phnom Penh, on 14 November 2007".[6]

The Charged Person "disputed the crimes with which he is charged, declaring: '*there are certain accusations that I cannot accept*' and demanding that proof of his guilt be provided. He added: '*I would like to know the truth about a dark period in our history. I do not know where the truth lies. I am very happy that this Court has been established because it will be an opportunity for me to discover the truth and also to share what I know*'.

He asked to be left at liberty, fearing that he would die in prison before knowing the truth, and claiming that, if he dies, the first victim will be his family, but the second will be the Court, which would thus lose an important witness and be criticised. He stated that he has no intention of interfering with the proceedings, noting that he has been at liberty for many years, informed of the possibility of being charged for a long time, and that he would have had the opportunity to intervene with the witnesses but has never done so. He observed that he is old and sick. He insisted on the total absence of any danger of flight, and declared himself ready to appear whenever summoned, adding that his age and state of health would not allow him to flee, which he could have done a long time ago if he had so wished. As regards the danger of revenge, he pointed out that, since he rallied the Government, he has never received the slightest threat, either in Pailin or Phnom Penh. On the contrary, he recalled that after being convicted by the Revolutionary Tribunal in Phnom Penh on the 19th of August 1979, he received an amnesty from the King on 14 September 1996 and that there was no trouble as a result. He stressed that it was thanks to him that the Khmer Rouge forces reintegrated the Government and argued that he had thus contributed to the re-establishment of peace. In conclusion, he requested to be left at liberty on bail".[7]

2) Conclusion of the Co-Investigating Judges

In the reasons for their decision, the Co-Investigating Judges first consider the legal issues related to the 1979 Judgment and the pardon and amnesty of 1996. With respect to the 1979 Judgment the Co-Investigating Judges observe that "[...] IENG Sary is not currently charged with genocide".[8] The Co-Investigating Judges consider that "consistent case law of the international tribunals establishes that, as regards international crimes, cumulative convinctions are possible in relation to the same act as long as each offence has a materially distinct element not contained in

[6] Provisional Detention Order, 14 November 2007.
[7] Provisional Detention Order, 14 November 2007, para. 4.
[8] Provisional Detention Order, 14 November 2007, paras. 7 and 8.

the other. [...] In application of these principles, there seems to be no impediment to the prosecution of IENG Sary for the acts covered by the 1979 Judgment under an international legal characterisation other than genocide".[9]

With respect to the scope of the 1996 pardon and amnesty, the Co-Investigating Judges consider "as regards the effects of the royal pardon, it is important to note that they are limited to annulment of the sentence, as well as its execution, without having any effect on the conviction decision as such. Accordingly, even if it were opposable against the ECCC, this measure would have no effect on the current prosecution, and the only issue is that of the conviction itself, which has been dealt with above.

The amnesty, on the other hand, makes express reference to the 1994 Law. Yet, apart from an allusion to genocidal acts in its preamble, this law only refers to a number of domestic law offences subject to prosecution in accordance with national legislation applicable at the time, as well as a series of crimes against State security. Therefore, it does not cover the offences coming within the jurisdiction of the ECCC".[10]

The Provisional Detention Order further states the reasons for the decision of the Co-Investigating Judges to issue a Detention Order. The Co-Investigating Judges considered: "In the light of the many documents and witness statements implicating IENG Sary, contained in the Introductory Submission, there are well-founded reasons to believe that he committed the crimes with which he is charged".[11]

Furthermore, the Co-Investigating Judges determined there were sufficient grounds to order a provisional detention order. These grounds were stated to be :

- To prevent the Charged Person from exerting pressure on any witnesses or victims
- To ensure the presence of the Charged Person during the proceedings
- To preserve public order
- To protect the safety of the Charged Person

Related to the issues of bail and the health condition of the Charged Person the decision states: "The particular gravity of the crimes alleged against IENG Sary renders the risk set out above even more acute, and no bail order would be rigorous enough to ensure that the

[9] Provisional Detention Order, 14 November 2007, para. 9.
[10] Provisional Detention Order, 14 November 2007, para. 12 and 13.
[11] Provisional Detention Order, 14 November 2007, para. 15.

abovementioned requirements would be sufficiently satisfied and therefore detention remains the only means to achieve these aims.

To date, none of the documents produced by the defence lead us to believe that the Charged Person's state of health is incompatible with detention".[12]

D- Appeal and Submissions filed by Ieng Sary against the Order of Provisional Detention

1) Appeal

On 12 December 2007, Ieng Sary's Co-Lawyers filed an appeal against the Order of Provisional Detention and, on 15 January 2008, they filed an Appeal Brief.[13]

On 13 March 2008, the Co-Lawyers filed an application requesting the Pre-Trial Chamber to suspend the consideration of the appeal and to order the Co-Investigating Judges to place the Charged Person in a hospital facility. The Pre-Trial Chamber decided on 30 April 2008, that it will deal with the matter within the Appeal against Provisional Detention Order.

2) Ieng Sary's submissions

The Co-Lawyers request:

- **that the conditions of provisional detention be modified to house arrest under restrictions deemed necessary by the Pre-Trial Chamber**

on the following grounds:

(a) the current detention conditions and facilities put Ieng Sary's health at significant risk given his medical conditions and therefore a more appropriate form of provisional detention would be house arrest;[14] and

(b) house arrest is a form of bail and in this case a sufficient condition ensuring against any perceived risks.[15]

[12] Provisional Detention Order, 14 November 2007, paras. 19 and 20.
[13] Record of Appeals, 12 December 2007 and Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008.
[14] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, paras. 5 and 44.

The Co-Lawyers furthermore submit that the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on facts, and moreover submit there are no grounds for provisional detention.[16]

The Co-Lawyers submitted that they would not address any issue concerning ne bis in idem and the Royal Decree pardoning and granting amnesty to the Charged Person, reserving the right to raise objections at a more appropriate time.

E- Response and submissions by the Co-Prosecutors

1) Response

The Co-Prosecutors filed their submissions in response to the Appeal Brief on 29 January 2008.[17]

2) Submissions

The Prosecution submit that Ieng Sary's request to be placed under house arrest should be rejected because:

(a) the conditions of Rule 63(3) have been met and the Co-Investigating Judges exercised their discretion appropriately in considering that provisional detention was a necessary measure; and

(b) the unsubstantiated health reasons cited in the Appeal do not justify the modification of the current conditions of detention to that of house arrest.[18]

The Co-Prosecutors submit on the jurisdictional issue that the submissions of the defence should include arguments on this issue as it is raised in the Detention Order which is the subject of the appeal.

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[15] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, section E and, in particular, para. 38.

[16] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, paras 21, 26, 33 and 36.

[17] Co-Prosecutor's Response to Ieng Sary's Appeal against Provisional Detention Order of 14 November 2007, 29 January 2008.

[18] Co-Prosecutor's Response to Ieng Sary's Appeal against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 6.

F- ***Amicus Curiae* Briefs** (*amicus curiae* being a person or organization not involved in a case, but that has made submissions to the Court to assist it)

On 05 February 2008, this Court invited persons and organizations to submit written *amicus curiae* briefs in this matter within 15 days.[19] The Court acknowledges with thanks the submission received from:

(1) Anne Heindel; and

(2) Mr. Mahdev Mohan and Mrs. Vinita Ramani Mohan.

These submissions deal with legal issues and are not otherwise referred to in this report. The co-rapporteurs indicate that these submissions will be considered by the Court, as will any responses to such made by the Co-Lawyers and the Co-Prosecutors.

G- Request and submissions filed by Ieng Sary on jurisdiction issues

1) Request

On 14 February 2008, the Pre-Trial Chamber invited the Co-Lawyers to file a reply to the submissions of the Co-Prosecutors related to the consideration of the jurisdictional issues. On 18 February 2008, the Co-Lawyers filed their reply stating that they are still of the view that the jurisdictional issues should be dealt with seperately, and requesting the Pre-Trial Chamber to find that the Charged Person has not waived any challenge to jurisdiction and is free to file any jurisdictional challenge before the Co-Investigating Judges. Further, they requested an extension of time to address the jurisdictional issues. The Pre-Trial Chamber, on 03 March 2008, reading the request as a request to set a time limit to file submissions on the jurisdictional issues, granted the last request without deciding on the first issue raised by the Co-Lawyers.

2) Submissions

On 07 April 2008 the Co-Lawyers filed their submissions on the jurisdictional issues in English. The Co-Lawyers submit that:

[19] Public Notice, 05 February 2008.

(a) the 1979 trial of Mr. IENG Sary prevents the ECCC from investigating and prosecuting Mr. IENG Sary for any crimes contained within the Introductory Submission under the principle of *ne bis in idem*; and

(b) the Royal Amnesty and Pardon granted to Mr. IENG Sary on 14 September 1996 is lawful, valid and enforceable and deprives the ECCC of personal jurisdiction over Mr. IENG Sary.

H- Directions and submissions filed by the Co-Prosecutors

1) Directions

On 03 March 2008, the Pre-Trial Chamber granted the Co-Lawyers' request to file submissions on the jurisdictional issues. In their decision the Pre-Trial Chamber directed the Co-Prosecutors to file a response, if any, within 15 days of notification of the Co-Lawyers' submissions in English and Khmer. On 07 April 2008 the Co-Lawyers filed their submission in English. On 30 April 2008 the Khmer translation was notified to the parties.

2) Submissions

On 16 May 2008 the Co-Prosecutors filed their Response to Ieng Sary's Submission on Jurisdiction. The Co-Prosecutors submit:

(a) the principle of double jeopardy is not applicable in this case because the People's Revolutionary Tribunal did not conform to international fair trial standards;
(b) cumulative convictions for different offences arising out of the same conduct is not prohibited under international law where any unfairness can be taken into account at sentencing;
(c) the Outlawing Law does not relate to the offences alleged in the Introductory Submission and, therefore, the amnesty is not applicable before this Court; and
(d) the scope of the pardon is limited to the non-execution of the sentence of death and confiscation of property and does not preclude the Charged Person's future investigation and prosecution.

I- Directions and submissions filed by the Lawyers for the Civil Parties

1) Directions

On 30 April 2008, the Pre-Trial Chamber directed the Lawyers for the Civil Parties to file a single response, if any, not exceeding 15 pages in English or 30 in Khmer, within 15 days. A joint submission was not to exceed 45 pages in English or 90 pages in Khmer.

2) Submissions

On 20 May 2008 the Lawyers for the Civil Parties filed their Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order. The Lawyers for the Civil Parties submit:

(a) the principle of *ne bis in idem* does not apply because the proceedings were not conducted (a) independently, (b) impartially and (c) in accordance with international standards;
(b) the pardon violates international standards and is therefore likewise unlawful and non-binding before the ECCC; and
(c) the discretion of the OCIJ has been properly exercised and shows no unreasonable and unsustainable grounds.

- Further comment

All public submissions made by the parties and the *amici curiae*, are set out on the website of the ECCC.

II) EXAMINATION

A- Legal issues

1) Jurisdictional issue part of the Appeal against Provisional Detention Order

The Co-Lawyers submit in their Appeal Brief that "Mr. IENG Sary will not address – as part of his appeal of the Detention Order – any issues concerning *ne bis in idem* and the Royal Decree pardoning and granting amnesty to Mr. IENG Sary, thus reserving the right to raise any and all objections to the OCIJ legal analysis and findings on these matters at a more appropriate time. Mr. IENG Sary's decision not to specifically address the issues *ne bis in idem* and the Royal Decree pardoning and granting amnesty should not be viewed as a waiver".[20]

In their Response, the Co-Prosecutors submit that "The Internal Rules provide for no such waiver. Internal Rule 75(1) provides for a thirty-day period for appeal against an order of the CIJs. Consequently, any failure to file an appeal or a failure to address certain issues in an appealed decision should be deemed to be a waiver.

[…] While the CIJs did not give a formal notice to the parties that such issues shall be addressed during the Adversarial Hearing, IENG Sary cannot, as a result, claim that he can selectively choose what parts of the Detention Order he prefers to appeal now, and what parts he shall choose to address later. An order having been passed, IENG Sary and his counsel had thirty days to appeal it. Consequently, if he is aggrieved by any part of the Detention Order, then he must address it now or waive his right to do so.

By their very nature and constitution, judicial bodies of the ECCC and their proceedings are inquisitorial and, hence, are not party-driven. While parties can raise issues and trigger judicial decisions, the judicial bodies have the autonomy to deal with any issue relevant to the Case File at any appropriate time.

[…]

The issues being jurisdictional, any tribunal should adjudicate them at the earliest available opportunity. They have the potential to nullify judicial investigation and prosecution. It would be an improper use of this tribunal's limited time and resources to proceed with the judicial investigation against a defendant if an issue, that could have been adjudicated earlier, could later halt it. The

[20] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 6.

Internal Rules clearly contemplate that jurisdictional challenges would be adjudicated at the pre-trial stage and grant the PTC the competence to hear appeals against decisions confirming the jurisdiction of the ECCC. Accordingly, the PTC ought to decide these issues in this Appeal, it is requested that the parties be granted opportunity to file written submissions on these issues prior to an oral hearing".[21]

On 18 February 2008, on invitation of the Pre-Trial Chamber[22], the Co-Lawyers replied to this response on jurisdictional issues, submitting that "these issues were addressed prematurely by the Office of the Co-Investigating Judges ('OCIJ'), as they fell outside the scope of the provisional detention order of 14 November 2007. As such, any ruling by the OCIJ on them was: 1) *ultra vires*; 2) not required by the OCIJ to issue its decision on the matter at issue (i.e. provisional detention); and, as such, 3) could not, and should not, be considered by the Pre-Trial Chamber to have been waived when not addressed by the Defence in its appeal on provisional detention".[23]

The Co-Lawyers submit in this regard that "[t]he criteria for deciding the issue of provisional detention are clearly set out in Internal Rule 63(3) [...].

[...] In no part of this rule does it state that the OCIJ shall also rule on the ultimate issue of personal jurisdiction over the Charged Person [...].

Moreover, even if the rulings on *ne bis in idem* and the 1996 Royal Decree pardoning and granting amnesty to Mr. IENG Sary were not to be considered *ultra vires*, they would not constitute appealable issues. In the context of discretionary rather than automatic appeals, the established jurisprudence of the ICC is instructive in this case. In order for leave to appeal to be granted, the party seeking to appeal must identify an issue involved in the decision which can be appealed: 'an issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination'.

Simply, a part of a decision will only be appealable if that issue had to be resolved by the Judge or Chamber in order to make a final decision on the matter at issue. In this case, the matter at issue was the provisional detention of Mr. IENG Sary under Rule 63. The questions concerning *ne bis in idem* and the 1996 Royal Decree pardoning and granting amnesty to Mr. IENG Sary did not need to be resolved to make this decision. As such, the decision did not engender appealable issues,

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[21] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, paras. 14, 15, 16 and 18.

[22] Invitation to reply to the Co-Prosecutors' response on the issues of *ne bis in idem*, pardon and amnesty, 14 February 2008.

[23] Expedited request for a reasonable extension of time to file challenges to jurisdictional issues & reply per the invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors' response to the defence appeal on provisional detention, 18 February 2008, para. 2.

and thus could not have been appealed by the Defence. For the OCP to assert that the Defence's failure to appeal amounts to the waiver of the right to appeal is simply untenable and without merit".[24]

The Co-Lawyers furthermore submit that "[p]rior to the adversarial hearing, no advance notice was provided to Counsel for Mr. IENG Sary, and subsequent to the adversarial hearing, the Co-Lawyers for Mr. IENG Sary were not invited to brief these issues prior to the issuance of the Detention Order. By deciding issues on which the Defence was not able to make submissions, the OCIJ clearly violated Mr. IENG Sary's right to be heard, and circumvented his undisputed right to challenge jurisdiction.

[...]

The only *fair* and *just* way to compensate Mr. IENG Sary for the infringement of his fundamental fair-trial (human) right to be heard on these issues, is for the Pre-Trial Chamber to hold that the sections of the provisional detention order dealing with the issues of *ne bis in idem* and the 1996 Royal Pardon and granting of amnesty to Mr. IENG Sary be disregarded and retroactively expunged from the judicial record by the Pre-Trial Chamber for the purposes of this appeal. Only this would sufficiently protect Mr. IENG Sary's right to make submissions on these issues at a suitable time".[25]

The Co-Lawyers submit with regard to the asserted waiver that "a challenge to jurisdiction, due to the fundamental importance of the question at issue, and due to the effect that a finding of a lack of jurisdiction would have on the trial, cannot simply be deemed waived *willy-nilly*, particularly when notice has been provided to the relevant judicial authorities (the Pre-Trial Chamber) that the issue is not being waived and will be addressed in due course".[26]

The Co-Lawyers finally submit that "[t]he OCP submits in its Response that, since the issues of *ne bis in idem* and the 1996 Royal Decree pardoning and granting of amnesty to Mr. IENG Sary are jurisdictional, they should be adjudicated 'at the earliest available opportunity'. [...] The Defence does not object to these statement of principle but submits that such statements do not lend

[24] Expedited request for a reasonable extension of time to file challenges to jurisdictional issues & reply per the invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors' response to the defence appeal on provisional detention, 18 February 2008, paras. 6-9.

[25] Expedited request for a reasonable extension of time to file challenges to jurisdictional issues & reply per the invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors' response to the defence appeal on provisional detention, 18 February 2008, paras. 10 and 13.

[26] Expedited request for a reasonable extension of time to file challenges to jurisdictional issues & reply per the invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors' response to the defence appeal on provisional detention, 18 February 2008, para. 14.

any support to the OCP's conclusion, that, as a consequence, they should be addressed in this appeal.

The phrase 'at the earliest opportunity' must be assessed against the complexity of the issues at stake and the other issues faced by the parties at the time. It is noted that, in contrast to certain International Tribunals, where specific time limits for filing challenges to jurisdiction have been established by their respective rules of procedure, no such time limit has been established at the ECCC.

[…] The Defence does intend to file a brief on the issues at the earliest opportunity. However, the Defence respectfully submits that it does not deem it to be in the interests of Mr. IENG Sary to hastily file an ill-considered and manifestly substandard brief that effectively denies Mr. IENG Sary his fundamental right of effective assistance of counsel".[27]

2) *Ne bis in idem*

The Co-Lawyers submit in their submissions on jurisdictional issues that "the ECCC does not have jurisdiction to try Mr. IENG Sary for the crimes set out in the Introductory Submission".[28]

With regard to the principle of *ne bis in idem* the Co-Lawyers submit that "the OCIJ erred in its determination that the principle […] does not apply".[29] "*Ne bis in idem* is a fundamental principle of human rights law and has been recognized by a multitude of international instruments as well as by Cambodian criminal procedure. The agreement establishing the ECCC also clearly sets out that 'no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country' […] The Defence submits that the right not to be tried again for the same offence is protected without exception under Cambodian law. To the extent that the exceptions outlined by the OCIJ do exist and apply before the ECCC, the Defence submits that they are not applicable in the present case […] The first exception […] allows re-prosecution only when the prior proceedings were conducted 'for the purpose of shielding the person concerned from responsibility'. Since the 1979 trial resulted in Mr. IENG Sary being sentenced to death, and all his property being ordered confiscated, the Defence submits that the 1979 trial was obviously not meant to shield Mr. IENG Sary from criminal responsibility. For this reason, the first exception does not apply. The second

[27] Expedited request for a reasonable extension of time to file challenges to jurisdictional issues & reply per the invitation of the Pre-Trial Chamber to the Office of the Co-Prosecutors' response to the defence appeal on provisional detention, 18 February 2008, paras. 15-17.
[28] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, para. 3.
[29] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, para. 9.

exception [...] applies where the prior proceedings '[o]therwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice'. The 1979 trial was obviously not intended to help Mr. IENG Sary escape culpability, since he was sentenced to death and all his property was ordered to be confiscated. For this reason, the second exception does not apply".[30]

The Co-Lawyers furthermore submit that the principle of *ne bis in idem* "does not apply only when an accused is charged with the same crime for which he was previously tried. Rather, it applies as a bar to prosecution when he has previously been tried for the same conduct. This can be clearly seen in the Cambodian CPC, which states that '[i]n applying the principle of *res judicata*, any person who has been finally acquitted by a court order cannot be accused once again for the same causes of action, including the case where such action is subject to different legal qualification.' This is equally evident in the statutes of the ICC, ICTY and ICTR".[31] In addition the Co-Lawyers submit that "the concept of cumulative convictions is not applicable here, because cumulative convictions have only been used by the international tribunals where the accused was charged cumulatively in the same trial. In the present case, the trials are separated by almost 30 years. Even if the concept of cumulative convictions were to apply here, the OCIJ should have considered the criteria for allowing cumulative convictions in greater detail [...]".[32] [C]rimes against humanity and war crimes do not require proof of any element that is not required for genocide. Conversely, genocide does require proof of a specific intent not found in the other offences. Thus, only the conviction under the more specific provision, genocide, can be entered when taking into account the principle of cumulative convictions. [...] It logically follows, therefore, that Mr. IENG Sary's initial conviction for genocide in 1979 prevents him from being subsequently prosecuted for crimes against humanity and war crimes on the same factual basis".[33]

The Co-Lawyers finally submit in this respect that "in its discussion of *ne bis in idem*, the OCIJ finally held that 'it already appears to be established that the 1979 Judgement did not cover all the acts for which IENG Sary is currently being charged'. However, by the OCIJ's own admission, no in-depth analysis was conducted of the 1979 trial when the original detention order was made

[30] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, paras. 11, 13, 14 and 15.
[31] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, para. 16.
[32] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, paras. 17 and 18.
[33] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, paras. 20 and 21.

[...]. The factual basis of the 1979 indictment covers all the alleged crimes in the Introductory Submission".[34]

The Co-Prosecutors submit that "[a]rticle 14 of the International Covenant of Civil and Political Rights ("ICCPR"), applicable before this Court, prohibits double jeopardy. [...] This principle, however, is subject to exceptions. [...] Reflecting a crystallisation of international law, the statutes of international tribunals provide that double jeopardy does not apply when an international tribunal conducts a second prosecution after the first national prosecution was not conducted independently or impartially in accordance with internationally recognised due process norms or was conducted in a manner inconsistent with the intent to bring accused to justice".[35]

The Co-Prosecutors submit that "[t]he PRT did not meet international fair trial safeguards. First, the Decree Law, that created the PRT, was not promulgated by a legislature. [...] Second, the PRT was established in haste and seemingly with the sole purpose of denouncing the 'POL Pot – IENG Sary clique' in the immediate aftermath of the ouster of the Khmer Rouge from power. Third, the PRT presumed the accused guilty (not innocent) before judgment. [...] Fourth, the PRT did not try the accused in their presence. [...] Fifth, the PRT conviction was not *final* as the Decree Law did not grant a right of appeal to the accused".[36]

The Co-Prosecutors further submit that "[a] defendant's second prosecution for different crimes based on the same criminal act does not violate the principle of double jeopardy so long as any unfairness emanating from dual convictions is accounted for in sentencing. International tribunals permit multiple convictions for the same act (or omission) where it clearly violates multiple distinct provisions of a charging statute, i.e. where each provision contains a distinct element that requires a materially distinct proof of fact. [...] This principle serves twin aims; it ensures that the defendant is convicted only for distinct offences and ensures that the convictions fully reflect his criminality".[37]

The Co-Prosecutors submit that "[t]he subjective and objective elements of genocide and crimes against humanity differ in material aspects. As for the subjective elements, the crimes against humanity have a broader scope, for they may encompass acts that do not come within the purview of genoicde [...]. As for the objective elements, the crimes against humanity require the intent to commit the underlying offence in addition to the knowledge of a widespread or systematic practice constituting the general context of the offence. For genocide, what is required is the special

[34] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, paras. 24 and 25.
[35] Prosecution's Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, paras. 7 and 8.
[36] Prosecutors' Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, paras. 13 – 16.
[37] Prosecutors' Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, paras. 10 and 12.

intent to destroy in whole, or in part, a particular group in addition to the intent to commit the underlying offence".[38]

The Lawyers for the Civil Parties submit that "[f]or the interpretation of the principle *ne bis in idem* and its internationally recognised exceptions, the Statutes of International Tribunals should be taken into consideration".[39]

"With regard to Article 20(3)(a) and (b) of the ICC Statute the provisions for an exception are as follows: if the other Court shielded the person concerned or – if the trial was not conducted independently or – impartially in accordance with the norms of due process recognized by international law and – [was] conducted in a manner which was inconsistent [with an intent] to bring the person concerned to justice. [...] Thus, the 1979 Trial must be examined in-depth, to determine whether the former conviction of the Charged Person is an impediment to the current prosecution or not".[40]

The Lawyers for the Civil Parties furthermore submit that "[t]he numerous serious violations of the rights of the accused person leads us to the conclusion that the former trial can not endure. The fundamental principles of being tried by an impartial and independent court were violated. [...] The Charged Person can not effectively refer to the former 1979 conviction and rely on the *ne bis in idem* principle".[41]

3) The Royal Pardon and Amnesty

The Co-Lawyers submit that, contrary to the conclusions of the Co-Investigating Judges, "the 1994 Law [...] does cover the crimes 'coming within the jurisdiction of the ECCC'. The ECCC has jurisdiction over the crimes of homicide, torture, religious persecution, genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property, and crimes against internationally protected persons. The preamble to the 1994 Law does not merely 'allude to genocidal acts', but specifically states that the Law was enacted '[r]ealizing that the leadership of the 'Democratic Kampuchea' group can not ... conceal and escape from their responsibility of committing criminal, terrorist and genocidal acts since the time that the Pol Pot regime took power in 1975-78. The crime of genocide has no statute of limitations. The preamble

[38] Prosecutors' Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, paras. 19 and 20.
[39] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 17.
[40] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, paras. 22 and 23.
[41] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 28.

also explains that the Khmer Rouge have continually committed 'criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in April 1975 [...]'. The crimes referred to in this Law are far wider, therefore, than the OCIJ highlights. Articles 3 and 4 of the 1994 Law further describe the crimes this Law is intended to cover, including: murder, rape, robbery, destruction of property, and the taking up of arms against the public authority. This list is clearly not exhaustive, as Article 3 ends its list of crimes with the term, 'etc'. Because the list of crimes is not exhaustive, the purpose and scope of the Law, as discussed in the preamble, should be taken into consideration. There is also clear support from the application of the 1994 Law to the prosecution of other Khmer Rouge members for crimes of murder that it was fully intended to cover the same crimes as those coming within the jurisdiction of the ECCC, namely those committed during the period from 17 April 1975 to 6 January 1979. [...] The Defence submits that the 1994 Law was intended to be the *lex specialis* for the prosecution of crimes committed by the Khmer Rouge – the sole basis for prosecution of Khmer Rouge members. [...] Mr. IENG Sary's amnesty specifically grants immunity from prosecution for the crimes covered by the 1994 Law, and these crimes are clearly the same crimes over which the ECCC now has jurisdiction. Therefore, it deprives the ECCC of jurisdiction over Mr. IENG Sary in relation to these crimes".[42]

The Co-Prosecutors submit that "[t]he amnesty from future prosecution under the Outlawing Law given to this Charged Person is inapplicable before this Court. The Outlawing Law prospectively criminalizes membership of the Khmer Rouge from six months after its enactment. It refers to those 'who commit' (not those who *have committed*) resistance activities against the State. On the other hand, the ECCC Law grants temporal jurisdiction to this Court strictly for the crimes committed between 17 April 1975 and 6 January 1979. Therefore, the crimes chargeable under the Outlawing Law are beyond the temporal jurisdiction of this Court".[43]

The Co-Prosecutors furthermore submit that "[c]ontrary to his assertion, this Charged Person did not receive a pardon for any punishment for the crime of genocide. The language of the pardon is narrow and specific. It is limited in scope to spare this Charged Person only of 'the sentence of death and confiscation of all his property'. It does not refer to any conduct or crime for which he was pardoned and, consequently, does not grant him a pardon 'for the crime of genocide'. Nor did this Charged Person receive a pardon for any other offences that may have been committed

[42] Ieng Sary's submissions pursuant to the Decision on expedited request of Co-Lawyers for a reasonable extension of time to file challenges to jurisdictional issues, 07 April 2008, paras. 26 to 35.
[43] Prosecution's Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, para. 33.

from 1975 to 1979. The pardon is, therefore, no bar to his prosecution for any crimes within the jurisdiction of this Court".[44]

The Co-Prosecutors submit that "[...] genocide is a *jus cogens* crime. Any pardon of this serious international crime is impermissable. Thus, the royal pardon for this Charged Person's conviction of 1979 is invalid".[45]

The Co-Prosecutors finally submit that "[a]s a special internationalised tribunal, bound by international law, a domestic pardon (even if validly granted) shall not apply in respect of the prosecution of an international *jus cogens* crime before this Court. [...] Therefore, consistent with the SCSL decision in *Kallon*, which found that a national amnesty for an international crime could not bar prosecution of those crimes before an international tribunal, any domestic pardon for the *jus cogens* crime of genocide is not applicable before this Court".[46]

The Lawyers for the Civil Parties submit that "[p]ursuant to Article 27 of the Constitution, the King has no power to declare 'an amnesty' for a potential future prosecution without a preceding conviction. [...] Thus, the King exceeded his constitutional power by granting the 'amnesty' for prosecution under the Outlawing Law to the Charged Person. An 'amnesty' which is not legal, is not binding for the ECCC and no impediment for the prosecution".[47] The Lawyers for the Civil Parties further submit that "[a]ssuming that the granted [Royal Amnesty ("RA")] was covered by the constitutional power of the King, an acceptance of the RA had the meaning of impunity. Since the establishment of International Ad Hoc Tribunals and the ICC, and the broad successful movements, particularly in Latin-America against impunity of Heads of State and the most responsible, a general bar to prosecution for the most serious crimes is no longer accepted by the international community".[48] "These examples show that even if the RA should be interpreted to be within the constitutional authority of the King, it is not in accordance with international standards and is consequently a non-binding instrument before the ECCC".[49]

With regard to the pardon, the Lawyers for the Civil Parties submit that "[t]he RP has no futher meaning if the 1979 decision does not comply with the standards of impartiality and independence of the 'People's Revolutionary Court' and thus, can not hinder the actual

[44] Prosecution's Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, para. 35.
[45] Prosecution's Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, para. 38.
[46] Prosecution's Response to Ieng Sary's Submission on Jurisdiction, 16 May 2008, para. 39 and 40.
[47] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, paras. 32 and 33.
[48] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 35.
[49] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 41.

prosecution".[50]

4) Considering provisional detention a necessary measure

The provisional detention in the present case is governed by Rule 63 of the Internal Rules. Rule 63(3) states the grounds on which the Co-Investigating Judges *may* order provisional detention.

Rule 63(3) requires the existence of *both:*

a. Well founded reason to believe the Charged Person may have committed the crime or crimes specified in the Introductory Submission
b. The consideration of a ground making Provisional Detention a necessary measure

In the present case, the parties disagree on the factual basis necessary for considering the presence of grounds making provisional detention a necessary measure.

The Co-Lawyers submit that "the Co-Investigating Judges abused their discretion by basing their decision on abstract perceptions and general assertions, rather than relying on the facts. In doing so, they made factual errors and breached international standards of justice".[51]

The Co-Prosecutors submit that "this submission does not accurately portray the practice and procedure of this tribunal, especially, its judicial decision-making. While the CIJs are obliged to issue a reasoned order on provisional detention after an adversarial hearing, they are not obliged to point to every available piece of evidence in support of their conclusion. Indeed, the test is whether such evidence was available on the Case File. In IENG Sary's case, clearly there was an abundance of material to satisfy that test".[52] There is no specific guidance in the Internal Rules or the Cambodian Code of Criminal Procedure on the burden of proof in detention hearings.

[50] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 29 May 2008, para. 42.
[51] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, paras. 21, 26, 31 and 36.
[52] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 12.

The Lawyers for the Civil Parties submit that "the Pre-Trial Chamber may only overturn the OCIJ decision if the Judges erred and abused their discretion and – summarized – if the decision is 'logically perverse or evidentially unsustainable'".[53]

Furthermore, with regard to the grounds, the parties disagree specifically on the test relating to Rule 63(b)(v); the ground of "preserving public order".

The Co-Lawyers submit that "according to international standards, the public order justification can only be used where facts show that releasing the suspect would *actually* disturb public order and where detention is the only means of addressing an actual disturbance".[54]

The Co-Prosecutors submit that "the ECHR case cited [...] does not apply such an overly rigid standard. It, in fact, considers that disturbance to public order can mean "disturbance of public opinion". In any event, as stated above, the jurisprudence of the ECHR cannot be strictly applied in cases before this tribunal as ordinary criminal cases before the ECHR are not comparable in scope to cases of war crimes, crimes against humanity, and genocide before this tribunal. [...] The appropriate standard that should guide this tribunal in assessing public order concerns is to weigh the impact that IENG Sary's release may have on public order of Cambodia. Contrary to what is argued in the Appeal, there is clear international jurisprudence linking public disorder and provisional detention".[55]

5) House arrest as an alternative to provisional detention

The Co-Lawyers submit that, "while maintaining that there are no reasons why he should not be provisionally released, Mr. IENG Sary respectfully asserts that given his health condition a more appropriate form of provisional detention would be house arrest".[56]

The Co-Prosecutors submit that "basic documents of this tribunal and the Cambodian Criminal Procedure Code do not address this issue of house arrest. The ICTY, however, in *Blaskic*

[53] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 45.
[54] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 11.
[55] Co-Prosecutors' Response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, paras. 56 and 57.
[56] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 44.

ruled that the use of house arrest as an alternative to provisional detention depended on weighing of factors like:

i. there must be no evidence that the defendant will escape;
ii. there must be no likelihood that the defendant will tamper with evidence or witnesses;
iii. there must be no likelihood of continued criminality; and
iv. there must be no threat to peace and security.

According to *Blaskic*, courts may consider house arrest:

i. if the defendant is old or is seriously ill;
ii. if detention would risk his life; or
iii. as a reward for good behaviour".[57]

[57] Co-Prosecutors' Response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, paras. 69 and 70.

B- Facts at issue

1) The legal requirements for provisional detention

A ground making Provisional Detention a necessary measure (Internal Rule 63(3)(b))

i. The first ground: to 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 (Internal Rule 63(3)(b)(i))

The Co-Lawyers submit that "[...] it bears recalling that in the over ten years since his demobilization with the RGC, Mr. IENG Sary has not once insulted, threatened or attacked any potential witness, even though he knew (as did everyone else in Cambodia) that the national and international communities were engaged in setting up a Tribunal with the aim of prosecuting, at a minimum, alleged high ranking Khmer Rouge leaders".[58]

The Co-Prosecutors submit that "the Case File supports the CIJs' determination. The senior positions occupied by IENG Sary during Democratic Kampuchea, during the subsequent *Khmer Rouge* movement in exile and in other more recent political movements demonstrate that he has been a powerful and influential man in Cambodia for most of his adult life. To this day, he reportedly continues to enjoy popular support in Pailin, a traditional "Khmer Rouge stronghold", and in Phnom Penh and elsewhere. His son, Ieng Vuth, is the deputy governor of Pailin and his former bodyguard, I Chhean, the governor of that municipality. Ieng Vuth's press statements demonstrate his family's hostility towards the ideas of justice for the victims of the Khmer Rouge and the trials of its senior leaders like his father".[59]

The Co-Prosecutor furthermore submit that "based on concerns of revenge and intimidation, potential witnesses have considerable fears of testifying before this tribunal. CIJs investigators have encountered difficulties in their evidence gathering missions".[60]

[58] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 30.
[59] Co-Prosecutors Response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 31.
[60] Co-Prosecutors Response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 32.

The Lawyers for the Civil Parties submit that "[s]ince 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 thirds to prevent them from testifying. Furthermore, as the PTC has outlined, a climate of fear to testify dominates. The powerful influence and authority of the Charged Person was and is to this day, still in existence. 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 show his authority".[61]

ii. The second ground: to preserve evidence or prevent the destruction of any evidence (Internal Rule 63(3)(b)(ii))

The Co-Lawyers do not make any submissions relating to this ground.

The Co-Prosecutors submit that "in *Duch* the PTC recognized that the statements made by the witnesses of crimes of which a defendant is charged are "evidence" within the meaning of Internal Rule 63(3)(b)(ii). Thus, interference with the witnesses – as argued above – could also deprive the judicial process of relevant evidence".[62]

iii. The third ground: to ensure the presence of the Charged Person during the proceedings (Internal Rule 63(3)(b)(iii))

The Co-Lawyers submit that "[…] it was widely known throughout Cambodia that the national and international communities were engaged in setting up a tribunal with the aim of prosecuting, at a minimum, alleged high ranking Khmer Rouge leaders. It was also widely known that Ta Mok as well as KAING Guek Eav (aka "DUCH"), were in detention for years while awaiting the establishment of the ECCC. Unquestionably, these facts were known to Mr. IENG Sary. Against this backdrop, if the Co-Investigating Judges' reasoning is to have any credible weight, then it can be assumed that some demonstrative evidence must exist, however tenuous, showing that Mr. IENG Sary availed himself of his presumed wealth, foreign friends, and passport in order to leave Cambodia and/or secrete himself – particularly after the much publicized

[61] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 47.
[62] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 35.

establishment of the ECCC. No evidence was proffered by the OCP just as no evidence was relied upon by the Co-Investigating Judges, since no such evidence exists".[63]

The Co-Prosecutors submit that "IENG Sary [...] has enough means to organize his flight and to stay in another country, anywhere in the world. He has friends abroad who have assisted him in the past to travel overseas and are capable of doing so in the future. As Minister of Foreign Affairs of Democratic Kampuchea, he had regular contact with Chinese officials and, after its collapse, continued to have such ties. This may have been the reason for the Chinese service passport purportedly issued to him on 27 January 1979 by the Chinese Ministry of Foreign Affairs. The passport carries his photograph and is issued in the name of 'SU Hao', which the Co-Prosecutors understand, is one of his revolutionary names. With a view clearly to hide his identity, IENG Sary provided his place of birth as Peking. This is not the first time he has falsified his place of birth. In his Initial Appearance, he informed the CIJs that he did so on earlier occasions too in respect of his date and place of birth".[64]

The Co-Prosecutors further submit that "IENG Sary has made deliberately equivocal public statements concerning his participation in any judicial proceeding [...]. Moreover, now that he has been arrested and no longer has the protection of his pardon, the 'fact that he will be tried publicly before his former victims for the crimes he is charged with, could provide an additional incentive for him to abscond'".[65]

The Lawyers for the Civil Parties submit that "[t]he Charged Person's backing in Pailin, the possession of the means to flee 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 the government who commented that he [Ieng Sary] will not be tried, due to his key role in initiating peace and national reconciliation. Under these circumstances, the Charged Person would not have expected to be detained".[66]

[63] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 35.
[64] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 39.
[65] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 40.
[66] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 47.

iv. The fourth ground: to protect the security of the Charged Person (Internal Rule 63(3)(b)(iv))

The Co-Lawyers submit that "Mr. IENG Sarys's security is not a valid reason to keep him in detention, particularly when [...] the present detention conditions are highly detrimental (if not fatal) to Mr. IENG Sary's fragile state of health".[67]

The Co-Lawyers furthermore submit that "Mr. IENG Sary has been living freely and openly in central Phnom Penh for nearly a decade. Throughout this period, it was common knowledge that Mr. IENG Sary was associated with and part of the former senior leadership of the Khmer Rouge and that he lived in Phnom Penh. The location of his house was well known. No security guards – armed or unarmed – were employed to watch over his residence, to protect his person or to protect his family members living with him. Mr. IENG Sary lived a very normal life in a non-bunkered house free from barbed wire and electric fences. Inded, Mr. IENG Sary has not been insulted, threatened or attacked over the past ten years while demobilizing with the RGC'.[68]

The Co-Lawyers point out that "the Co-Investigating Judges noted, again without providing any factual or evidential basis in support of its claims, that "the situation is clearly no longer perceived in the same way since the official prosecution has commenced". This seems unlikely. Commentators and the media have long accused Mr. IENG Sary of being involved in the crimes allegedly committed during Democratic Kampuchea. Both regular Cambodians and international scholars appear to presume that he is guilty. Indeed, it would not be hyperbole to note that in the court of public opinion, fueled over the years by statements, press releases, and academic literature from various Cambodian "experts" (including those who presently work at the OCP and OCIJ), it is forgone conclusion that all high ranking members of the Khmer Rouge are guilty. Thus, to suggest that the situation is perceived differently just because the official prosecution has commenced, runs contrary to reality and common sense".[69]

The Co-Prosecutors submit that "the increased risks of "attacks of revenge" is evidenced from the fact that victims at this tribunal's first public hearings on 20-21 November 2007 reportedly had difficulty refraining from spontaneous acts of violence on seeing the chief of the notorious S-21 detention centre at such close range. Given IENG Sary's pivotal position and role in the

[67] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 23.
[68] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 24.
[69] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 25.

commission of crimes during Democratic Kampuchea, it is likely that there may be violent acts directed at him if he is released or is placed under house arrest amongst the general population".[70]

The Co-Prosecutors further submit that "[...] IENG Sary, on numerous occasions, has implicated the other senior leaders of that regime, including those who are or may likely be charged before this tribunal. This too clearly raises the risk to his life from those who may not wish to see a succesful prosecution of the mandate of this tribunal".[71]

The Lawyers for the Civil Parties submit that "[t]he PTC accurately noted in the Nuon Chea Appeal Decision the wide interest in the court hearings, the aggressive reaction against Duch by the public and what it would mean to Cambodian society if he (or the other Charged Persons) were to be released".[72]

v. *The fifth ground: to preserve public order* (Internal Rule 63(3)(b)(v))

The Co-Lawyers submit that "there is no credible evidence to suggest that releasing Mr. IENG Sary pending trial would *actually* disturb public order".[73] The Co-Lawyers point out that "it is worth recalling the absence of *protests of indignation leading to violence* in what must have been the much more fragile context of yesterday's Cambodian society when Mr. IENG Sary returned to Cambodia after the much publicized 1996 Royal Decree pardoning and granting amnesty to him".[74]

The Co-Lawyers furthermore submit that "there is no evidence to support any assertion that Cambodian society is fragile and liable to erupt in violent protest. The anti-Thai riots of 2003 cited as evidence by the Office of the Co-Prosecutors ("OCP") that Cambodia is a volatile society is unpersuasive. Isolated examples of public disturbances do not necessarily make a society 'fragile' or volatile".[75]

The Co-Lawyers submit that "it remains a mystery how the Co-Investigating Judges determined that the alleged crimes "still profoundly disrupt public order". [...] It is respectfully submitted that the picture of Cambodian society is very different than the one painted by the OCP and the Co-Investigating Judges. Government sources as well as independent international agencies recognize that Cambodia is now a country of peace and stability. [...] To suggest that Cambodian

[70] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 46.
[71] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 48.
[72] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 46.
[73] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 7.
[74] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 10.
[75] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 12.

society is so fragile that it would explode into violence if a court were to grant provisional release to a person presumed innocent underestimates both the maturity of Cambodian society and the succes of the RGC in bringing peace and stability".[76]

The Co-Prosecutors submit that "the proceedings may pose real risks to Cambodian society, through a resurfacing of anxieties and the attendant negative social consequences".[77]

The Co-Prosecutors further submit that "the present state of Cambodian society [...] is not comparable to that of 1996. [...] The release of IENG Sary and its impact on public order can hence not be assessed solely by relying on past events".[78]

The Co-Prosecutors point out that "IENG Sary relies upon a speech by the Prime Minister of Cambodia and a few other reports to contend that Cambodia is a country of "peace and stability" and hence implying that detention on grounds of public order should not be sustained. [...] he has not filed these documents. If these documents are indeed the ones that the Co-Prosecutors believe he is referring to, then it is clear that he quotes them selectively and out of context. The speech and the reports deal almost exclusively with economic issues and must be seen in that light".[79] "While Cambodia has experienced economic progress in the recent past, the security situation in the country remains critical, with a weak law enforcement capacity".[80]

The Lawyers for the Civil Parties submit that "[t]he daily experience, e.g. before the upcoming elections in July, shows a tense atmosphere in society. [...] It can be concluded and should be common knowledge that Cambodian society is still fragile".[81]

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[76] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 15, 16 and 20.
[77] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 50.
[78] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 51.
[79] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 52.
[80] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 54.
[81] Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 46.

2) The modification of the current conditions of detention to that of house arrest

The Co-Lawyers submit that "even in societies that are unquestionably fragile, International Courts have granted provisional release to people charged with violations of humanitarian law".[82]

The Co-Lawyers submit further that "if indeed the test for pre-trial provisional release is that the accused are free of any real or perceived power and influence, then how is it that at the ICTY numerous highly influential and potentially powerful accused have been provisionally released not only during the pre-trial stage but also during winter and summer recess periods while in trial. This can readily be seen by the examples set out in Annex A".[83]

The Co-Lawyers point out that "where the risk of flight is the only legitimate ground for provisional detention, release pending trial *should* be ordered if it is possible to obtain a guarantee from the charged person that he will appear for trial. Such guarantee, it is respectfully submitted, is bolstered and should be accepted, when supported by further guarantees provided by legitimate authorized authorities, such as the local police, with, as in this case, the approval of the RGC".[84]

The Co-Lawyers submit that "House arrest is also viewed as a from of bail. [...] it bears revisiting this alternative form of detention, which, as is widely known, proved most succesful in the *Biljana Plavsic* case at the ICTY. [...] To suggest that the RGC is incapable of providing security to Mr. IENG Sary or periodically transporting him safely to the Chambers during the investigative/pre-trial stage of the proceedings, is simply to ignore the Herculean efforts made by the RGC, and in particular Samdech Hun Sen, Prime Minister of the RGC, to bring peace and tranquility to Cambodia".[85]

The Co-Prosecutors submit that "the submission in the Appeal that this tribunal should order release if it can obtain a guarantee of appearance is unsubstantiated. In any event, IENG Sary has provided no such guarantee. He has also not cited any authority to establish that this could be the sole ground of granting release. International criminal tribunals have occassionally ignored even state guarantees and have ordered detention if the relevant grounds are made out. Annex A to the Appeal also cites factually distinguishable precedents where the ICTY granted provisional release to certain of its accused. These precedents are of minimal assistance as decisions on provisional detention need to address the particular circumstances of each case".[86]

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[82] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 14.
[83] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 29.
[84] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, para. 31.
[85] Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 15 January 2008, paras 38, 39 and 40.
[86] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 41 and 42.

The Co-Prosecutors further point out that "the Appeal alleges that if the ground of fragility of the society were to be sustained then no defendant at the ECCC would ever get provisional release. It refers to decisions of the ICTY where it granted bail to certain defendants without any accompanying public disturbance in the societies of the former Yugoslavia. The Co-Prosecutors submit that the particular circumstances of the ECCC should be considered while deciding on this issue. In contrast to the ICTY, this court is located in the country where the alleged crimes were committed, where evidence is located and where the defendants, victims and witnesses habitually reside. The SCSL, under similar circumstances, has granted no provisional release to date".[87]

The Co-Prosecutors submit that "there is no precedent, practical experience or proven capacity to provide either safeguards or enforcement mechanisms for suspects who may be released on bail, particularly, for someone with IENG Sary's notoriety. [...] The Co-Prosecutors submit that a highly visible, controversial and seriously implicated defendant charged with most egregious international crimes before this unique tribunal should not be the first to test the system".[88]

The Co-Prosecutors further submit that the arguments of the Co-Lawyers relating to IENG Sary's health, "do not have factual support".[89] The Co-Prosecutors furthermore submit that "the Detention Centre has recently received media attention for its appropriate facilities and services".[90]

The Lawyers for the Civil Parties submit that "[t]he Charged Person gets regular medical treatment. The detention is (still) compatible with the state of health".[91]

Phnom Penh, 25 June 2008

Co-Rapporteurs

Judge Ney Thol

Judge Katinka Lahuis

[87] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 55.
[88] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 62 and 63.
[89] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 65.
[90] Co-Prosecutors' response to Ieng Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 66.
[91] Civil Party Co-Lawyers'Joint Response to the Appeal of Ieng Sary against the Provisional Detention Order, 20 May 2008, para. 47.