



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Royaume du Cambodge
Nation Religion Roi

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

Kingdom of Cambodia
Nation Religion King

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction
Case File No: 002/19-09-2007-ECCC-OCIJ

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Before: **YOU Bunleng**
Marcel LEMONDE

Date: **10 November 2009**

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Order on Extension of Provisional Detention

Co-Prosecutors
Mrs. CHEA Leang
Mr. Willian SMITH

Charged Person(s)
IENG Thirith

Lawyers for the Civil Parties	
NY Chandy	Elizabeth Rabesandratana
LOR Chhunthy	Pierre-Olivier SUR
Kong Pisey	Mahdev MOHAN
HONG Kim Suon	Olivier BAHOUGNE
YUNG Phanit	David BLACKMAN
KIM Mengkhy	Martine JACQUIN
MOCH Sovannary	Annie DELAHAIE
Sin Sowom	Fabienne TRUSSES-
Silke STUDZINSKY	NAPROUS
Philippe CANONNE	Patrick BAUDOIN
	Lyma Thuy Nguyen
	Marie Guiraud

Lawyers for the Defence
PHAT Pouy Seang
Diana ELLIS

ឯកសារត្រឹមត្រូវតាមច្បាប់ដើម
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Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
Mail Po Box 71, Phnom Penh Tel:+855(0)23 218914 Fax: +855(0) 23 218941.



We, **You Bunleng ឃុំ ប៊ុនលេង** 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 **Ieng Thirith**, charged with **Crimes Against Humanity**, offences defined and punishable under Articles 5, 29 (new) and 39 (new) of the ECCC Law,

NOTING our Order, dated 14 November 2007, for the provisional detention of Ieng Thirith for a term not exceeding one year (C20),

NOTING the Decision of the Pre-Trial Chamber on Appeal against the Provisional Detention of Ieng Thirith, dated 9 July 2008 (C20/I/26),

Noting our Order on Extension of Provisional Detention, dated 10 November 2008 (C20/4) extending the provisional detention of IENG Thirith for a period not exceeding one year,

Noting the Pre-Trial Chamber's Decision on Appeal, dated 11 May 2009 (C20/5/17),

Noting that, on 5 October 2009, we duly notified the Charged Person and her lawyers that we were considering whether to extend the term of provisional, and that they had fifteen days to submit observations (C20/6),

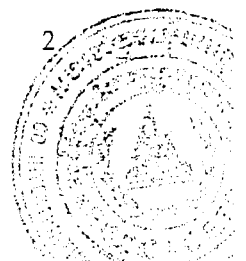
Noting the Defence Observations, dated 19 October 2009,

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors filed an Introductory Submission in which they named IENG Thirith and four other persons suspected of having committed crimes within the jurisdiction of the ECCC.¹
2. On 12 November 2007, the Co-Investigating Judges notified IENG Thirith that she was charged with Crimes against Humanity (murder, extermination, imprisonment, persecution, and other inhumane acts)².
3. On 14 November 2007, following an adversarial hearing, the Co-Investigating Judges ordered that IENG Thirith be held in provisional detention for a term not exceeding one

¹ Introductory Submission, 18 July 2007, D3.

² Written Record of Initial Appearance, 12 November 2007 (D39).



year³. On 9 July 2008, following the hearing held on 21 May 2008, the Pre-Trial Chamber unanimously confirmed the Order, substituting its own reasoning for that of the Co-Investigating Judges.⁴

4. On 10 November 2008, the Co-Investigating Judges ordered the extension of IENG Thirith's provisional detention for a term not exceeding one year.⁵ On 11 May 2009, the Pre-Trial Chamber unanimously confirmed the order, substituting its own reasoning for that of the Co-Investigating Judges.⁶
5. On 5 October 2009 the Co-Investigating Judges notified the Charged Person and her Co-Lawyers that the question of extending the term of provisional detention was being considered and they had fifteen days to submit observations. The co-lawyers for IENG Thirith submitted their observations on 19 October 2009.⁷

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:*

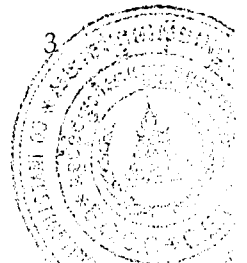
³Order for Provisional Detention of Ieng Thirith, 14 November 2007 (C20).

⁴ Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order of Ieng Thirith, 9 July 2008 (C20/1/26).

⁵ Order on Extension of Provisional Detention, 10 November 2008 (C20/4)

⁶ Decision on IENG Thirith's Appeal Against Order on Extension of Provisional Detention, 11 May 2009 (C20/5/17).

⁷ Defence Observations to the Co-Investigating Judges' Intention to Further Extend Madame Ieng Thirith's Provision Detention, 19 October 2009



- 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.*

OBSERVATIONS BY THE DEFENCE

8. In the Defence Observations, dated 19 October 2009, the Defence reiterated its reference to the arguments made in its 2008 Extension Appeal and in addition, made the following *inter alia* legal arguments that :

- a) There is no new evidence linking the Charged Person to any of the crimes charged and that there is an absence of evidence already on the Case File that would link the Charged Person to the crimes charged;⁸
- b) The threshold for a third year of provisional detention should be higher;⁹
- c) The present length of pre-trial detention is an unreasonable length of time;¹⁰ and
- d) The Co-Investigating Judges have failed to proceed with special diligence.¹¹

REASONS FOR THE DECISION

9. The Co-Investigating Judges note that provisional detention is an exception to the general rule of liberty at the pretrial phase. Therefore, the provisional detention of a Charged Person may only be maintained where it is established that the conditions set out in Internal Rule 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.¹²

Internal Rule 63(3)(a)

10. Internal Rule 63(3)(a) provides that to provisionally detain a Charged Person the Co-Investigating Judges must establish that there is well founded reason to believe that the

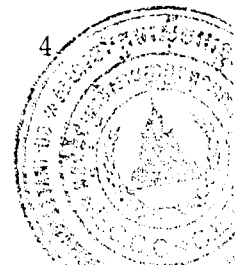
⁸ Defence Observations, paras. 10-15.

⁹ Defence Observations, paras. 16-18.

¹⁰ Defence Observations, paras. 19-27.

¹¹ Defence Observations, paras. 28-34.

¹² Para. 12, Order on Extension of Provisional detention of Ieng Thirith, 10 November 2008, C20/4; para. 22 C9/4/6.



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.¹³

11. On 10 November 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 IENG Thirith may have committed the crimes with which she is charged.¹⁴
12. On appeal, after reviewing the evidence on the case-file,¹⁵ the Pre-Trial Chamber found that the evidence considered by the Co-Investigating Judges had been “[S]ufficient for the Co-Investigating Judges to conclude that there were well-founded reasons to believe that the Charged Person may have committed the crimes for which she has been charged at the time the extension of provisional detention was ordered.”¹⁶ Furthermore, the Pre-Trial Chamber conducted its own analysis of the evidence placed on the Case File and found, “Taking into account this evidence and the fact that no exculpatory evidence has been placed on the Case File between the issuance of the Extension Order and the hearing held on 24 February 2009, the Pre-Trial Chamber finds that the first condition for ordering provisional detention, mentioned in Rule 63(3)(a), is still met.”¹⁷
13. In this Appeal Decision concerning the Charged Person, the Pre-Trial Chamber stated that it would consider the evidence placed on the Case File up until 24 February 2009, the last possible date for submissions by the parties.¹⁸ 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 24 February 2009.
14. Since that date, the Co-Investigating Judges have continued to investigate the allegations contained in the Introductory Submission and to place evidence on the Case File.¹⁹ Twenty one new witness statements²⁰ have been added which assist in clarifying

¹³ This standard has been applied repeatedly by the Pre Trial Chamber, see for instance: para 46, C11/54; and para. 24, C9/4/6.

¹⁴ Paras 13-20, C20/4.

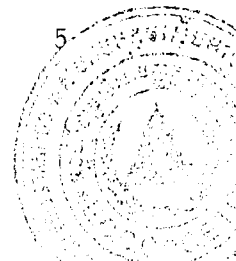
¹⁵ Paras 25-33, C20/5/17.

¹⁶ Para. 25, C20/5/17.

¹⁷ Para. 33, C20/5/17.

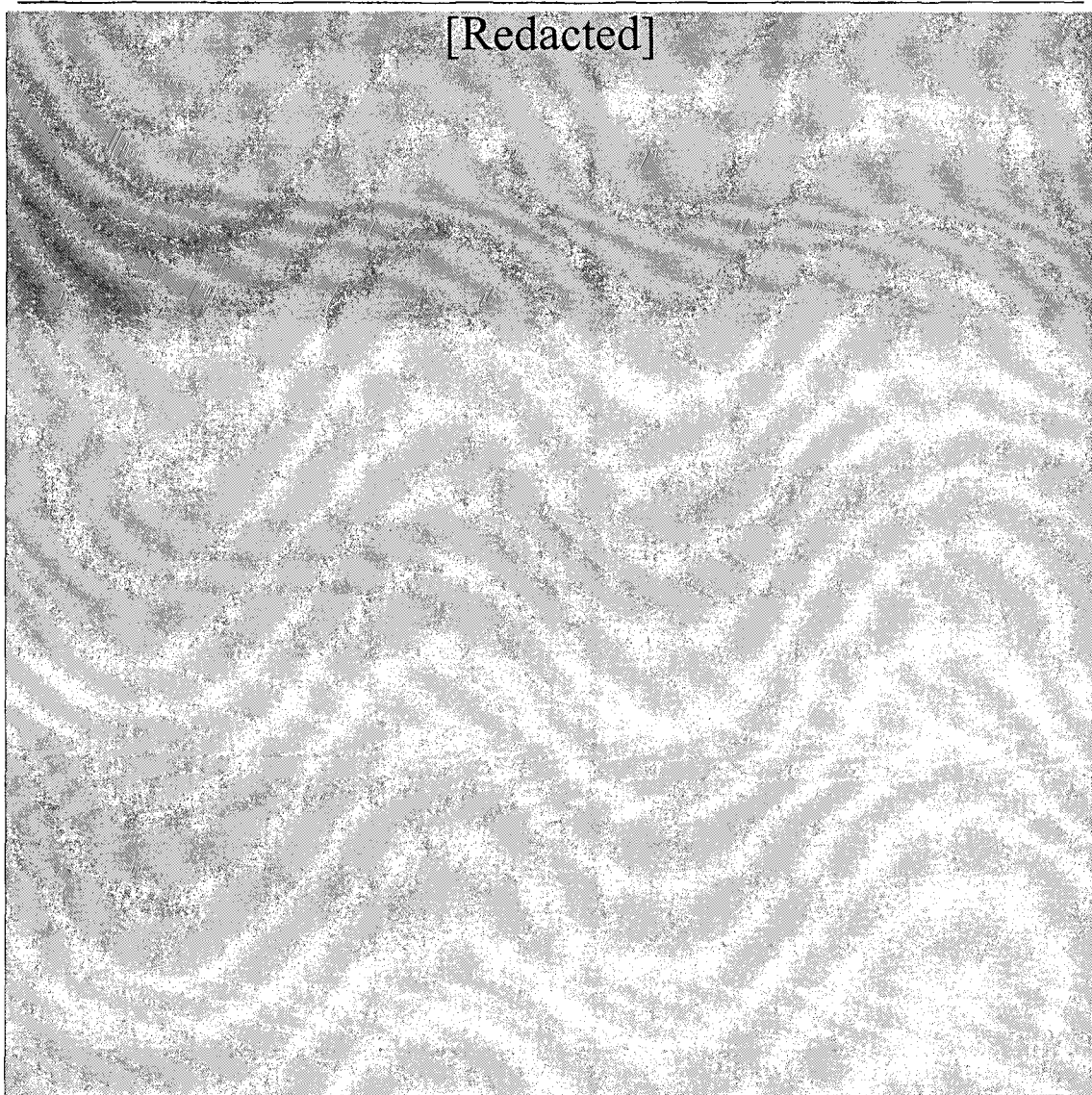
¹⁸ Para. 33, C20/5/17.

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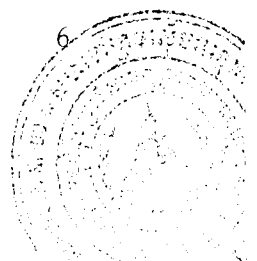


whether the Charged Person played any role in connection with the alleged crimes within the jurisdiction of the ECCC, including:

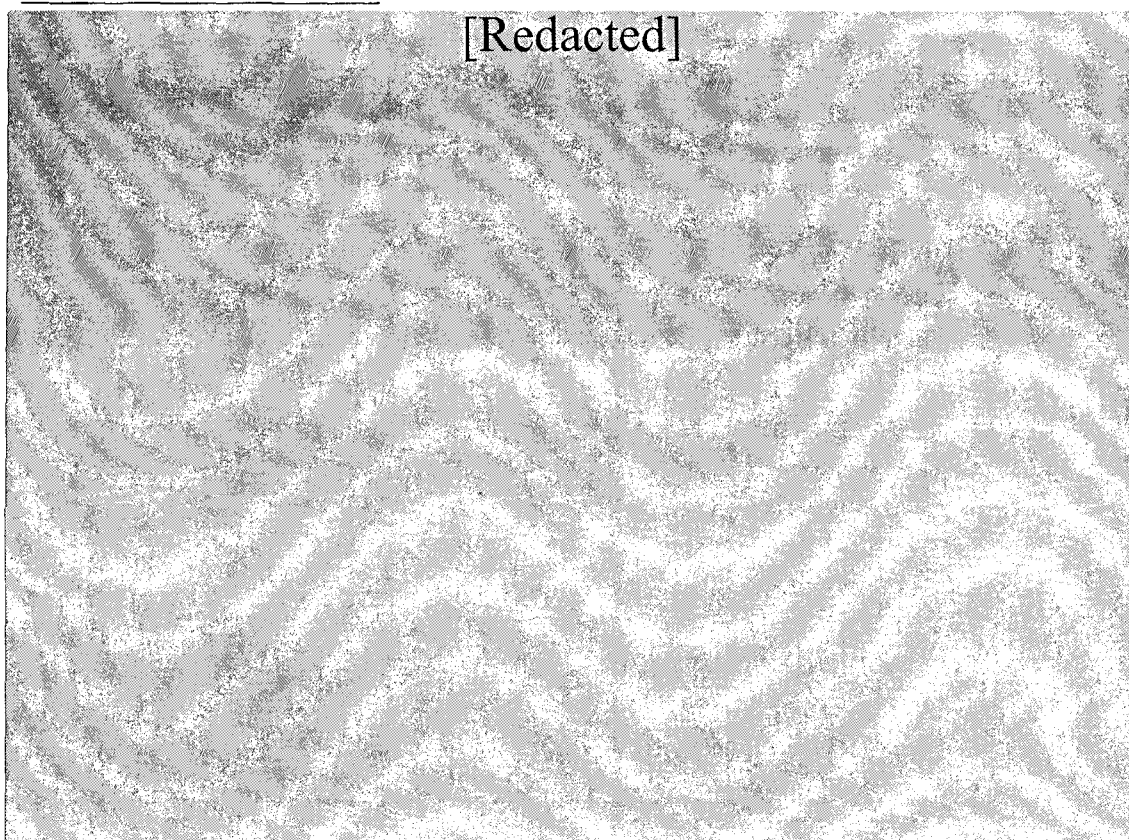
- a) The roles IENG Thirith allegedly held and her functions as Minister for Social Affairs during the Democratic Kampuchea period,²¹ including her responsibilities regarding the medical work²² and the internal security²³ of the Ministry.
- b) The roles IENG Thirith allegedly held and her functions in disseminating Social Affairs²⁴ and other CPK policies²⁵ within Democratic Kampuchea or whilst hosting foreign delegations.²⁶



Extraordinary Chambers in the Courts of Cambodia, National Road 4, Choam Chao, Dangkao Phnom Penh
Mail Po Box 71, Phnom Penh Tel: +855(0)23 218914 Fax: +855(0) 23 218941.



- c) The other roles IENG Thirith allegedly held and her functions during the Democratic Kampuchea period including her possible membership of the “Central Committee”²⁷ and “Party Centre Standing Committee”.²⁸
 - d) IENG Thirith’s alleged knowledge of the living and working conditions of the people in Phnom Penh and the countryside through visits to a number of hospitals,²⁹ cooperatives³⁰ and worksites³¹ including the 1 January Dam worksite.³²
 - e) IENG Thirith’s alleged knowledge and participation in the arrests of DK cadre³³ including cadres from her Ministry and/or related to the purge of East Zone cadres.³⁴
15. Some of the evidence collected during this period may appear to be exculpatory, either as regards IENG Thirith’s exact knowledge of the situation³⁵ or her roles in connection with the conditions³⁶ and arrests³⁷ at the Ministry of Social Affairs and its facilities.
16. Nevertheless, the Co-Investigating Judges do not consider that this evidence is sufficient to invalidate the basis for the well founded reason to believe that the Charged Person may have committed crimes specified within the Introductory Submission.



17. 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 there is well founded reason to believe that IENG Thirith, in one or more of her 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)

18. 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.³⁸

19. The Co-Investigating Judges take note of the fact that the conditions set out in Internal Rule 63(3)(b) were carefully considered by the Pre-Trial Chamber in its decision on Appeal against the Co-Investigating Judges Order on Extension of Provisional Detention.³⁹ 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

20. The Pre-Trial Chamber held on 11 May 2009, “[T]he Charged Person has access, through her lawyers, to evidence containing details on her possible role within the Democratic Kampuchea regime. The Co-Investigating Judges mentioned in their Extension Order that ‘many of these witnesses might be re-interviewed during the investigation, and, in their statements, have given other leads and named other potential witnesses who have not yet been interviewed at this stage of the investigation.’”⁴⁰ The Pre-Trial Chamber found that were the Charged Person to be released on bail there would exist a real risk of pressure being exerted on victims and witnesses and of interference with the evidence.⁴¹

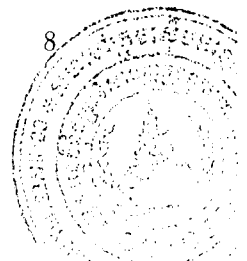
21. The Co-Investigating Judges additionally note the finding by the Pre-Trial Chamber that the Charged Person’s behavior and comments during previous hearings of the Pre-Trial Chamber further justified the assessment that there exists a real risk of the

³⁸ See for example, Pre-Trial Chamber, Decision on Appeal Against Provisional Detention of Nuon Chea, 20 March 2008, CI 1/54, para. 83.

³⁹ Paras. 34-45, C20/5/17.

⁴⁰ Para. 41, C20/5/17.

⁴¹ Para. 41, C20/5/17.



Charged Person exerting pressure on witnesses or victims and the destroying of evidence.⁴²

22. 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 any pressure on witnesses or any destroying of evidence.

63(3)(b)(iii) Ensure the presence of the Charged Person during any proceedings

23. The Pre-Trial Chamber held that “[T]he Co-Investigating Judges have found that the two other conditions necessitating the Charged Person’s detention under Rule 63(3)(b)(iii) and 63(3)(b)(v) were still met in the light of the circumstances prevailing at the time of the renewal of the detention and the fact that the Co-Lawyers did not put before the Chamber any argument or change in circumstances indicating the contrary. An examination of the Case File by the Pre-Trial Chamber has not undermined this conclusion of the Co-Investigating Judges.”⁴³

24. 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. In addition, the Co-Investigating Judges note that the Defence in its Observations do not make any submission addressing the risk of the Charged Person failing to attend beyond seeking to have her released on the conditions of bail proposed. Provisional detention thus still remains a necessary measure to ensure the Charged Person’s presence during the proceedings.

63(3)(b)(v) Preserve public order

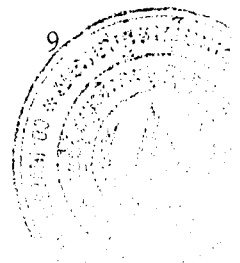
25. The passage of time has not diminished the impact of the Democratic Kampuchea regime on society. As recalled by the Pre-Trial Chamber, a proportion of the population that lived through the period from 1975 to 1979 suffers from post-traumatic stress disorder. Specialists have stated that judicial 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”⁴⁴. 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.

26. The Co-Investigating Judges make reference again to paragraph 44 of the Pre-Trial Chamber’s 11 May 2009 Decision on Appeal (cited above at paragraph 23 of this

⁴²Para. 42, 20/5/17.

⁴³ Para. 44, C20/5/17.

⁴⁴ 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).



Order) affirming that the Charged Person's detention under Rule 63(3)(b)(v) is still necessary. 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

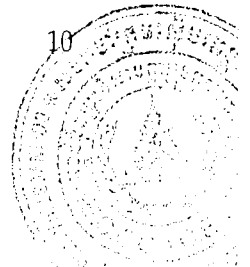
27. The Co-Investigating Judges recognize that the passage of time is relevant to determining the legitimacy of continued provisional detention of a Charged Person. The Pre-Trial Chamber has confirmed this analysis⁴⁵. In assessing the manner in which the judicial investigation has been conducted, and 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 parties⁴⁶.
28. In the present case, 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 the Charged Person require large-scale investigative action.
29. Furthermore, the Co-Investigating Judges do not concur with the Co-Lawyers' submission that after two years in detention the threshold being applied in assessing any extension of provisional detention is one of "reasonable suspicion".⁴⁷ The Co-Investigating Judges note that "well founded reason to believe" – the standard as stipulated in the Internal Rules – is an objectively higher standard to justify the provisional detention of a Charged Person, and taking into account the gravity of the crimes alleged and the complexity of the investigation, this standard continues to be met by the evidence so far placed on the Case File.
30. Since 24 February 2009, the Co-Investigating Judges have personally conducted interviews⁴⁸ and placed the written records of interviews of several witnesses⁴⁹ and

⁴⁵ Para. 45, C9/4/6.

⁴⁶ ECHR, *Frydlender v. France*, 27 June 2000, Application No. 30979/96, para. 43; ECHR, *Pellissier and Sassi v. France*, 25 March 1999, Application No. 25444/94, para. 71; ECHR, *Vernillo v. France*, 20 February 1991, Application No. 11889/85, para. 34.

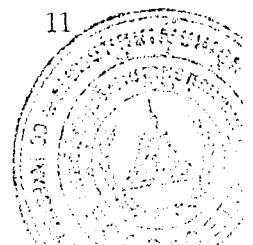
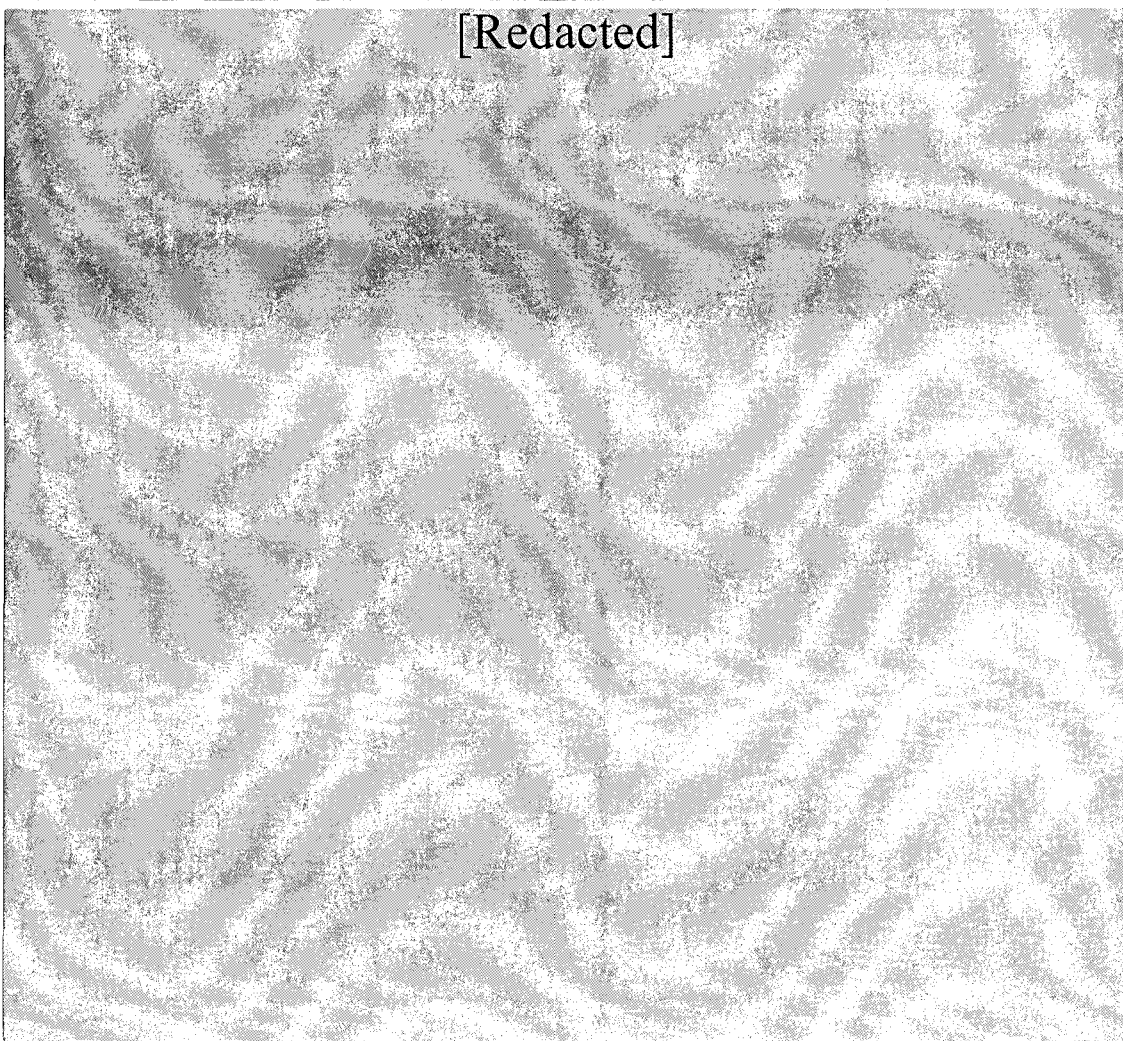
⁴⁷ Defence Observations, para. 18.

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Civil Parties⁵⁰ on the Case File. They have also added a large body of evidentiary materials, either at the request of the parties⁵¹ or *proprio motu*⁵². 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.

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



FOR THESE REASONS,

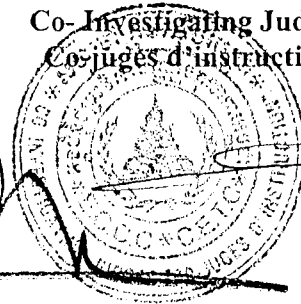
HEREBY ORDER the extension of the Provisional Detention of IENG Thirith for a maximum term of one year, pursuant to sub-Rule 63(6)(a) of the Internal Rules.

Done in Phnom Penh, on 10 November 2009

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Co-Investigating Judges

Co-juges d'instruction



Marcel LEMONDE

ស៊ី ធីនីត