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

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

D427/5/10

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 152)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Catherine MARCHI-UHEL
Judge HUOT Vuthy

Date: 21 January 2011

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PUBLIC
**DECISION ON IENG SARY'S APPEAL AGAINST THE CLOSING ORDER'S
EXTENSION OF HIS PROVISIONAL DETENTION**

Co-Prosecutors

CHEA Leang
Andrew CAYLEY
YET Chakriya
William SMITH
SENG Bunkheang

Accused

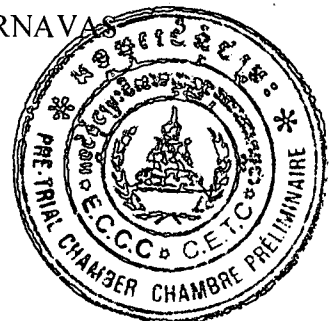
IENG Sary

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of “Ieng Sary’s Appeal against the Closing Order’s Extension of his Provisional Detention” (the “Appeal”).¹

I PROCEDURAL BACKGROUND

1. On 16 September 2010 the Co-Investigating Judges filed the Closing Order,² which was notified to the parties on the same day.
2. On 22 October 2010 the Co-Lawyers for the Accused filed the Appeal. The Appeal was notified to the parties in English and Khmer on 25 October 2010.
3. On 25 October 2010 the Co-Lawyers for the Accused filed in English another appeal against the Closing Order pursuant to an extension of time granted by the Pre-Trial Chamber (the “Jurisdiction Appeal”).³
4. On 28 October 2010 the Co-Prosecutors filed the “Co-Prosecutors’ Observations in Respect of Ieng Sary’s Separate Appeals against the Closing Order on Provisional Detention and Jurisdiction” (the “Preliminary Observations”).⁴
5. On 3 November 2010, the Co-Lawyers for the Accused filed their Response to the Co-Prosecutors’ Preliminary Observations.⁵
6. The same day, the Pre-Trial Chamber notified its Decision on the Co-Prosecutors’ Preliminary Observations,⁶ confirming its acceptance of the filing of the Appeal and the Jurisdiction Appeal and directing the Co-Prosecutors to file a separate Response to the Appeal.

¹ Ieng Sary’s Appeal against the Closing Order’s Extension of his Provisional Detention, 22 October 2010, D427/5/1.

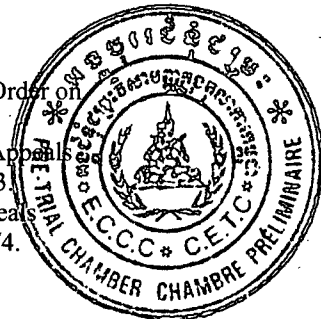
² Closing Order, 16 September 2010, D427.

³ Ieng Sary’s Appeal against the Closing Order, 25 October 2010, D427/1/6.

⁴ Co-Prosecutors’ Observations in Respect of Ieng Sary’s Separate Appeals against the Closing Order on Provisional Detention and Jurisdiction, 28 October 2010, D427/1/7 and D427/5/2.

⁵ Ieng Sary’s Response to the Co-Prosecutors’ Observations in Respect of Ieng Sary’s Separate Appeals against the Closing Order on Provisional Detention and Jurisdiction, 3 November 2010, D427/5/3.

⁶ Decision on Co-Prosecutors’ Preliminary Observations in Respect of Ieng Sary’s Separate Appeals Against the Closing Order on Provisional Detention and Jurisdiction, 3 November 2010, D427/5/4.



7. On 8 November 2010, the Co-Prosecutors filed the Co-Prosecutors' Response to Ieng Sary's Appeal Against the Closing Order's Extension of his Provisional Detention (the "Response").⁷ The Response was notified to the parties on 10 November 2010.
8. The Lawyers for the Civil Parties have not filed any Response to the Appeal.
9. On 12 November 2010 the Co-Lawyers for the Accused filed a request for information as to whether there would be an oral hearing. This request was notified to the parties on 15 November 2010.
10. On 18 November 2010 the Pre-Trial Chamber made a Scheduling Order, scheduling an oral hearing of the Appeal for 15 December 2010.⁸
11. On 3 December 2010 the Co-Lawyers for the Accused filed a Request for Leave to Reply in Lieu of an Oral Hearing & Reply to the Co-Prosecutors' Response to Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention ("Request and Reply").⁹
12. On 9 December 2010 the Pre-Trial Chamber notified a Cancellation Order to cancel the oral hearing set down for 15 December 2010. The Pre-Trial Chamber accepted the filing of the Request and Reply, and ordered that the Appeal would be determined on the basis of written submissions only.¹⁰
13. On 13 January 2011 the Pre-Trial Chamber notified its Decision on Ieng Sary's Appeal Against the Closing Order's Extension of his Provisional Detention.¹¹ The Pre-Trial Chamber decided unanimously that the Appeal was admissible and

⁷ Co-Prosecutors' Response to Ieng Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, 8 November 2010, D427/5/5 (the "Response").

⁸ Scheduling Order, 18 November 2010, D427/5/6.

⁹ Request for Leave to Reply in Lieu of an Oral Hearing & Reply to the Co-Prosecutors' Response to Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention, 3 December 2010, D427/5/7.

¹⁰ Cancellation Order, 9 December 2010, D427/5/8.

¹¹ Decision on Ieng Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, 13 January 2011, D427/5/9.



dismissed the Appeal, indicating that a reasoned decision would follow in due course.

14. The Pre-Trial Chamber hereby provides the reasons for this decision.

II ADMISSIBILITY

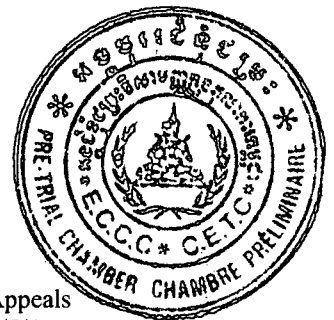
15. The Closing Order was notified on 16 September 2010. The Co-Lawyers for the Accused on 17 September 2010 filed a Notice of Appeal, and on 22 October 2010 filed the Appeal, within the prescribed time limit as extended due to flooding at the Court.

16. The Accused may appeal against any orders or decisions of the Co-Investigating Judges relating to provisional detention.¹² The Pre-Trial Chamber in its Decision on the Co-Prosecutors' Preliminary Observations¹³ confirmed its acceptance of the separate filing of the Appeal and of the Jurisdiction Appeal, taking into account "the very different subject matters of these Appeals and the fact that, consequently, where deemed necessary, different procedural steps may be applied".¹⁴

17. The Appeal is therefore admissible.

III APPLICABLE LAW

18. Reference is made to Internal Rules 63 and 68.



¹² Internal Rule 63(4), 74(3)(f).

¹³ Decision on Co-Prosecutors' Preliminary Observations in Respect of Ieng Sary's Separate Appeals Against the Closing Order on Provisional Detention and Jurisdiction, 3 November 2010, D427/5/4.

¹⁴ Decision on Co-Prosecutors' Preliminary Observations in Respect of Ieng Sary's Separate Appeals Against the Closing Order on Provisional Detention and Jurisdiction, 3 November 2010, D427/5/4, para. 7.

IV SUBMISSIONS OF THE PARTIES

19. In the Appeal, the Co-Lawyers request that the Pre-Trial Chamber reverse the Closing Order's continuation of the Accused's detention and terminate the provisional detention of the Accused.¹⁵
20. The Co-Lawyers submit that the Co-Investigating Judges failed to comply with the requirement of Internal Rule 68 that the maintenance of the Accused in provisional detention be ordered by "a specific, reasoned decision included in the Closing Order". The Co-Lawyers point to the brevity of the portion of the Closing Order extending provisional detention, and the fact that it references prior reasoning of the Pre-Trial Chamber. The Co-Lawyers submit that under Internal Rule 68, in the absence of a specific, reasoned decision, the issuance of a Closing Order puts to an end provisional detention.¹⁶
21. In the alternative, the Co-Lawyers submit that if the Closing Order does include a specific, reasoned decision ordering the maintenance of the Accused in provisional detention, the Co-Investigating Judges erred in finding provisional detention to be a necessary measure to ensure the presence of the Accused at trial, to protect his security and to preserve public order.¹⁷
22. The Co-Prosecutors in response submit that the Co-Investigating Judges have correctly applied Internal Rules 63 and 68 in maintaining the provisional detention of the Accused. They submit that the Closing Order includes a "specific, reasoned decision" as required by Internal Rule 68(1), and that the provisional detention of the Accused remains necessary.¹⁸ The Co-Prosecutors submit that the Accused has failed to demonstrate any change of circumstances warranting review of the necessity of his detention.¹⁹

¹⁵ Appeal, Part IV.

¹⁶ Appeal, para. 12.

¹⁷ Appeal, paras 14-18.

¹⁸ Response, paras 4 and 5.

¹⁹ Response, para. 9.



23. The Co-Lawyers in reply submit that the Co-Investigating Judges' references to past reasoning in the Closing Order are insufficient to comply with the requirement to provide a reasoned decision.²⁰ The Co-Lawyers submit also that they do not bear the burden of proving the Accused should be released; rather, the Co-Investigating Judges must thoroughly consider whether continued provisional detention, (which should be ordered only in exceptional circumstances), is justified.²¹
24. The Pre-Trial Chamber, in light of its previous decisions relating to provisional detention, and the submissions of the parties, will review the Closing Order's extension of Ieng Sary's provisional detention by an examination of:
- a. Whether the Co-Investigating Judges provided "a specific, reasoned decision included in the Closing Order" (Internal Rule 68(1));
 - b. Grounds that would make detention a necessary measure (Internal Rule 63(3)(b)); and
 - c. The Accused's request for release on bail, or house arrest.

V CONSIDERATIONS

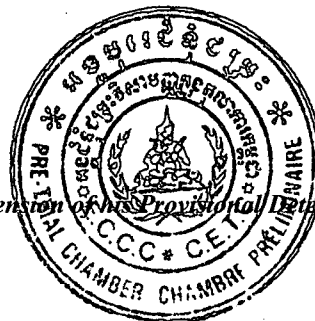
A. Requirement of a specific, reasoned decision

25. Internal Rule 68(1) sets out the effect of the Closing Order on provisional detention, and the steps to be taken if detention is to continue following the Closing Order:

The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Order have expired. However, where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail under Rules 63 and 65 are still met, they may, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.

²⁰ Request and Reply, para. 1.

²¹ Request and Reply, para. 2.



26. The Pre-Trial Chamber recalls that Internal Rule 63(3)(a) provides that the Co-Investigating Judges may order provisional detention only if “there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission”. Pursuant to Internal Rule 63(3)(b) the Co-Investigating Judges must also consider provisional detention to be necessary.
27. The Pre-Trial Chamber notes that it has previously held that the Co-Investigating Judges are obliged to justify their activities by giving reasons for their decisions.²²
28. The Closing Order includes a section headed “Maintenance of the Accused in Detention”. Under this heading, paragraphs 1622 and 1623 of the Closing Order provide the following:

1622. Considering that, in light of the evidence set out in this Closing Order in support of sending Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan for trial, the conditions laid out in Internal Rule 63(3)(a) are satisfied;

1623. Considering further, having regard to the conditions laid down in Internal Rule 63(3)(b), that the reasons set out in our last Order on the extension of Nuon Chea’s provisional detention (which was not appealed), on the one hand, and the reasoning adopted by the Pre-Trial Chamber in its latest decisions on the appeals against renewal of provisional detention by Ieng Sary, Ieng Thirith and Khieu Samphan, on the other hand, retain their full force, the only new element being the indictment of the abovementioned persons, which only reinforces the reasons for the abovementioned decisions and renders continued detention all the more necessary.

29. Paragraph 1624 of the Closing Order provides in relevant part:

1624. Considering, accordingly, that it is necessary to maintain the Accused in Provisional Detention until they appear before the Trial Chamber, pursuant to Internal Rule 68:

(...)

- Regarding Ieng Sary: in order to ensure the presence of the Accused at trial, protect the security of the Accused and preserve public order...

30. The Pre-Trial Chamber finds that the Co-Investigating Judges have provided sufficient reasoning for their conclusion that “well founded reason to believe” still exists.
31. As to the condition set out in Internal Rule 63(3)(a), the Co-Investigating Judges clearly consider that there is well founded reason to believe that the Ieng Sary

²² Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/I/73, para. 64.



may have committed the crimes specified in the Introductory or Supplementary Submission, “in light of the evidence set out in” the Closing Order in support of indicting Ieng Sary and sending him to trial.²³ The Closing Order, read as a whole, sets out in significant detail matters of fact and law in respect of the Accused sufficient to give rise to “well founded reason to believe” that he may have committed the crimes specified. This is in addition to the reasoning of the Pre-Trial Chamber, incorporated by the Co-Investigating Judges in para. 1623 of the Closing Order, that its examination of the documents and evidence in the case file in February 2010 led it to conclude that the totality of the evidence supported a conclusion that “well founded reasons to believe” existed.

32. Internal Rule 68 does not preclude the incorporation of specific reasoning from previous decisions by reference. The reasoning of the Co-Investigating Judges in para. 1623 of the Closing Order addresses the necessity of provisional detention under Internal Rule 63(3)(b). The Co-Investigating Judges have addressed in this paragraph whether there has been any change in circumstances since the April 2010 decision of the Pre-Trial Chamber dismissing Ieng Sary's appeal against his provisional detention (“April 2010 decision”).²⁴ The Co-Investigating Judges take account of and incorporate the reasoning of the Pre-Trial Chamber in the April 2010 decision, and then refer to the indictment as the “only new element” to indicate a change in circumstances since this decision, reasoning that this change in circumstance increases the necessity of provisional detention. The reasoning in the April 2010 decision is specific to the provisional detention of Ieng Sary, as is the part of para. 1623 of the Closing Order incorporating this reasoning and referring to his Indictment.
33. Accordingly the Pre-Trial Chamber finds that the Co-Investigating Judges' decision is specific and reasoned, and therefore in compliance with Internal Rule 68(1).

²³ Closing Order, para. 1622.

²⁴ Decision on Ieng Sary's Appeal against Order on Extension of Provisional Detention, 30 April 2010, Doc No. C22/9/14 (“April 2010 decision”).



B. Grounds that would make detention a necessary measure

34. Provisional detention is an exception to the right to liberty and the general rule that a person not be provisionally detained.

Necessity to ensure the presence of the Accused at trial

35. The Co-Lawyers submit that the Accused is 86 years of age, and has serious health problems limiting his mobility.²⁵ They submit further that the Accused, if released, would visit frequently his wife, Ieng Thirith, who remains in provisional detention and that he “could hardly be expected to flee the country and leave her”.²⁶ The Pre-Trial Chamber observes that it has dealt with the same arguments concerning the Accused's age and health in previous provisional detention appeals,²⁷ and that as submitted by the Co-Prosecutors²⁸ the Co-Lawyers provide no evidence to demonstrate that the Accused would not be able to flee the country by any means of transport.

36. The risk of an Accused fleeing increases following an indictment, as an Accused faces the fact of a imminent trial rather than the mere possibility of a future trial. The Pre-Trial Chamber has noted previously that if convicted the Accused may be sentenced to a term of imprisonment from five years to life, in view of the gravity of the charges he faces.²⁹

Necessity to protect the security of the Accused

37. The Co-Lawyers for the Accused provide no new or additional submissions to show a change in circumstances since the April 2010 decision of the Pre-Trial Chamber finding that provisional detention remains a necessary measure to protect the security of the Accused.

Necessity to preserve public order

38. The Co-Lawyers submit that since the sentencing of Duch and the indictment of Ieng Sary, Nuon Chea, Ieng Thirith and Khieu Samphan, conditions have

²⁵ Appeal, para. 15.

²⁶ Appeal, para. 15.

²⁷ Decision on Ieng Sary's Appeal against Order on Extension of Provisional Detention, 30 April 2010, Doc No. C22/9/14, para. 38; Decision on Appeal of Ieng Sary against Co-Investigating Judges' Order on Extension of Provisional Detention, 26 June 2009, C22/5/38, para. 28.

²⁸ Response, para. 9.

²⁹ Decision on Ieng Sary's Appeal against Order on Extension of Provisional Detention, 30 April 2010, Doc No. C22/9/14, para. 42.



changed. The indictment of the Accused leads to a conclusion that the public is now more interested in and concerned with the events of 1975-79 – this consideration militates against the preservation of public order and renders the maintenance of the Accused in provisional detention necessary. Any public disorder could, in addition, threaten the security of the Accused.

C. Request for House Arrest

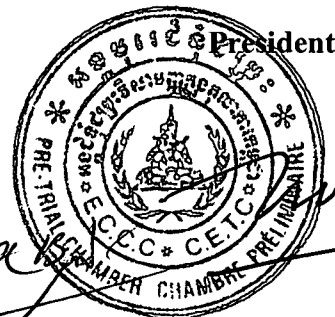
39. The Co-Lawyers request that less restrictive measures than detention be ordered, including house arrest.³⁰ The Pre-Trial Chamber in its April 2010 decision dealt with the request for house arrest, finding that the condition of house arrest proposed by Ieng Sary was outweighed by the necessity for his provisional detention.³¹ The Co-Lawyers provide no reason for the Pre-Trial Chamber to depart from its previous decisions on this matter.
40. For the abovementioned reasons the Pre-Trial Chamber decided as announced in its disposition of the Appeal on 13 January 2010.³²

Phnom Penh, 21 January 2010 ^{CR}

Pre-Trial Chamber

Rowan DOWNING NEY Thol Catherine MARCHI-UHEL HUOT Vuthy PRAK Kimsan



³⁰ Appeal, para. 16.

³¹ Decision on Ieng Sary's Appeal against Order on Extension of Provisional Detention, 30 April 2010, Doc No. C22/9/14, paras 63-4.

³² Decision on Ieng Sary's Appeal Against the Closing Order's Extension of his Provisional Detention, 13 January 2011, D427/5/9.