



Extraordinary Chambers in the Courts of Cambodia

Criminal Case File

၂၂၈/No: 002/14-08-2006

បេឡស៊ីបត្មៈ/Instruction/Investigation

លេខ/No: 002/19-09-2007-ECCC-OCLJ

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កងឃុំខ្ពង់បណ្តោះអាសន្ន

Order on Extension of Provisional Detention

We, You Bunleng (ឃុំ ប៊ុនឡុង) and Marcel Lemonde, Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia,

NOTING the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, dated 27 October 2004 (“ECCC Law”),

NOTING Rule 63(7) of the Internal Rules of the Extraordinary Chambers,

NOTING the continuing judicial investigation against **Khieu Samphan**, charged with **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,

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NOTING our Order of 19 November 2007, for the provisional detention of Khieu Samphan for a maximum period of one year (C26),

NOTING the Charged Person's Application for release, dated 8 October 2008 (C40),

NOTING our Order Refusing Provisional Release, dated 28 October 2008 (C40/4),

NOTING the Notice dated 28 October 2008 in which we formally notified the Charged Person and his Lawyers that we were considering whether to extend the provisional detention – which is due to expire on 19 November 2008 (C26/2),

NOTING the observations by the Charged Person's Co-Lawyers, dated 14 November 2008 (C26/3).

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission in which they named Khieu Samphan and four other persons suspected to have committed crimes the jurisdiction of the ECCC.¹
2. On 19 November 2007, the Co-Investigating Judges notified Khieu Samphan that he was charged with Crimes against Humanity (murder, extermination, imprisonment, persecution and other inhumane acts) and grave breaches of the Geneva Conventions of 12 August 1949 (wilful killing, wilfully causing great suffering or serious injury to body or health, wilfully depriving a prisoner of war or civilian the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a civilian).²
3. On 19 November 2007, following an adversarial hearing, the Co-Investigating Judges ordered that Khieu Samphan be held in provisional detention for a term not exceeding one year.³
4. On 14 December 2007, Khieu Samphan's Co-Lawyers filed an Appeal against the Provisional Detention Order.⁴

¹ Introductory Submission, 18 July 2007 (D3), ERN 00197410-00197545.

² Written Record of Adversarial Hearing, 19 November 2007 (C25), ERN 00153266- 00153270.

³ Provisional Detention Order, 19 November 2007 (C26), ERN 00156700-00156705.

⁴ Appeal Against Provisional Detention Order, 12 December 2007 (C26/I), ERN 00156610-00156611.

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5. On 8 October 2008, the Co-Lawyers for the Defence withdrew their appeal.⁵ The same day, they filed an Application for release with the Co-Investigating Judges, pursuant to Rule 64(2) of the Internal Rules.⁶
6. On 28 October 2008, the Co-Investigating Judges issued their Order Refusing Provisional Detention.⁷ The Co-Lawyers for the Defence filed an Appeal against the said Order on 4 November 2008.⁸
7. On 28 October 2008, the Co-Investigating Judges advised the Charged Person and his Lawyers that they were to make their submissions within 15 days.⁹ On 14 November 2008, Khieu Samphan's Co-Lawyers filed their submissions.¹⁰

THE LAW

8. Rule 63(6)(a) of the Internal Rules provides that, as regards Crimes against Humanity and war crimes, the Co-Investigating Judges have the power to extend provisional detention by one-year terms.
9. Rule 63(7) of the Internal Rules specifies that any decision by the Co-Investigating Judges concerning extension of provisional detention shall be in writing and set out the reasons for such an extension.
10. Rule 63(7) of the Internal Rules provides that "The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:
 - (a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
 - (b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
 - (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;

⁵ Notice of Withdrawal of Appeal, 8 October 2008, (C26/I/30), ERN 00228787- 00228793. Withdraw of the appeal was accepted by the Pre-Trial Chamber: Decision Relating to Notice of Withdrawal of Appeal, 15 October 2008, (C26/I/30), ERN00231971-00231974.

⁶ Urgent Application for Release, 8 October 2008, (C40), ERN 00228906-00228918.

⁷ Order Refusing Provisional Release, (C40/4), ERN 00235033- 00235044.

⁸ *Déclaration d'appel*, 4 November 2008.

⁹ Notice (Rule 63(7)), 28 October 2008 (C26/2), ERN 00235400-00235401.

¹⁰ *Objections de la défense concernant la prolongation de la détention*, 14 Novembre 2008, (C26/3), ERN00238930-00238941.

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- (iii) ensure the presence of the Charged Person during the proceedings;
- (iv) protect the security of the Charged Person; or
- (v) preserve public order.”

OBSERVATIONS BY THE DEFENCE

11. In their submissions, the Co-Lawyers contend that:¹¹

- *“It is not permissible to extend Khieu Samphan’s provisional detention, because it is arbitrary;
After one year of judicial investigation by the Co-Investigating Judges, Khieu Samphan is still unable to participate fully in his defence. His international lawyer is still unable to examine the investigation file in a language he understands. This situation is of the judicial authorities’ making, and it invalidates the entire judicial investigation process. Therefore, Khieu Samphan’s provisional detention is an arbitrary and cannot be extended.*
- *At this stage of the proceedings, the Co-Investigating Judges no longer have jurisdiction to order extension of provisional detention;
Khieu Samphan is entitled to be tried by an independent, impartial court. At this stage of the proceedings, the Co-Investigating Judges cannot rule impartially on provisional detention. They are therefore without jurisdiction.*
- *The appeal currently before the Pre-Trial Chamber cannot be dissociated from the facts of the present case, and the Co-Investigating Judges no longer have jurisdiction to order extension of provisional detention in conditions that are conducive to fair proceedings. Therefore, the Co-Investigating Judges must stay decision pending the Pre-Trial Chamber decision on the procedural defects arising from the absence of translation.*

REASONS FOR THE DECISION

A) Whether the provisional detention is “arbitrary”

12. In their submission, the Charged Person’s Co-Lawyers contend, *inter alia*, that the illegality of the Provisional Detention Order of 19 November 2007 has not yet been

¹¹ *Objections de la défense concernant la prolongation de la détention*, 14 Novembre 2008, p.2, (C26/3), ERN 00238930-00238941.

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demonstrated owing to the Pre-Trial Chamber's slowness and its decision to render a decision without taking the translation issue into account.

13. It is not for the Co-Investigating Judges to determine whether or not the Provisional Detention Order of 19 November 2007 was properly appealed by the Defence before the Pre-Trial Chamber. By withdrawing their appeal, the Charged Person's Co-Lawyers willfully waived their right to challenge before the competent judicial authority – in this instance, the Pre-Trial Chamber – the conditions in which the proceedings were conducted.
14. Further, the Charged Person contends that he “*cannot fully make his case under Rule 63(7) of the Rules, since he is not permitted to discuss the merits of the case*”.
15. The Co-Investigation Judges have already stated their position on parties' translation rights and obligations in the Order of the same name.¹² Since the Charged Person's appeal does not stay the proceedings, the parties are aware of the applicable law with respect to translation of the case file at this stage of the proceedings. At this stage, the Co-Investigation Judges cannot but reiterate that the Charged Person's rights, including the right to a fair trial, are being upheld.
16. Finally, the Order extending the provisional detention of Khieu Samphan is not contingent upon the outcome of the appeal against the Order on Translation Rights and Obligations of the Parties. The Co-Investigating Judges have the obligation to order the release of the charged person if the requirements laid out in Rule 63 of the Internal Rules are no longer satisfied¹³ and, if this is the case, they must draw all the necessary inferences from the Pre-Trial Chamber decision on the appeal. In the intervening period, since the Order for the provisional detention of Khieu Samphan is due to expire on 19 November 2008, the Co-Investigating Judges must re-assess the conditions for continued detention and decide forthwith whether to extend it or not.

B) Whether the Co-Investigating Judges are impartial in deciding to extend provisional detention

17. The Defence's submissions concerning the partiality of the Co-Investigating Judges could be viewed as an application for disqualification under Rule 34 of the Internal Rules. Pursuant to Rule 34(5) of the Internal Rules, where a party files an application

¹² Order on Translation Rights and Obligations of the Parties, (A190), ERN00196931-00196938.

¹³ See Rule 64 of the Rules, which provides that at any time during the Charged Person's detention, his release shall be ordered where the requirements of provisional detention under Rule 63 are no longer satisfied.

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for disqualification,¹⁴ as is the case in this instance, such an application “shall be submitted to the Pre-Trial Chamber”. Therefore, the Co-Investigating Judges are not competent to rule on the Charged Person’s application concerning their disqualification.

18. However, Rule 34(1) of the Internal Rules provides that a judge may recuse himself/herself from a case in which he or she has (...) concerning which a judge has or has had an association which objectively might affect his or her impartiality or objectively give rise to the appearance of bias. The Co-Investigating Judges adopt the jurisprudence of the International Criminal Tribunals in this connection in considering that there is a presumption of impartiality and that in the absence of proof to the contrary, it must be assumed that the Judges can disabuse their minds of any irrelevant personal beliefs or predispositions.¹⁵
19. In their submissions, the Charged Person’s Co-Lawyers contend that the Co-Investigating Judges’ dual role of conducting the judicial investigation and ruling on provisional detention could cast doubt on their impartiality.
20. The power to order detention, continued detention and extension of detention lies with the Co-Investigating Judges.¹⁶ This solution is consistent with and is similar to the system in force in Cambodia.¹⁷
21. However, analysis of current international law principles reveals that there is no such thing as a one-size-fits-all approach when it comes to determining which authority is empowered to order provisional detention. It seems, nonetheless, that international legal instruments offer one and the same approach with regard to deprivation of liberty. For example, Article 9.3 of the International Covenant on Civil and Political Rights¹⁸ and Article 5.3 of the European Convention on Human Rights¹⁹ provide in virtually similar terms that anyone arrested or detained on a criminal charge shall be brought before a judge or other officer authorized by law to exercise judicial power. Pursuant to this principle, the Co-Investigating Judges consider that the power to

¹⁴ Pursuant to Rule 34(2) of the Internal Rules.

¹⁵ See for example ICTY, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A., Judgement, Trial Chamber, 21 July 2000, para. 196; ICTY, *Prosecutor v. Dario Kordic et al.*, Case No. IT-95-14/2-PT, Decision of the Bureau, 4 May 1998, p. 2.

¹⁶ Rule 63 of the Internal Rules.

¹⁷ Article 206 of the new Code of Criminal Procedure of Cambodia.

¹⁸ Article 9.3 of the International Covenant on Civil and Political Rights, Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, provides: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial (...).”

¹⁹ Article 5.3 of the European Human Rights Convention of 4 November 1950 provides: “Everyone arrested or detained (...) shall be brought promptly before a judge or other officer authorized by law to exercise judicial power (...).”

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order detention, – provisional detention, in this instance – must lie with a judge or officer who offers equivalent guarantees, notably with regard to independence and impartiality.²⁰ So the authority charged with ordering detention would be regarded with misgivings if it were also empowered to participate as a party at other stages of the proceedings, say for the prosecution.²¹

22. In this instance, the Co-Investigating Judges perform a specific function, namely that of conducting the judicial investigation,²² by investigating the crimes they are seised of by the prosecution and – following adversarial judicial investigation proceedings involving both inculpatory and exculpatory evidence – determine if there is a case against charged person(s), and send the charged person to trial or dismiss the case, as the case may be. Their investigative function is not to be confused with that of the parties.²³ Also, the Co-Investigating Judges are “judges” in their own right, and, like other Judges of the Chambers, they offer all the guarantees attached to judicial functions, including independence and impartiality.²⁴ So in itself, the fact that the Judges charged with ordering provisional detention and extension thereof also conduct the judicial investigation proceedings does not objectively affect their impartiality or give rise to an appearance of bias.
23. Further, the fact that the Co-Investigating Judges have already decided that there are well-founded reasons to believe that the Charged Person committed the crimes charged against him – a *sine qua non* condition for continued provisional detention – does not mean that they cannot rule impartially on provisional detention at a later stage of the proceedings on this same condition, having regard to the change in circumstances. On the contrary, the very nature of the provisional detention scheme requires empowering a judge who offers all the guarantees attached to judicial functions to decide or assess impartially, at any stage of the proceedings, if the conditions for continued provisional detention are still satisfied.

²⁰ See for example, ECHR, *Case of Schiesser v. Switzerland*, 4 December 1979, A.34, Application No. 7710/76, para. 31; ECHR, *Case of Nikolova v. Bulgaria*, 5 March 1999, Application No. 31195/96, para. 49.

²¹ ECHR, *Case of Hood v. United Kingdom*, 18 February 1999, Application No. 27267/95, paras. 57-58; CEDH, *Case of Nikolova v. Bulgaria*, 25 March 1999, Application No. 31195/96 para. 49; ECHRT, *Case of Huber v. Switzerland*, 23 October 1990, A188, para. 43, ECHR, *Case of Brincat v. Italy*, 26 November 1992, A249-A, para. 21.

²² Article 23 of the 2004 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, and Article 5 of the Agreement Between the United Nations and the Kingdom of Cambodia.

²³ For the European Court of Human Rights, the relevant test is a judge or magistrate who offers the guarantees attached to such judicial functions, and not whether performing investigative functions is incompatible with deciding on provisional detention.

²⁴ See Article 5 (2) and (3) of the Agreement Between the United Nations and the Kingdom of Cambodia and Article 25 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia. The same guarantees are attached to the other judges of the Extraordinary Chambers (see Article 3 the Agreement Between the United Nations and the Kingdom of Cambodia, and Article 10 of the 2004 Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia.

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24. Moreover, contrary to what is asserted by the Defence,²⁵ the fact that the Co-Investigating Judges have already issued a separate Order on translation and drawn the necessary legal inferences from it does not mean that they cannot rule impartially on extension of provisional detention.²⁶

(C) Regarding the conditions laid out in Rule 63(3) of the Internal Rules

25. The Co-Investigating Judges consider that the extension of provisional detention beyond a one-year term may only be ordered only when it has been established that the conditions set out in Rule 63(3) are still met. These conditions must still be satisfied with the passage of time and the progress of the judicial investigation.
26. The Co-Investigating Judges have made a decision on the conditions laid out in 63(3) of the Internal Rules while taking into account the time that has elapsed since the Provisional Detention Order, in paragraphs 7-11 (Rule 63(3)(a)) and paragraphs 15-21 (Rule 63(3)(b)) of the Order Refusing Provisional Detention dated 28 October 2008.²⁷ Since that date, no change in circumstances has occurred that could call into question the position adopted by the Co-Investigating Judges in the aforementioned Order.
27. Consequently, the Co-Investigating Judges consider that the requirements for extension of provisional detention as set out in Rule 63(3) are still satisfied. They reiterate that well-founded reasons still exist to believe that the Charged Person encouraged the commission of the crimes charged against him or that he aided and abetted perpetration thereof. Moreover, there is still a genuine risk that the Charged Person could exert pressure on victims and witnesses; also, his continued provisional detention is necessary to preserve evidence and prevent destruction of any evidence. Also, the continued provisional detention of the Charged Person is necessary to protect his safety and to preserve public order.

²⁵ In their submissions, the Lawyers for the Charged Person take the view that the Co-Investigating Judges failed to take into account the Order for the provisional detention of Khieu Samphan, dated 28 October 2008, in that Khieu Samphan is not permitted to discuss the merits of the case, and having rendered a decision on the issue of translation, the Co-Investigating Judges cannot rule impartially on all aspects of provisional detention.

²⁶ ICTY case-law goes a lot further in setting the premise that while one cannot entirely rule out the possibility that decisions rendered by a Judge or Chamber may suffice to establish actual bias, it would be a truly extraordinary case in which they would. See ICTY, Decision of Blagojevic's Application Pursuant to Rule 15(B), 19 March 2003, IT-02-60, para.14. At issue in this instance was a Trial Chamber decision which differed with the Appeals Chamber decision was on a point of law; no evidence of bias was found.

²⁷ Order Refusing Provisional Detention, (C40/4), ERN 00235033- 00235044.

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១ ទូរស័ព្ទលេខ +៨៥៥(០)២៣ ២១៨៩១៤ ទូរសារលេខ +៨៥៥(០)២៣ ២១៨៩៤១។

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28. Reiterating the arguments contained in paragraph 25 of the Order Refusing Provisional Release, dated 28 October 2008, the Co-Investigating Judges consider that no alternative to detention can outweigh the necessity for detention and continued detention.
29. Lastly, the Co-Investigating Judges reiterate that the passage of time is relevant in determining the legitimacy of extending the provisional detention of the Charged Person²⁸ and that provisional detention is still necessary and must be extended for the same reasons as the ones stated in the Order Refusing Provisional Release.²⁹

FOR THESE REASONS,

HEREBY ORDER the extension of provisional detention of Khieu Samphan for a term not exceeding one year, pursuant to ECCC Internal Rule 63(6)(a).

Phnom Penh, on 18 November 2008

សហចៅក្រមស៊ើបអង្កេត

**Co- Investigating Judges
Co-juges d'instruction**

²⁸ See Order Refusing Provisional Detention, para. 27, (C40/4), ERN 00235033-00235044.

²⁹ See Order Refusing Provisional Detention, paras. 28030, (C40/4), ERN 00235033- 00235044.

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១
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