C22/5/1

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Criminal Case File No:	002/19-09-2007-ECCC-OCIJ (PTC17)
Filed to:	The Pre-Trial Chamber
Date:	10 December 2008
Party Filing:	The Defence for IENG Sary
Language:	Original in English
Type of Document:	Public

ORIGINAL DOCUMENT/DOCUMENT ORIGINAL
Date of receipt/Date de reception: 10 / DEC / 2008
Time/Heure: 11:00
Case File Officer/L'agent chargé du dossier: C. A. Fay

IENG SARY'S APPEAL AGAINST THE OCIJ ORDER ON EXTENSION OF PROVISIONAL DETENTION

Filed by:

Co-Lawyers

ANG Udom

Michael G. KARNAVAS

CERTIFIED COPY/COPIE CERTIFIÉE CONFORME
Certified Date/Date de certification: 11 / DEC / 2008
Case File Officer/L'agent chargé du dossier: C. A. Fay

Distributed to:

The Pre-Trial Chamber Judges:

Judge PRAK Kimsan

Judge NEY Thol

Judge HUOT Vuthy

Judge Katinka LAHUIS

Judge Rowan DOWNING

Co-Prosecutors:

CHEA Leang

Robert PETIT

I. INTRODUCTION

Pursuant to Rule 63(7) and 74(3) of the ECCC Internal Rules ("Rules"), the Defence submits this Appeal against the 'Order on Extension of Provisional Detention' ("Extension Order") issued by the Office of the Co-Investigating Judges ("OCIJ") on 10 November 2008.[1] In the Extension Order, the OCIJ held that an extension to provisional detention was necessary because there are well-founded reasons to believe Mr. IENG Sary may have committed the crimes described in the Provisional Detention Order[2] and three of the five conditions described in Rule 63(3)(b) are met: that provisional detention is necessary to ensure the presence Mr. IENG Sary, to protect his security and to preserve public order. The OCIJ considered that alternative forms of detention were not provided for by the Rules and interpreted Mr. IENG Sary's request for house arrest as a request for provisional release. As the OCIJ determined that objectives of Rule 63(3)(b) demonstrated a need for continued detention, they ruled that house arrest could not be ordered.

II. SUMMARY OF ARGUMENT

1. The Defence will show:
   A. The investigation has not been conducted with due diligence and thus Mr. IENG Sary's fundamental human rights are not being adequately respected;

   B. The burden of proof is on the OCIJ to demonstrate that the conditions of Rule 63(3)(a) and (b) have been fulfilled;

   C. The failure to add evidence to the case file would not satisfy an objective observer that the level of evidence required under Rule 63(3)(a) is met;

   D. Continued imprisonment is not necessary, because (a) imprisonment is not the only form of detention permitted by the Rules, and (b) there are reasonable conditions of house arrest available to the OCIJ; and

   E. Reasonable conditions of house arrest would adequately protect the objectives set out in Rule 63(3)(b).

---

[1] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Order on Extension of Provisional Detention, 10 November 2008.
[2] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order, 14 November 2007.

III. THE LAW

2. Rule 63(3) sets out a two-pronged test to determine whether Provisional Detention may be ordered. Specifically, it requires in Rule 63(3)(a) that there is a well-founded reason to believe that the Charged Person may have committed the crimes described; and in Rule 63(3)(b) that provisional detention is necessary to satisfy any one of five conditions: (i) to prevent the Charged Person from exerting pressure on witnesses and victims, or colluding with other the Charged Persons; (ii) to prevent the destruction of evidence; (iii) to prevent the risk of flight by the Charged Person; (iv) to protect the security of the Charged Person; or (v) to preserve public order.

3. Rule 63(3) is discretionary, as demonstrated by the choice of language: "the [OCIJ] *may* order the provisional detention *only* [emphasis added] where [...] conditions are met". Even if all the conditions of Rule 63(3) are met, the OCIJ retains a discretionary power to order the release. It further outlines that the removal of liberty may only be considered if the conditions of the Rule '*are met*', thus requiring a high level of proof before any of the conditions described in the Rule justify provisional detention.

4. Even though the ECCC is applying Cambodian law, looking at international conventions by which Cambodia is bound is instructive. In particular, Article 9(3) of the International Covenant of Civil and Political Rights ("ICCPR") provides:

> Anyone arrested or detained on a criminal charge shall be [...] entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, or any other stage of the judicial proceedings [...].[3]

5. The ICCPR clearly influenced Art. 203 of the Cambodian Code of Criminal Procedure, which states:

> "In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated."

6. Article 5 of the European Convention on Human Rights ("ECHR") is also instructive and repeats the objectives described in the ICCPR. Article 5 provides that:

> "1.Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases [...]

---

[3] See also Article 14(3)(c) which describes the right "to be tried without undue delay".

> 3. Everyone arrested or detained [...] shall be entitled to a trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

7. Although the ECHR is not directly applicable law in Cambodia, its provisions are similar to those which are directly applicable at the ECCC, such as the ICCPR, and its jurisprudence has often been relied upon by the ECCC.[4]

IV. ARGUMENT

A. The Investigation has not been conducted with due diligence and thus Mr. IENG Sary's fundamental human rights are not being adequately respected

8. The OCIJ noted that "the passage of time is relevant to determining the legitimacy of continued provisional detention",[5] and that provisional detention cannot be unjustified if the investigation is conducted with due diligence.[6]

9. The test of 'due diligence' is used by the OCIJ to determine whether Mr. IENG Sary's right to a trial within a reasonable time has been breached. The OCIJ relies heavily on ECHR jurisprudence which requires that "while an accused person is held in custody [he] is entitled to have his case given priority and conducted with special diligence."[7] In addition, the requirement that a judicial investigation be conducted with due diligence also ensures that Mr. IENG Sary does not have to suffer unreasonable detriment while he waits for the conclusion of his investigation or trial.[8] The detrimental effects of provisional detention on the Charged Person are well documented. Prolonged imprisonment is known to put considerable strain on a Charged Person and have a negative effect on an Charged Person's mental health.[9] Factors listed as contributing to

---

[4] Both the OCIJ and Pre-Trial Chamber have relied on the jurisprudence of the ECHR in previous filings. *See Case of IENG Sary,* Order on Translation Rights and Obligations of the Parties, 19 June 2008, para.2, or Extension Order, para. 37; and *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ (PTC09), Decision of NUON Chea's Appeal Concerning Provisional Detention Conditions, 26 September 2008, para. 15.
[5] Extension Order, para. 37.
[6] *Id.*
[7] ECHR, *Matznetter v. Austria*, Application no 2178/64, 10 November 1969, para. 12.
[8] ECHR, *Wemhoff v. Germany*, Application no 2122/64, 27 June 1968, para.18.
[9] Largely ignored in the consideration for detention is the effect on detainees' families, wider society, state governance, and the effective administration of justice, which all are impacted negatively by the decision to detain an accused person pre-trial. As reported in a recent publication, "a decision to detain a person before he is found guilty of a crime is a particularly draconian ruling for a court to make", Martin Schönteich, *The Scale and Consequences of Pretrial Detention Around the World*, Justice Initiatives, A publication of the Open Society Justice Initiative, Spring 2008, 11, at 17.

this effect include "enforced solitude, lack of privacy, a dearth of meaningful activities and inadequate mental facilities."[10] Uncertainty about the outcome of the ongoing investigation can also place the Charged Person under considerable strain.[11]

10. In their consideration of whether the investigation had been conducted with due diligence, the OCIJ relies heavily on ECHR jurisprudence and noted that it was necessary to appreciate the complexity of proceedings and take the case as a whole when examining the conduct of the investigation.[12] Neither of these factors justifies an extension of detention in this case. Firstly, ECHR jurisprudence demonstrates that investigations must be carried out swiftly even where a case is complex.[13] Secondly, in this specific case, after a whole year of investigation since the initial Provisional Detention Order was issued[14] very little evidence has been placed on the case file relating to Mr. IENG Sary or the other Charged Persons.[15] Furthermore, investigations requested by other Defence teams have not even been pursued.[16]

11. Any examination of the diligence of an investigation must also verify how quickly the OCIJ is conducting its investigation into exculpatory, as well as incriminating, evidence; and whether those investigations are being conducted in an efficient way to reduce any

---

[10] *Id.*, at 18.
[11] *Id.*, at 19.
[12] The OCIJ relies on the ECHR case, *Frydlender v. France*, Application No. 30979/96, 27 June 2000, para 43: "the 'reasonableness' of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute". The ECHR case of *Pelissier and Sassi v. France*, Application no. 25444/94, 25 March 1999, para.73, further ruled "In the light of its findings that the case was not complex and that the applicants' conduct had been reasonable, the Court holds that there was no justification for the investigation's taking more than five years. Like the Commission, it also notes that there were unjustified delays and periods of inactivity during the investigation".
[13] ECHR, *Assenov v. Bulgaria,* Application no. 90/1997/874/1086, 28 October 1998, para.157, *AFFAIRE DEBBOUB alias HUSSEINI ALI c. FRANCE,* Requête n° 37786/97, 9 November 1999 (Original in French).
[14] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Provisional Detention Order, 14 November 2007.
[15] The Defence for Ieng Thirith argued in their Objections, in *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Defence Objections to the Co-Investigative Judges' Intention to Extend Madame IENG's Provisional Detention, 27 October 2008, that the investigation had not been conducted with diligence, that the OCIJ has failed to present any arguments showing her to be guilty and that Rule 63(3)(a) had not been met. All arguments the OCIJ dismissed. Also, in the *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Appeal Against Order on Extension of Provisional Detention, 16 October 2008, para.16, submitted that evidence collected so far relates largely to S-21, and despite a whole year of further investigations little concrete evidence has been collected to lead an objective observer to the version put forward by the OCP in the introductory submission.
[16] *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Request for Clarification of OCIJ Response to Second Request for Investigative Action, 26 November 2008; *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Third Request for Investigative Action, 18 August 2008; *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Fourth Request for Investigative Action, 27 August 2008; Fifth Request for Investigative Action, 26 September 2008; *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ, Sixth Request for Investigative Action, 30 October 2008.

unreasonable delay caused to the Charged Person. Such considerations appear to have been largely ignored by the OCIJ. Instead the OCIJ seeks to deflect blame for the lack of progress in its investigation by claiming that the exercise by Mr. IENG Sary of his right to silence has contributed to some of these delays.[17] The OCIJ may not invoke the exercise of one right, the right to silence, to deprive Mr. IENG Sary of his fundamental right to a trial within a reasonable time. ECHR jurisprudence has consistently upheld that there is no requirement that a person assist in an investigation which may lead to his ultimate trial and conviction.[18]

12. The lack of progress in the investigation during the last year has demonstrated a clear deficiency in due diligence on the part of the OCIJ, resulting in a breach of the obligation to hold a trial within a reasonable time.[19] This is accentuated by the age and ill health of Mr. IENG Sary, which was not adequately taken account of by the OCIJ. Indeed, it only considered the age and health of his wife in relation to the risk of flight.[20] The ongoing delay in completing investigations is caused solely by OCIJ inactivity and should, in and of itself, be considered as sufficient to justify provisional release.

B. The burden of proof is on the OCIJ to demonstrate that the conditions of Rule 63(3)(a) and (b) have been met

13. Human rights instruments which Cambodia has accepted demonstrate that pre-trial detention should be the exception and not the rule. This is also confirmed by Article 203 of the Cambodian Code of Criminal Procedure.

---

[17] Extension Order, para. 41.

[18] In the ECHR case of *Eckle v. Germany*, Application no. 8130/78, 15 July 1982, para. 82, the Court ruled that "Article 6 [right to fair trial] did not require the applicants actively to co-operate with the judicial authorities. Neither can any reproach be levelled against them for having made full use of the remedies available under the domestic law". *See also* ECHR cases *Corigliano v. Italy*, Application no. 8304/78, 10 December 1982, paras. 41, 42; *Dobbertin v. France*, Application no. 13089/87, 25 February 1993, at 43; *Ledonne v. Italy (no.1)*, Application no. 35742/97, 12 May 1999, at 25; *AFFAIRE SACCOMANNO c. ITALIE*, Requête n° 36719/97, 12 mai 1999, para.24 (original in French)at 24; *Barfuss v. Czech Republic*, Application no. 35848/97, 31 July 2000, at 83; *Yagci and Sargin v. Turkey*, Application nos. 16419/90 & 16426/90, 08 June 1995, at 66; *Richet v. France*, Requête n° 34947/97, 13 February 2001, para. 75 (original in French); *AFFAIRE DEBBASCH c. FRANCE*, Requête no 49392/99, 3 December 2002, para. 41 (original in French); *Nemeth v. Hungary*, Application no. 60037/00, 13 January 2004, at 29.

[19] ECHR, *Kudla v. Poland*, Application no. 30210/96, 26 October 2000, paras. 131-132: The "lack of progress in the proceedings resulted in a total delay of nearly one year and eight months, a delay for which the Court does not find a sufficient justification and which it considers incompatible with the diligence required under Article 6 § 1 [...] Accordingly, the Court cannot regard the period of time that elapsed in the instant case as reasonable. There has, therefore, been a violation of Article 6 § 1 of the Convention".

[20] Extension Order, para. 23.

14. The United Nations Standard Minimum rules for Non-Custodial Measures (the Tokyo Rules) also stipulate that governments should make every reasonable effort to avoid pre-trial detention and provide:

> 6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim; 6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings; 6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.[21]

15. Yet, ICTY jurisprudence, and that of the Special Court for Sierra Leone ("SCSL"), has often been cited by the OCP to assert that in international law detention is the rule[22] and consequently that the burden of proof is on the Defence to prove why provisional release should be ordered.[23] The lack of coercive power to enforce its decisions and the reliance on the co-operation of states to conduct surveillance of Charged Persons who have been released has meant that the ICTY, while accepting the *de jure* standard of pre-trial release, has required a more cautious approach in assessing the risk of flight to the Charged Person[24] to conclude a *de facto* standard of pre-trial detention. That is certainly not the case in Cambodia, where the police and the ECCC authorities have the mandate and resources to perform any orders to detain a Charged Person.

16. Indeed, in *Hadžihasanović* the ICTY considered the *de facto* standard of detention at some length, but finally accepted the international principles which preserve the

---

[21] Full document available at http://www.unhchr.ch/html/menu3/b/h_comp46.htm.
[22] *Case of IENG Thirith*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutors' Additional Grounds in Support of Provisional Detention of IENG Thirith (KHIEU Thrith), 12 November 2007, para. 5, *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, Co-Prosecutor's Response to IENG Sary's Appeal Against Provisional Detention Order of 14 November 2007, 29 January 2008, para. 25, *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ (PTC 13), Co-Prosecutors' Response to NUON Chea's Appeal on Extension of Provisional Detention, 30 October 2008, para. 15.
[23] *Prosecutor v. Issa Hassan Sesay et al.*, SCSL-2004-15-PT, Decision on the Motion by Morris Kallon for Bail, 23 February 2004, para.23 ("Sesay Decision").
[24] *Prosecutor v. Dragan Jokic*, Case No. IT-02-53-PT, Decision on Request for Provisional Release of Accused Jokic, 28 March 2002, para 17. This decision is further noteworthy as it demonstrates that the continued provisional detention of Dragan Jokic is based on concern that the host state which, at the time, was considered part of Bosnia and Herzegovina, and was unable to fulfil certain guarantees which the Tribunal required for the safe return of the accused. These guarantees could not be met and so the Request was refused. The situation in Cambodia is very different and one might wonder how many more accused would be offered provisional release were the ICTY able to enforce its decisions in a more meaningful way, as in the ECCC.

presumption of innocence and prohibit the violation of the fundamental right to liberty in all but the strictest of circumstances. It also considered the general principle of proportionality which determines that "if it is sufficient to use a more lenient measure, it must be applied".[25] The *de facto* standard of detention at the ICTY is also a result of the wording of the Rules of Procedure, which provide that: "Upon being transferred to the seat of the Tribunal, the Accused shall be detained".[26] Once again, the ECCC Rules have been deliberately drafted to take into account the high standards of human rights to which all Charged Persons are entitled. The deficiencies evident in the Rules and jurisprudence of the *ad hoc* Tribunals do not appear in the ECCC Rules. Indeed, Rule 63 clearly sets out the legal grounds for provisional detention, according to the various conditions which must be met. Such consideration should prevent abuse by the OCIJ and determine that provisional detention must remain the exception and never the rule.

17. The early rules of the ICTY/R placed a burden on the Defence to demonstrate "exceptional circumstances" before the Accused could be offered bail. However, in 1999, the ICTY amended Rule 65 on provisional release, relieving the Defence of the burden of proving exceptional circumstances. "The reason behind this amendment appears to have been to bring the ICTY in line with international human rights norms."[27] The ICTR later amended its respective Rules to reflect the same wording as the ICTY.[28]

18. In the SCSL *Kallon* Decision, the Court considered that it remained up to the Defence to show that further detention of the Accused was no longer justified. However, once the Defence submits evidence to satisfy the test for provisional release described in Rule 65 (B) of the Rules of Procedure of the SCSL, the Prosecution would then be compelled to provide evidence to rebut what had been submitted and demonstrate that the right of the Accused to be released is outweighed by a public interest requirement for continued detention.[29]

19. The ICTY identified the burden placed on the Accused as a substantial one in light of the jurisdictional and enforcement limitations of the tribunal. The burden is described as

---

[25] *Prosecutor v. Hadžihasanović et al.*, IT-01-47, Decision Granting Provisional Release to Enver Hadžihasanović, 19 December 2001, para. 7 ("*Hadžihasanović* Decision").
[26] ICTY, Rules of Procedure and Evidence, IT/32/Rev.38, 13 June 2006, Rule 64. See also SCSL Rules of Procedure and Evidence, Amended 27 May 2008, Rule 64.
[27] Sesay Decision para. 25.
[28] ICTR, Rules of Procedure and Evidence, Adopted on 29 June 1995, as amended on 27 May 2003.
[29] Sesay Decision, paras. 32-33.

substantial particularly because of the jurisdictional limits of the ICTY. These circumstances do not apply in Cambodia and the OCIJ erred to place weight on the *de facto* detention standard of their jurisprudence.[30]

20. Contrary to the OCP argument,[31] alternatives to detention which satisfy conditions of Rule 63(3) must be favorably considered in lieu of detention. As mandated by Rule 63(3), provisional detention may only be ordered if no other less restrictive form of detention satisfies its objectives. Even where the OCIJ has determined that provisional detention was initially required, one year later it must again conduct a fresh analysis and show how the material facts justifying detention remain the same. Human rights jurisprudence has consistently found the risks which justify initial detention to diminish over time.[32] The burden of proof thus remains on the OCIJ to demonstrate that the removal of Mr. IENG Sary's right to liberty is necessary. Any other conclusion would defeat the objective of Rule 63(6)(a), which determines that an Order for provisional detention be revisited every year and upholds the presumption of innocence and expectation of liberty.

C. The failure to add evidence to the case file would not satisfy an objective observer that the threshold of Rule 63(3)(a) has been met

21. In its analysis of whether there were 'well-founded reasons' to believe that Mr. IENG Sary may have committed the crimes, the OCIJ relied almost entirely on the conclusion of the Pre-Trial Chamber ("PTC") which considered case file evidence collected up to the date of the hearing in July 2008.[33] The OCIJ did not identify any new evidence collected

---

[30] *See Prosecutor v. Prlić,* IT-04-74, Order on Provisional Release of Slobodan Praljak, 30 July 2004, para. 14 ("Praljak Decision"). The Trial Chamber describes that "the burden of proof rests on the Accused to satisfy the Trial Chamber that he will appear for trial and will not pose a danger to any victim, witness or other person. The Accused's burden is a substantial one, due to the jurisdictional and enforcement limitations of the Tribunal". *See also Prosecutor v. Radoslav Brdjanin and Momir Talić*, IT-99-36-PT, Decision on Motion by Radoslav Brdjanin for Provisional Release, 25 July 2000, para. 18.

[31] *Case of NUON Chea*, 002/19-09-2007-ECCC/OCIJ (PTC 13), Co-Prosecutors' Response to NUON Chea's Appeal on Extension of Provisional Detention, 30 October 2008, para. 9.

[32] *Garycki v. Poland* of the ECHR, para. 38. The applicant emphasized that the courts had not given relevant and sufficient reasons for his continued detention. He argued that the likelihood of heavy sentence being imposed on him could not suffice to justify the whole period of his detention. As regards the risk of exerting pressure on P.S. (co-defendant), the applicant maintained that with the progress of the trial any such risk had gradually lost its relevance. Furthermore, the authorities should have considered other guarantees to ensure that he would appear for trial, for instance bail or police supervision. Lastly, the authorities had not displayed special diligence in the proceedings.

[33] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ (PTC03), Decision on Appeal Against Provisional Detention of IENG Sary, 17 October 2008 ("Detention Appeal Decision"). The oral hearings on this appeal were held on 30 June and 1-3 July 2008.

since this date. It simply relied upon a recent interview conducted with Laurence Picq, who, rather than describing any new allegations, merely repeats accusations already made in her book which was submitted by the OCP as part of the Introductory Submission.[34]

22. As such, the OCIJ can only rely upon the evidence already used by the PTC in its Detention Appeal Decision. While such evidence may have been considered sufficient when the original Provisional Detention Order was issued in November 2007, a higher level of evidence is required to satisfy Rule 63(3)(a) after Mr. IENG Sary has spent a year in detention while still under investigation.[35] By failing to identify any new evidence relating to whether Mr. IENG Sary may have committed the crimes with which he is charged, to supplement the evidence already identified by the Pre-Trial Chamber, the OCIJ has not satisfied its burden of persuasion outlined above in relation to Rule 63(3)(a).

D. Rule 63(3)(b) – Continued Imprisonment is not necessary

a. Imprisonment is not the only form of detention permitted by the Rules

23. The Extension Order relied on the Detention Appeal Decision which reasoned that the Rules do not provide for alternative forms of detention and which categorised the Defence request for detention under house arrest as a request for release with conditions.[36]

24. No definition of detention is given in any of the ECCC's legal texts. In evaluating the concept of detention, academics have considered that it "is a measure taken by a public authority by which a person is kept against his or her will for a certain amount of time within a limited space and hindered by force, or by a threat of force, from leaving that space".[37] However, mere restrictions on movement may not be considered a deprivation of liberty. The distinction is "merely one of degree or intensity, and not one of nature or

---

[34] Extension Order, para. 13. The OCIJ clearly accepts that the evidence collected during the interviews with Laurence Picq does not form new evidence, but rather "confirmed and detailed her accusations".
[35] ECHR, *Letellier v. France*, Application no. 12369/86, 26 June 1991, para. 35.
[36] Extension Order, para. 33.
[37] STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (Oxford: 2005), p. 412.

substance."[38] It is therefore impossible to define deprivation of liberty in terms of square meters. Confinement to a cell is usually considered a deprivation of liberty.

25. The same definition applies to house arrest,[39] to a person detained on remand in a hospital[40] and similar detention centers, even if the person can move around freely within such locations.[41] Indeed house arrest has further been described by the ICTY as "milder than incarceration, [for] whilst it would be harsher than provisional release, [...] house arrest is a form of detention".[42] In the SCSL case against Sam Hinga *Norman,*[43]Justice Robertson distinguished between house arrest which requires round the clock guards from the detaining power, albeit in the more comfortable surrounds of a private house rather than a prison cell, and house arrest which requires residence in a private house outside the control of the detaining power, like the detention served by General Pinochet in the UK. Justice Robertson considered that the second form of house arrest is rather a form of provisional release with conditional bail than a form of detention. In their analysis, the power to operate a regime of control would be essential for it to be considered 'detention'.

26. Rule 63(8) specifically permits the OCIJ to revise a Detention Order. The Rule is drafted to adhere to international human rights standards and ensures that the detention of the Charged Person is no more restrictive than necessary, ordering the reconsideration of treatment and conditions in detention every four months, and, "[w]here any action is required, the Co-Investigating Judges may issue appropriate orders". The detention arrangements of Mr. IENG Sary and other Charged Persons have already been subject to several modifications, demonstrating that alternative forms of detention are provided for

---

[38] ECHR, *Ashingdane v. UK*, Application no. 8225/78, 28 May 1985, para. 41; *Engel and others v. Netherlands*, Application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, 8 June 1976, para. 58.
[39] ECHR *Vachev v. Bulgaria*, Application no. 42987/98, 8 July 2004, para. 64; *CN v. Italy (No.1)*, Application no. 24952/94, 11 January 2001, para. 33; *Vittorio and Luigi Mancini v. Italy*, Application no. 44955/98, 2 August 2001, para. 17; *Lavents v. Latvia*, Requête no 58442/00, 28 novembre 2002, para. 63 (Original in French).
[40] ECHR, *Lavents v. Latvia*, para. 63.
[41] Even if the ECHR does not always agree with its own jurisprudence, even in borderline cases it has found that house-type arrest is a form of detention. See *Guzzardi v. Italy*, Application no. 7367/76, 6 November 1980, paras. 90-96, where Guzzardi's conditions of remand were limited to a camp on a small island off the coast of Sardinia.
[42] *Prosecutor v. Tihomir Blaškić*, IT-95-14-T, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, 3 April 1996, para. 13 ("*Blaškić* Decision", Emphasis added).
[43] *Prosecutor v. Sam Hinga Norman*, SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003 para. 4.

within the Rules.[44] Indeed, several of the Charged Persons have been transferred to hospital facilities under conditions of detention for medical treatment.[45]

27. The OCIJ also accepted that detention may only be ordered if it is necessary to meet any of the conditions in Rule 63(3)(b) and so if these objectives could be achieved another way, they must be considered.[46] The OCIJ is therefore permitted to make any modifications to the conditions of detention, including an order for house arrest where 'required'. This provision is comparable to Rules relating to detention applied in the ICTY,[47] ICTR and the SCSL[48] to order conditions of house arrest. House arrest is thus not only an alternative form of detention under the rules, but the power to alter the conditions of detention of Mr. IENG Sary to house arrest rather than detention at the ECCC detention unit, is clearly available to the OCIJ and PTC.

b. There are reasonable conditions of house arrest that would protect the objectives of Rule 63(3)(b)

28. The OCIJ held that there are "no *reasonable* [emphasis in original] conditions of house arrest which could would be imposed which would guarantee the objectives of Rule 63(3)(b)(iii-v) to the same extent as Provisional Detention".[49]

29. The emphasis placed on "*reasonable*" conditions indicates that the OCIJ appreciated that there are alternatives to imprisonment that would meet the objectives of Rule 63(3), which it did not order because they do not consider them reasonable. Despite the PTC ruling that the OCIJ is under an obligation to provide reasons for its decisions,[50] the Extension Order conspicuously failed to set out any of the conditions which could have been attached to house arrest but which were rejected as unreasonable. Nor did the OCIJ explain the reasoning enabling it to come to this conclusion.

---

[44] See *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ, Order to Bring the Charged Person for Medical Examination, 11 April 2008 and 13 November 2007; OCIJ, 002/19-09-2007-ECCC/OCIJ, Order Concerning Provisional Detention Conditions, notified to the Defence on 21 May 2008; *Case of Ieng Sary*, 002/19-09-2007-ECCC/OCIJ, A134, Doctor's Request to bring IENG Sary to Calmette Hospital for medical check, 28 January 2008; and A142, Doctor's Request to bring IENG Sary to Calmette Hospital for medical check, 4 Feb 2008.

[45] These circumstances were discussed in *Prosecutor v. Sam Hinga Norman*, SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para.7, "The Prisoner remains in detention [...] when transferred to holding areas prior to entry into court or outside the prison for medical treatment (even if placed for a lengthy period in hospital) and in the courtroom itself while being tried".

[46] Extension Order, para. 18.

[47] ICTY Rules of Procedure and Evidence, IT/32/Rev.38, 13 June 2006, Rule 64.

[48] SCSL Rules of Procedure and Evidence, Rule 64.

[49] Extension Order, para. 36.

[50] Detention Appeal Decision, para. 64.

30. In *Blaškic*, the ICTY noted that in national jurisdictions the conditions of house arrest vary greatly, particularly as they are based on the individual circumstances of the case. The broad agreement is that it is designed to cover detention in one's own home. It is widely specified in examples of national legislation and held by courts that house arrest is a form of detention. The ICTY also noted that national rules specifically provide for house arrest "when the Accused is seriously mentally or physically ill [or] when he is aged".[51]

31. While conditions of house arrest vary, the feature common to all types of house arrest is the right of the detainee to live with his family and to see his counsel in his place of detention.[52] In *Blaškić*, the ICTY accepted the condition that all costs related to such modification be covered by, or on behalf of, the Accused.[53] The ICTY accepted that if Blaškić were assigned to house arrest under close police surveillance, he would not be likely to escape. However, his presence on Dutch territory might pose a threat to public order. The ICTY further noted Blaškić was not ill or aged.[54] Yet, in spite of the fact that some basic preconditions for granting house arrest were lacking, the ICTY still found that Blaškić should be held under house arrest according to the rules described below:

- The Accused should remain within the confines of his residence.
- He is not permitted to leave the state unless authorized by competent authority.
- He is authorized to leave his residence only to meet with his counsel, his family and his friends. All meetings will take place within the detention unit.
- He is not permitted to leave his place of detention at any other time.
- He shall ensure payment of all the costs incurred by the special conditions of his detention, such as the security officers required to safeguard his protection.
- He shall have no contact whatsoever with the press or media.
- He shall respond promptly to all orders issued by the Court.
- He shall deliver his passport(s) and all other identity documents to the Court.

---

[51] *Id.* para. 19.
[52] The specific requirements of house arrest typically involve one of the following: the Accused may be allowed to live in accommodation with his/her family without being permitted to receive or meet with anybody other than his legal counsel or medical doctor; or he may be allowed to leave his place of residence at fixed hours per day, for a short period of time, to engage in a pre-agreed activity such as employment; or he may leave his place of residence for short and pre-established periods of time for specified purposes, on condition that he should report to the Police before and after leaving his residence. *Blaškić* Decision, para. 20.
[53] *Blaškić* Decision, para. 22.
[54] *Id.* para. 21.

- He shall not make or receive telephone calls at his place of detention.
- All correspondence to and from the Accused shall be directed to the Court and dealt with according to the Rules of Detention.
- He shall not communicate the location of his detention to anyone.
- Any serious breach of these rules shall entail immediate suspension of house arrest. The competent Court authority will determine whether a serious breach has been committed and whether his transfer to the detention unit is required.[55]

32. There are therefore, conditions that can be attached to house arrest that have been ordered by other courts. These must by implication have been considered to be *reasonable.* The Pre-Trial Chamber must therefore examine each of the conditions above and verify whether they are reasonable and whether they adequately protect the objectives set out in Rule 63(3)(b).

E. Rule 63(3)(b) - All of the objectives in Rule 63(3)(b) are protected by conditions of house arrest

33. The OCIJ asserted that provisional detention was necessary to guarantee three of the objectives of Rule 63(3)(b).[56] This conclusion is often based on nothing more than hypothetical assertions, irrelevant or outdated evidence or factors entirely beyond the control of Mr. IENG Sary.

34. In addition, the OCIJ's analysis leading to this conclusion is predicated on a fundamental failure of logic.[57] This failure is constituted by the following steps of reasoning. Firstly, the OCIJ identifies objectives in Rule 63(3)(b) that need to be protected. Secondly, it asserts that imprisonment would meet these objectives. As a consequence it reasons that imprisonment is 'necessary' to protect these objectives. The clear mistake in this reasoning is that the conclusion does not follow from the first two propositions. While imprisonment would achieve the objectives of Rule 63(3)(b), appropriate conditions of house arrest would equally do so. Imprisonment is therefore not necessary.

---

[55] *Id.* paras. 24, 25.
[56] Extension Order, para. 36.
[57] *Case of IENG Sary*, 002/19-09-2007-ECCC/OCIJ, IENG Sary Motion Against Extension of Provisional Detention, 28 October 2008, para. 8.

a) Rule 63(3)(b)(i) to prevent the Charged Person from exerting pressure on witnesses and victims, or colluding with other Charged Persons; and (ii) to prevent the destruction of evidence

35. The OCIJ accepts the PTC rulings which determine that, in the case of Mr. IENG Sary, provisional detention is not a necessary measure to protect witnesses, prevent collusion or preserve and prevent the destruction of evidence.[58]

b) Rule 63(3)(b)(iii) to prevent the risk of flight by the Charged Person

36. This objective seeks to guarantee the attendance of the Charged Person at all parts of the trial and for any sentence ordered in the case of conviction. In determining that Mr. IENG Sary remained a flight risk, the OCIJ outlined various factors: (a) Mr. IENG Sary's connections with Officials in Pailin; (b) financial resources to escape; (c) passport(s) and allies abroad; and (d) the incentive to flee as he remains under investigation.[59]

37. The risks identified by the OCIJ are hypothetical and not real risks with any firm evidentiary basis. In the case of *Prlić et al.*, the ICTY found objections to provisional release made by the Prosecution to be without an evidentiary basis. This was because none of the objections made was supported by any evidence sufficient to rebut the evidence of the Accused that he should be granted provisional release. The ICTY concluded that it could not identify *in concreto* any indication that the Accused would try and abscond.[60]

38. Despite Mr. IENG Sary's alleged influence and finances, there is no evidence that he undertook activity to flee or interfere with the administration of justice. The OCIJ failed to adequately consider this fact. If Mr. IENG Sary had any intention to flee, he would have surely done so much earlier. Instead, he patiently waited in Phnom Penh for the administration of justice.[61] In fact, even though Mr. IENG Sary allegedly had influence, money and a passport, Mr. IENG Sary has in no instance attempted to interfere with the

---

[58] Detention Appeal Decision, para. 100.
[59] Extension Order, para. 21.
[60] *Prosecutor v. Prlić*, IT-04-74-AR65.1; IT-04-74-AR65.2; IT-04-74-AR65.3, Decision on Motions for re-consideration, clarification, request for release and applications for leave to appeal, 8 September, para. 27 ("*Prlić* Reconsideration Decision").
[61] Praljak Decision, para. 30, the ICTY Trial Chamber noted that the fact that the accused never tried to abscond prior to his arrest, which supported the likelihood that he would indeed appear for trial when so ordered by the Trial Chamber. "This is true particularly because the Accused knew in advance that he was likely to be indicted by the Tribunal, and the Trial Chamber accepts that the Accused never attempted to go into hiding despite receiving indications that he was a suspect falling within the Tribunal's jurisdiction and that he could face a severe sentence if convicted."

administration of justice.[62] Mr. IENG Sary's advanced age, and the fact that his wife is also in detention also significantly reduces both his ability and motivation to flee.[63]

39. The OCIJ also erred by failing to consider whether less restrictive methods of detention or release would satisfy this objective. In fact, there are a range of alternative conditions of detention or release which satisfy this objective. Only if the OCIJ determine that none of the alternative forms of detention meet the objective may imprisonment be ordered.

40. The Defence submits that available conditions of house arrest, such as: (1) confinement to his residence; (2) confiscation of his passports; and (3) placing his residence under armed guard, would all ensure the presences of Mr. IENG Sary at trial. These measures are reasonable, especially if the cost of such a guard is borne entirely by, or on behalf of, Mr. IENG Sary.[64]

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

41. The objective of Rule 63(3)(b)(iv) is to protect the personal security of the Charged Person, both to guarantee his presence at trial and to protect his human rights.[65] The OCIJ considers that once it becomes public that there is an alleged nexus between Duch and Mr. IENG Sary, the threat towards Mr. IENG Sary would escalate and detention in the form of imprisonment would be necessary to preserve the security of the Charged Person.[66]

42. The argument is based entirely on a presumption of Mr. IENG Sary's guilt, as it takes as certain that (a) such a nexus exists, and (b) the alleged guilt of Duch is borne equally by Mr. IENG Sary. It is unacceptable for the OCIJ to preconceive guilt of Mr. IENG Sary and violates the presumption of innocence. Such a violation questions the impartiality of the OCIJ's whole investigation.

---

[62] *Prlić* Reconsideration Decision, para. 28.
[63] Detention Appeal Decision, para. 16.
[64] Alternative conditions which reduce or eliminate the risk of absconding may be seen in the conditions of provisional release applied to Jovica Stanišić, as described in *Prosecutor v. Jovica Stanišić*, IT-03-69-PT, Decision on Provisional Release, 26 May 2008, para. 68.
[65] Although the notion of security is rather vague, it appears to have been interpreted by the court to mean physical safety from attack. Historically the concept has been interpreted as personal protection from other people (STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (Oxford: 2005), pp.405-454. p.409) although ECHR caselaw has ruled it to be "a guarantee against arbitrariness in the matter of arrest and detention" (*Arrowsmith v. UK,* Application 7050/75 at para. 64; See also *Winer v. UK*, Application 10871/84). The ECHR has also ruled that it cannot be understood to mean just protection from unlawful attacks (*X v. Germany,* Application 8334/78) and finally concluded the issue in *Bozano v. France*, paras. 54, 60.
[66] Extension Order, para. 27.

43. The argument further admits that the OCIJ does not consider a threat against Mr. IENG Sary significant enough to require Provisional Detention. Rather, it is only *once* an alleged nexus becomes public will the threat become significant enough to deprive Mr. IENG Sary of his right to liberty.

44. Until the threat becomes significant, this condition may not be used to justify continued detention. The OCIJ therefore erred in law to use this objective to justify provisional detention.[67]

45. The relationship between Mr. IENG Sary and DUCH was already the subject of media speculation and the public already widely believed there was an alleged nexus between the purported crimes of the of Duch and the allegations against Mr. IENG Sary.[68] Therefore, if such a nexus were to be discovered, the threat to Mr. IENG Sary would not significantly escalate as the public already widely believe him to be guilty of the crimes. The OCIJ therefore erred in fact to consider an escalation of the threat towards Mr. IENG Sary would result from the discovery of any alleged nexus.

46. The OCIJ failed again to consider whether alternative forms of detention or release would meet the objective of Rule 63(3)(b)(iv). It also determines that none of the alternative forms of detention meet the objective may imprisonment be ordered.

47. The Defence has already submitted that there is no actual risk to Mr. IENG Sary's personal security, and alternatives such as house arrest would in fact increase his safety and thus fulfil the objective to guarantee his security beyond that currently offered by imprisonment.[69] Provisions could be made at the residence of Mr. IENG Sary such as the presence of security guards, to ensure that conditions of house arrest would eliminate any unacceptable risk to his security.[70] Such provisions are entirely within the power of the Court, which has provided close protection support and guards to ECCC Judges, Senior members of the OCP and even the former head of the Defence Support Section. Many

---

[67] Extension Order, para. 28.
[68] *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ(PTC03), IENG Sary's Appeal Against Provisional Detention Order, 15 January 2008, para. 25.
[69] *Id*, para. 23 noted that the conditions of continued detention are highly detrimental to the accused's health.
[70] The SCSL considered security of house arrest in *Prosecutor v. Sam Hinga Norman*, SCSL-2003-08-PT, Decision on Motion for Modification of the Conditions of Detention, 26 November 2003, para 12. The Court considered that the circumstances of Blaškić's house arrest were not satisfactory, and that they proved impractical. However, the Court noted that a subsequent decision dealing with security resolved such issues by having the accused guarded whilst at home.

staff members of the Court and Cambodian families also routinely employ guards for their residences.

d) Rule 63(3)(b)(v) to preserve public order

48. The objective of Rule 63(3)(b)(v) is to prevent actual risks to public order which may result in a negative public view of Mr. IENG Sary's perceived release. Without considering any fresh examinations of the threat to public order, the OCIJ simply accepted the conclusion of the PTC and found Mr. IENG Sary's release would actually disturb public order, simply noting that there was no evidence suggesting the situation has changed since the PTC Appeal ruling.[71] The PTC considered that the Democratic Kampuchea regime still has an impact on the population and many people still suffer from post-traumatic stress disorder. The PTC further held that the forthcoming trials risk the resurfacing of anxieties and negative social consequences. The OCIJ accepted the 'real' threat described by the PTC.

49. The PTC was incorrect to rely on some of the reports it described in the Detention Appeal Decision. One report describes the bizarre public outcry caused in 2003 when national media reported that a Thai actress had claimed Angkor Wat should belong to Thailand.[72] Somewhat obviously, Mr. IENG Sary is not a Thai actress and so analogies with the public outcry over her comments are clearly of limited value. Further, the OCIJ and PTC erroneously relied upon evidence from over five years ago. The incredible speed of development in Cambodia requires a fresh examination of the threat to public order be conducted every time the OCIJ consider whether pre-trial detention is necessary. Many recent reports unequivocally demonstrate the situation in Cambodia is actually far more stable and peaceful.[73] The OCIJ could have considered any of the recent news reports which described that, despite widespread reports of irregularities, the national elections held earlier this year were almost wholly peaceful;[74] or even the improvements to public order reported at the during the recent Water Festival celebrations.[75] Such reports

---

[71] Extension Order, para. 31.
[72] Detention Appeal Decision, fn.70.
[73] Consider the 2007 speech made by Prime Minister Hun Sen, or the 2007 Cambodia Human Development Report, or the 2007 Report of the World Bank, described in *Case of IENG Sary*, 002/19-09-2007-ECCC-OCIJ (PTC03), IENG Sary's Appeal Against Provisional Detention Order, 15 January 2008, paras. 7-21.
[74] Phnom Penh Post, *2008 election was peaceful but flawed: EU observers*, 15 October 2008.
[75] Phnom Penh Post, *PPenh closes another festival*, Friday, 14 November 2008, "revellers say better public order made for a more memorable celebration".

demonstrate that the threat of widespread public disorder caused by the modification of conditions to detention of an 83 year old man is now practically non-existent. Rule 63(6)(a), which requires regular review of the necessity of provisional detention, clearly demonstrates that risks to public order must be assessed on evidence of the situation in society at the time that the decision on detention is taken, rather than rely on stale and outdated reports.

50. The OCIJ further failed to consider whether alternative, less restrictive modes of detention such as house arrest would equally pose a risk to public order. More importantly, the OCIJ did not consider what the court as a whole could do to ensure that such a risk did not materialise.

51. If the extensive outreach and public relations facilities of the ECCC properly explain that house arrest is a form of detention and is in many respects no different from imprisonment, no threat to public order would materialise. Instead, the OCIJ seems content to rely upon the public misconception by the public of house arrest to deny this option to Mr. IENG Sary. Mr. IENG Sary's rights should not be forfeited to allow an incorrect perception of justice to be maintained by the public. The ECCC is entrusted with bringing some measure of justice to the Cambodian judicial process. Justice "also means respect for the alleged perpetrators' fundamental rights".[76]

V. CONCLUSION & RELIEF SOUGHT

52. The OCIJ investigation into Mr. IENG Sary has been conducted with neither diligence nor concern for how provisional detention will cause inevitable deterioration to Mr. IENG Sary's already fragile mental and physical state. By relying on, rather than correcting, abuses to Mr. IENG Sary's fundamental rights of silence and liberty, the OCIJ has demonstrated wilful disregard for national and international human rights standards which the ECCC is duty bound to uphold. Mr. IENG Sary is presumed innocent, yet has been forced to surrender a second year of his life at his advanced age of 83, in the expectation that charges may be brought against him at some point in the future.

53. Placing Mr. IENG Sary under conditions of house arrest would compensate for many of the inadequacies of the OCIJ investigation and would fully meet the objectives of Rule

---

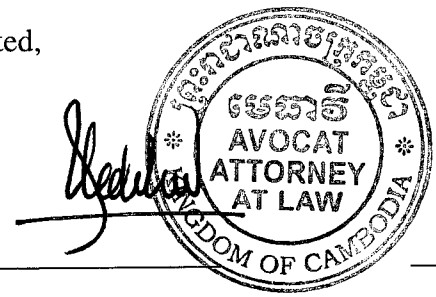
[76] *Hadžihasanović* Decision, para. 5.

63(3)(b). The case for house arrest is made more compelling by the age and ill health of Mr. IENG Sary, which demonstrates grounds for the Chamber to exercise its discretion permitted by rule 63(3), and order Mr. IENG Sary be released under less restrictive conditions of house arrest.[77]

WHEREFORE, for all of the reasons stated herein, the Defence respectfully requests the Pre-Trial Chamber to:

a. VACATE the Extension Order issued 10 November 2008, and ORDER the provisional release of Mr. IENG Sary; or
b. ORDER the OCIJ to modify the conditions of detention according to Rule 63(8) and impose conditions of house arrest described above.

Respectfully submitted,



ANG Udom Michael G. KARNAVAS

Co-Lawyers for Mr. IENG Sary

Signed in Phnom Penh, Kingdom of Cambodia on this 10th day of **December, 2008**

[77] Jurisprudence from other tribunals has indicated that the age and medical condition of the accused may demonstrate "a salient and relevant factor in assessing whether to exercise the discretion to grant provisional release", *Prosecutor v. Jovica Stanišić*, IT-03-69-PT, Decision on Provisional Release, 26 May 2008, para. 41. Also see the ECHR case of *Kudla v. Poland*, Application no. 30210/96, 26 October 2000, paras.130: "The applicant had been in custody and had suffered from serious depression. This required particular diligence of them in dealing with his case".