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ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

វិញ្ញាបនបត្របញ្ជាក់ថា ឯកសារនេះត្រឹមត្រូវតាមច្បាប់
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ថ្ងៃ ខែ ឆ្នាំ ត្រូវបានបញ្ជាក់ (Certified Date/Date de certification):
 30 / 04 / 2010

មន្ត្រីទទួលបន្ទុកសំណុំរឿង / Case File Officer / L'agent chargé
 du dossier: SANN RADA

អង្គបុរេជំនុំជម្រះ
Pre-Trial Chamber
Chambre Préliminaire

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 (PTC32)

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

Greffiers: CHHORN Proloeng
 Entela JOSIFI

Date: 30 April 2010

ឯកសារដើម
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PUBLIC REDACTED
DECISION ON IENG SARY'S APPEAL AGAINST ORDER ON EXTENSION OF
PROVISIONAL DETENTION

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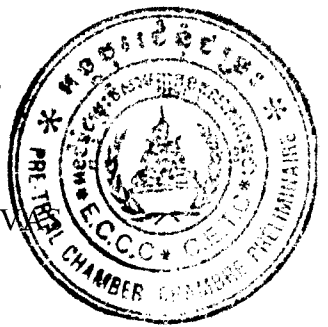
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 Ms. Lima NGUYEN
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 Ms. Elizabeth-Joelle RABESANDRATANA

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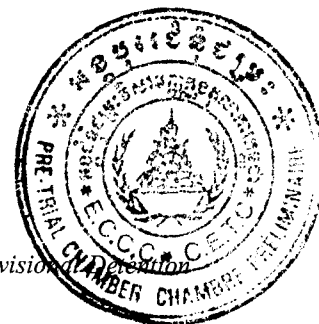
IENG Sary

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of “Ieng Sary’s Appeal against the [Co-Investigating Judges’ Order on] Extension of Provisional Detention” filed by the Co-Lawyers for the Charged Person Ieng Sary on 07 December 2009 (the “Appeal”).¹

I. PROCEDURAL BACKGROUND

1. The Pre-Trial Chamber refers to, repeats and adopts the Report of Examination,² dated 8 February 2010, which forms part of this Decision.
2. On 10 November 2009, the Co-Investigating Judges issued their Order on Extension of Provisional Detention (the “Extension Order”) extending the provisional detention of Ieng Sary, who has been detained since 14 November 2007.³ The Extension Order was notified to the parties on 11 November 2009.
3. On 13 November 2009, the Co-Lawyers for the Charged Person filed a Notice of Appeal and, on 7 December 2009, they filed their Appeal which was notified to the Parties on 12 December 2009.
4. On 17 December 2009, the Co-Prosecutors submitted their Response to the Appeal (the “Co-Prosecutors’ Response”).⁴

On 18 December 2009, the Civil Party Co-Lawyers submitted their Response to the Appeal (the “Civil Parties’ Response”).⁵

On 3 February 2010, the Pre-Trial Chamber received observations of other Civil Party Lawyers concerning the Appeal (the “Civil Party Lawyers’ Observations”).⁶ The Pre-



¹ Ieng Sary’s Appeal against the Co-Investigating Judges’ Order on Extension of Provisional Detention, 07 December 2009, C22/9/1.

² Report of Examination, 8 February 2010, C22/9/8.

³ Order on Extension of Provisional Detention, 10 November 2009, C22/8.

⁴ Co Prosecutors’ Response to Ieng Sary’s Appeal on Extension of Detention, 17 December 2009, C22/9/2.

⁵ Civil Party Co-Lawyers’ Response to the Appeal of Ieng Sary against Extension of Provisional Detention, 18 December 2009, C22/9/3.

Trial Chamber, after reviewing the contents of these observations and noticing that none of the parties commented or objected to its late filing,⁷ pursuant to Internal Rule 39(4)(b) has decided to recognize the validity of this submission which was filed after the expiration of the time limit prescribed in the Internal Rules and Practice Directions.

7. On 20 January 2010 the President of the Pre-Trial Chamber issued an Order scheduling a public hearing on the Appeal for 11 February 2010.⁸ Before the hearing, the Pre-Trial Chamber was given access to the Case File, which was updated.
8. On 11 February 2010, the Pre-Trial Chamber held a hearing where the Charged Person was represented by his Co-Lawyers. This hearing was held in public.

II. ADMISSIBILITY OF THE APPEAL

9. The Extension Order was issued on 10 November 2009 and notified to the Parties on 11 November 2009. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 13 November 2009. The Appeal was filed on 7 December 2009 and therefore within the time provided for in Internal Rule 75(3) of the ECCC Internal Rules (the “Internal Rules”).

III. APPLICABLE LAW

10. Reference is made to Internal Rule 63.

IV. NATURE OF THE APPEAL

11. In the Appeal, the Co-Lawyers request that the Pre-Trial Chamber:



⁶ Observations of the Co-Lawyers for the Civil Parties Concerning Ieng Sary's Appeal against the Co-Investigating Judges' Order on Extension of Provisional Detention, 3 February 2010, C22/9/7.

⁷ The Pre-Trial Chamber specifically mentioned this filing during the hearing on Appeal of 11 February 2010; see Transcript of hearing of 11 February 2010 on Appeal, C22/9, p. 18.

⁸ Scheduling Order, 20 January 2010, C22/9/4.

“reverse the Extension Order and terminate the provisional detention of the Charged Person”.⁹

12. They contend that the Internal Rule 63(3) conditions for detention have not been met and that even if one of those conditions were met, the Co-Investigating Judges abused their discretion in ordering detention without considering whether less restrictive measures would accomplish the same goals.¹⁰
13. During the hearing of 11 February 2010, the Co-Lawyers for the Charged Person appeared to resile from the relief sought in the Appeal, stating that they “have never asked that [the Charged Person] be released” and that their request was “that the Court change the conditions of his provisional detention from provisional detention at the facility of the ECCC to [...] house arrest or [...] detention at the hospital.”¹¹
14. The Co-Prosecutors in their Response to the Appeal request from the Pre-Trial Chamber to dismiss the Appeal on the grounds that, 1) the Appellant has failed to demonstrate any material change in circumstances, 2) no material exculpatory evidence has been found to undermine the evidence that is capable of satisfying an objective observer that the Appellant may have committed the crimes with which he is charged, 3) Defence’s challenges to the operations of the Office of the Co-Investigating Judges have not been found as valid, and 4) Conditions under Internal Rule 63(3)(b) are still fulfilled.¹²
15. A number of Civil Party Lawyers in their Response to the Appeal conclude that “the Appeal must fail. The Extension Order of the [Co-Investigating Judges] is reasonable, justifiable and the discretion is properly exercised.”¹³ Other Civil Party Lawyers in their Observations request the Pre-Trial Chamber to affirm the Extension Order and submit

⁹ Appeal, last paragraph.

¹⁰ Appeal, para. 27.

¹¹ Transcript of hearing of 11 February 2010 on Appeal, C22/9, p.25.

¹² Co-Prosecutors’ Response, para. 2, subparas. a-e.

¹³ Civil Parties’ Response, para. 28.



that release of the Charged Person “cannot but cause incomprehension among the population, and this could heighten the risk of acts of violence.”¹⁴

16. The Pre-Trial Chamber, in the light of its rulings related to detention matters¹⁵ and the submissions of the Parties as set out in the Report of Examination, will review the Extension Order by an examination of:

- a. Well founded reasons to believe that the Charged Person may have committed the crimes specified in the Introductory Submission (Internal Rule 63(3)(a));
- b. Grounds that would make detention a necessary measure (Internal Rule 63(3)(b));
- c. Due diligence in the conduct of investigation;
- d. Request for release on bail.

V. CONSIDERATIONS

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

17. In the Extension Order, the Co-Investigating Judges noted that in their Order of 10 November 2008¹⁶ extending provisional detention of the Charged Person and in the Pre-Trial Chamber’s Decision of 26 June 2009¹⁷ on Appeal against Extension of Provisional



Civil Party Lawyers’ Observations, paras 26-27 and Transcript of hearing of 11 February 2010 on Appeal, p.77.

¹⁵ Decision on Appeal of Charged Person Nuon Chea against Co-Investigating Judges’ Order for Extension of Provisional Detention, 18 May 2009, C9/4/7; Decision on Appeal of Charged Person Ieng Thirith against Co-Investigating Judges’ Order for Extension of Provisional Detention, 18 May 2009, C80/5/18; Decision on Appeal of Ieng Sary against OCIJ’s Order on Extension of Provisional Detention, 26 June 2009, C22/5/38 and Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26.

¹⁶ Order on Extension of Provisional Detention, 10 November 2008, C22/4.

¹⁷ Decision on Appeal of Ieng Sary against Co-Investigating Judges’ Order on Extension of Provisional Detention, 26 June 2009, C22/5/38 (the “Decision on Appeal against Extension of Detention”).

Decision on Ieng Sary’s Appeal against Order on Extension of Provisional Detention

Detention it was found that there were well founded reasons to believe that Ieng Sary may have committed the crimes with which he is charged.¹⁸

18. The Co-Investigating Judges further state that since the last Pre-Trial Chamber hearing on appeal against extension of provisional detention held on 2 April 2009, they have continued to investigate the allegations contained in the Introductory Submission and to place evidence on the Case File. They indicate that more than fifty new witness statements have been added which assist in clarifying whether the Charged Person played a role in connection with the alleged crimes.¹⁹
19. The Co-Investigating Judges then, in their Extension Order, continue to enumerate the evidence that they consider to be of an inculpatory nature.²⁰ They mention that some of the evidence may appear to be exculpatory, but consider that this evidence is not sufficient to invalidate the basis of the well founded reason to believe that the Charged Person may have committed the crimes with which she is charged.²¹
20. The Co-Investigating Judges conclude that:

“after a fresh review of the evidence on the Case File, at this stage of the judicial investigation, there are sufficient additional facts or information which would satisfy an objective observer that there is well founded reason to believe that Ieng Sary, in one or more of his [...] roles and functions, either planned, instigated, ordered, failed to prevent or otherwise aided and abetted in the commission of crimes specified in the Introductory Submission and, thus, that the condition set out in Internal Rule 63(3)(a) is still met, notwithstanding the passage of time.”²²

¹⁸ Extension Order, paras. 11-13.

¹⁹ Extension Order, para. 15.

²⁰ Extension Order, para. 15, subparas. a-h.

²¹ Extension Order, paras. 16 and 17.

²² Extension Order, para. 18.



21. The Co-Lawyers, referring to various motions they have brought before the Pre-Trial Chamber against one of the Co-Investigating Judges, submit in their Appeal that “it is impossible to determine from the Case File whether “well founded reasons” exist, because of flaws in the [...] judicial investigation.” The Co-Lawyers conclude that “these problems related to the investigation cannot be allowed to prejudice Mr. IENG Sary’s fundamental right to liberty or his right to be presumed innocent.”²³
22. In their Response to the Appeal, the Co-Prosecutors submit that “the Appellant has not shown how [their motions] regarding [the operations of the Office of the Co-Investigating Judges], and their as yet unsuccessful results, could be sufficient to demonstrate any flaws [in the investigations].” They submit that “the Appellant does not indicate what exculpatory material is missing from the Case File and what evidence could have been overlooked by the [Co-Investigating Judges].”²⁴ During the hearing of 11 February 2010 on the Appeal, the Co-Prosecutors submitted that the well-founded reasons establishing that the Charged Person may have committed the crimes he is charged with “have become stronger” because he has recently been further charged with the crime of genocide, various national crimes and with the mode of liability of joint criminal enterprise.²⁵
23. In their Response to the Appeal, the Civil Parties submit that the Appeal does not impugn the extension order with regard to the prerequisite of Internal Rule 63(3)(a).²⁶ They further point out that some witness statements which have been considered as exculpatory evidence by the Co-Investigating Judges must be considered with utmost caution as they submit that the quoted witnesses had close connections with Pol Pot and the Charged Person.²⁷ The other Civil Party Lawyers in their Observations also recall that recently the Charged Person was also charged with genocide.²⁸

²³ Appeal, paras.12-14.

²⁴ Co-Prosecutors’ Response, paras. 9-10.

²⁵ Transcript of hearing of 11 February 2010 on Appeal, C22/9, p. 52.

²⁶ Civil Parties’ Response, para. 5.

²⁷ Civil Parties’ Response, para. 10.

²⁸ Civil Party Lawyers’ Observations, paras. 17-19.



24. In relation to the Co-Prosecutors' and Civil Parties submissions on the additional charges, the Pre-Trial Chamber observes that the Order on Extension of Provisional Detention was issued on 10 November 2009 and the Co-Investigating Judges issued an Order to clarify the charges against the Charged Person on 20 November 2009 which was notified in English to the Parties on 11 December 2009.²⁹
25. On 16 December 2009, during an interview of the Charged Person, the Co-Investigating Judges notified the Charged Person and his Co-Lawyers of the charges for which he may be indicted, indicating that "there is clear and consistent evidence that acts constituting crimes against humanity, grave breaches of the 1949 Geneva Conventions, crimes of genocide and national crimes were committed."³⁰ At the initial appearance the Charged Person had been advised that he was placed under judicial investigation for the acts set out in the Introductory Submission and specified the offences with which he was charged in relation thereto as: Crimes Against Humanity and Grave Breaches of the Geneva Conventions of 1949 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."³¹
26. In the interests of justice, the Pre-Trial Chamber points to its previous decision on the Appeal against the Closing Order in Case 001 ("Decision on Appeal against the Closing Order").³² The Pre-Trial Chamber found that only where the factual elements are exactly the same one can assert that other crimes are included in the charge and where the elements differ, the other crimes are not included.³³ In the same Decision, the Pre-Trial Chamber found that, for instance, the national crimes contain different elements from the international crimes.³⁴ The Pre-Trial Chamber also found that according to international standards, the Charged Person must be informed of any and all separate charges against

²⁹ Order Concerning the Co-Prosecutors' Request for Clarification of Charges, 20 November 2009, D198/1 (the "Order on Clarification of Charges").

³⁰ Written Record of Interview with the Charged Person, 21 December 2009, D282, paras. 1-4.

³¹ Written Record of Initial Appearance, 28 November, 2007, D38, p.2 and 3.

³² Decision on Appeal against the Closing Order Indicting KAING Guek Eav Alias "Duch", 5 December 2008, D99/3/42 (the "Decision on Appeal against the Closing Order").

³³ Decision on Appeal against the Closing Order, paras.85 and 88.

³⁴ Decision on Appeal against the Closing Order, paras 60 -88.

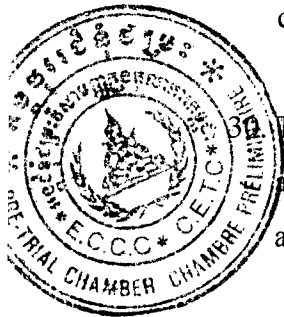


him/her as soon as they are justified “to such an extent that he/she is able to exercise the rights accorded to him/her during the investigation, including the right to request investigative action pursuant to Internal Rule 58(6).³⁵

27. The Pre-Trial Chamber further observes that in the Appeal, the Co-Lawyers of the Charged Person challenge the conclusions of the Co-Investigating Judges Order in respect of the requirements of Internal Rule 63(3)(a) on grounds of alleged “flaws in the investigation.” The Pre-Trial Chamber notes, as also pointed out by the Co-Prosecutors in their Response, that the Co-Lawyers concerns are based on allegations yet to be confirmed and that the Co-Lawyers do not specifically show what exculpatory material is missing from the Case File or what evidence has been overlooked by the Co-Investigating Judges which could lead the Pre-Trial Chamber to reconsider.

28. The Pre-Trial Chamber further notes that in the Extension Order the Co-Investigating Judges have conducted a fresh review of the evidence on the Case File including both inculpatory and exculpatory evidence, taken into consideration the relevant material contained in the Case File and concluded that the well founded reasons still exist.³⁶

29. The Pre-Trial Chamber finds that the Co-Investigating Judges have given sufficient reasoning for their conclusion and therefore have exercised their discretion correctly in concluding that the “well founded reasons” still exist.



The Pre-Trial Chamber, having looked at the case file afresh, notes that it found that there are recent statements and documents placed in the case file which constitute evidence of an exculpatory³⁷ and inculpatory³⁸ nature. After an examination of the totality of the

³⁵ Decision on Appeal against the Closing Order, para.138.

³⁶ Extension Order, paras. 15-18.

³⁷ Written Record of Interview of Witness SALOT Ban, 22 July 2009 (filed on 11 November 2009), D233/2, p.3.

³⁸

evidence, the Pre-Trial Chamber did not find that the new exculpatory evidence would undermine, at this time, the conclusion that well-founded reasons exist.

31. The Pre-Trial Chamber finds that the “well founded reasons” that would satisfy an objective observer that the Charged Person may have been responsible for, or committed, the alleged crimes specified in the Introductory Submission not only exist, as ascertained by the Co-Investigating Judges in their Extension Order, but are, at present, also supported by additional evidence.
32. Therefore, the Pre-Trial Chamber finds that the first condition for ordering provisional detention, mentioned in Internal Rule 63(3)(a), is still met.

B. Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b)):

33. In the Extension Order, the Co-Investigating Judges referred to the Pre-Trial Chamber’s findings in its Decision on Ieng Sary’s Appeal against the Order on Extension of Provisional Detention dated 26 June 2009³⁹ and considered whether the conditions under Internal Rule 63(3)(b) still remain satisfied. The Co-Investigating Judges found in their Extension Order that because there has been no change in the circumstances detention is still a necessary measure to ensure the presence of the Charged Person during the proceedings, to protect the security of the Charged Person and to preserve public order.⁴⁰
34. The Pre-Trial Chamber finds that in applying this standard the Co-Investigating Judges acted correctly.

Necessity to ensure the presence of the Charged Person during the proceedings (Internal Rule 63(3) (b) (iii)):

³⁹ Decision on Appeal against Extension of Detention.

⁴⁰ Extension Order, paras. 20-27.



35. The Co-Lawyers argue in their Appeal that the Co-Investigating Judges have erred by failing to fully consider the current situation where the Charged Person is 84 years of age, has serious health problems which limit his mobility and is “so well known that it is unlikely that he could escape unnoticed.” The Co-Lawyers further submit that differently from the international tribunals the ECCC has judicial police and authority to issue arrest warrants,⁴¹ which, as they further mention during the hearing on Appeal, would mean that it is easier for the ECCC to watch or arrest the Charged Persons if released.⁴²
36. The Co-Prosecutors in their Response to the Appeal contend that the fact that the Charged Person is a well known figure shows that it is unlikely that he will be without contacts to assist him to flee. The Co-Prosecutors add that the existence of judicial police and authority to issue arrest warrants of the ECCC are not currently relevant and become so only once the Charged Person has fled, which does nothing to reassure this Court that the risk of flight is nonexistent. The Co-Prosecutors further point out that the Co-Lawyers have not provided new evidence to convince the Pre-Trial Chamber to reverse its finding of 26 July 2009.⁴³
37. A number of Civil Parties in their Response to the Appeal suggest that the Pre-Trial Chamber should follow the jurisprudence of the ECCC and find that “in accordance with [Internal] Rule 21(2) the detention of the [Charged Person] is justified by the requirements of the [...] proceedings, in particular the need to ensure his presence and is proportionate to the gravity of the crimes for which he is accused.”⁴⁴ Other Civil Party Lawyers add in their observations that the Pre-Trial Chamber should consider also the Charged Person’s “status as a senior leader, his relations and the sentence he faces.”⁴⁵
38. In relation to the Co-Lawyers argument that the age and health of the Charged Person limit his mobility, the Pre-Trial Chamber observes that it has dealt with this same

⁴¹ Appeal, paras. 16-17.

⁴² Transcript of the hearing of 11 February 2010 on Appeal, pp.28 and 41.

⁴³ Co-Prosecutors’ Response paras. 11-12.

⁴⁴ Civil Parties’ Response, paras. 23-24.

⁴⁵ Civil Party Lawyers’ Observations, paras. 20-21.



arguments in its previous decision on appeal against extension of provisional detention⁴⁶ and that the Co-Lawyers do not provide any evidence that shows that, at this time, the Charged Person would not be able to flee the country by using any means of transport.

39. Regarding the power of the ECCC Chambers to issue arrest warrants, the Pre-Trial Chamber finds that the existence of judicial police and authority to issue arrest warrants of the ECCC does nothing to reassure this Court that the risk of flight is nonexistent. The Pre-Trial Chamber further finds that when risk of flight is being discussed the issue is not to give the benefit of the doubt to the Charged Person and check the possibilities to ensure his presence in case he will flee and not appear in court. The raised argument will therefore not further be discussed.
40. The Pre-Trial Chamber shall not consider the Co-Lawyers argument that the Charged Person is so well known that it is unlikely that he will flee unnoticed, because the issue in these proceedings is not to assess whether the Charged person may flee noticed or unnoticed, but rather whether he may flee.
41. The Pre-Trial Chamber further notes, as also pointed out by the Co-Prosecutors, that the Co-Lawyers did not provide any new evidence to convince the Pre-Trial Chamber to reverse its previous findings on this issue which are the basis of the appealed order.
42. The Pre-Trial Chamber repeats that, in view of the gravity of the charges, the Charged Person could face a sentence of imprisonment from five years to life, if found guilty. Nothing presently placed on the case file leads to a conclusion that the circumstances have changed. Moreover, the new evidence added in the case file adds to the arguments supporting a connection between the alleged acts and the Charged Person, thus putting greater pressure on him.⁴⁷



⁴⁶ Decision on Appeal against Extension of Detention, para.28.

⁴⁷ See paragraph 29 above.

43. The Pre-Trial Chamber finds that the Co-Investigating Judges were correct in concluding that there is still a need to keep the Charged Person in detention in order to ensure his presence in the proceedings.

Necessity to protect the security of the Charged Person (Internal Rule 63(3)(b)(iv))

44. The Co-Lawyers submit that the Co-Investigating Judges erred in considering that the fear of aggression towards Duch could be taken into account when assessing security of the Charged Person because he has not confessed to any crimes, his trial has not yet started and the publicity surrounding his alleged crimes is much less than that surrounding Duch's. They add that the outcome of Duch's trial would enhance public faith in the judicial system which should lessen any risk of aggression towards the Charged Person.⁴⁸

45. The Co-Prosecutors in their Response submit that the Co-Lawyers "theorised shift in feeling within Cambodian society is purely speculative and the anticipated sentencing [of Duch] cannot be considered as a change in circumstance as it has not yet happened."⁴⁹

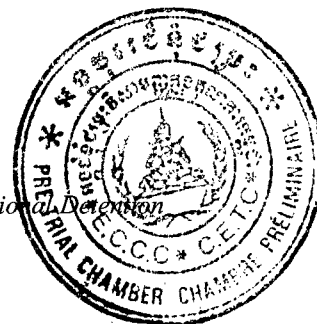
46. The Civil Party Lawyers in their Response to the Appeal note that the cases of Duch and the Charged Person are not equal but "nevertheless can be compared in some ways as they are both similarly charged for serious crimes within the jurisdiction of the ECCC." They add that the Charged Person is charged with many more crimes than Duch, as he is allegedly a senior leader and that while Duch has admitted his responsibility and cooperated with the Court, this is not the case for the Charged Person.⁵⁰ The other Civil Party Lawyers in their Observations add that the Charged Person could face reprisals from the victims if released.⁵¹ The Civil Party Lawyers added during the hearing of 11 February 2010 that "the high ranking role of the Charged Person during the Democratic Kampuchea [period] made people more intrigued to understand his role, and his [failure

⁴⁸ Appeal, paras. 18-19.

⁴⁹ Co-Prosecutors' Response paras. 13-14.

⁵⁰ Civil Parties' Response, para. 24.

⁵¹ Civil Party Lawyers' Observations, para. 24.



to cooperate with the court] does not mean [that] it is a reason to bring peace and reconciliation, but instead its going to cause more pain to the victims throughout the country.”⁵²

47. The Pre-Trial Chamber observes that the Co-Investigating Judges in their Extension Order considered whether the Internal Rule 63(3)(b)(iv) conditions necessitating the Charged Person’s detention were still met in light of the findings of the Pre-Trial Chamber in its Decision on Appeal against Extension of Provisional Detention. They did not find any change in the circumstances and concluded that provisional detention still remains a necessary measure to protect the Charged Person’s security. The Pre-Trial Chamber further observes that the Co-Lawyers did not put before the Co-Investigating Judges or the Chamber any argument or change in circumstances indicating the contrary. Further examination of the Case File by the Pre-Trial Chamber has not caused it to differ from this conclusion of the Co-Investigating Judges.

48. In relation to the Co-Lawyers contention that the Co-Investigating Judges erred in taking into consideration the fear of aggression towards Duch because the Charged Person has not confessed to any crimes, his trial has not yet started and the publicity surrounding his alleged crimes is much less than that surrounding Duch’s, the Pre-Trial Chamber observes, as also pointed out by the Civil Parties in their Response, that, notwithstanding the presumption of innocence, the charges against the Charged Person are of a more serious nature than those against Duch. While Duch may be seen as having cooperated with the Court, the Charged Person appears to have exercised his rights. The Pre-Trial Chamber will not recognise any adverse inference that is sought to be drawn by the Civil Parties from such an exercise of rights.

49. In relation to the Co-Lawyers submission that the outcome of Duch’s trial would enhance public’s faith in the judicial system which should lessen any risk of aggression towards the Charged Person, the Pre-Trial Chamber finds as also pointed out by the Co-

⁵² Transcript of the hearing of 11 February 2010 on Appeal, p. 75.
Decision on Ieng Sary’s Appeal against Order on Extension of Provisional Detention



Prosecutors that an anticipated sentencing of Duch cannot be considered as a change in circumstance for the purposes of this appellate procedure as it has not yet happened.

50. The Pre-Trial Chamber finds that the Co-Investigating Judges were correct in their conclusion that provisional detention remains a necessary measure to protect the Charged Person's safety.

Necessity to ensure Public Order (Internal Rule 63(3)(b)(v)):

51. The Co-Lawyers submit that the interest of the public in the proceedings at the ECCC cannot be used as a basis of an order extending the Charged Person's provisional detention. They further argue that the Cambodian society has not been threatened by the announcement that new trials may begin and submit that "no one takes the threat of instability seriously." To support this argument the Co-Lawyers refer to an article of 16 September 2009 posted in the International Justice Tribune.⁵³

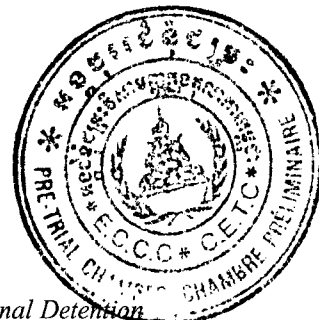
52. In response the Co-Prosecutors submit that it is "unclear how the argument that the lack of public disorder upon the announcement of the further investigation of five additional suspects has any bearing on the potential effect on public order that the release of a Charged Person, as widely known as the Appellant and associated with Duch, might have." They add that the Co-Lawyers for the Charged Person "have provided no new evidence since 26 July 2009 that may convince the Pre-Trial Chamber to reverse its finding."⁵⁴

53. A number of Civil Party Lawyers submit that "the release of the [Charged Person] cannot but cause incomprehension among the population, and this could heighten the risk of acts of violence."⁵⁵

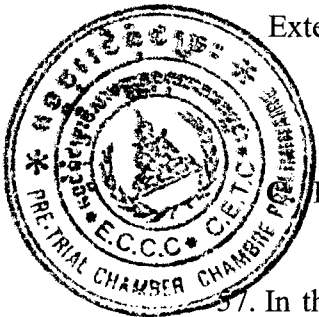
⁵³ Appeal, paras. 21-22.

⁵⁴ Co-Prosecutors Response, para. 15.

⁵⁵ Civil Party Lawyers' Observations, para. 26.



54. The Pre-Trial Chamber will not discuss the arguments raised by the Co-Lawyers where they oppose previous findings of the Pre-Trial Chamber where no new arguments have been raised considering this ground for provisional detention. The Pre-Trial Chamber finds that previous findings are not subject to further discussion unless the requirements for reconsideration of decisions are met.⁵⁶
55. The Pre-Trial Chamber notes, as also pointed out by the Co-Prosecutors, that it is unclear how the effect that the announcement of further investigations has on public order is related to the effect that the release of the Charged Person is considered to have. The Pre-Trial Chamber also notes that the article posted in the International Justice Tribune used by the Co-Lawyers in their Appeal is a speculative count of what may happen at the ECCC and an unsubstantiated statement that no one takes instability seriously.
56. The Pre-Trial Chamber observes that the Co-Investigating Judges affirm in the Extension Order that they have not found any change in circumstances since the Pre-Trial Chamber's Decision on the Appeal against Extension of Provisional Detention that could lead them to find that continued detention is not necessary. The Co-Lawyers did not put before the Co-Investigating Judges or the Chamber any argument or change in circumstances indicating the contrary. The Pre-Trial Chamber finds that the Co-Investigating Judges have exercised their discretion correctly in this part of their Extension Order in finding that detention remains necessary to preserve public order.



Due Diligence by the Co-Investigating Judges:

57. In the Extension Order, the Co-Investigating Judges acknowledged that “the passage of time is relevant to determining the legitimacy of continued provisional detention of a Charged Person.”⁵⁷ They indicate that the scope of the judicial investigation required by the Introductory Submission and the gravity of the crimes alleged therein with respect to

⁵⁶ Decision on Application for Reconsideration of Civil Party's Right to Address Pre-Trial Chamber in Person, C22/I/68, 28 August 2008, para. 25.

⁵⁷ Extension Order, para. 28.

the Charged Person require large-scale investigative actions. They further provide details in the Extension Order of the number of investigative actions undertaken since 2 April 2009, which include written records of witnesses and Civil Parties interviews and documents added to the Case File either at the request of Parties or *proprio motu*.⁵⁸

58. The Co-Lawyers in their Appeal do not submit any arguments to challenge due diligence by the Co-Investigating Judges. The Co-Prosecutors during the hearing of 11 February 2010 indirectly touch on this issue by advising that eight hundred witness statements had been taken and five hundred rogatory letters had been issued, during the entire course of the investigation.⁵⁹ The Civil Party Lawyers in their Responses to the Appeal did not submit any arguments in this respect.

59. Pre-Trial Chamber finds that the reasonableness of the length of detention and the diligence of the Co-Investigating Judges in conducting their investigation are factors that shall be taken into consideration when exercising the discretionary power to extend provisional detention. The Pre-Trial Chamber refers to the period of time from the date of the hearing on the Appeal against the Extension of detention which is 2 April 2009 up to the date of the hearing of 11 February 2010.

60. The Pre-Trial Chamber finds that there is sufficient additional evidence in the case file to demonstrate that the investigations have progressed expeditiously during the period under consideration. The Co-Investigating Judges have provided sufficient reasoning in the Extension Order to support this finding.⁶⁰

61. The Pre-Trial Chamber further finds that the gravity and nature of the crimes with which the Charged Person is charged require large-scale investigative actions which have been undertaken, and that in view of the scope and current stage of the investigations, the Co-Investigating Judges reasonably exercised their discretion to order the extension of the provisional detention.

⁵⁸ Extension Order, paras. 29-30.

⁵⁹ Transcript of the hearing of 11 February 2010 on Appeal, p. 52.

⁶⁰ Extension Order, para. 30 and related footnotes.



D. Request for house arrest or detention at the hospital:

62. The Co-Lawyers submit in the Appeal that the Co-Investigating Judges abused their discretion by failing to consider less restrictive alternatives to detention before ordering an extension of the Charged Person's detention.⁶¹ The Pre-Trial Chamber observes that no new circumstances were submitted in this respect by the Co-Lawyers in their Motion of 20 October 2009 against Extension of Provisional Detention. The Pre-Trial Chamber further observes that the Co-Investigating Judges found in the Extension Order that the conditions under Internal Rule 63(3) are met, therefore, the Co-Investigating Judges exercised their discretion correctly by extending the Charged Person's detention.
63. The Pre-Trial Chamber notes that, although in the relief sought in the Appeal the Co-Lawyers for the Charged Person ask for "termination of the provisional detention", during the hearing of 11 February 2010 on Appeal they clarified that they do not ask for provisional release and that they only request the Pre-Trial Chamber to consider ordering house arrest or detention at the hospital instead of detention at the ECCC facility.⁶²
64. The Pre-Trial Chamber notes that it has determined this same request in its Decision on the Charged Person's Appeal against Extension of Provisional Detention, dated 26 June 2009, stating that "the conditions of Internal Rule 63(3)(b) are still met. Any one of these conditions alone would have been sufficient to justify the continuation of the provisional detention of the Charged Person. The conditions proposed by the Charged Person are outweighed by the necessity for his provisional detention."⁶³
65. As the current request for house arrest contains no new or additional submissions and there has been no demonstrable change of circumstances the Pre-Trial Chamber rejects this request without further reasoning.

⁶¹ Appeal, Section III/B, paras. 23-26.

⁶² Transcript of hearing of 11 February 2010 on Appeal, p. 25.

⁶³ Decision on Appeal against Extension of Detention, para.48.



THEREFORE, THE PRE-TRIAL CHAMBER HEREBY UNANIMOUSLY DECIDES:

1. The Appeal is admissible in its form;
2. The Extension Order of the Co-Investigating Judges is affirmed with the reasons expressed in paragraphs 30-32 of this decision, in part, being added to the reasons of the Co-Investigating Judges;
3. The request for modification of conditions of detention is rejected;
4. The Appeal is dismissed.


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


GIVEN IN PUBLIC BY the Pre-Trial Chamber, in the presence of the Charged Person and ~~his~~ Co-Lawyer.


Phnom Penh, 30 April 2010


Pre-Trial Chamber


President

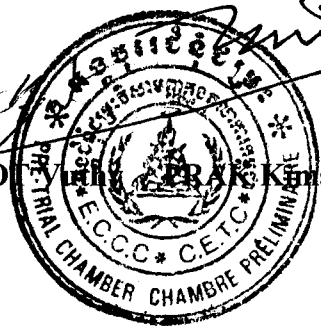

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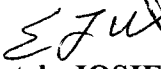

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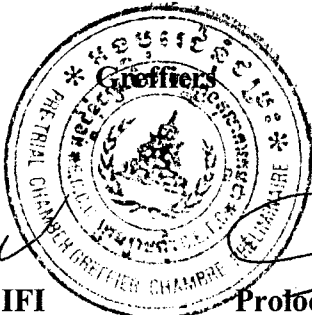

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 PRE-TRIAL CHAMBER
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 CHAMBRE PRELIMINAIRE


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 Pre-Trial Chamber
 CHAMBRE PRELIMINAIRE