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C22/5/7

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO IENG SARY'S APPEAL ON EXTENSION OF PROVISIONAL 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 ("Extension Order") extending his provisional detention for a further period not exceeding one year.[2] He claims that (1) the evidentiary threshold for detention under Internal Rules 63(3)(a) and (b) has not been met;[3] (2) house arrest is a reasonable alternative to detention[4] and, in any event, (3) the Co-Investigating Judges have not conducted the investigation with due diligence.[5]

2. The Co-Prosecutors request the Pre-Trial Chamber to dismiss the Appeal 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 ("Detention Order").[6] Particularly, he has not demonstrated any change of circumstance since the hearing on his Detention Appeal and the Pre-Trial Chamber's confirmation of his provisional detention on 17 October 2008 ("Detention Appeal Decision").[7] In the 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 detention [was] still a necessary measure on the basis of [those] grounds".[8]

   (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. Additionally, three of the five disjunctive conditions under Rule 63(3)(b) are still fulfilled, thereby rendering provisional detention a

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1 *Case of IENG Sary*, Appeal Against The OCIJ Order on Extension of Provisional Detention, 10 December 2008, C22/5//1, ERN 00250393-00250412 [*hereinafter* Appeal].
2 *Case of IENG Sary*, Order on Extension of Provisional Detention, 11 November 2008, C22/4, ERN 00238566-00238576 [*hereinafter* Extension Order].
3 Appeal, para. 1.
4 *Id.*
5 *Id.*
6 *Case of IENG Sary*, Provisional Detention Order, 14 November 2007, C22 [*hereinafter* Detention Order].
7 *Case of IENG Sary*, Decision on Appeal Against Provisional Detention Order of IENG Sary, 17 October 2008, C22/I/73, ERN 00232830-00232861 [*hereinafter* IENG Sary Detention Appeal Decision].
8 IENG Sary Detention Appeal Decision, Disposition.

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.

(c) 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.

(d) An analysis of the Case File does not demonstrate any lack of diligence on the part of the Co-Investigating Judges. Further, the concept of due diligence, or a lack thereof, is of no assistance in the determination of this Appeal. First, it is not relevant to the determination of detention under Rules 63(3)(a) and (b). Second, the courts who consider it as a determining criteria try cases that are very different in complexity and magnitude than those before this Court. Third, those other courts deal with much more established municipal investigative bodies than this Court, which confronts the distinct challenge of working with a newly and specifically constituted investigative mechanism.

II. PRELIMINARY SUBMISSION

An Oral Hearing is not Required

3. Rule 77(3) permits the Pre-Trial Chamber, after considering the views of the parties, to determine an appeal on the basis of written submissions alone. The Appellant has not asked for an oral hearing of this Appeal. While hearings determinative of detention should be heard orally, the current Appeal concerns only an extension of a recently confirmed detention and, as such, raises no new factual or legal arguments that need to be addressed in an oral hearing. Therefore, in the interest of judicial economy, the Co-Prosecutors request that the Pre-Trial Chamber determine this Appeal on written submissions alone.

III. THE LAW

Duty to Give Reasons in Detention Orders

4. Rule 63(7) requires that a decision of the Co-Investigating Judges concerning the extension of detention shall set out the reasons for such an extension. These reasons have to be given after considering the objections of the detainee. Citing settled international jurisprudence, the Pre-Trial Chamber has found that all decisions of judicial bodies, including the Co-Investigating Judges, have to be reasoned to meet international standards that this Court is mandated to uphold.[9]

5. A judicial authority must demonstrate, through a discussion of all relevant factors, how the defendant has met, or failed to meet, the burden of proving that he will appear for trial and will not pose a danger to victims, witnesses or third persons.[10] The authority is not obliged to deal with all possible factors that it could take into account when deciding whether the defendant will appear for trial. It is sufficient for it to indicate all the relevant factors that it has taken into account in reaching its decision.[11]

Conditions Necessitating Detention

6. 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

   (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;

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[9] *Case of NUON Chea*, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), 28 August 2008, ERN 001219322-00219333, D55/I/8, para. 21.

[10] *Prosecutor v. Popovic*, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release, Case No. IT-05-88-AR65.3, ICTY Appeals Chamber, 1 March 2007, para. 7 [*hereinafter* Popovic Decision].

[11] *Prosecutor v. Haradinaj*, Decision on Lahi Brahimaj's Motion for Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 3 May 2006, para. 16.

(iv) protect the security of the defendant; or

(v) preserve public order.

7. 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 before other criminal tribunals dealing with similarly serious international crimes.[13]

Exercise of Discretion in Considering Detention

8. A judicial chamber 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 adopted by this Court.[15]

Extension of Detention

9. 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

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[12] IENG Sary 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.

("SCSL"). Those tribunals, however, maintain that for a renewed application for release to be successful, the defendant must demonstrate "a material change of circumstances".[16]

10. Similar to the Rules of this Court, however, 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]

11. 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]

Reasonable Delay

12. In the Extension Order, the Co-Investigating Judges acknowledge that the passage of time is relevant to determining whether the basis of provisional detention remains.[22]

13. Article 14(3)(c) of the International Convention on Civil and Political Rights ("ICCPR") provides that "in the determination of any criminal charge against him, everyone shall be entitled [...] to be tried without undue delay". Article 9(3) of the ICCPR, Article 7(5) of the

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[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.

[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, page 6.

[19] *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.

[20] Internal Rules, rule 63(7) [*hereinafter* Rules].

[21] *Id.*

[22] Extension Order, para. 37.

American Convention on Human Rights and Article 5(3) of the European Convention on Human Rights provide that everyone detained shall be entitled to trial within a 'reasonable time'. The United Nations Human Rights Committee has held that "what constitutes 'reasonable time' is a matter of assessment for each particular case".[23] This is a settled principle of international criminal law having been approved by the ICTR and ICTY.[24]

14. The ICTY has held that in order to establish the reasonableness of the length of detention it is necessary to evaluate the circumstances of each case in the light of the following criteria:

    (a) The effective length of detention.

    (b) The length of detention in relation to the nature of the crimes.

    (c) The physical and psychological consequences of the detention on the detainee.

    (d) The complexity of the case and the investigations.

    (e) The conduct of the entire proceedings.[25]

15. The ICTR has adopted a similar test in evaluating the reasonableness of pre-trial detention. It is yet to find any period of pre-trial detention unreasonable.[26]

16. Notwithstanding the gravity of the charges tried by the ECCC, Rule 63 provides for several safeguards to ensure that pre-trial detention is as short as possible. Rules 63(6) and (7) provide that no defendant before the ECCC can be held in provisional detention for more than three years in total. This safeguard does not exist at the ICTR and ICTY. Moreover, as stated above, Rules 63 (6) and (7) provide for an automatic periodic review of detention of a Charged Person (at least every year).

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[23] *Fillastre v. Bolivia*, U.N. Human Rights Committee, Communication No. 336/1988, U.N. doc. GAOR A/47/40, 5 November 1991.

[24] *Prosecutor v. Kanyabashi*, Decision on the Defence Motion for the Provisional Release of the Accused, 21 February 2001, para. 11.

[25] *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14, ICTY Trial Chamber, 20 December 1996.

[26] *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérome-Clément Bicamumpaka and Prosper Mugiraneza* Decision on Prosper Mugiraneza's Application for a Hearing or Other Relief on his Motion for Dismissal for Violation of his Right to a Trial Without Undue Delay, Case No. ICTR-99-50, ICTR Trial Chamber, 3 November 2004, para. 26.

IV. FACTS AND ARGUMENT

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

17. 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 17 October 2008, the Pre-Trial Chamber issued a reasoned decision upholding the necessity of his pre-trial detention. The Appellant contends that the passage of time since his arrest without "due diligence" in the conduct of the investigation justifies his release.

18. The length of time spent in detention has been considered by international tribunals as a relevant factor in determining continuation of detention.[27] However, the Appellant has not shown how the length of his detention has prejudiced his case in such a manner as to prevent a fair trial and / or to demonstrate how it can, in and of itself, justify a reconsideration of detention. In the light of the circumstances of the case and international jurisprudence, the length of provisional detention of the Appellant is not unreasonable. The Appellant has been held in detention for a reasonable period of time given the gravity of the crimes charged, the complexity of the case and the extent of the ongoing investigations being carried out by the Co-Investigating Judges. The safeguards contained in the Rules limiting the duration of permissible detention and providing for review of detention should allay concerns that the duration of provisional detention will be permitted to become unreasonable. For these reasons the Co-Prosecutors invite the Pre-Trial Chamber to dismiss this ground of Appeal.

B. Well Founded Reasons Exist to Believe that the Appellant may have Committed the Charged Crimes - Rule 63(3)(a)

19. The Appellant contends that because substantial new evidence has not been added to the Case File, an objective observer would not conclude that there are well-founded reasons to believe that he may have committed the crimes specified in the Introductory Submission.[28]

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[27] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Review of the Decision on the Application for the Interim Release of Mathieu Ngudjolo Chui, Case No. 01/04-01/07, ICC Pre-Trial Chamber, 23 July 2008, page 12.

[28] Appeal, para. 21.

20. On 11 November 2008, in their impugned Extension Order, the Co-Investigating Judges noted that well founded reasons continued to exist for them to believe that the Appellant may have committed the crimes specified in the Introductory Submission. They recalled that the Pre-Trial Chamber undertook a detailed analysis of the Case File to reach this conclusion. The Co-Investigating Judges noted that the judicial investigation has progressed since the Detention Appeal Decision and that the conditions for the Appellant's detention under Rule 63(3)(b) continued to be satisfied. Accordingly, they extended his detention for a period not exceeding one year.[29]

21. In ruling whether there were "well founded reasons", the Pre-Trial Chamber considered whether facts existed that would satisfy an objective observer that this Appellant may have committed the charged offences.[30] It noted that the term "have committed" had to be understood as "incur individual responsibility for" which includes planning, instigating, ordering, aiding and abetting, or committing and superior criminal responsibility.[31]

22. The Appellant does not contest the well founded reasons determination of the Detention Appeal Decision. He only challenges the Co-Investigating Judges' alleged lack of due diligence in conducting their investigation, claiming that his fundamental rights have not been respected[32] and that provisional release should be granted as a consequential remedy.[33]

23. In its Detention Appeals Decision, as stated above, the Pre-Trial Chamber found that material on the Case File would satisfy an objective observer that the Appellant may have been responsible for, or committed, the alleged crimes specified in the Introductory Submission at this stage of the investigations.[34] This determination was based on the evidence on the Case File incriminating the Appellant, which has increased both in volume and gravity in the recent months. The Co-Investigating Judges have issued at least twelve Rogatory Letters in Case File No. 002 (Document Nos. D25, D40, D43, D78, D82, D91, D92, D93, D94, D104,

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[29] Extension Order, page 11.
[30] IENG Sary Detention Appeal Decision, para. 71.
[31] *Id.*
[32] Appeal, para. 8.
[33] *Id.*, para. 12.
[34] IENG Sary Detention Appeal Decision, para. 94.

D107 and D115)[35] and they, or their investigators, have interviewed more than 115 witnesses in relation to the crimes that the five persons charged in that Case File, including the Appellant, may have committed. In addition, a substantial number of documents from the Case File No. 001, relevant to the Appellant's case, have been transferred to Case File No. 002;[36] the 28 written records of interview of KAING Guek Eav alias DUCH conducted in Case File No. 001 had already been placed in Case File No.002 on 30 May 2008.[37] Moreover, 10 interviews of DUCH regarding the roles of the four other Charged Persons, including the Appellant, have been conducted by the Co-Investigating Judges between June and November 2008 in the specific context of Case File No. 002.[38]

24. Witnesses have implicated the Appellant in crimes committed throughout the period of Democratic Kampuchea. For example, evidence on the Case File, as noted by the Pre-Trial Chamber, supports a well founded reason to believe that the Appellant was part of the high command structure of the Khmer Rouge.[39] One witness saw the Appellant participate in a weekly meeting at Office B-1 with NUON Chea, POL Pot, SON Sen, DUCH, and MOK.[40] Another witness saw the Appellant along with KHIEU Samphan, NUON Chea, and IENG Thirith during study sessions at Borei Keila and Olympic Stadium between 1976 and 1977.[41] Recently, in extensive interviews witness Laurence PICQ has confirmed the Appellant's extensive knowledge of and role in the purges at the Democratic Kampuchea's Ministry of Foreign Affairs.[42]

25. The Appellant states that i) "very little evidence has been placed on the Case File," and ii) "investigations requested by other Defence teams have not been pursued".[43] This contention

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[35] Among those Rogatory Letters, seven relate to witness interviews: D 25 (36 witness interviews), D 40 (25 witness interviews), D 91 (24 witness interviews), D 92 (8 witness interviews), D 94 (16 witness interviews), D 107 (at least 1 witness interview) and D 115 (several interviews of Laurence PICQ).

[36] *Case of NUON Chea et al.*, Note by the Co-Investigating Judges, 28 October 2008, D 108, ERN 00236076-77 (ENG).

[37] *Case of NUON Chea et al.*, Note by the Co-Investigating Judges, 30 May 2008, D 86, ERN 00194661-67 (ENG).

[38] The written records of interview are as follows: D 87 (2 June 2008), D 88 (3 June 2008), D 89 (24 June 2008), D 90 (25 June 2008), D 95 (15 July 2008), D 117 (19 November 2008), D 118 (20 November 2008), D119 (25 November 2008), D 120 (27 November 2008) and D 121 (28 November 2008). Others are scheduled for January or February 2009.

[39] IENG Sary Detention Appeal Decision, paras. 75–8.

[40] Witness Statement of [REDACTED].

[41] Witness Statement of [REDACTED].

[42] Extension Order, para. 40.

[43] Appeal, para. 10.

does not accord with the reality of accumulated evidence on the Case File, which currently contains over 450 binders[44] including the investigative requests that are being currently considered by the Co-Investigating Judges.[45] While other Charged Persons have filed investigative requests, the Appellant has filed none. Therefore, the Appellant's contention of "a lack of progress" is unfounded and should be rejected.

26. No significant exculpatory evidence has been found to undermine the determination of the existence of "well founded reasons". To date, the Appellant has not placed any material, much less exculpatory material, on the Case File that should trigger a reconsideration of this determination.

27. The Appellant also argues that the Co-Investigative Judges have held his right to remain silent against him.[46] No factual support is offered for this statement which appears to be based on an erroneous reading of the Extension Order. The Co-Investigating Judges have only asserted that the Appellant's exercise of this right "is not conducive to speedy proceedings".[47] This assertion does not indicate that the Co-Investigating Judges have held the exercise of this right by the Appellant against him. The Co-Prosecutors note that a Charged Person's right to remain silent is protected by law and is an international standard, which is binding upon this Court. As neutral judges conducting a search for the truth, the Co-Investigating Judges have to gather both incriminatory and exculpatory evidence. Presumably, a Charged Person can—better than anybody else—assist the Co-Investigating Judges in discovering exculpatory evidence. In the absence of this cooperation, the investigation necessarily takes longer than it would have taken had the Appellant presented such evidence.

28. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to reject the Appellant's argument that his right to remain silent is being held against him by the Co-Investigating Judges. They also request the Pre-Trial Chamber to hold that well founded reasons continue

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[44] *Case of NUON Chea et al.*, Letter from Co-Investigating Judges to Chief of the Detention Facility, *Access to the Case File by Detainees*, Case No. 002/19-09-2007-ECCC-OCIJ/ A228 & A239, 11 December 2008, A228/2, ERN 00250695.

[45] *Case of NUON Chea et al*, Co-Investigating Judges' Internal Memorandum on the Request for Clarification, 26 November 2008, Case No. 002/19-09-2007-ECCC-OCIJ, 12 December 2008, D100/5, ERN 00250662.

[46] Appeal, para. 11.

[47] Extension Order, para. 41.

to exist for believing that the Appellant may have committed the crimes specified in the Introductory Submission.

C. Provisional Detention Remains a Necessary Measure - Rule 63(3)(b)

29. The Pre-Trial Chamber's determination on 17 October 2008 that provisional detention at the ECCC Detention Facility is necessary was made after a review of all the evidence on the Case File on the date of the hearing of that appeal (3 July 2008). The Appellant has provided no new evidence since 3 July 2008 that may convince the Pre-Trial Chamber to reverse this finding. The Co-Prosecutors submit that (a) the rationale outlined in the Detention Appeal Decision is still valid and should be upheld, and (b) house arrest—as sought in this Appeal—is neither a viable alternative to detention at the ECCC Detention Facility nor will it protect the objectives of Rules 63(3)(b).

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

D. No Grounds Made Out for Bail or House Arrest

31. The Rules do not provide for alternative forms of detention other than detention at the ECCC Detention Facility.[48] Rule 65(1), however, envisions that a charged person may be released from detention by a bail order under conditions necessary to ensure his presence during the proceedings and the protection of others.[49] However, if any of the conditions necessitating detention under Rule 63(3)(b) are met, a charged person cannot be released on bail.[50]

32. Even if a charged person were to be put under house arrest or "hospital detention", this would not satisfactorily mitigate risks to his personal safety. He would be required to come to the ECCC premises on different occasions and it would be difficult to ensure his safety during transportation from the hospital or his house to the ECCC to attend publicly scheduled

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[48] IENG Sary Detention Appeal Decision, para. 119.
[49] *Id.*, para. 120.
[50] *Id.*, para. 121.

hearings.[51] The ECCC Detention Facility, on the other hand, is "properly equipped to provide medical assistance, as required".[52]

33. Statutes or rules of procedure of international criminal tribunals do not provide for "house arrest". Of all the existing international criminal tribunals, only the ICTY has on rare occasions considered and allowed such requests. In *Blaskic*, it granted a request for detention in a safe house on the ground that the accused met the conditions for release, that he voluntarily surrendered to the Tribunal at a time when his country (Croatia) could not have legally arrested or extradited him and that he volunteered to cover all the costs of his detention in the safe house.[53] Notably, however, the basic instruments of the ICTY do not permit an accused to be detained in a private dwelling solely nominated by him.[54]

34. On 15 December 2008, the Co-Investigating Judges conducted a statutory interview with the Appellant regarding the conditions of his detention. During this interview, the Appellant did not complain about any substantive element of his detention at the ECCC Detention Facility.[55]

35. The Co-Prosecutors submit that the conditions requiring provisional detention at the ECCC Detention Facility remain satisfied. As such, the request for bail in the form of a "house arrest" or under any other condition should be rejected.

E. Due Diligence in Investigation, or Lack Thereof, is Immaterial to the Determination of this Appeal

36. The Appellant claims that the Co-Investigating Judges have not conducted the investigation with due diligence. This, according to him, has violated his fundamental human rights

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[51] *Id.*, para. 122.
[52] *Id.*, para. 123.
[53] *Prosecutor v. Blaskić*, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, Case No. IT-94-14-T, 4 April 1996, para. 13–24.
[54] *Prosecutor v. Ljubicic*, Decision on Request for Modification of Conditions of Detention, Case No. IT-00-41-PT, President of the ICTY, 23 November 2005, para. 3.
[55] *Case of IENG Sary*, Written Record of Interview on Conditions of Detention, Case No. 002/19-09-2007-ECCC/OCIJ, 12 December 2008, C44, ERN 00250650 – 00250652.

justifying provisional release.[56] The Co-Prosecutors submit that the accumulation of evidence on the Case File since the filing of the Introductory Submission negates this claim.

37. The Appellant is being investigated for having planned, instigated, ordered, aided or abetted, committed or for having superior responsibility for various crimes against humanity and the grave breaches of the Geneva Conventions. Further, as articulated in the Introductory Submission and in subsequent filings, inclusive in the charge of "committing" is the Appellant's participation in a joint criminal enterprise ("JCE") as a co-perpetrator that led to the commission of egregious crimes under Democratic Kampuchea throughout the country and for the entire temporal mandate of this Court.[57] Therefore, the evidence collected by the Co-Investigating Judges covers all the modes of the Appellant's contribution to those crimes including crime-base evidence, evidence linking crime-base to leadership structures within which the Appellant exercised authority, evidence supporting his participation in the JCE, evidence supporting jurisdictional elements, etc.

38. Without prejudice to the submission that the Co-Investigating Judges have exercised the requisite due diligence, the Co-Prosecutors submit that due diligence, or lack thereof, on the part of the Co-Investigating Judges is not relevant to the determination of provisional detention under Rules 63(3)(a) and (b).

39. Additionally, regional human rights mechanisms, like the European Court of Human Rights ("ECHR"), which consider the issue of due diligence as relevant, and whose decisions form the basis of the Appellants submission, operate in fundamentally different circumstances to this Court. The ECHR primarily deals with cases emanating from national jurisdictions based on prosecutions of municipal crimes in non-conflict circumstances. Conversely, courts like the ECCC are special international or internationalised tribunals that try highly complex international crimes mostly committed in the context of internal or international armed conflicts and/or in the context of widespread or systematic attacks directed against civilian populations. The Co-Prosecutors submit that the Pre-Trial Chamber must consider the

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[56] Appeal, para. 1A.

[57] *Case of IENG Sary*, Co-Prosecutors' Response to Ieng Sary's Motion on Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 11 August 2008, D 97/II, ERN 00211956–70; *Case of IENG Sary*, Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 16 September 2008, D 97/III, ERN 00224208–09.

jurisprudence of the ECHR with requisite caution and should more appropriately look towards the jurisprudence of the permanent or *ad hoc* criminal tribunals that try crimes of comparable complexity and magnitude for guidance on detention issues.

40. The Co-Prosecutors also note that courts like the ECHR deal with cases emanating from very advanced municipal jurisdictions with established investigative and prosecutorial machineries drawing upon years of precedents and practices while this Court has to work with a newly and specifically constituted investigative mechanism. This presents unique and specific challenges and complexities lessening the usefulness of the ECHR jurisprudence cited by the Appellant.

41. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the due diligence argument as both factually unsupported and legally unsustainable.

V. CONCLUSION

42. For the reasons stated above, the Co-Prosecutors request that the Pre-Trial Chamber dismiss the Appeal.

CHEA Leang
Co-Prosecutor

Robert PETIT
Co-Prosecutor

Signed in Phnom Penh, on this twenty-first day of January 2009.