

**LEGAL DISCUSSION: IENG THIRITH'S APPEAL AGAINST THE PROVISIONAL
DETENTION ORDER**

Randle DeFalco & Jared L. Watkins

On 21 May 2008 the Extraordinary Chambers in the Courts of Cambodia (ECCC) conducted a hearing to consider Charged Person Ieng Thirith's appeal against the Provisional Detention Order ("PDO") entered against her by the Co-Investigating Judges ("CIJs") on 14 November 2007. Ieng Thirith is charged with crimes against humanity perpetrated between April 1975 and January 1979 as an alleged member of a criminal plan to effect radical change in Cambodian society. Specifically, Ieng Thirith is alleged to have participated in the criminal plan in her capacity as Minister of Social Affairs of Democratic Kampuchea. If convicted, Ieng Thirith faces between five years and life in prison. The appeal sought Ieng Thirith's release from provisional detention, subject to such conditions as the Pre-Trial Chamber considers necessary to ensure her appearance at subsequent proceedings. The Defense put forth two main arguments in support of its appeal: (1) the CIJs finding of "well-founded reason[s] to believe that [Ieng Thirith] committed" the alleged crimes is unsupported and violates the principle of presumption of innocence; and (2) the CIJs had "no proper evidential basis" for finding her detention necessary. A decision by the Pre-Trial Chamber is expected by the end of June.

ECCC Law Applicable to Provisional Detention

Rule 63(3) of the ECCC Internal Rules sets forth the conditions under which the CIJs may impose provisional detention. Subsection (a) requires the CIJs to find that there exist "well-founded reasons to believe" that the Charged Person "may have committed" the crime(s) charged in the Prosecution's submission(s) to the Court. Subsection (b) requires the CIJs to find that provisional detention is necessary to: (i) prevent the Charged Person from intimidating or otherwise influencing witnesses or colluding with other Charged Persons; (ii) preserve evidence and prevent evidence tampering; (iii) ensure the Charged Person's appearance at future proceedings; (iv) protect the security of the Charged Person; or (v) preserve public order.

The Provisional Detention Order of 14 November 2007

In the PDO, the CIJs concluded that there are "well-founded reasons to believe that [Ieng Thirith] committed the crimes with which she is charged." Furthermore, the CIJs found that the crimes alleged are of such gravity that, thirty years after their commission, they still "profoundly disrupt public order" to the extent that releasing Ieng Thirith would "risk provoking protests of indignation which could lead to violence and perhaps imperil" Ieng Thirith's safety. The CIJs also found that, if released, Ieng Thirith "might attempt, and would be in a position to organize" pressure on witnesses and victims, especially due to the fact that she now has access to her full case file, which includes the "identity of inculpatory witnesses and victims involved in the proceedings." This risk of intimidating witnesses or victims was considered greater by the CIJs due to the fact that Ieng Thirith has numerous "family members and sympathizers" in Cambodia, some of whom currently hold influential positions and have armed guards. Regarding the risk of absconding, the CIJs found that Ieng Thirith has both the means necessary to facilitate her flight from Cambodia to a non-extradition state and the incentive to flee, given her recent detention experience and the gravity of the charges against her. Finally, the CIJs determined that none of the documents

produced by the Defense prove that Ieng Thirith's state of health is "incompatible with detention."

Arguments Regarding the Applicable Legal Standards

In its appeal to the Pre-Trial Chamber, the Defense maintained that there exists a "presumption of liberty" that can only be overcome by a strong showing of reasons why detention is necessary. The Prosecution responded by noting that at the International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone (SCSL) and International Criminal Tribunal for the former Yugoslavia (ICTY), pre-trial release is the exception rather than the rule, thereby establishing a presumption of pre-trial detention. Furthermore, the Prosecution argued that the CIJs' PDO was based on numerous "well-founded reasons to believe" that provisional detention of Ieng Thirith is appropriate and that these reasons clearly overcome any presumption in favor of release.

In its previous provisional detentions decisions the Pre-Trial Chamber has not said which party bears the burden of proving on appeal that the conditions for provisional detention have or have not been satisfied. Ieng Thirith's Defense argued that review should be *de novo*, asserting that under Cambodian law the burden lies with the Co-Prosecutors to provide a proper evidential foundation on appeal to support the grounds advanced to withhold provisional release.

In response, the Co-Prosecutors argued that the proper level of appellate review is a mistake of fact or abuse of discretion standard. Such a standard gives deference to the CIJs and makes it harder to overturn their order. They noted the similarity of functions between the CIJs and the Trial Chambers in other internationalized courts and asserted that since such a discretionary standard is consistent with that applied by the ICTY and the SCSL Appeals Chambers in reviewing discretionary decisions by their respective Trial Chambers, it is similarly appropriate here given the discretionary nature of the CIJs' PDO under Rule 63(3).

The Defense argued in the alternative that even if the Pre-Trial Chamber applies a mistake of fact or abuse of discretion standard, the Court should still find on behalf of the Charged Person as the CIJs erred in their analysis of the relevant facts or abused their discretion in interpreting the law as providing for Ieng Thirith's provisional detention.

Arguments Challenging the Findings of the CIJs in the November PDO

1. Lack of Evidence of Criminal Responsibility

The Defense made three submissions to the Court attacking the CIJs finding that there are "well-founded reasons" to believe that she committed the charged crimes. First, it argued that that Ieng Thirith's case is fundamentally different than that of the other Charged Persons before the ECCC.^{1[1]} Second, that there is a lack of evidence tying Ieng Thirith to the commission of atrocities. Third, that there is no evidence showing that Ieng Thirith may have committed, even indirectly, the crimes alleged. Because these arguments are based on confidential evidentiary findings of the CIJ, these challenges were not discussed during the public proceedings.

2. Violation of the Presumption of Innocence

^{1[1]} Although this argument was not discussed during the public hearing, it appears that Ieng Thirith's Defense is maintaining that, unlike the other Charged Persons, she was not a senior Khmer Rouge leader.

Defense counsel also argued that in finding that that “there are well-founded reasons to believe that [Ieng Thirith] committed the crimes with which she is charged” the CIJs violated Ieng Thirith’s right to be presumed innocent as guaranteed to Charged Persons under the ECCC Law, the Agreement between the UN and the Royal Government of Cambodia, the Constitution of Cambodia, and international human rights law. According to the Defense, this failure of the CIJs to regard the presumption of innocence may have tainted the CIJs’ ability to rule objectively on whether the conditions for provisional detention were satisfied.

The Defense’s specific argument in making this challenge was unclear. The form and breadth of the Defense’s argument suggests that it may have been challenging the legitimacy of the very process that rule 63(3) requires, although the Defense never overtly stated that the requirements of rule 63(3) are *per se* incompatible with the presumption of innocence. The Prosecution responded to the argument as if it were a challenge to the specific wording used by the CIJs in the English translation of the PDO, which omits the words “may have” and simply reads “there are well-founded reasons to believe that [Ieng Thirith] committed the crimes.” Notably, according to ECCC Senior Assistant Prosecutor Vincent de Wilde, the original drafts of the order were written by Khmer and French judges and both contain the qualifier “may have.”

3. Lack of Factual Basis for Finding Detention Necessary

Finally, the Defense argued that there is no factual basis for finding Ieng Thirith’s provisional detention necessary as required by Internal Rule 63(3).

Public order and personal safety

The Defense maintained that there are no facts from which the CIJs could have concluded that the provisional release of Ieng Thirith “risks provoking protests of indignation which could lead to violence and perhaps imperil the safety of the Charged Person.” The Defense noted that the Charged Person lived openly both in Pailin and in Phnom Penh since 1979 without threats to her safety. Moreover, Ieng Thirith was well-known throughout this period to have been the DK Minister for Social Affairs. Nevertheless, no public disorder has resulted.

The attorney for the civil parties responded by noting that in light of recent publicity surrounding the ECCC and the upcoming Cambodian national elections in July, her release risks igniting an already impassioned public to react negatively.

Interference with witnesses and victims by the charged person or her sympathizers

The Defense claimed that the CIJs’ finding that the Charged Person “might attempt” to exert pressure on witnesses was based on conjecture rather than facts. The Defense argued that there is no evidence that the Charged Person, her family, or any sympathizers have impeded justice or intimidated witnesses. In response to this argument, the Prosecution provided the Court with evidence of two prior instances when Ieng Thirith publicly chastised an individual. In the first instance, a government official was removed from a gathering at Ieng Thirith’s command after calling for the arrest and trial of Ieng Sary, Ieng Thirith’s husband who is also currently facing charges before the ECCC. The second instance involved a newspaper op-ed that Ieng Thirith authored accusing Youk Chhang, Director of the Documentation Center of Cambodia, of being a “liar...who can only think of money.” In addition to highlighting these attempted intimidations, the Prosecution argued that the political influence of Ieng Thirith’s immediate family, especially in Pailin, could be

used to intimidate specific witnesses if she were released with knowledge of the identities of the witnesses against her.

Failure to attend trial / risk of flight

According to the Defense, Ieng Thirith's actions in the face of her prosecution demonstrate that she is not a flight risk. Despite the length of sentence she may face if convicted of the serious crimes with which she is charged, Ieng Thirith did not seek to hide or to live under a false name upon learning that her arrest by the ECCC was imminent. The Defense also argued that the Charged Person requires regular medical treatment in Thailand, and that she has always returned to Cambodia from Thailand. Furthermore, even if she were to remain in Thailand, extradition could easily be obtained.

The Prosecution countered by arguing that the timing of her application for a Thai visa shortly before her arrest was not a mere coincidence. It argued that the charged person still retains a valid passport, and given the powerful connections of her family, she could make arrangements to abscond to another country that is sympathetic to her situation and with whom Cambodia does not have an extradition treaty. Moreover, Ieng Thirith retains access to vast sums of money, even though she transferred all of her assets into her children's names. Therefore, the Prosecution contended, any claim that she is a pauper without the financial ability to abscond must be flatly rejected.

Health-related arguments

The Defense concluded by arguing that it had submitted extensive documents and medical reports showing that Ieng Thirith suffers from both mental and physical ailments requiring frequent medical attention. The Prosecution responded that the sheer number of documents submitted by the Defense is inconsequential and that such documents only show that Ieng Thirith suffers from ailments typical of an elderly woman. Moreover, they argued that medical facilities available and staff on call at the ECCC are more than sufficient to address any medical need Ieng Thirith may have. The Prosecution closed by emphasizing that such facilities are in fact far superior to the facilities available to the typical Cambodian citizen.

-Randle DeFalco is a 2008 DC-Cam Legal Associates and a student at Rutgers School of Law - Newark

-Jared L. Watkins is a 2008 DC-Cam Legal Associates and a student at Brooklyn Law School