



**អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**

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

**អង្គបុរេជំនុំជម្រះ**

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.*

**Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC03)**

**Before:** Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

**Greffiers** CHUON Sokreasey  
Dirk Jan LAMAN

**Date:** 17 October 2008

<b>ឯកសារដើម</b>
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**PUBLIC  
DECISION ON APPEAL AGAINST PROVISIONAL DETENTION ORDER  
OF IENG SARY**

**Co-Prosecutors**

CHEA Leang  
Robert PETIT  
YET Chakriya  
William SMITH  
TAN Senarong  
Anees AHMED

<b>ឯកសារច្បាប់ត្រឹមត្រូវតាមច្បាប់ដើម</b>
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**Charged Person**

IENG Sary

**Lawyers for the Civil Parties**

HONG Kim Suon  
LOR Chunthy  
NY Chandy  
KONG Pisey  
Silke STUDZINSKY  
YONG Phanith  
KIM Mengkhy  
Martine JACQUIN

**Co-Lawyers for the Defence**

ANG Udom  
Michael G. KARNAVAS



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the Appeal against Provisional Detention Order of Ieng Sary (“Appeal”).

## I. INTRODUCTION

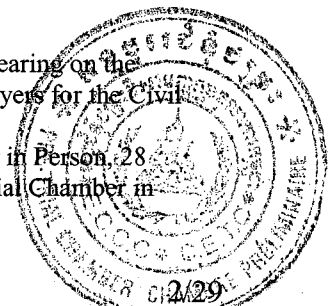
1. The Pre-Trial Chamber refers to, repeats and adopts the Report of Examination, dated 25 June 2008, on the proceedings and legal and factual issues in this case, which is attached to this Decision.<sup>1</sup>
2. On 5 May 2008, the Pre-Trial Chamber issued a Scheduling Order in which a hearing date was set for 30 June 2008.<sup>2</sup>
3. Before the hearing, the Pre-Trial Chamber received access to the Case File, which was updated.
4. The hearing was held by the Pre-Trial Chamber in public on 30 June and 1, 2 and 3 July 2008.
5. On the first day of the hearing, 30 June 2008, the Pre-Trial Chamber heard preliminary matters from the Co-Lawyers and Lawyers for the Civil Parties.<sup>3</sup> On 1, 2 and 3 July 2008, the Pre-Trial Chamber heard submissions on jurisdictional issues and provisional detention.
6. The Pre-Trial Chamber decided in a separate decision and directions on the matter of the right of Civil Parties to address the Pre-Trial Chamber in person.<sup>4</sup>
7. The Pre-Trial Chamber observes that, in order to ensure that the investigation is not compromised, a public version of this Decision will be issued with any necessary redactions.

<sup>1</sup> Report of Examination, 25 June 2008, C22/1/42.

<sup>2</sup> Scheduling Order, 5 May 2008, C22/1/31.

<sup>3</sup> See Written Version of Oral Decision of 30 June 2008 on Co-Lawyers’ Request to Adjourn the Hearing on the Jurisdictional Issues, 2 July 2008, C22/1/49 and Decision on Preliminary Matters raised by the Lawyers for the Civil Parties in Ieng Sary’s Appeal against Provisional Detention Order, 1 July 2008, C22/1/46.

<sup>4</sup> Decision on Application for Reconsideration of Civil Party’s Right to Address Pre-Trial Chamber in Person, 28 August 2008, C22/1/68 and Directions on Unrepresented Civil Parties’ Right to Address the Pre-Trial Chamber in person, 29 August 2008, C22/1/69.



## II. ADMISSIBILITY OF THE APPEAL

8. On 12 December 2007, the Co-Lawyers for the Charged Person filed a notice of appeal against the Provisional Detention Order. By order of the Chief Greffier dated 19 December 2007, the Pre-Trial Chamber directed the Co-Lawyers to file their pleadings within fifteen days of notification of that order. The order was notified to the Charged Person on 20 December 2007. On 9 January 2008 the Co-Lawyers requested the Pre-Trial Chamber to extend the time limit to file their Appeal Brief until 15 January 2008. This request was granted by the Pre-Trial Chamber on 10 January 2008. The Appeal Brief was filed on 15 January 2008 and therefore in time.

## III. THE NATURE OF THE APPEAL

9. In the light of its rulings in previous cases<sup>5</sup> and the submissions of the Parties as set out in the Report of Examination, the Pre-Trial Chamber will review the Provisional Detention Order (“the Order”) by an examination of:
- a. the exercise of discretion by the Co-Investigating Judges in applying Internal Rule 63(3);
  - b. the sufficiency of the facts for ordering provisional detention under Internal Rule 63(3);
  - c. whether the circumstances on which the Order was based still exist today; and
  - d. hospitalisation as an alternative form of detention.

## IV. THE EXERCISE OF DISCRETION BY THE CO-INVESTIGATING JUDGES TO CONSIDER THE APPLICATION OF INTERNAL RULE 63(3)

### 1. THE LEGAL BASIS FOR EXAMINATION

10. The first issue before the Pre-Trial Chamber is whether the Co-Investigating Judges were competent to examine the matter of the previous conviction of the Charged Person or the Royal Decree related to him.<sup>6</sup>

<sup>5</sup> Decision on Appeal against Provisional Detention Order of NUON Chea, 20 March 2008, C11/54 (“Decision on Nuon Chea’s Provisional Detention Appeal”).

<sup>6</sup> See Judgment of the Revolutionary People’s Tribunal, August 1979 and Royal Decree No. NS/RKT/0996/72.



11. The Co-Investigating Judges considered this matter in their Provisional Detention Order as follows:

“5. Before deciding on the provisional detention of IENG Sary, it is worth recalling the particular circumstances of the Charged Person which, given the obligation to take account of both exculpatory and inculpatory evidence in conducting the judicial investigation, raises a specific difficulty that the Co-Investigating Judges must resolve. Indeed, an *in absentia* Judgement handed down by the People’s Revolutionary Tribunal at Phnom Penh on 19 August 1979, condemned IENG Sary to death and confiscation of all his possessions for the crime of genocide. It appears that, under Cambodian law, this judgement is final. Later, under a Royal Decree dated 14 September 1996, IENG Sary was pardoned for these penalties and received an amnesty with respect to the 14 July 1994 Law on ‘the Outlawing of the “Democratic Kampuchea” Group’.

6. This situation raises a number of legal issues: first, does the current prosecution before the ECCC infringe the binding authority of a previous legal decision, under the general principle of criminal law *ne bis in idem*? [S]econd, assuming that the answer to the first question is negative (and providing that the Co-Investigating Judges have the jurisdiction to decide on the scope of the 1996 Royal Decree), are the pardon and amnesty granted to IENG Sary opposable to the ECCC? These issues will be dealt with consecutively.”<sup>7</sup>

12. Internal Rule 63(3) provides in relevant part:

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

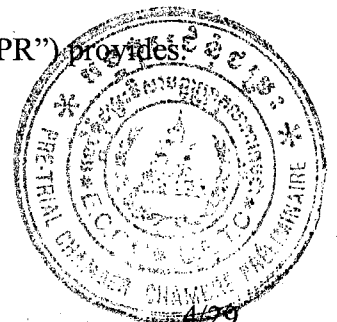
13. This provision gives the Co-Investigating Judges a discretionary power to order provisional detention. When considering whether to apply this power, the Co-Investigating Judges had to comply with fundamental international rights and norms.

14. In this regard, Article 9 of the Universal Declaration of Human Rights (“UDHR”) provides:

“No one shall be subjected to arbitrary arrest, detention or exile.”

15. Article 9(4) of the International Covenant on Civil and Political Rights (“ICCPR”) provides:

<sup>7</sup> Provisional Detention Order, 14 November 2007, C22, paras. 5 and 6.



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“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”

16. The Pre-Trial Chamber finds in the light of these rights, that the issuance of an arrest or detention order would not be lawful if any circumstance could be foreseen which would evidently or manifestly prevent a conviction by the Trial Chamber.
17. The Co-Investigating Judges were therefore correct to consider the particular issues (mentioned in paragraph 11 above) in this case. The Pre-Trial Chamber will, in its examination of this Appeal, apply a similar approach.
18. According to the Written Record of Adversarial Hearing, the Charged Person and his national Co-Lawyer raised the issue of the amnesty granted to the Charged Person.<sup>8</sup> The Co-Investigating Judges considered this issue, but not in a full and detailed manner such that the Charged Person and his Co-Lawyers had an opportunity to properly consider and prepare submissions. The Pre-Trial Chamber finds that by giving this opportunity to the Defence at the appeal stage of the Provisional Detention Order, this omission is now rectified. The Pre-Trial Chamber will base its findings on the detailed submissions on appeal made by all Parties.
19. In their Appeal Brief, the Co-Lawyers stated that issues concerning *ne bis in idem* and the Royal Decree pardoning and granting amnesty to the Charged Person would not be addressed in the Appeal and they reserved the right to raise any and all objections to the Co-Investigating Judges' legal analysis and findings on these matters at a more appropriate time. This decision should in their view not be regarded as a waiver.
20. The Pre-Trial Chamber observes in this respect that submissions made before the Pre-Trial Chamber in the current Appeal cannot result in the waiver of the right to raise at a later stage of the proceedings pursuant to the following provision:
21. Internal Rule 74(3)(a):

“The Charged Person may appeal against the following orders of the Co-Investigating Judges:

- a) confirming the jurisdiction of the ECCC”

<sup>8</sup> On 14 November 2007, in accordance with Internal Rule 63, an adversarial hearing was held in order for the Co-Investigating Judges to decide whether to issue an order for provisional detention. See Written Record of Adversarial Hearing, 14 November 2007, C19.



22. Under the heading "Proceedings Before the Trial Chamber", Internal Rule 89(1) provides in relevant part:

"1. A preliminary objection concerning:

- a) the jurisdiction of the Chamber,
- b) any issue which requires the termination of prosecution;
- c) [...]

shall be raised in the initial hearing, failing which it shall be inadmissible."

23. The Pre-Trial Chamber notes that the issues which are raised in this Appeal can, according to the Internal Rules concerning proceedings before the Trial Chamber, be raised and addressed fully at later stages of the proceedings because these issues can require the termination of the prosecution. Not raising these issues in full before the Pre-Trial Chamber at this stage of the proceedings can therefore not be seen as a waiver to challenge them.

## 2. THE FACTS

24. On 15 July 1979 Decree Law No. 1 was promulgated, which states, in relevant part:

"The People's Revolutionary Council of Kampuchea,

[...]

Has taken the following decisions:

Article 1

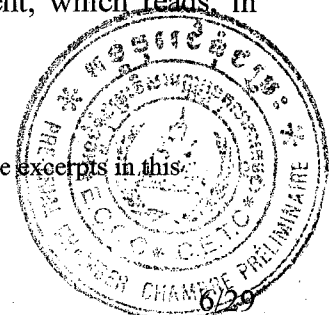
To set up a People's Revolutionary Tribunal at Phnom Penh to try the acts of genocide committed by the Pol Pot-Ieng Sary clique, namely, planned massacres of groups of innocent people; expulsion of inhabitants of cities and villages in order to concentrate them and force them to do hard labor in conditions leading to their physical and mental destruction; wiping out religion; destroying political, cultural and social structures and family and social relations."<sup>9</sup>

25. According to the Judgement of the People's Revolutionary Tribunal, Pol Pot and Ieng Sary were charged by an Indictment of 15 August 1979.<sup>10</sup> The People's Revolutionary Tribunal, according to its Judgement, held sessions from 15 to 19 August 1979 to judge the accused.<sup>11</sup> In August 1979, the People's Revolutionary Tribunal delivered its Judgement, which reads, in relevant part:

<sup>9</sup> Decree Law No. 1, 15 July 1979, p. 1.

<sup>10</sup> Judgement of the Revolutionary People's Tribunal, UN Doc. A/34/491, August 1979, p. 2. The excerpts in this Decision are from the Judgement referred to in the Provisional Detention Order.

<sup>11</sup> Judgement of the Revolutionary People's Tribunal, p. 2.



“Considering that the accused Pol Pot and Ieng Sary are found guilty of genocide on all counts as defined in Decree-law No. 1 of 15 July 1979 [...]”<sup>12</sup>

“Considering the personal responsibility of each of the accused:

[...]

Ieng Sary, as Standing Political Bureau member of the Angkar and Deputy Prime Minister in charge of foreign affairs, held high offices with real power, shared leadership with Pol Pot, built up and conducted the collusion with the Peking reactionary forces in the world and defended the criminal acts of genocide committed by his clique on international tribunals. Ieng Sary himself gave orders for the recall of intellectuals and students from abroad. It is Ieng Sary who is directly responsible for the execution of intellectuals and students living in the country or returning from abroad. [...]”<sup>13</sup>

“The Council of Judges of the Revolutionary People’s Tribunal held in Phnom Penh

Rules

1. That the accused Pol Pot, alias Saloth Sar, and Ieng Sary are guilty of the crime of ‘genocide’.
2. That the accused Pol Pot, alias Saloth Sar, and Ieng Sary be condemned to death in absentia.
3. That all the properties of the accused Pol Pot and Ieng Sary be confiscated.

[...]”<sup>14</sup>

26. On 7 July 1994, the National Assembly of the Kingdom of Cambodia in Phnom Penh approved the “Law on the Outlawing of the ‘Democratic Kampuchea’ Group” (“1994 Law”). This 1994 Law reads, in relevant part:

“The National Assembly of the Kingdom of Cambodia

[...]

Seeing that throughout the period since the election in 1993 to the present the ‘Democratic Kampuchea’ group has continually committed criminal, terrorist and genocidal acts which has been a characteristic of the group since it captured power in April 1975 [...]

[...]

Realizing that the leadership of the ‘Democratic Kampuchea’ group can not take the Paris Peace Agreement as a legal shield to 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.

[...] hereby approves the following law:

<sup>12</sup> Judgement of the Revolutionary People’s Tribunal, p. 28.

<sup>13</sup> Judgement of the Revolutionary People’s Tribunal, p. 29

<sup>14</sup> Judgement of the Revolutionary People’s Tribunal, p. 29.



[...]

Article 3: Members of the political organization or the military forces of the 'Democratic Kampuchea' group or any persons who commit crimes of murder, rape, robbery of people's property, the destruction of public and private property, etc. shall be sentenced according to existing criminal law.

Article 4: Members of the political organization or the military forces of the 'Democratic Kampuchea' group or any persons who commit

- secession [*sic.*],
- destruction against the Royal Government,
- destruction against organs of public authority, or
- incitement or forcing the taking up of arms against public authority

shall be charged as criminals against the internal security of the country and sentenced to jail for 20 to 30 years or for life.

Article 5: This Law shall grant a stay of six months after coming into effect to permit people who are members of the political organization of military forces of the 'Democratic Kampuchea' group to return to live under the control of the Royal Government in the Kingdom of Cambodia without facing punishment for crimes which they have committed.

Article 6: For leaders of the 'Democratic Kampuchea' group the stay described above does not apply.

Article 7: The King shall have the right to give partial or complete amnesty or pardon as stated in Article 27 in the Constitution.

[...]

Article 9: Any persons who use this law to violate the rights of the people by incorrectly threatening, charging, arresting, detaining, jailing, torturing or violating their homes shall be punished and be jailed from two to five years.

Any persons who give false information, false witness, or false evidence in order to serve his or her interests by using this law to violate the rights of people shall be punished and jailed from two to five years.

Victims of injustice have the right to appeal for damages arising from the above mentioned violations.”<sup>15</sup>

27. On 14 September 1996, Royal Decree No. NS/RKT/0996/72 was proclaimed, which states<sup>16</sup>:

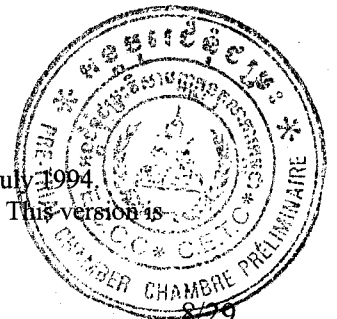
“We, Preah Bat Norodom Sihanouk Varma, King of Cambodia

[...]

hereby proclaim

<sup>15</sup> Law on the Outlawing of the “Democratic Kampuchea” Group, Reach Kram No. 1, NS 94, 15 July 1994

<sup>16</sup> The Khmer version of this Royal Decree was translated into English by translators of the Court. This version is therefore different from the English version of the document in the Case File.





**Article 1:** An amnesty to Mr Ieng Sary, former Deputy Prime Minister in charge of Foreign Affairs in the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994;

**Article 2:** This Royal Decree will take effect on the day of its signature;

**Article 3:** The Council of Ministers, the Ministry of Interior and the Ministry of Justice shall fully implement this Royal Decree."<sup>17</sup>

28. On 6 June 2003, an agreement was signed between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea ("Agreement"). This Agreement provides in Article 11(2):

"This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers."<sup>18</sup>

29. On 27 October 2004, the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea ("ECCC Law") was promulgated, which provides in Article 40 new:

"[...] The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers."<sup>19</sup>

30. According to the Report on the Arrest of Ieng Sary and Ieng Thirith and the Search of their home address in Phnom Penh, of 13 November 2007:

"At 6:05 am the named JP Officers supported by Military Police and local Police executed the Arrest Warrants in accordance with the terms and conditions of the Arrest Warrants dated 8<sup>th</sup> of November 2007 [...] and arrested Ieng Sary and Ieng Thirith."<sup>20</sup>

<sup>17</sup> Royal Decree No. NS/RKT/0996/72, 14 September 1996.

<sup>18</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, Article 11(2).

<sup>19</sup> The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, 27 October 2004, Article 40 new.



31. On 14 November 2007, the Co-Investigating Judges issued a Provisional Detention Order, placing the Charged Person in provisional detention for a period not exceeding one year.<sup>21</sup>

### 3. SUBMISSIONS OF THE PARTIES

#### a. *Ne bis in idem*

32. The Co-Lawyers submit that, in accordance with the principle of *ne bis in idem*, the trial and conviction of the Charged Person by the People's Revolutionary Tribunal in 1979 bars prosecution of the Charged Person before the ECCC.

33. The Co-Lawyers assert the principle of *ne bis in idem* applies as a bar to prosecution when a person has previously been tried for the same conduct and that this applies for the Charged Person as the factual basis of the 1979 indictment covers all the alleged crimes in the Introductory Submission. They find support for this view in Article 12 of the Cambodian Criminal Procedure Code of 5 June 2007 ("CPC").

34. The Co-Prosecutors submit that the rationale of the principle of *ne bis in idem* is to protect an individual from suffering the hardships of a trial or consequent punishment twice. According to the Co-Prosecutors, this does not apply in the Charged Person's case as he has suffered no significant hardship or punishment from the proceedings in 1979. The Co-Prosecutors further submit that the principle of *ne bis in idem* requires that the first trial be conducted independently and impartially, in accordance with internationally recognised due process norms and standards. Since the proceedings in 1979 did not comply with internationally recognised fair trial standards, the principle of *ne bis in idem* does not apply.

35. In the alternative, the Co-Prosecutors submit that the international practice and jurisprudence of cumulative charging would not necessarily undermine the principle of *ne bis in idem*. Under this practice, cumulative charging and consequential multiple convictions in single cases arising out of the same conduct is allowed as long as the additional offences contain unique legal requirements, not required in the other offences, and when the additional offences serve different policy interests. The Co-Prosecutors submit that any unfairness arising out of multiple convictions could be addressed in sentencing.

<sup>20</sup> Report on the Arrest of Ieng Sary and Ieng Thirith and the Search of their home address in Phnom Penh, 13 November 2007, p. 1.

<sup>21</sup> Provisional Detention Order.



36. The Lawyers for the Civil Parties support the view of the Co-Prosecutors. They note that Article 12 of the CPC deals with the principle of *ne bis in idem*, but also note however that this article does not deal with what constitutes a valid judgement. Since there seems to be a lacuna in Cambodian law, the Lawyers for the Civil Parties argue that Article 33 of the ECCC Law is applicable as it provides that where Cambodian law does not deal with or is not consistent with international standards, international law is applicable. Thus international law can be used to determine when a judgement is valid. The Lawyers for the Civil Parties submit that as the trial before the People's Revolutionary Tribunal resulted in serious and grave violations of the rights of the Charged Person, the Charged Person cannot effectively refer to the former 1979 conviction and cannot rely on the principle of *ne bis in idem*.

**b. The Royal Decree**

37. The Co-Lawyers submit that the 1994 Law covers the acts from 1975 to 1979 and that the Royal Decree applies to all of those acts. They argue that the preamble to the 1994 Law makes it clear that the statute covers all of the acts and crimes encompassed by the ECCC or over which the ECCC has jurisdiction. Therefore, the ECCC is deprived of jurisdiction over the Charged Person in relation to these crimes.

38. The Co-Prosecutors submit that the Charged Person was granted amnesty specifically for prosecution under the 1994 Law and that the key question is the scope of prosecutable offences under the 1994 Law. According to the Co-Prosecutors, the only prosecutable offences are those created in Articles 4 and 9 of the statute.

39. In the alternative, the Co-Prosecutors submit that even if the Royal Decree was intended to bar future prosecution, international law does not allow such amnesties because genocide is considered a *jus cogens* crime.

40. The Lawyers for the Civil Parties submit that the Royal Decree is invalid, since, according to Cambodian law, an amnesty can only be implemented when half of the sentence has been served. Furthermore, the Royal Decree can only have an effect as long as the punishment imposed in 1979 is valid. As set out above, the Lawyers for the Civil Parties submit this is not the case.



#### 4. CONSIDERATIONS

##### a. *Ne bis in idem*

41. The principle of *ne bis in idem* provides that a court may not institute proceedings against a person for a crime that has already been the object of criminal proceedings and for which the person has already been convicted or acquitted. The principle of *ne bis in idem*, which derives from civil law, is similar to the concept of double jeopardy which is more frequently used in common law. The principle of *ne bis in idem* has been interpreted as meaning that the accused “shall not be tried twice for the same crime”.<sup>22</sup>
42. The Internal Rules of the ECCC make no direct provision in respect of the doctrine of *ne bis in idem*.
43. The Parties disagree as to whether guidance should be sought only in Cambodian law or also at the international level. The Pre-Trial Chamber notes that the principle is defined differently in the provisions in Cambodian law and at the international level. This is reflected in the consideration of what constitutes the “same crime”. Under Cambodian law the “same crime” is provided as the “same act”.<sup>23</sup> The ICCPR prohibits successive trials for the “same offence”.
44. Article 7 of the CPC provides as follows:

##### “Extinction of Criminal Actions

The reasons for extinguishing a charge in a criminal action are as follows:

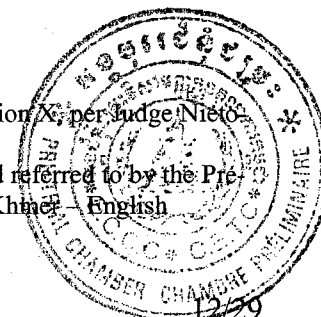
1. The death of the offender;
2. The expiration of the statute of limitations;
3. A grant of general amnesty
4. Abrogation of the criminal law;
5. The *res judicata*

When a criminal action is extinguished a criminal charge can no longer be pursued or shall be terminated”

45. Article 12 of the CPC provides:

<sup>22</sup> Prosecutor v Tadić, Judgment Case No. IT-94-1, ICTY Appeals Chamber, 15 July 1999, section X, per Judge Nieto-Navia.

<sup>23</sup> The English version of the provisions of the Cambodian Criminal Procedure Code set out and referred to by the Pre-Trial Chamber is taken from the “Code of Criminal Procedure of The Kingdom of Cambodia, Khmer – English Translation, First Publication September 2008”.



**“Res Judicata**

In applying the principle of *res judicata*, any person who has been finally acquitted by a court judgment cannot be prosecuted again for the same act, even if such act is subject to different legal qualification.”

46. Article 14(7) of the ICCPR provides:

“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.”

47. The principle of *ne bis in idem* can be seen as very narrowly related to the doctrine of *res judicata* as the consequence of this doctrine is that no one can be convicted again for the same charges after a decision has become final. Article 12 of the CPC, as set out above at paragraph 45, may be regarded as an example of the application of the doctrine of *res judicata*.

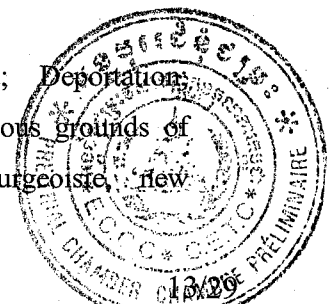
48. In the following, the Pre-Trial Chamber will consider whether the 1979 trial and conviction would evidently or manifestly prevent a conviction, applying the different interpretations of the principle advanced.

49. Decree Law Nos. 1 and 2 and the Judgement of the People’s Revolutionary Tribunal indicate that the Charged Person was tried and convicted for “genocide”.

50. At this stage of the proceedings, the Charged Person is being charged, according to the Written Record of Initial Appearance, as follows:

“Having recorded the identity of this person, we advised him of the acts with which we have been seised by the Introductory Submission of the Co-Prosecutors of the Extraordinary Chambers, dated 18 July 2007, and for which he appeared before us. We informed him that the acts set out in the Introductory Submission by the Co-Prosecutors, and summarized below, were open to legal characterisation as follows:

- **Violations of the 1956 Penal Code** (Homicide, Torture, and Religious Persecution of Buddhists and Cham);
- **Genocide** (of Buddhists, Cham and Vietnamese);
- **Crimes Against Humanity** (Murder; Extermination; Enslavement; Deportation; Imprisonment; Torture; Rape; Persecutions on political, racial and religious grounds of former officials of the Khmer Republic, feudalists, capitalists and bourgeoisie, new



people', suspected 'bad elements', Buddhists, Cham, and Vietnamese; and Other Inhumane Acts);

- **Grave Breaches of the Geneva Conventions of 12 August 1949** (Wilful Killing; Torture or Inhumane Treatment; Wilfully Causing Great Suffering or Serious Injury to Body or Health; Destruction and Serious Damage to Property not justified by military necessity and carried out unlawfully and wantonly; Wilfully Depriving a Prisoner of War or Civilian the Rights of Fair and Regular Trial; and Unlawful Deportation or Transfer or Unlawful Confinement of a Civilian).

We advised this person that he was hereby placed under judicial investigation for the acts of which he has just been notified and specified the offences with which he was charged in relation thereto:

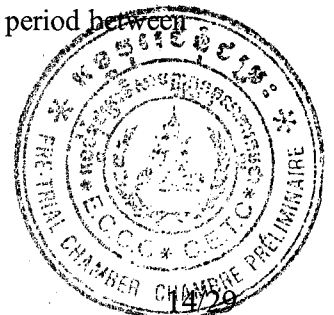
- **Crimes Against Humanity** (Murder, Extermination, Imprisonment, Persecution and Other Inhumane Acts), and
- **Grave Breaches of the Geneva Conventions of 1949** (Wilful Killing, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Wilful Deprivation of Rights to a Fair Trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian),

offences 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;

for having, throughout Cambodia during the period from 17 April 1975 to 6 January 1979:

- in his capacity as Minister of Foreign Affairs, exercising authority and effective control over the Ministry and all of its constituent and subordinate organs, and as a full rights member of the Central and Standing Committees of the Communist Party of Kampuchea (CPK),
- instigated, ordered, failed to prevent or punish, or otherwise aided and abetted in the commission of the aforementioned crimes;
- by directing, encouraging, enforcing, or otherwise rendering support to CPK policy and practice which was characterised by murder, extermination, imprisonment, persecution on political grounds and other inhuman acts such as forcible transfers of the population, enslavement and forced labour;
- as part of a widespread or systematic attack targeting a civilian population;
- noting that there was a state of international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam during all or part of the period between 17 April 1975 and 6 January 1979.<sup>24</sup>

<sup>24</sup> Written Record of Initial Appearance, 12 November 2007, D38, pp. 2 and 3.



51. Since the Charged Person is not charged specifically with genocide, the Pre-Trial Chamber finds that the current prosecution might be for different “offences”.
52. The Pre-Trial Chamber finds that the characterisation given by the Co-Investigating Judges, although sufficient to inform the Charged Person of the charges against him, is too vague to allow a proper consideration of whether the current prosecution is for the same “acts” as those ‘acts’ upon which the charges brought in 1979 were based. To specify such “acts” at the commencement of the investigation by the Co-Investigating Judges is not possible or proper. In the event of there being an indictment of the Charged Person, “the material facts and their legal characterisation” will be set out by the Co-Investigating Judges upon the issuance of the Closing Order at the conclusion of the investigation.<sup>25</sup>
53. Therefore, when applying the *ne bis in idem* principle in the various proposed ways, the Pre-Trial Chamber finds it is not, at this stage of the proceedings, manifest or evident that the 1979 trial and conviction would prevent a conviction by the ECCC. The points may crystallise upon the indictment of the Charged Person, at which stage the precise charges and material facts relied upon will be known.
54. Given this finding, the Pre-Trial Chamber will not consider the issue of whether the 1979 trial had to reach minimum standards in order for the principle of *ne bis in idem* to be applicable.

**b. The Royal Decree**

55. By Royal Decree NS/RKT/0996/72 “in accordance with the proposal of the First Prime Minister and the Second Prime Minister of the Royal Government of Cambodia”, the following proclamation was made:

“**Article 1:** An amnesty to Mr Ieng Sary, former Deputy Prime Minister in charge of Foreign Affairs in the Government of Democratic Kampuchea, for the sentence of death and confiscation of all his property imposed by order of the People's Revolutionary Tribunal of Phnom Penh, dated 19 August 1979; and an amnesty for prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994;

**Article 2:** This Royal Decree will take effect on the day of its signature;



<sup>25</sup> See Internal Rule 67.

**Article 3:** The Council of Ministers, the Ministry of Interior and the Ministry of Justice shall fully implement this Royal Decree.”<sup>26</sup>

56. This Decree became effective on 14 September 1996.
57. The Pre-Trial Chamber finds that the meaning of the word “amnesty” cannot necessarily be found by applying a grammatical interpretation. In this respect, the Pre-Trial Chamber notes that the use of the Khmer word for amnesty is used inconsistently. The word “amnesty” in the first sentence of Article 1 is used as “amnesty from a sentence” while in the second part of the article it is used as “amnesty from prosecution”. Both amnesties mentioned in the Royal Decree are inconsistent with the provision on amnesty in Article 27 of the Constitution of Cambodia of 1993. The Pre-Trial Chamber further notes that at the time the Royal Decree was proclaimed, the death penalty had already been abolished in Cambodia by Article 32 of the Constitution.
58. In the light of these issues surrounding the amnesty for the sentence related to the conviction for genocide, the Pre-Trial Chamber considers that the validity of the amnesty is uncertain. The Pre-Trial Chamber finds that it is therefore not manifest or evident that this part of the Royal Decree will prevent a conviction for genocide before the ECCC.
59. In the context of the inconsistent use of the word “amnesty”, the Pre-Trial Chamber finds that the second “amnesty” in the Royal Decree can be interpreted as meaning that the Charged Person “will not be proceeded against” in respect of the sentence given or breaches of Reach Kram No. 1, NS 94, dated 15 July 1994. The Pre-Trial Chamber will address the issue from this perspective as this explanation is the most in favour of the Charged Person.
60. Applying this interpretation, the Pre-Trial Chamber will now turn to consider the possible effect of this part of the Royal Decree.
61. The scope of this part of the amnesty is limited to the prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No 1, NS 94, dated 14 July 1994. The offences mentioned in this Law are not within the jurisdiction of the ECCC. The Pre-Trial Chamber finds therefore that this part of the amnesty in the Decree cannot be seen as having the possible effect of preventing a conviction by the ECCC. It is therefore not manifest or evident that it prevents a conviction by the ECCC.

<sup>26</sup> This excerpt in this Decision is a literal translation of the original Khmer version of the Royal Decree, translated by the Khmer-English translator assigned to the Pre-Trial Chamber.





62. Considering these conclusions, the Pre-Trial Chamber will not address further the submissions of the Parties concerning the validity of the Royal Decree.<sup>27</sup>
63. The Pre-Trial Chamber has reasoned extensively why the issues related to *ne bis in idem* and the possible effects of the Royal Decree do not manifestly or evidently prevent a conviction by the ECCC. As a consequence, the Pre-Trial Chamber finds that the Co-Investigating Judges could use their discretion in this case to order provisional detention.

#### V. THE SUFFICIENCY OF FACTS FOR REACHING THE CONCLUSION UNDER 63(3) OF THE INTERNAL RULES

64. The Pre-Trial Chamber finds that “an authority is obliged to justify its activities by giving reasons for its decisions”.<sup>28</sup>
65. In their Provisional Detention Order, the Co-Investigating Judges have indicated their view on the conditions of Rule 63(3) referring to the Case File in general and other circumstances.
66. The Pre-Trial Chamber finds that the Co-Investigating Judges are not obliged to indicate a view on all the factors as the obligation to state reasons only indicates that they set out the legal grounds and facts taken into account before coming to a decision.

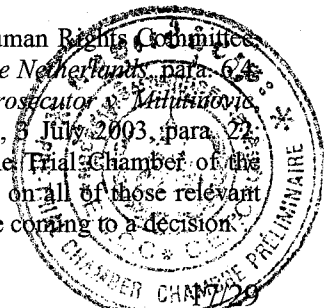
#### VI. EXAMINATION OF THE CONDITIONS UNDER RULE 63(3) OF THE INTERNAL RULES

67. Rule 63(3) of the Internal Rules provides:

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

<sup>27</sup> The Pre-Trial Chamber additionally notes that the grant of amnesty is limited, being in respect of “prosecution under the Law to Outlaw the Democratic Kampuchea Group, promulgated by Reach Kram No. 1, NS 94, dated 14 July 1994” and is not applicable to this case.

<sup>28</sup> European Court of Human Rights, Case of *Suominen v. Finland*, 1 July 2003, para. 36; Human Rights Committee, General Observations Article 14, para. 49. See Communications No. 903/1999 *Van Hulst v. The Netherlands*, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, para. 8.5; *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR65.3, Decision Refusing Milutinovic Leave to Appeal (“*Milutinovic*”), 8 July 2003, para. 22; *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000, par 69. In *Milutinovic* the Trial Chamber of the ICTY considered that: “This requirement obliges the Chamber, *inter alia*, to indicate its view on all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision.”



- 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.”

68. In considering the Appeal, the Pre-Trial Chamber will undertake its own analysis, applying the standard set out in Internal Rule 63(3).

69. In deciding if the grounds for provisional detention as set out in Rule 63(3) are met, the Pre-Trial Chamber has taken into account the written pleadings of the Parties and their oral submissions, the evidence they have submitted and the whole Case File of the Co-Investigating Judges up to the date of the hearing.

a. Well founded reason to believe that the Charged Person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

70. Before proceeding with an examination of the condition set out in Rule 63(3)(b), the Pre-Trial Chamber will examine whether there is well founded reason to believe that the Charged Person may have committed the crime or crimes mentioned in the Introductory Submission.

71. In examining whether there is such well founded reason, the Pre-Trial Chamber will decide whether facts or information exists which would satisfy an objective observer that the person concerned may have committed the offences.<sup>29</sup> In accordance with Article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia of 27 October 2004, the term “have committed” has to be understood as “incur individual responsibility for”, which includes planning, instigating, ordering, aiding and abetting, or committing, and superior criminal responsibility.

<sup>29</sup> Decision on Nuon Chea’s Provisional Detention Appeal, para. 46.



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72. In the Provisional Detention Order, the Co-Investigating Judges found that there is well founded reason to believe that the Charged Person might have committed the following crimes, of which he was notified at the initial appearance:

- “- **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),

offences 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;

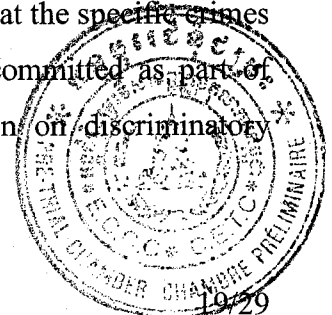
for having, throughout Cambodia during the period from 17 April 1975 to 6 January 1979:

- in his capacity as the Minister of Foreign Affairs, exercising authority and effective control over the Ministry and all of its constituent and subordinate organs, and as a full rights member of the Central and Standing Committees of the Communist Party of Kampuchea (CPK),
- instigated, ordered, failed to prevent and punish, or otherwise aided and abetted in the commission of the aforementioned crimes;
- by directing, encouraging, enforcing, or otherwise rendering support to CPK policy and practice which was characterised by murder, extermination, imprisonment, persecution on political grounds and other inhuman acts such as forcible transfers of the population, enslavement and forced labour;
- as part of a widespread or systematic attack targeting a civilian population;
- noting that there was a state of international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam during all or part of the period between 17 April 1975 and 6 January 1979.”<sup>30</sup>

73. As the Provisional Detention Order of the Co-Investigating Judges was based on crimes more limited in their scope than the ones identified in the Introductory Submission, the Pre-Trial Chamber will use this limited scope to examine the Order.

74. The Pre-Trial Chamber finds that there is well founded reason to believe that the specific crimes for which this Charged Person is under investigation may have been committed as part of widespread or systematic attacks directed against a civilian population on discriminatory

<sup>30</sup> Written Record of Initial Appearance, 12 November 2007, D38, p. 3.



grounds and/or in the context of an international armed conflict.<sup>31</sup> Therefore, the Pre-Trial Chamber will limit its examination to the individual responsibility of the Charged Person on the basis of Article 29 of the ECCC Law.

75. The Charged Person has admitted that he was the Minister of Foreign Affairs, at least from 4 April 1976 until the end of the Democratic Kampuchea period.<sup>32</sup>
76. The Charged Person also reportedly stated in an interview with Steve Heder that he was a member of the Standing Committee of the Communist Party of Kampuchea:

“SH [Steve Heder]: So who was then in the Standing Committee and who was at the meeting?

IS [Ieng Sary]: Virtually all of the Standing Committee was there: Pol Pot, Nuon Chea, Sao Pheum, me, Son Sen, Ta Mok and Von Vet.”<sup>33</sup>

77. [REDACTED].<sup>34</sup>

78. [REDACTED].<sup>35 36</sup>

79. [REDACTED].<sup>37</sup>

80. [REDACTED].<sup>38 39</sup>

81. The Pre-Trial Chamber observes that the prisoner lists from S-21 reports for more than 100 persons that their arrest was “from the Ministry of Foreign Affairs”.<sup>40</sup>
82. In her book *Au delà du Ciel: Cinq ans chez les Khmers rouges*, Laurence Picq, a former employee of the Ministry of Foreign Affairs, describes her version of meetings in which the Charged Person reportedly incited others to “denounce traitors”. The book relates:

<sup>31</sup> See Decision on Nuon Chea’s Provisional Detention Appeal, para. 48 and Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/26, para. 24.

<sup>32</sup> Written Record of Initial Appearance, 12 November 2007, D38, p. 2.

<sup>33</sup> Suspect Statement of IENG Sary alias Van, 17 December 1996, ERN 00003660-00003669, p. 2.

<sup>34</sup> [REDACTED].

<sup>35</sup> [REDACTED].

<sup>36</sup> [REDACTED].

<sup>37</sup> [REDACTED].

<sup>38</sup> [REDACTED].

<sup>39</sup> [REDACTED].

<sup>40</sup> See D81, Annex A [REDACTED].



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“So, for several hours, I heard [Ieng Sary] speak about purifications that were taking place over the past weeks. Five ‘great traitors’ had been annihilated: the clan of Koy Thoun, president of the north zone, with Soeu Doeun, secretary of state of commerce, husband of Roeyun, Toch Phoeun, Sien An, Krean Lean, president of the Pochentong airport and his wife, Sean Layni and his wife... people whom I knew and whom I had appreciated or admired. (What Ieng Sary left out during his talk was that before sending them to Security, he had announced to each one that they would be getting a promotion!)

When he had finished speaking, Ieng Sary was wearing a serious expression and asked the participants to collaborate in the denouncement of ‘traitors’.”<sup>41</sup>

“The meeting continued. Ieng Sary assured that after these last arrests, there would only be one traitor left, a high-placed one. Hearing that, we told ourselves that, since he knew him, he would go and do what was necessary and put an end to these nauseating purifications. It was time to move on to concrete things. At a time when troops were gathering at the border, was there nothing better to do?

Ieng Sary continued:

-- The last traitor is for you to find! Raise your revolutionary vigilance and denounce him!”<sup>42</sup>

83. The Pre-Trial Chamber furthermore observes that the Case File contains *Ministry of Foreign Affairs Branch Committee Notes*. According to the “Note on the document” by editors/translators Ben Kiernan and Phat Kosal, it is “[v]ery likely, [that] the major part of the text is a summary record of speeches and documents prepared or distributed by Ieng Sary”.<sup>43</sup> The Notebook reads, amongst other things, under part IV, “Essential Work” as part of “The Objectives to Direct the Work of the Ministry of Foreign Affairs from July 1976 to July 1977”:

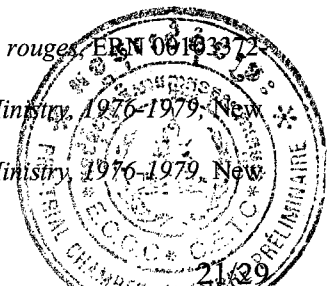
“Our enemies are now weakening and are going to die. The revolution has pulled out their roots, and the espionage networks have been smashed; in terms of classes, our enemies are all gone. However, they still have the American imperialists, the free [world], the KGB, and Vietnam. Though they have been defeated, they can still block us. Another thing is that the enemies are inside our body, among the military, the workers, in the co-operatives and even in our ranks. Making Socialist Revolution deeply and strongly, these enemies must be progressively wiped out as soon as possible”.<sup>44</sup>

<sup>41</sup> Unofficial English translation of: Laurence Picq, *Au delà du Ciel : Cinq ans chez les Khmers rouges*, ERN 00103372-00103478, p. 100.

<sup>42</sup> Unofficial English translation of: Laurence Picq, *Au delà du Ciel : Cinq ans chez les Khmers rouges*, ERN 00103372-00103478, p. 123.

<sup>43</sup> Phat Kosal and Ben Kiernan, *Ieng Sary's Regime: The Diary of the Khmer Rouge Foreign Ministry, 1976-1979*, New Have: 1997, ERN 00003237-00003341, p. 3.

<sup>44</sup> Phat Kosal and Ben Kiernan, *Ieng Sary's Regime: The Diary of the Khmer Rouge Foreign Ministry, 1976-1979*, New Have: 1997, ERN 00003237-00003341, p. 95.



84. [REDACTED].<sup>45 46</sup>

85. [REDACTED].<sup>47</sup>

86. [REDACTED].<sup>48</sup>

87. [REDACTED].<sup>49</sup>

88. The Case File contains CPK Standing Committee Meeting Minutes which mention the Charged Person's presence on at least nine different occasions.<sup>50</sup>

89. From the allegations contained in the statements of [REDACTED], it could be inferred that the Charged Person was involved in Standing Committee decisions, in particular those related to the arrests by S-21 and consequences of confessions at S-21:

[REDACTED].<sup>51</sup>

90. [REDACTED].<sup>52</sup>

91. In an interview with journalists in September 1996, the *Phnom Penh Post* relates that the Charged Person, upon being asked if there was anything he had known at the time about the executions or the purging inside the party, stated the following:

"Pol Pot is very intelligent to form a secret committee. Sometimes they already executed the people then he told me".<sup>53</sup>

<sup>45</sup> [REDACTED].

<sup>46</sup> [REDACTED].

<sup>47</sup> [REDACTED].

<sup>48</sup> [REDACTED].

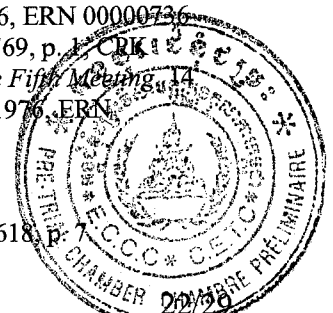
<sup>49</sup> [REDACTED].

<sup>50</sup> See CPK Standing Committee Meeting Minutes, 9 October 1975, ERN 00019108-00019126, p. 1; CPK Standing Committee Meeting Minutes, 2 November 1975, ERN 00019127-00019135, p. 1; CPK Standing Committee Meeting Minutes, 22 February 1976, ERN 00000713-00000720, p. 1; CPK Standing Committee Meeting Minutes, 8 March 1976, ERN 00017124-00017127, p. 1; CPK Standing Committee Meeting Minutes, 11 March 1976, ERN 00000736-00000743, p. 1; CPK Standing Committee Meeting Minutes, 3 May 1976, ERN 00000768-00000769, p. 1; CPK Standing Committee Meeting Minutes entitled *Examination of the Reaction of Vietnam During the Fifth Meeting*, 14 May 1976, ERN 00000810-00000826, p. 1; CPK Standing Committee Meeting Minutes, 17 May 1976, ERN 00000829-00000836, p. 1.

<sup>51</sup> [REDACTED].

<sup>52</sup> [REDACTED].

<sup>53</sup> Suspect Statement of IENG Sary alias Van, dated 6-19 September 1996, ERN 00078605-00078618, p. 1.



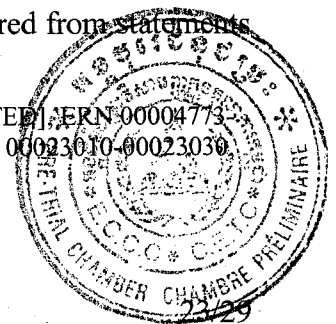
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92. The S-21 Confessions of [REDACTED], who, according to the S-21 prisoner list mentioned above, were both arrested “from the Ministry of Foreign Affairs”, mention that these confessions were sent to the Charged Person.<sup>54</sup> [REDACTED].<sup>55</sup>
93. More specifically, Laurence Picq, in her book referred to above, and witness [REDACTED] mention that the Charged Person was in possession of the S-21 Confessions of [REDACTED].<sup>56</sup>
94. The Pre-Trial Chamber finds, in the light of the documents set out above, 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.
- b. Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b))
- i) *The first and second grounds in Internal Rule 63(3)(b): 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 and to preserve evidence or prevent the destruction of evidence*
95. These two grounds for provisional detention can be analysed together since they are supported by the same arguments. The statements made by witnesses are considered as “evidence” within the meaning of Internal Rule 63(3)(b)(ii).
96. The Pre-Trial Chamber notes that the whole Case File has been made available to the Charged Person, including the names of Civil Parties and potential witnesses. It seems there is a limited number of remaining witnesses who can testify to the Charged Person’s involvement in the alleged crimes. Some of these witnesses have not yet been interviewed by the Co-Investigating Judges.
97. The Charged Person has stated he was Minister of Foreign Affairs during the Democratic Kampuchea period. Furthermore, as set out above, it could be properly inferred from statements

<sup>54</sup> S-21 Confession of [REDACTED], ERN 00024493-00024557; S-21 Confession of [REDACTED], ERN 00004773-00004827, 00002465-00002472, 00026191-00026252; S-21 Confession of [REDACTED], ERN 00023010-00023030-00022924-00022943.

<sup>55</sup> [REDACTED].

<sup>56</sup> [REDACTED].



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by Charged Persons Khieu Samphan and Duch, that the Charged Person was a member of the Standing Committee of the Communist Party of Kampuchea. The Charged Person also seems to have been active in politics after 1979.<sup>57</sup> The Pre-Trial Chamber finds that a degree of influence is necessarily attached to such senior positions and involvement in political movements. This influence does not stop when one no longer occupies such positions and can therefore still be exerted today.

98. In these circumstances, the Pre-Trial Chamber considers that the Charged Person has the necessary influence to organise others to place pressure on witnesses and victims.

99. Despite this, the Pre-Trial Chamber has not found evidence of any past actions and/or behaviour of the Charged Person which in themselves would display a concrete risk that he might use that influence to interfere with witnesses and victims.

100. The Pre-Trial Chamber therefore finds that detention is not a necessary measure to prevent the Charged Person from exerting pressure on witnesses or victims and destroying evidence.

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

101. The Pre-Trial Chamber observes that, in view of the gravity of the charges, the Charged Person could face a sentence of imprisonment from five years to life if he is found guilty.

102. The evidence indicates that until 1996, the Charged Person lived in Pailin, a Khmer Rouge centre of support located very close to the Thai border. Even after he moved to Phnom Penh, the Charged Person continued to spend some time in Pailin.<sup>58</sup> Moreover, the evidence indicates that the Charged Person has connections in Pailin, notably with the governor of the town and his deputy.<sup>59</sup> These contacts are likely to be in a position to assist the Charged Person should he wish to flee. They can notably assist the Charged Person in obtaining a V.I.P. card to cross the Thai border. It is also more than likely that these influential persons are well-known in the region, on both sides of the border, contributing to the Charged Person's possibilities to flee.

<sup>57</sup> Thet Sambath and Erika Kinetz, "Khmer Rouge Inc: Former Communists Embrace the Market Economy in Mafar District", *The Cambodia Daily*, 17-18 February 2007 (Notice of Disclosure of Additional Materials and Authorities, 18 October 2007, D29, Attachment 36).

<sup>58</sup> Kaet Somrech, "Ieng Sary Keeps Silence Whereas Nuon Chea and Khieu Samphan Are Trying To Disavow Crimes During The 'Killing Fields' Regime", *Moneaksekar Khmer*, 27 July 2007 (D29, Attachment 8 ("Ieng Sary Keeps Silence" Article)); Untitled article, *Moneaksekar Khmer*, 21 February 2006 (D29, Attachment 5).

<sup>59</sup> "Ieng Sary Keeps Silence" Article.





103. The Pre-Trial Chamber also notes that after the collapse of the Democratic Kampuchea regime, both the Charged Person and his wife travelled abroad frequently.<sup>60</sup> Considering that significant expenses are necessarily associated with these past travels, it can be inferred that the Charged Person either has the financial means, or access to such means, to facilitate his escape.
104. The Charged Person has always had a passport since his defection in 1996.<sup>61</sup> In addition, he reportedly owned a Chinese passport under a false name and incorrect place of birth.<sup>62</sup> The Written Record of his Initial Appearance relates that he modified his date and place of birth on an earlier occasion.<sup>63</sup> Considering his former political position, the Charged Person has allies in foreign countries that would be capable of assisting him in travelling abroad.
105. While it is true that the Charged Person knew 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 and could have attempted to flee before, the situation is no longer the same now that he is under investigation before the ECCC. The Charged Person may furthermore not have foreseen that he would be among the first suspects to be arrested by the ECCC. In this respect, the Pre-Trial Chamber also notes the issues of the Charged Person's 1979 trial and the amnesty / pardon granted to him by Royal Decree.
106. For these reasons, the Pre-Trial Chamber considers that provisional detention is a necessary measure to ensure the Charged Person's presence during the proceedings.

*iii) The fourth ground in Internal Rule 63(3)(b): to protect the security of the Charged Person*

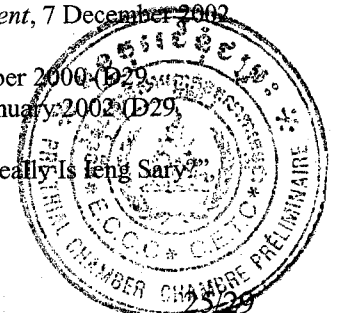
107. The Pre-Trial Chamber observes that the Charged Person is a well-known former political figure in Cambodia and considered one of the leaders of the Democratic Kampuchea regime.
108. The fact that the Charged Person resided in Phnom Penh for the last ten years, without any acts of violence in protest against his liberty or attempted acts of revenge is of limited relevance.

<sup>60</sup> "Ieng Sary Keeps Silence" Article; Phann Ana and Kevin Doyle, "Retired Ideals: Old Age Finds Ieng Sary Fully Divested of his Once Revolutionary Disdain of Wealth", *The Cambodia Daily*, 5-6 October 2002 (D29, Attachment 12); Michael Sheridan, "Pol Pot's in-laws face trial", *The Sunday Times*, 19 February 2006 (D29, Attachment 13); Untitled article, *Moneaksekar Khmer*, 21 February 2006 (D29, Attachment 51); Kathy Marks, "How 'brother number three', architect of the Killing Fields, lives a life of luxury in the new Cambodia", *The Independent*, 7 December 2002 (D29, Attachment 52).

<sup>61</sup> "Former Khmer Rouge leader in line for passport: report", *Agence France Presse*, 12 September 2000 (D29, Attachment 54); "Ex-Khmer Rouge formin's diplomatic passport revoked.", *Reuters News*, 7 January 2002 (D29, Attachment 55).

<sup>62</sup> See Copy of Chinese passport of Ieng Sary (D29, Attachment 17) and Youk Chhang, "Who Really Is Ieng Sary?", *The Cambodia Daily*, 7 May 1998 (D29, Attachment 18).

<sup>63</sup> Written Record of Initial Appearance, D38, pp. 1 and 2.



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Such non-interference should be placed in the context of the impunity that reigned for almost thirty years, which could apply in particular for this Charged Person who was granted a royal pardon and amnesty in 1996. It is likely that his arrest diminished his perceived protection in this respect.

109. Taking reported threats made against Duch during the first public hearing of the Pre-Trial Chamber into consideration, the Pre-Trial Chamber finds that, 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.<sup>64</sup>

110. The Pre-Trial Chamber considers that provisional detention is a necessary measure to protect the Charged Person's safety.

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

111. As reasoned in previous decisions of the Pre-Trial Chamber, with reference to the European Court of Human Rights in the case of *Letellier*, to satisfy this ground "facts capable of showing that the accused's release would actually disturb public order must exist. In addition, detention will continue to be legitimate only if public order remains actually threatened [...]".<sup>65</sup> The Pre-Trial Chamber notes the difference between the standard of "facts capable of showing", and the standard asserted by the Co-Lawyers, namely that the "facts show".<sup>66</sup>

112. The Pre-Trial Chamber finds that although specific evidence is required to support an actual risk that public order may be disrupted if the Charged Person is released, this assessment necessarily involves a measure of prediction particularly in the context of the crimes falling within the jurisdiction of the ECCC.<sup>67</sup>

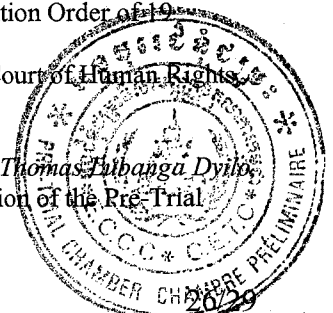
113. The Pre-Trial Chamber finds that the passage of time has not diminished the impact of the Democratic Kampuchea regime on society. It is believed that a proportion of the population that lived through this period from 1975 to 1979 suffers from post-traumatic stress disorder.

<sup>64</sup> Erika Kinetz and Yun Samean, "Duch Faces Judges in 1st Public ECCC Hearing", *The Cambodia Daily*, 21 November 2007 (Co-Prosecutors' Response to NUON Chea's Appeal against Provisional Detention Order of 19 September 2007, 3 December 2007, C11/11, Annex A, Attachment A 24).

<sup>65</sup> Decision on Nuon Chea's Provisional Detention Appeal, para. 76, referring to the European Court of Human Rights, Case of *Letellier v. France*, 26 June 1991, para. 51.

<sup>66</sup> Ieng Sary's Appeal Against Provisional Detention Order, 15 January 2008, C22/1/5, para. 11.

<sup>67</sup> As is done in *Situation in the Democratic Republic of Congo in the case of The Prosecutor v. Thomas Lubanga Dyilo*, 01/04-01/06 (OA 7), "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Pre-Trial Chamber", Appeals Chamber, 13 February 2007, para. 137.



Specialists have stated that the commencement of judicial activities before the ECCC “may pose a fresh risk to the Cambodian society”. It may “lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them”.<sup>68</sup>

114. The General Assembly of the United Nations has recognised that the crimes committed during the Democratic Kampuchea period from 1975 to 1979 are still a matter of concern for Cambodian society, and for humanity:

“Recalling that the serious violations of Cambodian and international law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole,

[...]

Recognizing that the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims [...].”<sup>69</sup>

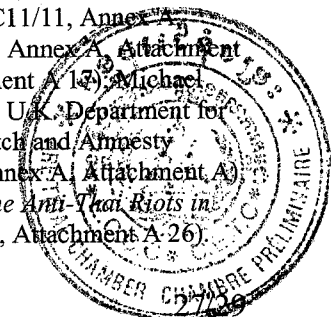
115. The hearings before the Pre-Trial Chamber, including that of the Charged Person, have generated a great deal of interest amongst the Cambodian population and press, as well as the international community. Hundreds of people, including members of the public and representatives of the press, non-governmental organisations and the international community, came to attend the hearings. This interest is demonstrative of the fact that the proceedings, even in the pre-trial phase, against senior leaders and those most responsible for the crimes committed during the Kampuchea Democratic period from 1975 to 1979 are still a matter of great concern today for the Cambodian population and the international community.

116. The Pre-Trial Chamber finds that the perceived threat to security is not illusory. This is firstly demonstrated by everyday disturbances or even violent crimes, of which the Pre-Trial Chamber takes notice as facts of common knowledge. Secondly, the example of the anti-Thai riots in 2003 points towards the potential for politically motivated instability.<sup>70</sup>

<sup>68</sup> Rob Savage, “Post Traumatic Stress Disorder: A legacy of pain and violence”, *Monthly South Eastern Globe*, July 2007, pp. 24-27 (C11/11, Annex A, Attachment A 25).

<sup>69</sup> Preamble, *Resolution adopted by the General Assembly – Khmer Rouge Trials*, GA Res A/RES/57/228, 27 February 2003.

<sup>70</sup> John Aglionby, “Thais cut links with Cambodia after riots”, *The Guardian*, 31 January 2003 (C11/11, Annex A, Attachment A 15); “Thai diplomats return to Cambodia”, *BBC News*, 10 February 2003 (C11/11, Annex A, Attachment A 16); “Cambodia apologizes for riots”, *CNN.com*, 30 January 2003 (C11/11, Annex A, Attachment A 17); Michael Flint, *Evaluation of DFID Country Programmes, Country Study: Cambodia 1997-2003*, London: UK Department for International Development, 2004, p. 4 (C11/11, Annex A, Attachment A 19); Human Rights Watch and Amnesty International, “Cambodia: Freedom of Expression Under Attack”, 11 February 2003 (C11/11, Annex A, Attachment A 20); U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Report to the Congress on the Anti-Thai Riots in Cambodia on January 29, 2003*, Washington: U.S. Department of State, 2003 (C11/11, Annex A, Attachment A 26).



117. The facts mentioned above are capable of showing that the Charged Person's release would actually disturb public order. The Pre-Trial Chamber finds that the provisional detention of the Charged Person is a necessary measure to preserve public order.

## VII. HOSPITALISATION AS AN ALTERNATIVE FORM OF DETENTION

118. The Co-Lawyers have submitted that with their Appeal they do not seek the Charged Person's release, but request an alternative form of detention. It is argued that such an alternative form would be warranted on the ground of the current health condition of the Charged Person. The Charged Person should, according to the Co-Lawyers, be placed in a hospital in the first instance and under house arrest once his health condition has improved.

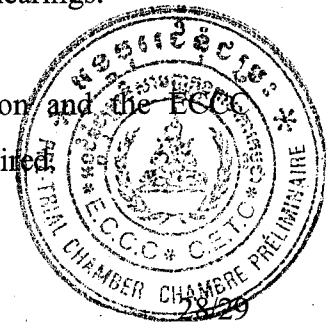
119. The Pre-Trial Chamber notes that the Internal Rules do not specifically provide for alternative forms of detention.

120. Rule 65(1) provides, however, that a charged person may be released from detention by bail order, under imposed conditions necessary to ensure the presence of the charged person during the proceedings and the protection of others. The Pre-Trial Chamber, therefore, will interpret the Co-Lawyers' request for alternative detention as a request for release under the condition of hospitalisation or house arrest.

121. The Pre-Trial Chamber finds that, in the present case, the conditions of Rule 63(3)(a) and three grounds set out in Rule 63(3)(b) have been met, though any one of these alone would have been sufficient to justify the provisional detention of the Charged Person. This means that provisional detention is a necessary measure to ensure the security of the Charged Person, to ensure the presence of the Charged Person during the proceedings and to preserve public order. In these circumstances, the Pre-Trial Chamber considers that the Charged Person cannot be released on bail, since any of the conditions proposed by the Charged Person are outweighed by the necessity for his provisional detention.

122. Even if the Charged Person were to be hospitalised or put under house arrest, there may still be high risks to his personal safety. The Charged Person 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 publicly scheduled hearings.

123. There is no evidence of an immediate need for long-term hospitalisation and the ECCC Detention Facility is properly equipped to provide medical assistance as required.



**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:**

- 1) The Appeal is admissible in its form;
- 2) The Co-Investigating Judges properly exercised their discretion to order the provisional detention of the Charged Person;
- 3) Provisional detention is still a necessary measure on the basis of the above-mentioned grounds;
- 4) The Order of the Co-Investigating Judges is affirmed with the reasons expressed in this Decision being substituted for the reasons of the Co-Investigating Judges;
- 5) The request for hospitalisation as an alternative form of detention is denied;
- 6) The Appeal is dismissed.

In accordance with Rule 77(13) of the Internal Rules, this Decision is not subject to appeal.

**GIVEN IN PUBLIC BY** the Pre-Trial Chamber, in the presence of the Charged Person and his national Co-lawyer.

Phnom Penh, 17 October 2008

**Pre-Trial Chamber**

**President**

  
Rowan DOWNING


  
NEY Thol

  
Katinka LAHUIS

  
HUOT Vuthy



**Greffiers**  
  
CHUON Sokreasey

  
Dirk Jan LAMAN

