

BEFORE THE CO-INVESTIGATING JUDGES
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPEAL ON
EXTENSION OF DETENTION

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I. INTRODUCTION

1. The Charged Person IENG Sary has filed an appeal (“Appeal”)¹ seeking a reversal of the Co-Investigating Judges’ order (“Second Extension Order”) extending his provisional detention for a further period not exceeding one year.² He claims that (1) his right to liberty and his presumption of innocence are violated by his continued detention as the conditions required for his detention under Internal Rules 63(3) (“Rules”) have not been met;³ (2) the Co-Investigating Judges abused their discretion in failing to consider less restrictive alternatives to detention that would ensure that the Appellant appears at trial without risking his safety or disrupting public order.⁴
2. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeal, *inter alia*, on the following grounds:
 - (a) The Appellant has failed to demonstrate any material change in circumstances since he was originally detained by the Co-Investigating Judges on 14 November 2007 (“Original Detention Order”).⁵ In particular, he has not demonstrated any change of circumstance since the Pre-Trial Chamber’s confirmation of his provisional detention on 17 October 2008 (“Original Detention Appeal Decision”)⁶, since the first extension of provisional detention on 11 December 2008 (“First Extension Order”)⁷, or the Pre-Trial Chamber’s confirmation of that Order on 26 June 2009 (“First Extension Appeal Decision”).⁸ In the Original Detention Appeal Decision, which evaluated all evidence on the Case File up to the date of the hearing, the Pre-Trial Chamber noted that the requirements of Rules 63(3)(a) and 63(3)(b)(iii)-(v) were met and “provisional

¹ *Case of IENG Sary*, IENG Sary’s Appeal Against Extension of Provisional Detention, 7 December 2009, C22/9/1, ERN 00411501-00411512 [*hereinafter* Appeal].

² *Case of IENG Sary*, Order on Extension of Provisional Detention, 10 November 2009, C22/8, ERN 00399377-00399388.

³ Appeal, para. 1.

⁴ *Id.*

⁵ *Case of IENG Sary*, Provisional Detention Order, 14 November 2007, C22 [*hereinafter* First Detention Order].

⁶ *Case of IENG Sary*, Decision on Appeal Against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, ERN 00232830-00232861 [*hereinafter* Original Detention Appeal Decision].

⁷ *Case of IENG Sary*, Order on Extension of Provisional Detention, 11 November 2008, C22/4, ERN 00238566-00238576 [*hereinafter* First Extension Order].

⁸ *Case of IENG Sary*, Decision on Appeal of IENG Sary Against OCIJ’s Order on Extension of Provisional Detention, 26 July 2009, C22/5/38, ERN 00343866-00343879 [*hereinafter* First Extension Appeal Decision].

detention [was] still a necessary measure on the basis of [those] grounds”.⁹ In the First Extension Appeal Decision, the Pre-Trial Chamber noted that “once the existence of ‘well founded reasons’ has been established, unless exculpatory evidence has been found to undermine it, it is sufficient to fulfil the requirement of Rule 63(3)(a) throughout the pre-trial stage of proceedings”.¹⁰

- (b) The Case File today contains evidence capable of satisfying an objective observer, at this stage of investigation, that the Appellant may have committed the crimes for which he is currently under investigation. No material exculpatory evidence has been found to undermine this evidence.
- (c) The “flaws in the investigation”¹¹ contended by the Defence as an impediment to the appraisal of the existence of reasons for detention are evidenced only by Defence challenges to operations of the Office of the Co-Investigating Judges (“OCIJ”), none of which have been found to be valid by Pre-Trial Chamber.
- (d) Three of the five disjunctive conditions under Rule 63(3)(b) are still fulfilled, thereby rendering provisional detention a necessary measure. Specifically, the Appellant’s provisional detention is necessary (1) to ensure his presence during the proceedings, (2) to protect his security, and/or (3) to preserve public order.
- (e) The Pre-Trial Chamber has noted that house arrest, or even hospital detention, for this Appellant is not warranted. There has been no change in circumstances to merit a reversal of this holding. The ECCC Detention Facility remains appropriately equipped to detain him.

II. THE LAW

Conditions Necessitating Detention

- 3. Under Rule 63(3), the Co-Investigating Judges may order provisional detention where:
 - (a) there is a well-founded reason to believe that the defendant may have committed the crimes specified in the Introductory Submission; and

⁹ Original Detention Appeal Decision, Disposition.

¹⁰ First Extension Appeal Decision, para. 21.

¹¹ Appeal, para 14.

- (b) they consider provisional detention to be a necessary measure to:
- (i) prevent the defendant from exerting pressure on any witness or victim, or prevent any collusion between him and his accomplices;
 - (ii) preserve evidence or prevent its destruction;
 - (iii) ensure the presence of the defendant during the proceedings;
 - (iv) protect the security of the defendant; or
 - (v) preserve public order.

4. The five grounds of detention under Rule 63(3)(b) are disjunctive.¹² There is no requirement that the Co-Investigating Judges find that every ground is satisfied before they consider that provisional detention is a necessary measure or that its extension is warranted. On the contrary, should they consider that any one of the five grounds exist, the test for detention is met. This approach is also followed by other criminal tribunals dealing with similarly serious international crimes.¹³

Exercise of Discretion in Considering Detention

5. A judicial authority may exercise discretion in determining whether or not detention is a necessary measure or its extension is warranted. Such discretion is usually exercised by taking into account all documents on the case file and all relevant facts of the case, including the gravity of the charges, the cogency of the evidence, the past and present character and behaviour of the defendant, the interests of witnesses and victims and the interests of justice as a whole.¹⁴ This conforms to the accepted practice in international criminal tribunals which has also been adopted by this Court.¹⁵

¹² Original Detention Appeal Decision, para. 121.

¹³ *Prosecutor v Sainovic and Odjanic*, Decision Refusing Ojdanic Leave to Appeal, Case No. IT-99-37-AR65.2, ICTY Appeals Chamber, 27 June 2003, page 3 adopted by the ECCC PTC in *Case of KAING Guek Eav alias "DUCH"*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC-OCIJ (PTC 01), 3 December 2007, ERN 00154284-00154302, C5/45, para. 59 [*hereinafter* DUCH Detention Appeal Decision].

¹⁴ *Prosecutor v Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, para. 4.

¹⁵ DUCH Detention Appeal Decision, para. 27.

Extension of Detention

6. Rule 63(6) provides for an automatic periodic review of a charged person's detention. Such a provision is absent in the basic documents of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). Those tribunals, however, require that for a renewed application for release to be successful, the defendant must demonstrate "a material change of circumstances".¹⁶
7. However, similar to the Rules of this Court, Rule 118 of the Rules of Procedure and Evidence of the International Criminal Court ("ICC") requires that the pre-trial detention of a defendant must be reviewed by its Pre-Trial Chamber at least every 120 days. The Pre-Trial Chamber of the ICC has a "distinct and independent obligation [...] to ensure that a person is not detained for an unreasonable period prior to trial".¹⁷ The Pre-Trial Chamber can modify its ruling on detention "if it is satisfied that the change in circumstances so require".¹⁸ At the ICC, "the Prosecution has the burden of proof in relation to the continuing existence of the conditions [...] of pre-trial detention".¹⁹
8. In this Court, the Rules do not require the Co-Investigating Judges to hear the Co-Prosecutors or any other party except the Charged Person, while determining the extension of detention.²⁰ The existence of an automatic periodic review of detention provides the detainee with an opportunity to put forth his position and, if warranted, to exercise his right to appeal.²¹

¹⁶ *Prosecutor v Boskoski and Tarculovski*, Decision Concerning Renewed Motion for Provisional Release of Johan Tarculovski, Case No. IT-04-82-PT, ICTY Trial Chamber, 17 January 2007, para. 9.

¹⁷ *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui*, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germaine Katanga, Case No. ICC—01/04-01/07, ICC Pre-Trial Chamber, 9 July 2008, page 4 [*hereinafter* 9 July 2008 Katanga Decision].

¹⁸ *Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui*, Review of the Decision on the Conditions of the Pre-Trial Detention of Germaine Katanga, Case No. ICC—01/04-01/07, ICC Pre-Trial Chamber, 18 August 2008, p. 6.

¹⁹ 9 July 2008 Katanga Decision, p. 4.

²⁰ Internal Rules, rule 63(7).

²¹ *Id.*

III. ARGUMENT

A. Appeal Does Not Identify Material Change of Circumstances to Justify Reconsideration of Detention

9. The Appellant has not identified any material change of circumstance to necessitate a reconsideration of his detention or even a change in detention conditions. On 26 June 2009, the Pre-Trial Chamber issued a reasoned decision for the second time upholding the necessity of his pre-trial detention.
10. The Appellant contends that flaws in the OCIJ investigation are such that it is impossible to determine from the Case File whether “well founded reasons” exist. The Appellant supports this contention by referring to various motions against the OCIJ he has brought before the Pre-Trial Chamber. The Appellant has not shown how his pleadings regarding OCIJ operations, and their as yet unsuccessful results, could be sufficient to demonstrate any “flaws”. The Appellant has also not shown how such alleged flaws in the investigation would hinder the appraisal of the necessity of detention. The Appellant states that “lack of sufficient exculpatory evidence on the Case File is very likely due to several problems with the judicial investigation”, but does not indicate what exculpatory material is missing from the Case File or what evidence could have been overlooked by the OCIJ. The procedures under the Rules—including the annulment proceedings—which allow the Appellant to challenge OCIJ procedures before the Pre-Trial Chamber are the appropriate forum for allegations of flaws in the judicial investigation. The Appellant has so far not succeeded in his attempts to challenge the reliability of OCIJ investigations before the Pre-Trial Chamber. It is inappropriate to revisit these allegations in a detention extension appeal. For these reasons the Co-Prosecutors invite the Pre-Trial Chamber to dismiss this ground of Appeal.

B. Provisional Detention Remains a Necessary Measure to Ensure the Appellant’s Presence During the Proceedings

11. The Pre-Trial Chamber determined on 26 July 2009 that provisional detention at the ECCC Detention Facility was necessary under Rule 63(3)(b)(iii) on the basis that the Appellant could face a sentence of imprisonment from five years to life if found guilty. The Appellant counters that the situation at this time is different in that he is 84 years of age and in poor

health. In the First Extension Appeal Decision, however, the Pre-Trial Chamber already considered the Appellant's advanced age (and presumably the health concerns that accompany it) and determined that it might count as an aggravating circumstance, rather than a mitigating one, when examining risk of flight.²² Furthermore, the contention that the Appellant is a well known figure could also be considered aggravating, rather than mitigating, in that he is unlikely to be without contacts to help him flee. Similarly, contrasting the ECCC with the ICC, ICTY and ICTR, in relation to the availability of judicial police and arrest warrants is unhelpful in that the ECCC, being the only Court of its kind in Cambodia which is prosecuting serious international crimes of unprecedented magnitude must deal with aggravated flight risk linked to the proximity to contacts and ease of flight unmatched by the other municipal courts. Moreover, the issue of judicial police and arrest warrants raised by the Appellant is only relevant once he has fled, which does nothing to reassure this Court that such flight is impossible. The Appellant has provided no new evidence since 26 July 2009 that may convince the Pre-Trial Chamber to reverse this finding. The Co-Prosecutors submit that the rationale outlined in the First Extension Appeal Decision is still valid and should be upheld to protect the objectives of Rules 63(3)(b).

12. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber hold that conditions of detention under Rule 63(3)(b)(iii) are, and continue to be, satisfied thereby justifying an extension of the Appellant's detention.

C. Provisional Detention Remains a Necessary Measure to Ensure the Appellant's Security

13. The Pre-Trial Chamber determined on 26 July 2009 that provisional detention at the ECCC Detention Facility was necessary under Rule 63(3)(b)(iv) on the basis that the alleged nexus between [REDACTED] and the Appellant means that the risk of aggressive behaviour by the public towards the former could also be vented towards the latter.²³ The Appellant notes that he has "explained to the OCIJ that there is no reason to fear for Mr IENG Sary's safety based on a risk [REDACTED]".²⁴ It is not, however, for the Appellant to make that determination. The Appellant further notes that there may be a change

²² First Extension Appeal Decision, para. 28.

²³ First Extension Appeal Decision, para. 33.

²⁴ Appeal, para. 19.

in circumstance with [REDACTED].²⁵ This theorised shift in feeling within Cambodian society is purely speculative and the anticipated [REDACTED] cannot be considered as a change in circumstance as it has not yet happened. The Appellant further argues that alternative measures of restraint or detention should have been considered.²⁶ However, the Pre-Trial Chamber has held that “the conditions proposed by the Charged Person are outweighed by the necessity for his provisional detention”.²⁷ The Appellant has provided no new evidence since 26 July 2009 that may convince the Pre-Trial Chamber to reverse this finding. The Co-Prosecutors submit that the rationale outlined in the First Extension Appeal Decision is still valid and should be upheld to protect the objectives of Rules 63(3)(b).

14. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber hold that conditions of detention under Rule 63(3)(b)(iv) are, and continue to be, satisfied thereby justifying an extension of the Appellant’s detention.

D. Provisional Detention Remains a Necessary Measure to Preserve Public Order

15. The Pre-Trial Chamber determined on 26 July 2009 that provisional detention at the ECCC Detention Facility was necessary under Rule 63(3)(b)(v) on the basis that the Appellant’s release would actually disturb public order.²⁸ The Appellant argues that the suffering of the public in the Democratic Kampuchea period cannot be a basis to order the extension of detention under the mistaken understanding that the detention is being applied as a punitive purpose.²⁹ The First Extension Appeal Decision, however, is not framed as a punitive measure, but as one that seeks to prevent disruptions to the public order.³⁰ The Appellant argues that “no one takes the threat of instability seriously”³¹ but in doing so, attempts to substitute—without substantiation—his judgment for that of the Pre-Trial Chamber. Moreover, 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

²⁵ *Id.*, para. 20.

²⁶ *Id.*

²⁷ First Extension Appeal Decision, para. 48.

²⁸ First Extension Appeal Decision, para. 37.

²⁹ Appeal, para. 22.

³⁰ First Extension Appeal Decision, paras. 35 – 37.

³¹ Appeal, para. 22.

Appellant and associated with ██████ might have. The Appellant has provided no new evidence since 26 July 2009 that may convince the Pre-Trial Chamber to reverse its finding. The Co-Prosecutors submit that the rationale outlined in the First Extension Appeal Decision is still valid and should be upheld to protect the objectives of Rules 63(3)(b).

16. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber hold that conditions of detention under Rule 63(3)(b)(v) are, and continue to be, satisfied thereby justifying an extension of the Appellant's detention.

E. Alternatives to Detention are Outweighed by the Need for Provisional Detention

17. The Pre-Trial Chamber determined on 26 July 2009 that detention at the ECCC Detention Facility was necessary under Rule 63(3) and that the alternatives to detention were outweighed by the need for provisional detention.³² Since, as argued above, the need for provisional detention has not diminished, the alternatives to detention continue to be outweighed. The Appellant has provided no new evidence since 26 July 2009 that may convince the Pre-Trial Chamber to reverse its finding. The Co-Prosecutors submit that the rationale outlined in the First Extension Appeal Decision is still valid and should be upheld to protect the objectives of Rules 63(3). Moreover, since no change of circumstances existed which would affect the plausibility of alternatives to detention; the Co-Investigating Judges did not abuse their discretion or fail in their responsibilities under Rules 21(1) and (2).

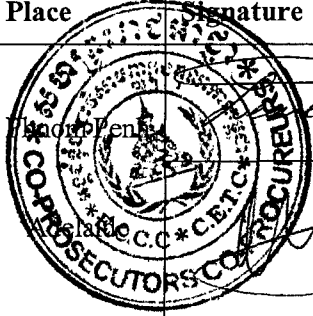
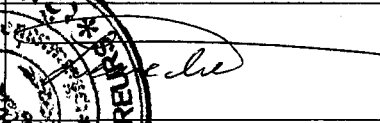

18. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber hold that conditions of detention at the ECCC Detention Facility under Rule 63(3) are, and continue to be, satisfied thereby justifying an extension of the Appellant's detention to the exclusion of any alternative modes of restraint. As such, the request for bail in the form of a "house arrest" or under any other condition should be rejected.

³² First Extension Appeal Decision, para. 48.

IV. CONCLUSION

19. The Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeal.

Respectfully submitted,

| Date | Name | Place | Signature |
|------------------|--|--|---|
| 17 December 2009 | CHEA Leang Co-Prosecutor |  |  |
| | William SMITH Deputy Co-Prosecutor | |  |