



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ
Kingdom of Cambodia
Nation Religion King

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
Extraordinary Chambers in the
Courts of Cambodia

ការិយាល័យសហចៅក្រមស៊ើបអង្កេត
Office of the Co-Investigating Judges
Bureau des Co-juges d'instruction
សំណុំរឿងព្រហ្មទណ្ឌ
Criminal Case File /Dossier pénal
លេខ/No: 002/14-08-2006
លេខស៊ើបអង្កេត/Investigation/Instruction
លេខ/No: 002/19-09-2007-ECCC/OCIJ

ដីកាសម្រេចឃុំខ្លួនបណ្តោះអាសន្ន
Provisional Detention Order
Ordonnance de placement en
détention provisoire

We, **You Bunleng** and **Marcel Lemonde**, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia,

Noting the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004,
 Noting Rule 63 of the Internal Rules of the Extraordinary Chambers,
 Noting the judicial investigation opened against:

IENG Sary
 Alias: Van
 Born on 24 October 1925.

Charged with Crimes against Humanity and Grave Breaches of the Geneva Conventions of 12 August 1949, crimes defined and punishable under Articles 5, 6, 29 (new) and 39 (new) of the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004.

Noting today's adversarial hearing,

I- STATEMENT OF THE FACTUAL AND LEGAL SITUATION

1. To date (and without prejudice to the outcome of on-going judicial investigations which may identify other offences referred to in the Introductory Submission that may implicate the Charged Person) IENG Sary is being prosecuted for:
 - **Crimes Against Humanity** (Murder, Extermination, Imprisonment, Persecution and Other Inhumane Acts), and
 - **Grave Breaches of the Geneva Conventions of 1949** (Wilful Killing, Wilfully Causing Great Suffering or Serious Injury to Body or Health, Wilful Deprivation of Rights to a Fair Trial of prisoners of war or civilians, unlawful deportation or transfer or unlawful confinement of a civilian),

2. for having, throughout Cambodia during the period from 17 April 1975 to 6 January 1979:
 - in his capacity as the Minister of Foreign Affairs, exercising authority and effective control over the Ministry and all of its constituent and subordinate organs, and as a full rights member of the Central and Standing Committees of the Communist Party of Kampuchea (CPK),
 - instigated, ordered, failed to prevent and punish, or otherwise aided and abetted in the commission of the aforementioned crimes;
 - by directing, encouraging, enforcing, or otherwise rendering support to CPK policy and practice which was characterised by murder, extermination, imprisonment, persecution on political grounds and other inhuman acts such as forcible transfers of the population, enslavement and forced labour;
 - as part of a widespread or systematic attack targeting a civilian population;
 - noting that there was a state of international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam during all or part of the period between 17 April 1975 and 6 January 1979.

3. The Co-Prosecutors, who developed their factual and legal arguments in the written submissions placed on the case file on 18 October 2007 and 13 November 2007, have requested the provisional detention of IENG Sary, firstly, in order to guarantee his presence before the Extraordinary Chambers, arguing that he is in possession of a passport and that there is a danger of flight; secondly, to prevent any acts of revenge by the victims; and finally, to prevent any pressure on witnesses.

4. IENG Sary disputed the crimes which he is charged, declaring: *“there are certain accusations that I cannot accept”* and demanding that proof of his guilt be provided. He added: *“I would like to know the truth about a dark period in our history. I do not know where the truth lies. I am very happy that this Court has been established because it will be an opportunity for me to discover the truth and also to share what I*

know". He asked to be left at liberty, fearing that he would die in prison before knowing the truth, and claiming that, if he dies, the first victim will be his family, but the second will be the Court, which would thus lose an important witness and be criticised. He stated that he has no intention of interfering with the proceedings, noting that he has been at liberty for many years, informed of the possibility of being charged for a long time, and that he would have had the opportunity to intervene with the witnesses but has never done so. He observed that he is old and sick. He insisted on the total absence of any danger of flight, and declared himself ready to appear whenever summoned, adding that his age and state of health would not allow him to flee, which he could have done a long time ago if he had so wished. As regards the danger of revenge, he pointed out that, since he rallied the Government, he has never received the slightest threat, either in Pailin or Phnom Penh. On the contrary, he recalled that after being convicted by the Revolutionary Tribunal in Phnom Penh on the 19th of August 1979, he received an amnesty from the King on 14 September 1996 and that there was no trouble as a result. He stressed that it was thanks to him that the Khmer Rouge forces reintegrated the Government and argued that he had thus contributed to the re-establishment of peace. In conclusion, he requested to be left at liberty on bail.

II - REASONS FOR THE DECISION

5. Before deciding on the provisional detention of IENG Sary, it is worth recalling the particular circumstances of the Charged Person which, given the obligation to take account of both exculpatory and inculpatory evidence in conducting the judicial investigation, raises a specific difficulty that the Co-Investigating Judges must resolve. Indeed, an *in absentia* Judgement handed down by the People's Revolutionary Tribunal at Phnom Penh on 19 August 1979, condemned IENG Sary to death and confiscation of all his possessions for the crime of genocide.¹ It appears that, under Cambodian law, this judgement is final. Later, under a Royal Decree dated 14 September 1996, IENG Sary was pardoned for these penalties and received an amnesty with respect to the 14 July 1994 Law on "the Outlawing of the "Democratic Kampuchea" Group".
6. This situation raises a number of legal issues: first, does the current prosecution before the ECCC infringe the binding authority of a previous legal decision, under the general principle of criminal law *ne bis in idem*? second, assuming that the answer to the first question is negative (and providing that the Co-Investigating Judges have the jurisdiction to decide on the scope of the 1996 Royal Decree), are the pardon and amnesty granted to IENG Sary opposable to the ECCC? These issues will be dealt with consecutively.

¹ Judgement of the People's Revolutionary Court, Doc. U. N. A/34/491, 19 August 1979.

A. Ne bis in idem

7. Pursuant to Article 14(7) of the International Covenant on Civil and Political Rights, dated 16 December 1966, which the ECCC are required to follow, “*No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*” However, under international criminal law, this is not an absolute principle.
8. Thus, as a general rule, the statutes and practice of international and internationalized tribunals permit the prosecution of a person for the same acts and under the same legal characterization, in particular where “*the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice*”². The Co-Investigating Judges will decide later whether they need to conduct an in-depth analysis of the trial that took place before the People’s Revolutionary Tribunal in 1979. In any case, the question whether this solution is applicable to the circumstances of the case in hand does not arise at this time since, without prejudice to the outcome of on-going judicial investigation, IENG Sary is not currently charged with genocide.
9. Moreover, consistent case law of the international tribunals establishes that, as regards international crimes, cumulative convictions are possible in relation to the same act as long as each offence has a materially distinct element not contained in the other³. Therefore, it is accepted that a person may be prosecuted for genocide, crimes against humanity and war crimes based on the same acts, given that each of these international offences has a distinct element not contained in the others and protects different values⁴. This solution has already been adopted before 1975, since the International Military Tribunal at Nuremberg also handed down cumulative convictions based on the same acts⁵. In application of these principles, there seems to

² Article 20 Rome Statute; see as well Article 9(2) ICTR Statute; Article 10 ICTY Statute; Article 9 SCSL Statute; UNTAET regulation 2000/15.

³ Judgement of the ICTY Appeals Chamber, Case No. IT-96-21-A, *The Prosecutor v. Delalic et al* (“*CELEBICI Case*”), 20 February 2001, para. 412.

⁴ See also the Judgement of an ICTY Trial Chamber in *Prosecutor v. Kupreskic et al*, Case No. IT-95-16, 14 January 2000, para. 637; the Judgement of an ICTR Trial Chamber in *Prosecutor v. Jean-Paul Akayesu*, Case No. 96-46-T, 2 September 1998, par. 468 ; Timor Leste Special Panels, Legal Ruling Concerning the Applicability of *Ne Bis in Idem* at the Arrest Warrant Stage of the Proceedings, Case *Wiranto et al*, No. 05/2003, 5 May 2005, para. 33 ;and for national case law : US Supreme Court, *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

⁵ For example, 12 accused, including Goering, Ribbentrop, Keitel, Rosenberg, Jodl and Von Neurath, were found guilty cumulatively of crimes against humanity and war crimes; see the Judgement of the

be no impediment to the prosecution of IENG Sary for the acts covered by the 1979 Judgement under an international legal characterisation other than genocide.

10. Finally, and above all, it already appears to be established that the 1979 Judgement did not cover all of the acts for which IENG Sary is currently being charged. Accordingly, there does not appear to be any valid argument here concerning the binding authority of previous legal decisions.

B. The scope of the 1996 pardon and amnesty

11. Article 40 of the Law on the establishment of the Extraordinary Chambers, dated 27 October 2004 (as provided in Article 11 of the Agreement between the United Nations and the Royal Government of Cambodia dated 6 June 2003) confers jurisdiction on the Extraordinary Chambers to decide on “*the scope of any amnesty or pardon that may have been granted prior to the enactment of this Law*”, which is in fact a direct reference to the case of IENG Sary. In its capacity as a judicial body of the ECCC responsible for conducting an exculpatory and inculpatory investigation into IENG Sary’s alleged acts, the Co-Investigating Judges thus have jurisdiction to decide on the scope of the pardon and amnesty in question. Of course, their determination is of a provisional nature and does not bind the Trial and Supreme Court Chambers.
12. As regards the effects of the royal pardon, it is important to note that they are limited to annulment of the sentence, as well as its execution, without having any effect on the conviction decision as such. Accordingly, even if it were opposable against the ECCC, this measure would have no effect on the current prosecution, and the only issue is that of the conviction itself, which has been dealt with above.
13. The amnesty, on the other hand, makes express reference to the 1994 Law. Yet, apart from an allusion to genocidal acts in its preamble, this law only refers to a number of domestic law offences subject to prosecution in accordance with national legislation applicable at the time, as well as a series of crimes against State security. Therefore, it does not cover the offences coming within the jurisdiction of the ECCC.
14. In summary, neither the pardon nor the amnesty currently establish any obstacles to prosecution before the ECCC for the international crimes with which IENG Sary stands charged. The only remaining issue at this stage is, thus, whether the provisional detention of the Charged Person is necessary or not.

Nuremberg IMT, 1 October 1946, available on the Avalon project at Yale University:
<http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm>.

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា មានទីតាំងស្ថិតនៅ ផ្លូវជាតិលេខ៤ សង្កាត់ ចោមចៅ ខណ្ឌ ដង្កោ ក្រុង ភ្នំពេញ ប្រអប់សំបុត្រលេខ៧១
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C. Provisional Detention

- 15. In light of the many documents and witness statements implicating IENG Sary, contained in the Introductory Submission, there are well-founded reasons to believe that he committed the crimes with which he is charged.
- 16. These crimes are of a gravity such that, 30 years after their commission, they still profoundly disrupt public order to such a degree that it is not excessive to conclude that a decision to leave the Charged Person at liberty would, in the fragile context of today’s Cambodian society, risk provoking protests of indignation which could lead to violence and perhaps imperil the very safety of the Charged Person, given that the situation is clearly no longer perceived in the same way since the official prosecution has commenced.
- 17. In addition, it is absolutely essential for the continuing judicial investigation to prevent any pressure on witnesses and victims. However, it may be feared that, if the Charged Person were to remain at liberty, he might attempt, and would be in a position to organize such pressure. Indeed, henceforth, IENG Sary will have access to all of the elements in the case file of the judicial investigation, including the written records of interviews with specific witnesses, complaints and civil party applications. Whereas the nature of the alleged crimes makes it difficult for a suspect to identify and influence the very large number of potential witnesses before the judicial investigation begins, the same is not true once the Charged Person has knowledge of the identity of the inculpatory witnesses and victims involved in the proceedings. In view of this new situation, the fear of pressure being exercised would be particularly justified if the Charged Person was in a position to have uncontrolled communication with these people, given that IENG Sary has numerous family members and former subordinates in the regions of Phnom Malai, Pailin and Phnom Penh, some of whom currently hold influential positions and even have armed guards.
- 18. Furthermore, numerous elements show that IENG Sary (who has a residence abroad and has made numerous voyages outside Cambodia) has the material means necessary to facilitate his flight to another country, especially those with which Cambodia does not have any extradition agreements. The Charged Person, who faces a maximum sentence of life imprisonment if convicted, has made a number of public statements to the effect that he refuses to appear before the Extraordinary Chambers. These statements severely undermine the value of any statements which indicate his intention to be available at trial. It may, thus, be feared that he will be tempted to flee the legal process.
- 19. The particular gravity of the crimes alleged against IENG Sary renders the risks set out above even more acute, and no bail order would be rigorous enough to ensure that the abovementioned requirements would be sufficiently satisfied and therefore detention remains the only means to achieve these aims.

20. To date, none of the documents produced by the defence lead us to believe that the Charged Person's state of health is incompatible with detention.
21. Consequently, considering that provisional detention is necessary to prevent any pressure on witnesses and victims; that it is also necessary to ensure the presence of the Charged Person during the proceedings; and finally, that it is necessary to preserve public order and protect the safety of the Charged Person.

On these grounds,

we hereby order that **IENG Sary** be placed in provisional detention for a period not exceeding one year.

Done at Phnom Penh, on 14 November 2007

សហចៅក្រមស៊ើបអង្កេត

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

The present order was written in Khmer and in French and then translated into English.

We,....., have given a copy of this order to the below-mentioned persons on

Charged Person	Lawyer of Charged Person	Co-prosecutors	Office of the Administration	Delivering Agent
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Through this notification, the Charged Person is informed that :

- S/He has the right to appeal this order, pursuant to the conditions outlined in Rule 75 of the Internal Rules of the Extraordinary Chambers Elle a le droit de faire appel contre la présente ordonnance, dans les conditions prévues à la Règle 75 du Règlement intérieur des Chambres extraordinaires ;
- S/He has the right to be personally brought before the Co-Investigating Judges at least every 4 (four) months and to be given an opportunity to discuss his or her treatment and conditions during Provisional Detention ;
- During his or her presentation beofre the Co-Investigating Judges, s/he may formulate a request, upon which the Co-Investigating Judges shall decide ;
- S/He may submit an application for release to the Co-investigating Judges at any moment during the period of Provisional detention;
- If his or her conditions have changed since his or her last application, the Charged Person may file a further application not less than 3 (three) months after the final determination of the previous application for release.