

Summary of IENG Sary's Appeal Against Extension of Provisional Detention, 7 December 2009

Introduction

On 7 December 2009, the Defence filed an Appeal against the Office of the Co-Investigating Judges' ("OCIJ") Order on Extension of Provisional Detention ("Extension Order"). The Appeal asserts that the OCIJ erred in determining that the conditions necessary for detention enumerated in Rule 63(3) have been met. It also abused its discretion in failing to consider any less restrictive measures which would alleviate any concerns as to Mr. IENG Sary's risk of flight, safety, or threat to public order once it determined that the conditions had been met. Because this is a matter which affects Mr. IENG Sary's fundamental right to liberty, the Defence requested an oral hearing.

Summary of Arguments

A. The OCIJ erred in determining that the conditions required for Mr. IENG Sary's detention have not been met

Rule 63(3)(a): In its most recent decision regarding Mr. IENG Sary's detention, the Pre-Trial Chamber observed that "once the existence of 'well founded reasons' has been established, unless exculpatory evidence has been found to undermine it, it is sufficient to fulfill the requirement of Rule 63(3)(a) throughout the pre-trial stage of the proceedings." Having newly looked at the case file, the Pre-Trial Chamber did not find exculpatory evidence. The OCIJ did find that some exculpatory evidence has been added to the Case File, but that it was not "sufficient to invalidate the basis for the well founded reason..." The Defence has repeatedly pointed out that the fact that there is a lack of sufficiently exculpatory evidence on the Case File is very likely due to several problems with the judicial investigation: 1) the bias of a Co-Investigating Judge, 2) the potential bias of other OCIJ Staff members, 3) other interference with the administration of justice, 4) the possible lack of an investigational plan and procedure for locating exculpatory evidence and 5) the OCIJ's reliance on the use of torture tainted evidence. These problems cannot be allowed to prejudice Mr. IENG Sary's fundamental right to liberty or his right to be presumed innocent.

The OCIJ did not make any finding that Mr. IENG Sary must be held pursuant to Rule 63(3)(b)(i) or (ii).

Rule 63(3)(b)(iii): The OCIJ erred in determining that provisional detention is necessary to ensure Mr. IENG Sary's presence during the proceedings. The OCIJ and Pre-Trial Chamber have previously found detention necessary due to a risk of flight. In the Extension Order, the OCIJ found that there had been no change in circumstances and detention "remains a necessary measure". The OCIJ has erred by failing to fully consider the current situation: Mr. IENG Sary is 84 years of age, and he has serious health problems which greatly limit his mobility. He can hardly walk, let alone flee. Because he is a well-known figure, he would be unlikely to escape the jurisdiction unnoticed.

Furthermore, the ECCC, unlike the ICC, ICTY, or ICTR, has judicial police and has the authority to issue arrest warrants.

Rule 63(3)(b)(iv): The OCIJ erred in determining that provisional detention is necessary to protect Mr. IENG Sary's security. Previously, the OCIJ and the Pre-Trial Chamber found detention necessary to protect Mr. IENG Sary's safety based on "tension within the Cambodian society" and on the fact that there is a risk of aggression against Duch. The OCIJ's Extension Order noted that there had been no change in circumstances since the Pre-Trial Chamber's latest findings. The Defence has explained that there is no reason to fear for Mr. IENG Sary's safety based on a risk to Duch. Threats made against Duch due to the crimes he confessed to during a well-publicized trial cannot be equated with a threat to Mr. IENG Sary whose trial has not yet started. Any feelings of aggression or retribution which may exist amongst the general public should be lessened now the Duch's trial has ended. The OCIJ erred in failing to take any of these arguments into consideration in its Extension Order. The OCIJ further erred in failing to consider whether house arrest, with armed guards if necessary, would provide Mr. IENG Sary equal protection as detention.

Rule 63(3)(b)(v): The OCIJ erred in determining that provisional detention is necessary to preserve public order. Previously, the OCIJ and Pre-Trial Chamber found Mr. IENG Sary's detention necessary because the passage of time has not diminished the impact of the Democratic Kampuchea regime on society. It noted a portion of Cambodian society suffers from post-traumatic stress disorder and that specialists have found ECCC judicial activities may pose a fresh risk. It also noted that the United Nations General Assembly has recognized that crimes committed during the Democratic Kampuchea period are still a matter of concern for Cambodian society, and that this remains true due to the great deal of interest in the hearings concerning Mr. IENG Sary. The Defence submits that this cannot be a basis to order the extension of Mr. IENG Sary's provisional detention. It must be remembered that "pre-trial detention is not to be considered as pre-trial punishment and shall not be used for punitive purposes." Consider that investigations will likely begin involving five additional suspects who are still at large. Although their identities have not been released, the identity of at least two is widely thought to be known. Cambodian society has not been threatened by the announcement that new trials may begin.

B. The OCIJ abused its discretion in failing to consider less restrictive alternatives to detention before ordering an extension of Mr. IENG Sary's detention

According to Rule 65(1), the OCIJ "may order release from detention on bail. The order ...shall specify whether a bail bond is payable, and impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others." Confiscating Mr. IENG Sary's passport or imposing house arrest would ensure that he appears for trial and would mitigate risks to his safety and public order. Rule 65(1) makes it clear that simply because the OCIJ determines that one of the conditions listed in Rule 63(3)(b) exists does not mean that the OCIJ must order detention. The OCIJ did not even consider the Defence arguments that less restrictive

alternatives are available, and thus violated its obligations under Rule 21(1) and (2), to always safeguard Mr. IENG Sary's interests and strictly limit any coercive measures to the needs of the proceedings, in proportion to the gravity of the offense charged and with full respect for human dignity. This was an abuse of its discretion.

Essence of Submission

The OCIJ erred in ordering the extension of Mr. IENG Sary's provisional detention. The Rule 63(3) conditions for detention have not been met. Even if one of the conditions in Rule 63(3) were met, the OCIJ abused its discretion in ordering detention without considering whether less restrictive measures would accomplish the same goals. The Defence requested the Pre-Trial Chamber to reverse the OCIJ's Extension Order and terminate the provisional detention of Mr. IENG Sary.