លេខ/No: C9/6

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ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

Kingdom of Cambodia
Nation Religion King

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
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Case File No: 002/19-09-2007-ECCC-OCIJ

Before: **YOU Bunleng**
Marcel LEMONDE

Date: **15 September 2009**

Original language: **Khmer/English**

Classification: Public [REDACTED VERSION]

Order on Extension of Provisional Detention

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We, **You Bunleng** ឈូ ប៊ុនឡេង and **Marcel LEMONDE**, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (the "ECCC"),

Noting the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (the "ECCC Law"),

Noting Rule 63 of the ECCC Internal Rules (the "Internal Rules"),

Noting the ongoing judicial investigation against **Nuon Chea (**នួន ជា**) and others**,

in relation to charges of **Crimes Against Humanity** and **Grave Breaches of the Geneva Conventions of 12 August 1949**, offences defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the ECCC Law,

Noting our Provisional Detention Order, dated 19 September 2007 (C9),

Noting the Pre-Trial Chamber Decision on appeal, dated 20 March 2008 (C11/54),

Noting our Order on Extension of Provisional Detention, dated 16 September 2008 (C9/3),

Noting the Pre-Trial Chamber's Decision on appeal, dated 4 May 2009 (C9/4/6),

Noting that, on 19 August 2009, we duly notified the Charged Person and his lawyers that we were considering whether to extend the term of provisional detention which is due to expire on 16 September 2009, and that they had fifteen days to submit observations (C9/5),

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission in which they named Nuon Chea and four other persons suspected of having committed crimes within the jurisdiction of the ECCC.[1]

2. On 19 September 2007, the Co-Investigating Judges charged Nuon Chea with Crimes Against Humanity (Murder, Torture, Imprisonment, Persecution, Extermination, Enslavement, Deportation and Forcible Transfer and Other Inhumane Acts), and Grave Breaches of the Geneva Conventions of 1949 (Wilful Killing, Torture, Inhumane Acts, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Wilful Deprivation of Rights to a Fair Trial, Unlawful Confinement, and Unlawful Deportation or Transfer).[2]

3. On 19 September 2007, following an adversarial hearing, the Co-Investigating Judges ordered that Nuon Chea be held in provisional detention for a term not exceeding one

[1] Introductory Submission, 18 July 2007, D3.
[2] Written record of initial appearance, 19 September 2007, D20.

year.[3] On 20 March 2008, following hearings held on 7 and 8 February 2008, the Pre-Trial Chamber unanimously confirmed the order, substituting its own reasoning for that of the Co-Investigating Judges.[4]

4. On 16 September 2008, the Co-Investigating Judges ordered the extension of Nuon Chea's provisional detention for a term not exceeding one year.[5] On 4 May 2009, the Pre-trial Chamber unanimously confirmed the order, again substituting its own reasoning for that of the Co-Investigating Judges.[6]

5. On 20 August 2009 the Co-Investigating Judges notified the Charged Person and his lawyers that the question of extending the term of provisional detention, due to expire on 16 September 2009, was being considered and that hey had fifteen days to submit observations. The co-lawyers for Nuon Chea did not submit any observations within the required time limit.

THE LAW

6. Internal Rule 63 provides, as regards the Co-Investigating Judges, that:

6. Provisional Detention may be ordered as follows:

a) for genocide, war crimes and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the Provisional Detention for further 1 (one) year periods.
...

7. Any decision by the Co-Investigating Judges concerning extension of Provisional Detention shall be in writing and shall set out the reasons for such an extension. An extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.

7. The Co-Investigating Judges may only provisionally detain a Charged Person when the following conditions, set out in Internal Rule 63(3), are met:

a) there is well founded reason to believe that a person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and

b) The Co-Investigating Judges consider the Provisional Detention to be a necessary measure to:

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[3] Provisional Detention order of Nuon Chea, 19 September 2007, C11/1.
[4] Decision on Appeal against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54.
[5] Order on Extension of Provisional Detention, 16 September 2008, C9/3.
[6] Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea, 4 May 2009, C9/4/6.

i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
ii) preserve evidence or prevent the destruction of any evidence;
iii) ensure the presence of the Charged Person during the proceedings;
iv) protect the security of the Charged Person; or
v) preserve public order

REASONS FOR THE DECISION

8. The Co-investigating Judges note that provisional detention is an exception to the general rule of liberty at the pretrial phase. Therefore a Charged Person may only be maintained in provisional detention where it is established that the conditions set out in Internal Rules 63(3) are still met. For that reason, when considering the extension of provisional detention, the Co-Investigating Judges examine whether the abovementioned conditions still exist at the time of their decision, taking into consideration the results of the judicial investigation, notwithstanding the passage of time.[7]

Internal Rule 63(3)(a)

9. Internal Rule 63(3)(a) provides that the Co-Investigating Judges must establish that there is well founded reason to believe that the person may have committed crimes specified in the introductory submission. The Pre-Trial-Chamber has noted that the threshold to be applied when extending provisional detention is the satisfaction of an objective observer that the Charged Person may have been responsible for the commission of the alleged crimes specified in the Introductory Submission.[8]

10. On 16 September 2008, in their Order extending the provisional detention of the Charged Person, the Co-Investigating Judges found there were well founded reasons to believe that he may have committed the crimes with which he is charged.[9] On appeal, after reviewing the evidence on the case-file,[10] the Pre-Trial Chamber found that *"according to the witnesses' recent testimonies, the Charged person, allegedly, was in a position to give orders to staff in addition to those of S-21 and the outcome of implementation of such orders were the purges, arrests, killing and maltreatment of prisoners. These would satisfy an objective observer, at present, that the Charged Person may have been responsible for, or committed, the alleged crimes specified in the Introductory submission".*[11]

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[7] Para 12, Order on Extension of Provisional detention of Ieng Thirith, 10 November 2008, C20/4; para 22 C9/4/6.
[8] This standard has been applied repeatedly by the Pre Trial Chamber, see for instance: para 46, C11/54; and para 24, C9/4/6.
[9] Page 2, C9/3.
[10] Paras 24-29, C9/4/6.
[11] Para 29, C9/4/6.

11. In its previous appeal decision concerning the Charged Person, the Pre-Trial Chamber stated that it would consider the evidence placed on the case file up until 17 December 2008, the last possible date for submissions by the parties.[12] The Co-Investigating Judges consider that the findings of the Pre-Trial Chamber remain valid and will therefore limit their review to all inculpatory and exculpatory evidence relating to the Charged Person that has been placed on the case file since 17 December 2008.

12. Since that date, the Co-Investigating Judges have continued to investigate the allegations contained in the Introductory Submission and to place evidence in the case file.[13] More than 20 new witnesses statements[14] have been added which assist in clarifying whether the Charged Person played any role in connection with the alleged crimes within the jurisdiction of the ECCC:

a) Clarifying the roles and functions Nuon Chea allegedly held during the Democratic Kampuchea period, in particular as regards his membership of the Central Committee[15] and the Standing Committee[16], his position as Chairman of the DK Peoples' Assembly[17] and his involvement in internal security matters.[18]

b) Supporting the allegation that the Charged Person may have participated in the evacuation of Phnom Penh in April 1975,[19] and had knowledge of the second

[12] Para 6, C9/4/6.
[13] For an overall overview of the investigation since 17th of December 2008 see Para 27 below.
[14] [REDACTED]

phase of transfer of population to the Old North zone (central Zone) and the Northwest Zone.[20]

c) Indicating that NUON Chea had knowledge of the living and working conditions of the people in Phnom Penh and the countryside through visits to a number of worksites, cooperatives, warehouses and hospitals[21] (including a number of worksites listed in the Introductory Submission, such as: the Srae Ambel government Salt field[22] and the 1st January Dam[23]) and via telegrams he received or was copied in to from Zones and sectors around the country. This system of telegram flows has been clarified by several telegraph operators interviewed by the OCIJ.[24]

d) Concerning the involvement of Nuon Chea in the arrest of DK cadre and military personnel.[25] Detailed witness evidence of his involvement in decision making concerning, and implementation of, the purge of East Zone cadre and military personnel considered to be "internal enemies", and the decision to send them either to the Kampong Chhnang Airfield construction site or the S-21 Security Centre.[26]

13. Some of the documents and testimony collected during this period, which may appear to be exculpatory as regards Nuon Chea's role and participation as a Central Committee member, has also been placed on the case file.[27] Nevertheless, the Co-investigating Judges do not consider that this evidence is sufficient to invalidate the basis for their reasons to believe that the Charged Person may have committed crimes set out in the Introductory Submission.

14. Accordingly, the Co-Investigating Judges consider that, after a fresh review of the evidence on the case file, at this stage of the judicial investigation, there are sufficient additional facts or information which would satisfy an objective observer that Nuon Chea, in one or more of his above-mentioned roles and functions, either planned, instigated, ordered, failed to prevent or otherwise aided and abetted in the commission of crimes specified in the Introductory Submission and, thus, that the condition set out in Internal Rule 63(3)(a) is still met, notwithstanding the passage of time.

Internal Rule 63(3)(b)

[REDACTED]

15. The Co-Investigating Judges recall that, as clarified by the Pre-Trial Chamber, in order to justify a provisional detention order, only one of the objectives set out in Rule 63(3)(b) needs to be satisfied and that, as such, there is no obligation to examine each of the criteria if the judges deem that they have sufficiently demonstrated the need for provisional detention in reference to one or more of the conditions stipulated in Rule 63(3)(b) at the relevant time.[28]

16. The Co-investigating judges take note of the fact that each condition set out in Internal Rule 63(3)(b) was carefully considered by the Pre-Trial Chamber in its decision on Appeal against the Co-Investing Judges Order on Extension of Provisional Detention.[29] The Co-Investigating Judges have considered whether these conditions are still satisfied currently in light of the findings of the Pre-Trial Chamber and all the circumstances up to the present time.

63(3)(b)(i) Prevent the Charged Person from exerting pressure on any witnesses or victims; and (ii) preserve evidence or prevent the destruction of evidence

17. The Pre-Trial Chamber held, on 4 May 2009, *"that the passage of time has not eliminated the risk of pressure towards witnesses or collusion. On the contrary, the risk is more critical when more records from the case file are available. The level of knowledge of the Charged Person about identity and details of witnesses and civil parties has increased since the time he was initially detained. This increases the possibility that the Charged Person may exert pressure on witnesses who have been interviewed and might be re-interviewed and upon those who have not been interviewed"*[30]. The Pre-Trial Chamber has found that witnesses are in real fear of intimidation. The Co-Investigating Judges further note the finding by the Pre-Trial Chamber that the Charged Person has already tried to threaten witnesses or sough to destroy evidence in the past. Fresh evidence on the case file confirms that this risk still exists.[31]

18. The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that would lead them to a different conclusion. Therefore Provisional Detention still remains a necessary measure to prevent the Charged Person from exerting pressure on witnesses or destroying evidence.

63(3)(b)(iii) Ensure the Presence of the Charged Person During Any proceedings

19. The Pre-Trial Chamber has held that *"in view of the gravity of the charges, the Charged Person could face a sentence of imprisonment from five years to life if he is found guilty. Nothing placed on the case file since this Chamber's previous decision on provisional detention [footnote omitted] leads to a conclusion that the circumstances have changed. Moreover, the new evidence counted above adds on the arguments*

[28] See for example, Pre-Trial Chamber, Decision on Appeal Against Provisional Detention of Nuon Chea, 20March 2008 Cl 1/54, para. 83.
[29] Paras 30 to 43, C9/4/6.
[30] para. 31, C9/4/6.
[31] para. 61, C11/54.

supporting a connection between the alleged acts and the Charged Person hence putting more pressure on him."[32]

20. The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead to a different conclusion. Provisional Detention still remains a necessary measure to ensure the Charged Person's presence during the proceedings.

63(3)(b)(iv) Protect the Security of the Charged Person

21. On 4 May 2009, the Pre-Trial Chamber found, with reference to Nuon Chea, that Provisional Detention still remains a necessary measure to protect the Charged Person's security[33] The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead to a different conclusion.

22. Accordingly, the Co-Investigating Judges consider that Provisional Detention still remains a necessary measure to protect the Charged Person's security.

63(3)(b)(v) Preserve Public Order

23. The passage of time has not diminished the impact of the Democratic Kampuchea regime on society. As recalled by the Pre-Trial Chamber, a proportion of the population that lived through the period from 1975 to 1979 suffers from post-traumatic stress disorder. Specialists have stated that judicial activities before the ECCC "*may pose a fresh risk to the Cambodian society*" and may "*lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them*"[34]. The Pre-Trial Chamber has also noted that the United Nations General Assembly has recognized that crimes committed during the Democratic Kampuchea period from 1975 to 1979 are still a matter of concern for Cambodian society. A great deal of interest has emerged concerning hearings involving the Charged Person, which demonstrates that the trial is still a matter of great concern for the Cambodian population today.

24. The Co-Investigating Judges find, therefore, that the Charged Person's release would disturb public order. Provisional Detention of the Charged Person thus continues to remain necessary in order to preserve public order.

PASSAGE OF TIME

25. The Co-Investigating Judges recognize that the passage of time is relevant to determining the legitimacy of continued provisional detention of a charged person. The Pre-Trial Chamber has confirmed this analysis[35]. In assessing the manner in which the

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[32] para. 33, C9/4/6.
[33] paras. 35-36, C9/4/6.
[34] Rob Savage, Monthly South Eastern lobe, *Post Traumatic Stress disorder: A Legacy of Pain and Violence*, July 2007, pp. 24-27 (Co-Prosecutors' response to Nuon Chea's Appeal against Provisional detention Order of September 2007).
[35] para.45, C9/4/6.

judicial investigation has been conducted, and by analogy with the case-law of the European Court of Human rights concerning reasonable time, the Co-Investigating Judges have taken account of the facts of the case as a whole, including its complexity, in terms of fact and law, the conduct of the judicial authorities and that of the parties[36].

26. In the case in hand, the Charged Person has been in detention for nearly 24 months. The Co-Investigating Judges are conscious that this is a significant period. They reiterate, however, that the scope of the judicial investigation required by the Introductory Submission and the gravity of the crimes alleged therein with respect to to the Charged Person require large-scale investigative action.

27. Since the 17 December 2008, the Co-Investigating Judges have personally conducted interviews[37] and placed the Written records of interviews with many witnesses[38] and Civil Parties[39] on the case file. They have also added a large body of evidentiary materials, either at the request of the parties[40] or *proprio motu*[41], notably regarding the Charged Person's role during the DK regime. Numerous Rogatory letters are currently in the course of being executed and the resulting evidence placed on the case file. In view of the foregoing, the Co-Investigating Judges do not consider that passage of time calls into question the need for continued provisional detention of the Charged Person.

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[36] ECHR, *Frydlender v. France*, 27 June 2000, Application No. 30979/96, par. 43; ECHR, *Pellissier and sassi v. France*, 25 March 1999, Application No. 25444/94, par. 71; ECHR, *Vernillo v. France*, 20 February 1991, Application No. 11889/85, par. 34

[REDACTED]

28. The Co-Investigating Judges find that, as stated above, the conditions for continued Provisional Detention of the Charged Person, set out in Rule 63(3), are still met to date. There is still well founded reason to believe that Nuon Chea may have committed the crime or crimes specified in the Introductory Submission, and provisional detention appear as a necessary measure to: (i) prevent the Charged Person from exerting pressure on any witnesses or Victims; (ii) ensure the presence of the Charged Person during the proceedings; (iii) protect the security of the Charged Person; and iv) preserve public order.

FOR THESE REASONS,

HEREBY ORDER the extension of the Provisional Detention of Nuon Chea for a maximum term of one year, pursuant to sub-Rule 63(6)(a) of the Internal Rules.

Done in Phnom Penh, on 15 September 2009

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges

Co-juges d'instruction

Marcel LEMONDE

ឃូ ចុំណឿន