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**Kingdom of Cambodia
Nation Religion King**

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

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction

Case File No: 002/19-09-2007-ECCC-OCIJ

Before: **YOU Bunleng**
Marcel LEMONDE

Date: **18 November 2009**

Original language: **Khmer/French**

ឯកសារច្បាប់ចម្លងត្រឹមត្រូវតាមច្បាប់ជាធរមាន
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du dossier: **Ratanak**

Classification: **Public [Redacted Version]**

Order on Extension of Provisional Detention

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Mr William SMITH

Charged Person(s)
KHIEU Samphan

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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 **KHIEU Samphan (ខៀវសំផាន) 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 November 2007 (Document C26),

Noting our Order Refusing Request for Release of Khieu Samphan, dated 28 October 2008 (Document C40/4),

Noting our Order on Extension of Provisional Detention, dated 18 November 2008 (Document C26/4),

Noting the Pre-Trial Chamber's Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, dated 3 July 2009 (Document C26/5/26),

Noting the Notice, dated 5 October 2009, by which we duly notified the Charged Person and his Co-Lawyers that we were considering whether to extend the term of provisional detention and that they had fifteen days to submit observations (Document C26/6),

Noting the objections to the extension of Khieu Samphan's provisional detention, dated 20 October 2009 (Document C26/7),

PROCEDURAL HISTORY

1. On 18 July 2007, the Co-Prosecutors issued an Introductory Submission in which they named KHIEU Samphan and four other persons suspected of having committed crimes within 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, Torture, Imprisonment, Persecution, Extermination, Enslavement, Deportation and Forcible Transfer and Other Inhumane Acts), and Grave Breaches of the Geneva Conventions of 1949 (Wilful

¹ Introductory Submission, 18 July 2007, Document D3.

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 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 21 December 2007, KHIEU Samphan's Co-Lawyers filed an Appeal against the Provisional Detention Order.⁴ This appeal was withdrawn by the Co-Lawyers on 8 October 2008.⁵ The same day, they filed an Application for Release with the Co-Investigating Judges, pursuant to Rule 64(2) of the Internal Rules.⁶
5. On 28 October 2008, the Co-Investigating Judges issued their Order Refusing Request for Release.⁷ On 4 November 2008, KHIEU Samphan's Co-Lawyers filed an Appeal against this Order.⁸
6. On 18 November 2008, the Co-Investigating Judges ordered the extension of KHIEU Samphan's provisional detention for a term not exceeding one year.⁹
7. On 27 November 2008, the Co-Lawyers for the Charged Person filed an Appeal Brief against the Order Refusing Release.¹⁰
8. On 3 July 2009, following the hearing held on 3 April 2009, the Pre-Trial Chamber unanimously dismissed the Appeal against the Order Refusing Release and the Appeal against the Extension Order, upheld these two orders, but substituted its own reasoning for that of the Co-Investigating Judges.¹¹
9. On 5 October 2009, the Co-Investigating Judges notified the Charged Person and his Co-Lawyers that they were contemplating extending the Charged Person's provisional detention and that they had fifteen days to submit observations. The Co-Lawyers for KHIEU Samphan submitted their observations on 20 October 2009.¹²

² Arrest Warrant for Khieu Samphan, 16 November 2007, Document C24.

³ *Order for Provisional Detention of Khieu Samphan*, 19 November 2007, Document C26.

⁴ Appeal Brief against the Provisional Detention Order of 19 November 2007, 21 December 2007, Document C26/I/3.

⁵ Notice of Withdrawal of Appeal, 8 October 2008, Document C26/I/30.

⁶ Urgent Application for Release, 8 October 2008, Document C40.

⁷ *Order Refusing Request for Release*, 28 October 2008, Document C40/4.

⁸ Record of Appeals, Notice of Appeal, 4 November 2008, Document C40/5.

⁹ *Order on Extension of Provisional Detention of Khieu Samphan*, 18 November 2008, Document C26/4.

¹⁰ Appeal against the Order of 28 October 2008 Refusing Release, 27 November 2008, Document C40/5/I.

¹¹ *Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, Document C26/5/26.

¹² Objections to the Extension of the Provisional Detention of Mr KHIEU Samphan, 20 October 2009, Document C26/7.

THE LAW

10. With respect to the powers of the Co-Investigating Judges regarding provisional detention, the relevant part of Rule 63 of the Internal Rules provides 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.*

11. The Co-Investigating Judges may order the provisional detention of a Charged Person only where the following conditions, set out in Rule 63(3) of the Internal Rules, 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 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;*
 - 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

12. In its Observations, dated 20 October 2009, the Defence made the following arguments against the extension of the provisional detention of the Charged Person:

- a) the Pre-Trial Chamber had established that there is no real risk of KHIEU Samphan exercising influence or pressure on victims or witnesses;¹³
- b) there was no real risk to KHIEU Samphan's security;¹⁴
- c) the continued provisional detention of KHIEU Samphan was not necessary for the maintenance of public order;¹⁵
- d) there are continuing violations of the rights of the Defence;¹⁶

¹³ Ibid., paras. 10 and 11.

¹⁴ Ibid., paras. 12 to 15.

¹⁵ Ibid., paras. 16 to 20.

- e) the ECCC has not acted in a transparent manner regarding allegations of corruption;¹⁷
- f) there has been a lack of diligence during the judicial investigation;¹⁸ and
- g) there is an appearance of partiality on the part of the International Co-Investigating Judge.¹⁹

REASONS FOR THE DECISION

13. The Co-Investigating Judges note that provisional detention is an exception to the general rule that a Charged Person should remain at liberty during the judicial investigation phase. Therefore, a Charged Person may only be kept in provisional detention where it is established that the conditions set out in Rule 63(3) of the Internal Rules are still met. For that reason, when considering the extension of provisional detention of a Charged Person, the Co-Investigating Judges examine whether the above-mentioned conditions still exist at the time of their decision, taking into consideration the time that has elapsed since the Charged Person was provisionally detained and the progress of the judicial investigation.²⁰

Rule 63(3)(a) of the Internal Rules

14. Rule 63(3)(a) of the Internal Rules provides that to provisionally detain a Charged Person, 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 deciding whether to extend provisional detention is whether there are facts or information which would satisfy an objective observer that the Charged Person can be held responsible for the alleged crimes specified in the Introductory Submission.²¹

15. On 28 October 2008, in their Order refusing the request for release and subsequently on 18 November 2008, in their Order extending the provisional detention of the Charged Person, the Co-Investigating Judges found that there was well founded reason to believe that he may have committed the crimes with which he is charged. On appeal, after reviewing the evidence on the case file,²² the Pre-Trial Chamber found, in regards to the Order refusing the request to release, that it “*ha[d] not found any obvious information which would undermine the Co-Investigating Judges’ conclusion on the*

¹⁶ Ibid., paras. 24 and 25.

¹⁷ Ibid., para. 26.

¹⁸ Ibid., para. 27.

¹⁹ Ibid., para. 28.

²⁰ *Order on Extension of Provisional Detention of Ieng Thirith*, 10 November 2008, para. 12, Document C20/4, para. 12.

²¹ This standard has been applied repeatedly by the Pre Trial Chamber, see for instance: *Decision on Appeal against Provisional Detention Order of Nuon Chea*, 20 March 2008, Document C11/54, para. 46 and *Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea*, 4 May 2009, Document C9/4/6, para. 24.

²² *Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, Document C26/5/26, para. 10.

fulfilment of the condition set out in 63(3)(a) at the time they issued the Order Refusing Release and at present."²³

16. Furthermore, in regards to the subsequent Order extending provisional detention and again having conducted its own review of the evidence contained in the case file,²⁴ the Pre-Trial Chamber held that the Co-Investigating Judges' "*conclusion on the fulfilment of the condition set out in Internal Rule 63(3)(a) is supported by the material to which they refer and the other evidence contained in the Case File quoted above, taken as a whole. This conclusion is not undermined by the evidence of a potentially exculpatory nature that had been placed in the Case File before the Extension Order was issued. [Reference omitted] The Pre-Trial Chamber further notes that it has not identified any evidence of exculpatory nature placed in the Case File after the making of the Extension Order, leading it to conclude that the condition set out in Internal Rule 63(3)(a) continues to be met.*"²⁵
17. In this appeal decision concerning the detention of the Charged Person, the Pre-Trial Chamber stated that it would consider the evidence placed on the case file up until 27 February 2009, the date of the hearing²⁶ and last possible date imposed on the parties to file their submissions.²⁷ The Co-Investigating Judges consider that the findings of the Pre-Trial Chamber in this regard remain valid and will therefore limit their current review to all inculpatory and exculpatory evidence relating to the Charged Person that has been placed on the case file since 27 February 2009.
18. 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.²⁸ More than 30 new witness statements²⁹ have been added which assist in

²³ Ibid., para. 36.

²⁴ Ibid., para. 111.

²⁵ Ibid., para. 137.

²⁶ The hearing was eventually adjourned to 3 April 2009.

²⁷ *Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, Document C26/5/26, paras. 10 to 12.

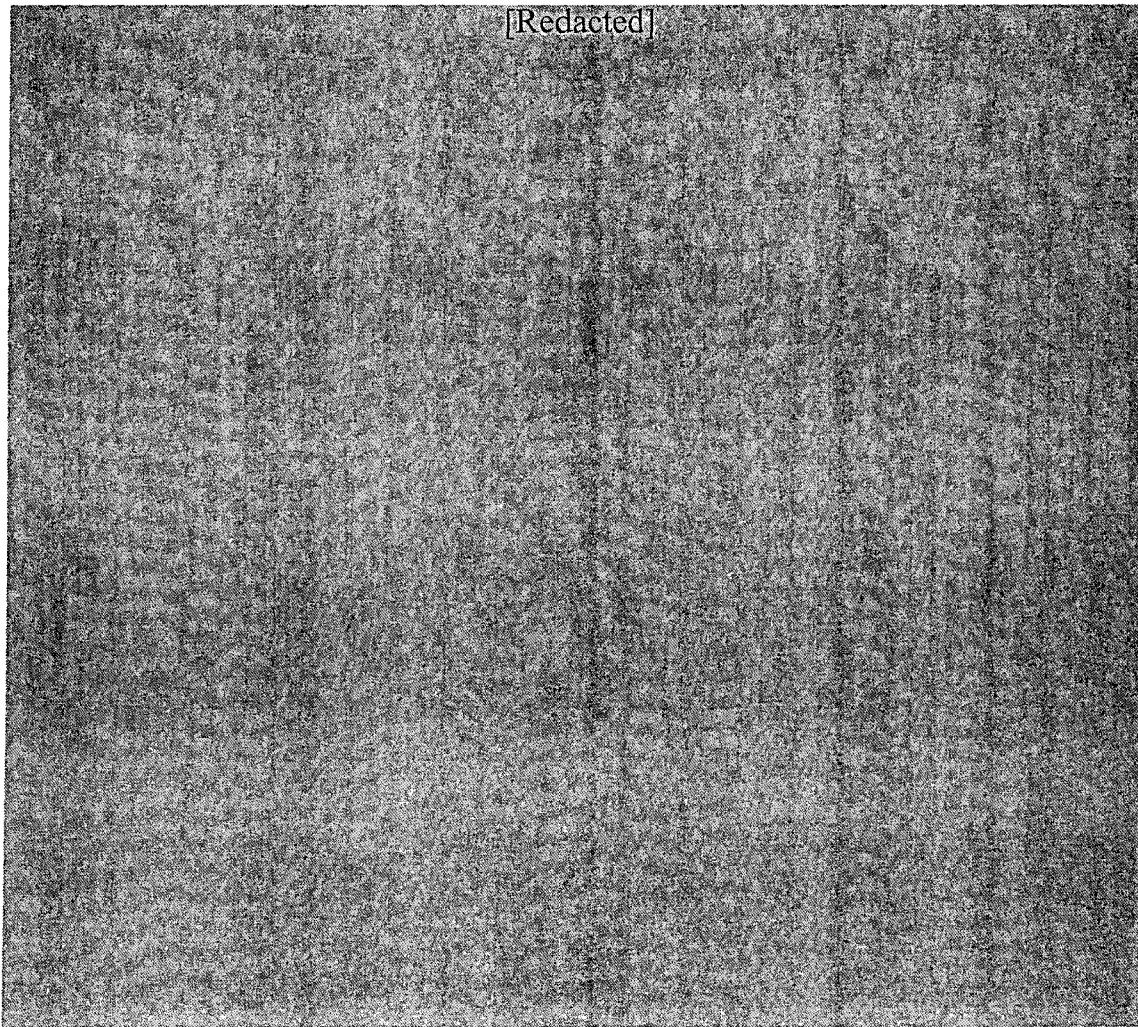
²⁸ For an overview of the judicial investigation since 27 February 2009, see para. 31 below.

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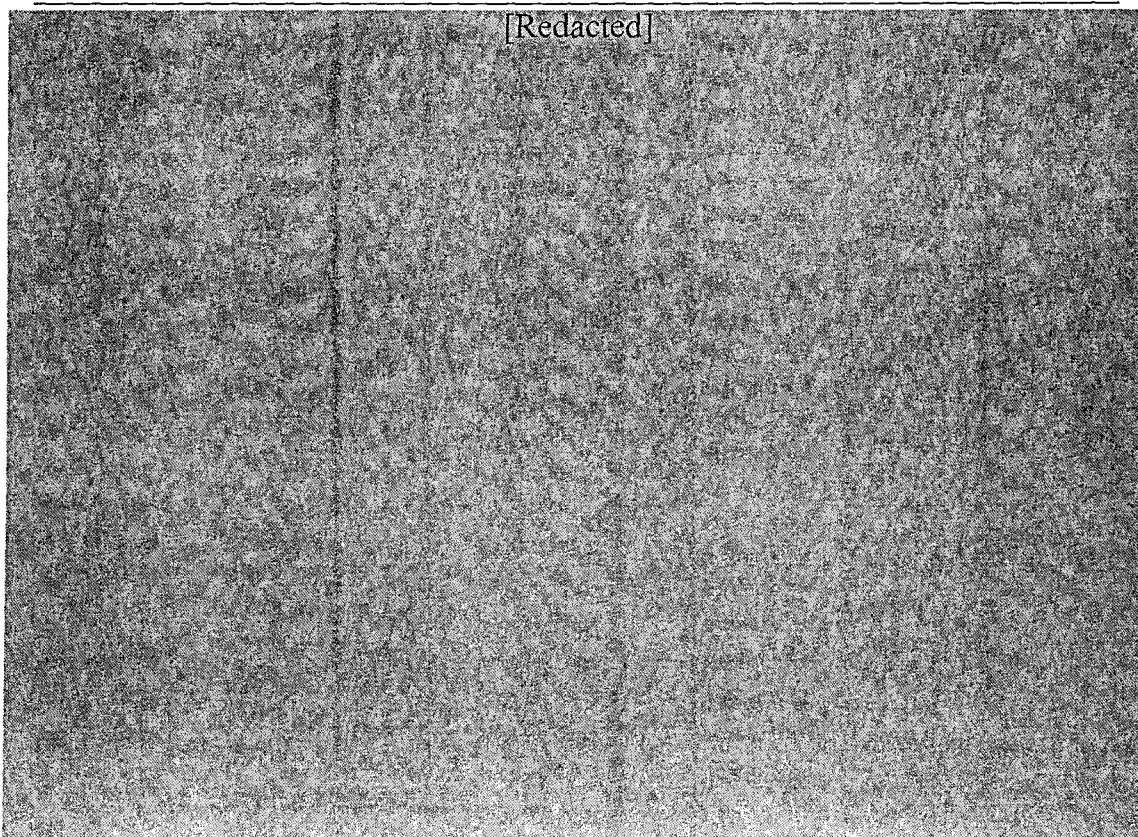


clarifying whether the Charged Person played any role in connection with the alleged crimes within the jurisdiction of the ECCC, including:

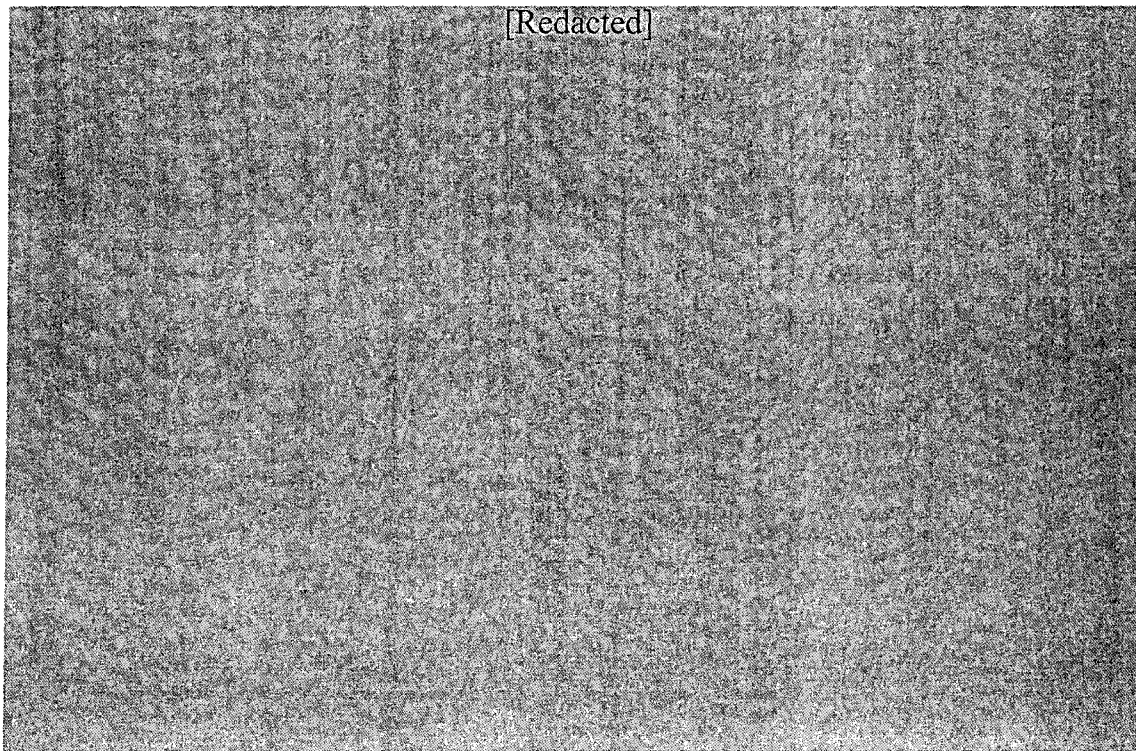
- (a) the roles KHIEU Samphan allegedly played and the functions he allegedly performed during the Democratic Kampuchea period including membership of the Central Committee,³⁰ his role as Head of State,³¹ his role as Deputy Prime Minister³² and his role within the State Presidium;³³
- (b) the roles KHIEU Samphan allegedly played and the functions he allegedly performed in promoting and disseminating CPK policy nationally³⁴ and internationally;³⁵
- (c) the roles KHIEU Samphan allegedly played and the functions he allegedly performed in managing the distribution of material and food, and trade and commercial matters;³⁶



- (d) the roles KHIEU Samphan allegedly played and the functions he allegedly performed in the training of intellectuals recalled from abroad;³⁷
- (e) the alleged involvement of KHIEU Samphan in the evacuation of Phnom Penh;³⁸
- (f) the alleged involvement of KHIEU Samphan in meetings with Zone leaders;³⁹
- (g) KHIEU Samphan's alleged knowledge of arrests and disappearances of cadre within the CPK;⁴⁰
- (h) KHIEU Samphan's alleged knowledge of an international armed conflict with Vietnam;⁴¹
- (i) KHIEU Samphan's alleged knowledge of the living and working conditions in Cambodia through the evidence that he may have personally visited Kampong Chhnang airport worksite,⁴² the 1st January Dam worksite (where he allegedly ordered the militiamen to order the people to work faster),⁴³ the dam and dike worksite in Thlork Village,⁴⁴ a rice farm,⁴⁵ Angkor Wat,⁴⁶ Kandal and Takeo provinces,⁴⁷ the 17th April Hospital⁴⁸ and other places along with Norodom Sihanouk (Kandal, Take, Kampong Cham and around Phnom Penh)."⁴⁹



- (j) KHIEU Samphan's alleged knowledge of crimes now within the jurisdiction of the ECCC being committed due to Amnesty International allegedly sending letters addressed to him detailing such crimes;⁵⁰
- (k) KHIEU Samphan allegedly living and associating with other Charged Persons and leaders of the CPK.⁵¹
19. Some of the evidence collected during this period may appear to be exculpatory either as regards KHIEU Samphan's level of power within the CPK,⁵² the extent of his work and travel within Cambodia,⁵³ or his knowledge of security centres⁵⁴ or hospitals.⁵⁵
20. 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 set out in the Introductory Submission.
21. Accordingly, after a fresh review of the evidence on the case file, the Co-Investigating Judges consider that, 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 KHIEU Samphan, 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 Rule 63(3)(a) of the Internal Rules is still met, notwithstanding the passage of time since he was provisionally detained.



Rule 63(3)(b) of the Internal Rules

22. The Co-Investigating Judges recall that, as clarified by the Pre-Trial Chamber, in order to justify the provisional detention of a Charged Person, only one of the conditions set out in Rule 63(3)(b) of the Internal Rules 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) of the Internal Rules at the time the order is issued.⁵⁶
23. The Co-investigating judges take note of the fact that the conditions set out in Rule 63(3)(b) of the Internal Rules were carefully considered by the Pre-Trial Chamber in its *Decision on Khieu Samphan's Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order*.⁵⁷ The Co-Investigating Judges have considered whether these conditions are still satisfied in light of the findings of the Pre-Trial Chamber and all the circumstances up to the present time.

Rule 63(3)(b)(iv) of the Internal Rules: Protect the security of the Charged Person

24. On 3 July 2009, the Pre-Trial Chamber found, with reference to KHIEU Samphan, that provisional detention still remained a necessary measure to protect his security.⁵⁸ The Pre-Trial Chamber concluded, from a series of outbursts by victims on various occasions towards the Charged Person, that “[t]hese emotional reactions displayed by the Victims show, as anticipated by psychiatrists, that the proceedings before the ECCC could lead to a resurfacing of anxieties amongst Victims who suffer from post-traumatic stress and ‘a rise in negative social consequences that may accompany them.’ [Reference omitted] These reactions indicate that the release of the Charged Person might degenerate into violence directed against him. The Pre-Trial Chamber therefore finds that provisional detention is still a necessary measure to protect the Charged Person’s safety.”⁵⁹ The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead them to a different conclusion.
25. Accordingly, the Co-Investigating Judges consider that provisional detention still remains a necessary measure to protect the Charged Person’s safety.

⁵⁶ See, for example, *Decision on Appeal against Provisional Detention Order of Nuon Chea*, 20 March 2008, C11/54, para. 83.

⁵⁷ *Decision on Khieu Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, Document C26/5/26, paras. 38 to 63 and 138 to 140.

⁵⁸ *Ibid.*, paras. 50 to 57.

⁵⁹ *Ibid.*, paras. 57 and 58.

Rule 63(3)(b)(v) of the Internal Rules: Preserve public order

26. The passage of time has not diminished the impact of the Democratic Kampuchea regime on Cambodian society. As recalled by the Pre-Trial Chamber, a portion 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.”⁶⁰ 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 public interest has emerged concerning hearings involving the Charged Person, which demonstrates that the trials of the Khmer Rouge leadership are still a matter of great concern for the Cambodian population today.
27. The Pre-Trial Chamber, having considered all relevant matters, held in the 3 July 2009 appeal decision that, “[t]here are facts capable of showing that the release of the Charged Person would actually disrupt public order. Thus, the Pre-Trial Chamber finds that the condition set out in Internal Rule 63(3)(b)(v) is still met.”⁶¹ The Co-Investigating Judges have not found any change in the circumstances since the Pre-Trial Chamber decision that could lead them to a different conclusion.
28. The Co-Investigating Judges find, therefore, that the Charged Person’s release would disrupt public order. Provisional detention of the Charged Person thus continues to remain necessary in order to preserve public order.

PASSAGE OF TIME

29. The Co-Investigating Judges recognize that the passage of time since a Charged Person was provisionally detained is relevant to determining the legitimacy of his or her continued provisional detention. The Pre-Trial Chamber has confirmed this analysis.⁶² In assessing the manner in which the judicial investigation has been conducted in this case, and by adhering to the case-law of the European Court of Human rights concerning the reasonableness of the length of a proceeding, the Co-Investigating Judges have taken account of the facts of the case as a whole, including its complexity,

⁶⁰ Rob Savage, Post Traumatic Stress disorder: A Legacy of Pain and Violence, *Monthly South Eastern Globe*, July 2007, pp. 24 to 27 (Co-Prosecutors’ Response to Nuon Chea’s Appeal against Provisional Detention Order of September 2007).

⁶¹ *Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order*, 3 July 2009, Document C26/5/26, para. 63.

⁶² *Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea*, 4 May 2009, Document C9/4/6, para. 45.

in terms of fact and law, as well as the conduct of the judicial authorities and that of the parties.⁶³

30. In the case at hand, the Charged Person has been in detention for nearly 24 months. The Co-Investigating Judges are conscious of the fact 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.

31. Since 27 February 2009, the Co-Investigating Judges have personally conducted interviews⁶⁴ and placed the written records of interviews of several witnesses⁶⁵ and Civil Parties⁶⁶ on the case file. They have also added a large body of evidentiary materials, either at the request of the parties⁶⁷ or *proprio motu*.⁶⁸ Numerous Rogatory

⁶³ 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.

[Redacted]



Letters are currently in the course of being executed and the resulting evidence placed on the case file. Consequently, the Co-Investigating Judges do not consider that passage of time calls into question the need for continued provisional detention of the Charged Person.

32. 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) of the Internal Rules, are still met to date. There is still well founded reason to believe that KHIEU Samphan may have committed the crime or crimes specified in the Introductory Submission, and that provisional detention is considered a necessary measure to: (i) protect the security of the Charged Person; and (ii) preserve public order.

FOR THESE REASONS,

HEREBY ORDER the extension of the provisional detention of KHIEU Samphan for a maximum term of one year, pursuant to Rule 63(6)(a) of the Internal Rules.

Done in Phnom Penh, on 18 November 2009

សហចៅក្រមស៊ើបអង្កេត

Co- Investigating Judges

Co-juges d'instruction

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