



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia  
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

C11154

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

*In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.*

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC01)

Before: Judge PRAK Kimsan, President  
Judge Rowan DOWNING  
Judge NEY Thol  
Judge Katinka LAHUIS  
Judge HUOT Vuthy

Greffiers KEO Vanny  
Dirk Jan LAMAN

Date: 20 March 2008

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du dossier: NUP SOTHUNVICHET

**DECISION ON APPEAL AGAINST PROVISIONAL DETENTION ORDER  
OF NUON CHEA**

**Co-Prosecutors**

CHEA Leang  
Robert PETIT

**Charged Person**

NUON Chea

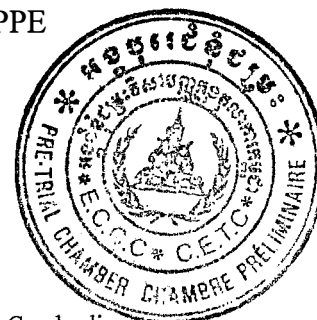
**Lawyers for the Civil Parties**

Mr. HONG Kim Suon  
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**Defence Co-Lawyers**

SON Arun  
Michiel PESTMAN  
Victor KOPPE

**ឯកសារបោះចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**  
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du dossier: SANN RADA



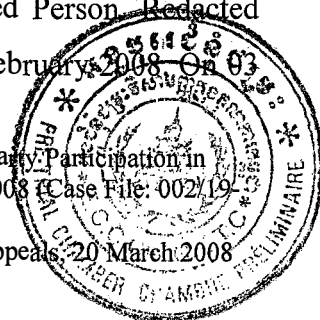
**THE PRE-TRIAL CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), is seized of the Appeal against Provisional Detention Order of Nuon Chea.

## I. INTRODUCTION

1. The Pre-Trial Chamber refers to, repeats and adopts the Report of Examination, dated 01 February 2008, on the proceedings and legal and factual issues in this case, which forms part of this Decision.
2. On 19 December 2007, the Pre-Trial Chamber issued a Scheduling Order in which a hearing date was set for 04 February 2008. The Chamber rescheduled the hearing to 07 February 2008, after a request for an adjournment to enable an international Co-Lawyer to appear for Mr. Nuon Chea (“the Charged Person”).
3. On 07 and 08 February 2008, the Pre-Trial Chamber held hearings partly *in camera*, partly in public. During these hearings, the Charged Person was represented by his National Co-Lawyer and one of his International Co-Lawyers.
4. Before the hearings, the Pre-Trial Chamber received the Case File, which was updated.
5. At the beginning of the hearing on 07 February 2008, the Co-Lawyers raised the issue of participation of Civil Parties during this hearing. The Pre-Trial Chamber allowed further written submissions on this issue and determined that it would decide on this matter separately before deciding this appeal.<sup>1</sup>
6. The Pre-Trial Chamber decided in a separate decision on the matter of the participation of Civil Parties to refuse the request of the Co-Lawyers.<sup>2</sup> The Chamber notes that the submissions made by the Civil Party Theary Seng largely amounted to a victim statement; this part of her submission has not been taken into account in deciding this appeal.
7. The Pre-Trial Chamber allowed the Co-Lawyers to file after the hearing, notes made by the Defence Support Section (“DSS”) of an initial meeting with the Charged Person. Redacted extracts of these notes were submitted and placed in the Case File on 14 February 2008.

<sup>1</sup> Charged Person Nuon Chea, Public Order on the Filing of Submissions on the issue of Civil Party Participation in Appeals against Provisional Detention Order and an invitation to *amicus curiae*, 12 February 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01), C11/36).

<sup>2</sup> Charged Person Nuon Chea, Decision on Civil Party Participation in Provisional Detention Appeals, 20 March 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01)).



March 2008, the Co-Prosecutors requested the Pre-Trial Chamber to consider ordering the disclosure of the complete un-redacted version of these notes.<sup>3</sup> This request is denied. C11/54

## II. ADMISSIBILITY OF THE APPEAL

8. On 17 October 2007, the Co-Lawyers of the Charged Person filed a notice of appeal. By order of the Chief Greffier dated 25 October 2007, the Pre-Trial Chamber allowed the Co-Lawyers to file their pleadings within fifteen days after receiving the notification of that order. This order was notified to the Charged Person on 29 October 2007. The Appeal Brief was filed on 12 November 2007 and therefore in time.

## III. THE NATURE OF THE APPEAL

9. The Pre-Trial Chamber will review the Provisional Detention Order (“the Order”) by an examination of:
- the procedure of the Co-Investigating Judges prior to the Order being issued;
  - the sufficiency of the facts for ordering provisional detention under Internal Rule 63(3);
  - whether the circumstances on which the Order was based still exist today; and
  - the exercise of discretion by the Co-Investigating Judges in applying Internal Rule 63(3).
10. During the hearing, the Co-Lawyers submitted that fundamental notions of fair trial appear to have been, in practice, overlooked or neglected in certain proceedings before the Pre-Trial Chamber. They refer to the speediness of the dismissal of the motion for disqualification of a Judge in this case and the decision on the appeal in the case of Kaing Guek Eav. They submit that this decision appears to be reasoned, logical, and fully comprehensible, but some factual findings which they specified seem to suggest that opinions have already been formed on core issues in the case.<sup>4</sup> They further urge the Pre-Trial Chamber to respect the presumption of innocence in its language.

<sup>3</sup> Charged Person Nuon Chea, Co-Prosecutors Submissions re Redacted Extracts of Notes Submitted by the Defence on 14 February 2008, 3 March 2008 (Case File: 002/19-09-2007-ECCC/OCIJ (PTC01)), C11/46.

<sup>4</sup> The Co-Lawyers submitted that the decision in the case of Kaing Guek Eav contains the following factual findings: “The surviving witnesses [from S-21], either inmates or staff, were submitted to a cruel regime of terror” (para. 32). “The Charged Person has publicly acknowledged, since 1999, that he was Chairman of S-21 Security Centre, where thousands of men, women, and children were detained, tortured and killed” (para. 54). “A large portion of today’s Cambodian population has not only been personally subject to the harsh regime imposed by the Khmer Rouge but has also lost one or more of their relatives or friend” (para. 49).

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11. Both the adversarial hearing and the opportunity to appeal its outcome, give the Charged Person the possibility to have the lawfulness of his detention reviewed by a court, a right provided for by article 9 of the International Covenant on Civil and Political Rights ("ICCPR").<sup>5</sup> Moreover, article 9 of the ICCPR requires that such review is 'without delay'. It is therefore not understood how the Co-Lawyers can conclude that the speediness of making a decision leads to neglecting or overlooking fundamental notions of fair trial.
12. The 'fact finding' referred to by the Co-Lawyers in a previous case dealt with by the Pre-Trial Chamber is related to the presented evidence and the position of the Charged Person in that case. Decisions of fact in one case provide no decision in respect of another case. The Co-Lawyers submitted conclusions on facts determined in a previous case without reference to the reasoning of the Pre-Trial Chamber and, in so doing, failed to disclose the context. Each case before the Pre-Trial Chamber is determined upon the evidence before it in that case. In the instant case, the Pre-Trial Chamber will do the 'fact finding' by examining the presented evidence and the position of the Charged Person and the other parties in respect of this evidence. There can therefore be no conclusion that the right to a fair trial of the Charged Person will be overlooked or neglected by the predetermination of facts.

#### IV. EXAMINATION OF THE PROCEDURE OF THE CO-INVESTIGATING JUDGES PRIOR TO THE ORDER BEING ISSUED

13. According to Rule 63(1) of the Internal Rules, the Co-Investigating Judges may order the provisional detention of a Charged Person after an adversarial hearing. Internal Rule 63(1) provides:

The Co-Investigating Judges may order the Provisional Detention of a Charged Person after an adversarial hearing. If the Charged Person does not yet have the assistance of a lawyer, he or she shall be advised of the right to a lawyer as provided by Rule 21(1)(d). The Charged Person has the right to a reasonable period in order to prepare his or her defence. During the hearing, the Co-Investigating Judges shall hear the Co-Prosecutors, the Charged Person and his or her lawyer. At the end of the hearing the Co-Investigating Judges shall decide on Provisional Detention. If Provisional Detention is not ordered, the Charged Person shall be released. If the Co-Investigating Judges decide to order Provisional Detention they shall issue a Detention Order.<sup>6</sup>

<sup>5</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (1967), article 9.

<sup>6</sup> Internal Rules (Rev. 1) of the Extraordinary Chambers in the Courts of Cambodia, 1 February 2008, Rule 63(1).



14. A question raised by the appeal is whether the Charged Person's decision to proceed with the adversarial hearing without the assistance of a lawyer may be regarded as a legally valid waiver of the right to legal assistance.
15. The Pre-Trial Chamber notes that the Co-Lawyers of the Charged Person and the Co-Prosecutors have different interpretations of the facts relating to the waiver given by the Charged Person during his Initial Appearance and adversarial hearing according to the records of the Co-Investigating Judges. During an *in camera* hearing, the Pre-Trial Chamber viewed parts of the video-recording of this initial appearance and adversarial hearing that related to this waiver.<sup>7</sup> The Pre-Trial Chamber has seen that neither the interpretation of the events by the parties nor the written records provide a complete picture of what actually occurred in this context.<sup>8</sup> The Pre-Trial Chamber therefore relies on the video-recordings that were viewed in court and sets out the transcript of what was heard through interpretation during the hearing.<sup>9</sup> The Pre-Trial Chamber will use this information as evidence of what happened during the hearing in deciding on the validity of the given waiver.

### The Initial Appearance

*You Bunleng*: Now you haven't got a lawyer yet, yes? Do you want to have a lawyer or not? So this is your right.

*Nuon Chea*: I would like to tell you that...

*Khmer – English Interpreter*: The interpreter could not really hear, because with the background sound. We will try our best to interpret.

[The French – English interpreter takes over]

*Nuon Chea*: If the tribunal obliges me to have a lawyer then...

*French – English Interpreter*: this was inaudible.

[The Khmer – English interpreter proceeds]

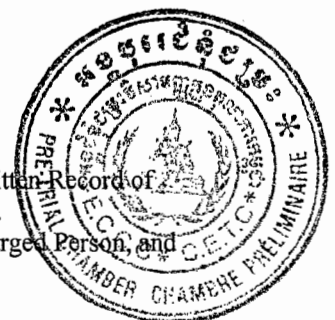
*You Bunleng*: Here the court has not anything to compel you. If you really think you can defend yourself, then the court does not oblige you to have a lawyer. But if you would like to have a lawyer, then you can choose a lawyer at your own choice. Or you may need a lawyer. If you don't have money to afford, to hire a lawyer then we have the service ready to offer to you.

*Nuon Chea*: I already told you, the Khmer lawyer. His name is already proposed but he is now in Battambang.

<sup>7</sup> Case File: 002/19-09-2007-ECCC/OCIJ, D20R and C8R.

<sup>8</sup> Charged Person Nuon Chea, Written Record of Initial Appearance, 19 September 2007 and Written Record of Adversarial Hearing, 19 September 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D20 and C8).

<sup>9</sup> The related conversation is transcribed as much as possible from the native language of the Charged Person, and therefore from the words of the Khmer interpreter.



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*You Bunleng:* Mr. Son Arun?

*Nuon Chea:* Yes. He is the Cambodian lawyer, but for the foreign lawyer I don't know his name yet.

*You Bunleng:* So now, for Mr. Son Arun, do you want him now?

*Nuon Chea:* Yes.

*You Bunleng:* Have you met Mr. Son Arun before.

*Nuon Chea:* We met, but I can not recognize him.

*You Bunleng:* So this means that you already asked him to be your lawyer and he said that he would be your lawyer.

*Nuon Chea:* He said actually that he would come tomorrow, he is now in Battambang.

*Marcel Lemonde:* So this means that you have selected a Khmer lawyer Mr. Son Arun but for the foreign lawyer you will choose him at a later date. What do you think? So because you can talk with your national lawyer to make sure you can contact with the foreign lawyer. But here we have the Defence Support Section which you can also seek assistance.

*Nuon Chea:* When Mr. Son Arun comes, I will discuss this with him, so that I can also choose a foreign lawyer to defend my case.

*You Bunleng:* So your Khmer lawyer is Mr. Son Arun and you said that you will discuss with Mr. Son Arun to choose another lawyer, the foreign lawyer.

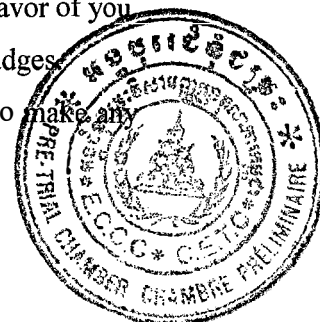
*Nuon Chea:* I have no resources to hire a lawyer.

The video-recording shows that Judge You Bunleng is talking, but this is not interpreted during the hearing.

*You Bunleng:* The question concerning lawyer I already asked. So the next... I already informed the information on the charges. And in the proceedings, the proceeding is recorded. Another right if, when the court asks questions, so during the investigation there will be interview, so you have the right to remain silent. And if you want to make any comment or statement, you can do so. And you have the right to consult with a lawyer. Since you haven't got the lawyer here. We would like to clarify that when in the interview phase, at all times you can ask to the Co-Investigating Judges to investigate to issue an order or warrant or to feel any investigation tasks if you feel it is important. This means that during the proceedings, if you have the lawyer you can discuss with your lawyer. In some points you may see that it's deemed important, then you can ask to the Investigating Judges to help collect evidence that are in favor of you. These rights are preserved and the decision of course will be made by the Judges.

*Marcel Lemonde:* Because your lawyer is not here today, would you like to make any statement in regard to the charges against you or the facts against you?

*Nuon Chea:* I would like to make some statement against these charges.



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*You Bunleng*: I think probably there will be some kind of a misunderstanding, I may like to clarify. Just now I informed you about your rights. During this Initial Appearance and after this I will announce, notify about the information or the possibility of Provisional Detention, because in this Initial Appearance and you haven't got the lawyer, the continued proceedings whether you will be detained or not. What would you like to comment on if you don't have your lawyer with you.

*Marcel Lemonde*: So because we conduct the Adversarial Hearing, would you like to make a statement?

*Nuon Chea*: Now?

[The French-English interpreter takes over]

*Marcel Lemonde*: If you would like to make a statement, this would be the time to do it. We are going to record them.

[The Khmer-English interpreter proceeds]

*Nuon Chea*: I would like to make a statement now.

*You Bunleng*: So after your statement, the judges will have to discuss, will have an adversarial hearing to decide or to rule on the possibility of provisional detention. In this regard, do you think you will wait until these kind of hearing can take place or do you think that the hearing can be conducted soon, or in a few more minutes.

*Nuon Chea*: To continue on what matter?

*You Bunleng*: Just now you said you have a lawyer, but the lawyer is not here. So the next proceeding, after the initial hearing, when you have been notified about your rights and charges against you, next we will discuss about the conditions or possibility of the conditions of detention and with the participation of the Co-Prosecutors as requested. You can respond to them. If you don't have a lawyer you can also do so, or if you have a lawyer you can still respond. In that situation, the judges will make a decision of the possibility of Provisional Detention. So do you want to wait until you have your lawyer here or do you want to proceed these proceedings?

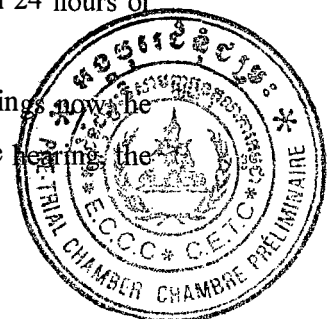
*Nuon Chea*: Of course I want to continue these proceedings on my own.

*Marcel Lemonde*: So to put it more clearly, you have to be informed about your rights. Because there will be the adversarial hearing where there will be participation from the Co-Prosecutors of the Extraordinary Chambers in the Courts of Cambodia and you should also know that you have the right to have a lawyer and with the lawyer, he will be able to defend you.

*Nuon Chea*: You mean the lawyer be... the hearing will be conducted in 24 hours or just in the next few minutes.

*Marcel Lemonde*: Since your lawyer cannot participate in these proceedings now, he can only be here tomorrow, so if you wait until your lawyer comes to the hearing, the hearing can only be conducted from tomorrow.

*Nuon Chea*: I don't have any problem or any secrets to hide.



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*You Bunleng*: So are you sure, because in order not to misunderstand, in order to not say that the court failed to tell you about your rights, I would like to clarify again the Judges already raised that we will conduct an Adversarial Hearing with the participation of the Co-Prosecutors and you can respond to them with your own statements and if you have a lawyer, the lawyer can assist you in this response also. If you think we can conduct a hearing now without a lawyer, it is your own right. And if you need a lawyer, so it has to be adjourned and then tomorrow, when the lawyer comes, then the court can continue. So I would like to finally clarify that whether the hearing can be conducted now, or can we wait until your lawyer come, because you haven't got your lawyer here. Adversarial Hearing can continue now.

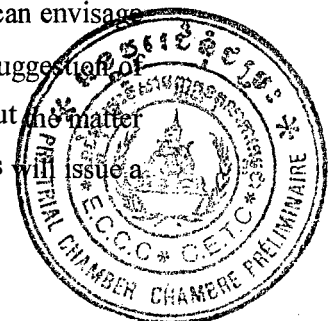
*Nuon Chea*: I think we can have it conducted now. But now I can go ahead on my own. Although my lawyer is not available today, I still want the debate to be held today.

### The Adversarial Hearing

*You Bunleng*: Let the proceeding continue. The composition of the Judges, in this Adversarial Hearing as I already informed, me myself and Judge Marcel Lemonde. Now I would like to inform the new composition who are Co-Prosecutors. Mrs. Chea Leang the national Co-Prosecutor and Mr. Robert Petit, the foreign Co-Prosecutor. This Adversarial Hearing is aimed to consider the possibility of Provisional Detention. You stated that you do not need a lawyer today and you could defend yourself. And the lawyer that you need will come on board in the proceedings at a later stage. So to consider in regard to this matter, I would like to give this role to the Co-Prosecutors to show their request or suggestions. In regard to the possibility of Provisional Detention.

*Chea Leang*: Thank you, I would like to make a comment in regard to, as stated in the Introductory Submission of the Co-Prosecutors. As Co-Prosecutors, we Co-Prosecutors would like to have some more time to review the matter. Because the Co-Prosecutors have not fully participated from the very beginning, so with these 5 minutes notification it is rather short time to understand the detail of the matter.

Point number two, we request that the Judges should inform this Adversarial Hearing clearly to the Charged Person. Because in the record he says that he needs his lawyer. As the name already listed in this record. When he already understands that this Adversarial Hearing proceeding, he does not need a lawyer. So make sure he understand this Adversarial Hearing matter, because it is the matter of consideration of the possibility of Provisional Detention of the Charged Person. So that he can envisage whether he would prefer having a lawyer here or not, now. So this is the suggestion of the Co-Prosecutors. I would like to make sure that he is well informed about the matter of the Adversarial Hearing and his right of having a lawyer. Because judges will issue a decision.





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*You Bunleng:* Because the Co-Prosecutor has submitted this suggestion. Mr. Nuon Chea has already clarified after this Initial hearing. Mr. Marcel Lemonde already explained once about this Adversarial Hearing. And about the consequence or the result of the possibility of the decision in regard to the Provisional Detention, it has already been clarified, especially in regard to the right to have the lawyer or not. And if you need to have a lawyer here, than the judges also stated clearly that the Adversarial Hearing could be adjourned to tomorrow. But you stated clearly that you don't need a lawyer now, because you can defend the matters by your own. So what I said just now, is that what you have been told?

*Nuon Chea:* I don't need a lawyer now, but tomorrow my lawyer come. In general, I need a lawyer, but now my lawyer is not here.

*You Bunleng:* Because this relates to the possibility of Provisional Detention, though Judge Lemonde already clarified this and I also explained to you do you understand that? So I would like to explain again to you, after the Initial Appearance, would you like to have a lawyer. Because, in the Adversarial Hearing that to be conducted will be considered the possibility of Provisional Detention.

*Nuon Chea:* I need a lawyer, I already proposed the name. For a foreign lawyer, I don't know his name yet. I only know that Mr. Son Arun the national lawyer.

*Marcel Lemonde:* I like to explain to you that everyone here understands that you can wait, because it is your interest, you can wait until your lawyer comes, so that the Adversarial Hearing can be conducted, because in that hearing it is about the possibility of Provisional Detention but if you can defend yourself here in this process without a lawyer, then we can continue.

*Nuon Chea:* I would like to clarify that I can defend the case on my own now, but from tomorrow onwards, when the lawyer comes, I will need his assistance. For the International Co-Lawyer I will seek advice from my national lawyer.

16. Internal Rule 63(1) does not specifically mention the possibility of a waiver, in contrast to Rule 58(2) of the Internal Rules, relating to *interviews* of a Charged Person. Rule 58(2) provides in relevant part:

A Charged Person shall only be questioned in the presence of his or her lawyer, unless the Charged Person waives the right to the presence of a lawyer, in a separate written record signed by the Charged Person, included in the case file. The waiver shall be recorded pursuant to Rule 25. [...] <sup>10</sup>

17. The Pre-Trial Chamber finds that Internal Rule 58(2) does not apply to the adversarial hearing on provisional detention. An adversarial hearing is distinct in its purpose from an interview of a

<sup>10</sup> Internal Rules (Rev. 1) of the Extraordinary Chambers in the Courts of Cambodia, 1 February 2008, Rule 58(2).



Charged Person. An adversarial hearing gives the Charged Person the opportunity to respond to the request of, and the arguments made by, the Co-Prosecutors. An interview is held as part of investigations by the Co-Investigating Judges to find the truth and therefore aimed at obtaining a statement from the Charged Person, a statement that could be used as evidence against him. While Rule 58 of the Internal Rules may be interpreted to apply to any questioning of a Charged Person, irrespective of the procedure, it does not apply in this case, since the Charged Person was not questioned during his adversarial hearing.<sup>11</sup> Thus the requirements of Rule 58 of the Internal Rules for a waiver of the right to a lawyer to be separately recorded in writing signed by the Charged Person do not apply in this case.

18. The Pre-Trial Chamber finds that the possibility of the waiver of the right to a lawyer during the adversarial hearing can be inferred from Rule 63(1). According to this Rule, a Charged Person without a lawyer shall be advised of his right to have one and can therefore waive this right.
19. The Trial Chambers of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") have both examined the validity of waivers of the right to a lawyer.<sup>12</sup> The Pre-Trial Chamber observes that the Tribunals applied different criteria for the waiver in different stages of the proceeding.
20. In *Bagosora*, the Trial Chamber of the ICTR considered that, to be effective, a waiver should be voluntary and unequivocal.<sup>13</sup> In this case, Bagosora, as a suspect, waived his right to a lawyer during questioning.
21. With regard to the requirement that the waiver must be unequivocal, the Trial Chamber considered that "the waiver must be shown 'convincingly and beyond reasonable doubt'. It must be express and unequivocal, and must clearly relate to the interview in which the statement in question is taken".<sup>14</sup>
22. The Trial Chamber pointed out that according to national jurisdictions, a waiver cannot be voluntary unless a detainee knows of the right to which he is entitled.<sup>15</sup> The Trial Chamber furthermore observed that "to be so informed, the suspect must be informed that the right

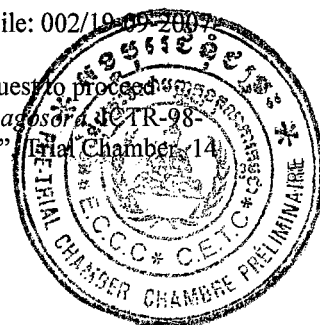
<sup>11</sup> Charged Person Nuon Chea, Written Record of Adversarial Hearing, 19 September 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, C8).

<sup>12</sup> See *Prosecutor v. Krajišnik*, IT-00-39-T, "Reasons for oral decision denying Mr. Krajišnik's request to proceed unrepresented by counsel", Trial Chamber, 18 August 2005 ("*Krajišnik* Reasons"); *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on the Prosecutor's motion for the admission of certain materials under Rule 89(c)", Trial Chamber, 14 October 2004 ("*Bagosora* Decision").

<sup>13</sup> *Bagosora* Decision, para. 17 and 18.

<sup>14</sup> *Bagosora* Decision, para. 18.

<sup>15</sup> *Bagosora* Decision, footnote 12.



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includes the right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective".<sup>16</sup>

23. The Trial Chamber of the ICTY was faced with a different situation in the case of *Krajišnik*. In this case, the accused requested to proceed with his trial, unrepresented by counsel. The Trial Chamber considered that "before a request [to proceed unrepresented by counsel] may be addressed on its own terms, both the law and common sense indicate a preliminary inquiry to determine whether the request is unequivocal, informed and intelligent".<sup>17</sup> Although the Trial Chamber did not link these requirements specifically to the waiver of the right to a lawyer, the Pre-Trial Chamber observes that U.S. case law referred to by the Trial Chamber does.<sup>18</sup> The Pre-Trial Chamber therefore considers that the Trial Chamber's inquiry and the applied requirements relate to the waiver of the right to a lawyer. The Pre-Trial Chamber observes however, that *Krajišnik*'s 'waiver' was made in the trial stage.

24. The Trial Chamber of the ICTY subsequently considered that 'equivocal' means "unclear in meaning or intention; ambiguous. [...] A request which is formulated conditionally, or in the alternative, may lack nothing in clarity. But where a court is not persuaded that the applicant actually desires the alternative of self-representation [...] the court has little choice but to find the request unclear in meaning or intention, ambiguous, and therefore equivocal".<sup>19</sup>

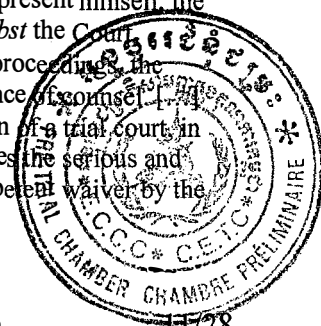
25. The Trial Chamber noted, with regard to the requirements of 'informed' and 'intelligent', that it was initially of the view that those requirements were not met. The request was uninformed "especially as to the financial and practical consequences of such decision" and unintelligent "in the sense that the Accused had not made a rational appreciation of the burden of conducting a

<sup>16</sup> *Bagosora* Decision, para. 17.

<sup>17</sup> *Krajišnik* Reasons, para. 5.

<sup>18</sup> See *Krajišnik* Reasons. The Trial Chamber explains the requirements in its notes. Note 6 mentions that "The inquiry is also a staple of the case-law referred to in the second section of these reasons". In this second section the Trial Chamber considers in paragraph 23 that "the Appeals Chamber has held that an accused has a presumptive right to self-representation. [...] In reaching this conclusion, the Appeals Chamber relied not only on the words of the Tribunal's Statute but also on the US case of *Faretta v. California*. This case had been relied on also by the Trial Chamber from which the appeal originated. *Faretta* was hailed by the Trial Chamber as "the classical statement of the right to self-representation," and the Appeals Chamber agreed". In *Faretta v. California*, (1975) 422 U.S. 806, the U.S. Supreme Court held, referring to its judgment in *Johnson v. Zerbst*, 304 U.S. 458 (1938) that "in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits". In *Johnson v. Zerbst* the Court considered at 464-465 that "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel". The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court in which the accused- whose life or liberty is at stake-is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused".

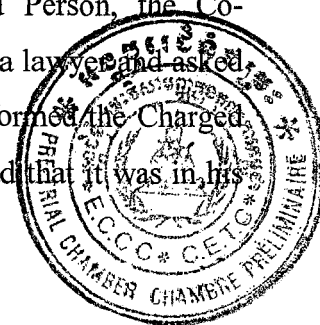
<sup>19</sup> *Krajišnik* Reasons, para. 6.



large criminal case from the confines of the UN detention centre, and of the salient and hidden dangers of such a choice".<sup>20</sup>

26. Although the Trial Chambers of the ICTY and ICTR used different wording, they factually applied the same requirements. The Pre-Trial Chamber infers from these decisions that, for a waiver to be valid, it should be unequivocal and voluntary. To be voluntary, a waiver should be informed, knowing and intelligent.
27. The Pre-Trial Chamber is of the view that the Trial Chambers applied the requirement of an unequivocal waiver in similar ways and will in this case apply their interpretations.
28. With regard to the requirement of voluntariness, the Chambers applied different standards. Where in *Bagosora* it was held sufficient to inform a suspect of the right to a lawyer, in *Krajišnik* a higher standard was applied, requiring information on financial and practical consequences of proceeding without a lawyer, before an intelligent decision could be made.
29. In this respect, as mentioned above, the cases dealt with waivers in different stages of the proceedings. In *Bagosora* the waiver was related to the questioning of a suspect; in *Krajišnik* the waiver was related to the exercise of the right to self-representation.
30. The Pre-Trial Chamber finds that the stage of the proceedings determines the information required to constitute an informed waiver. In the case of questioning, it is clear that proceeding without a lawyer could result in incriminatory evidence being elicited improperly.
31. In order to knowingly and intelligently waive the right to a lawyer, the Charged Person must be able to make a rational appreciation of the effects of proceeding without a lawyer.
32. An adversarial hearing is necessary before ordering provisional detention. The adversarial hearing gives a Charged Person the opportunity to respond to the Co-Prosecutors' request to have such an order issued. After hearing the submissions of the parties, the Co-Investigating Judges may order the provisional detention of the Charged Person.
33. During the Initial Appearance and adversarial hearing of the Charged Person, the Co-Investigating Judges repeatedly informed the Charged Person of his right to a lawyer and asked whether he required a lawyer. The Co-Investigating Judges furthermore informed the Charged Person of the purpose of, and procedures during, the adversarial hearing and that it was in his

<sup>20</sup> *Krajišnik* Reasons, para. 8.



interest to proceed with a lawyer. The Pre-Trial Chamber therefore finds that the waiver of the Charged Person was informed.

34. Although the charges faced by the Charged Person in this case are of a complex nature, he waived his right to a lawyer during the adversarial hearing. At this moment, there is no information in the Case File, including in the video-recording of the hearings of the Co-Investigating Judges, and nothing presented by the Co-Lawyers, that leads to the conclusion that the Charged Person is hampered by his old age or his medical condition in making decisions.
35. During the appeal hearing, the Co-Lawyers submitted that the Charged Person had told the DSS prior to the Initial Appearance that he was not fit to proceed. According to the redacted DSS meeting notes, submitted by the Co-Lawyers after the hearing, the DSS informed the Charged Person that he could ask the Co-Investigating Judges to delay the proceedings. The Charged Person subsequently requested the DSS to persuade the Co-Investigating Judges to give him time to rest. The meeting notes mention that the DSS advised the Office of the Co-Investigating Judges of this request by telephone..
36. The Pre-Trial Chamber observes that the DSS meeting concluded at 1:00 pm and the Initial Appearance commenced at 2:40 pm. During the hearings, according to the video-recording, the Charged Person did not ask the Co-Investigating Judges to adjourn, despite being offered this possibility with respect to the adversarial hearing. This opportunity to adjourn was not seized by the Charged Person. Furthermore, the Charged Person did not mention to the Co-Investigating Judges that he was not feeling well, nor was this mentioned by the Co-Investigating Judges. The Pre-Trial Chamber therefore finds that there is no evidence that the Charged Person was unable to give a valid waiver due to his physical condition.
37. The Pre-Trial Chamber considers that the Charged Person, who is educated and who in the past held a high political position, armed with the information provided as mentioned above and within the context of the adversarial hearing, had a rational and fully informed appreciation of the consequences of proceeding without a lawyer.
38. The Charged Person repeatedly asserted that he could proceed without a lawyer for those specific proceedings but that his Co-Lawyers would represent him for all future proceedings. The Pre-Trial Chamber finds that these assertions demonstrate that the Charged Person wanted to waive his right to a lawyer and that this decision was unequivocal.



39. In conclusion, the Pre-Trial Chamber finds that, when taking the requirements of the waiver and the circumstances of this case into account, the Charged Person's waiver was unequivocal and voluntary, and therefore valid.

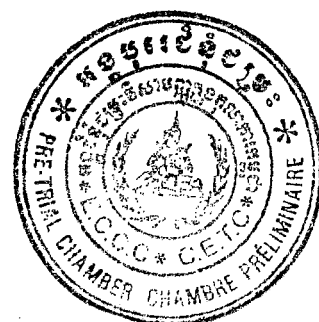
40. In the context of the adversarial hearing, the Co-Lawyers also assert that additional rights were violated, in particular the Charged Person's rights to an adversarial hearing, to a reasonable period of time to prepare his defence, to remain silent and to the equality of arms. The Pre-Trial Chamber notes that during the adversarial hearing, the Charged Person was not questioned, but was given the opportunity to respond to the request of the Co-Prosecutors, an opportunity he seized. There was no questioning and this was not the purpose of the meeting. The mention of his right to remain silent was therefore not necessary. Furthermore, the Charged Person was given the opportunity to read the documents submitted by the Co-Prosecutors in support of their request, an opportunity that he did not take. Even so, the Charged Person did not find it necessary to delay the adversarial hearing when this was offered to him, rather he expressly wished to proceed. The Pre-Trial Chamber therefore finds that none of these additional rights have been violated.

## V. EXAMINATION OF THE CONDITIONS WHICH HAVE TO BE MET ACCORDING TO RULE 63(3) OF THE INTERNAL RULES

41. Rule 63(3) of the Internal Rules provides:

The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

- a) there is well founded reason to believe that the 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.



42. In order to decide if the grounds for provisional detention as set out in Rule 63(3) are met, the Pre-Trial Chamber has taken into account the written and oral submissions of the parties, the evidence they have submitted by right and by leave and the whole Case File of the Co-Investigating Judges up to the date of the hearing.

a. Well founded reason to believe that the Charged Person Nuon Chea may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

43. The Pre-Trial Chamber observes that the Internal Rules do not explain what constitutes well founded reason. In this regard, the Pre-Trial Chamber notes that the French version of the Internal Rules uses “*raison plausibles*” for the term “well founded reason”, a term that corresponds with the term used in Article 5 of the European Convention of Human Rights. This article provides, *inter alia*:

Toute personne a droit à la liberté et à la sûreté. Nul ne peut être privé de sa liberté, sauf dans les cas suivants et selon les voies légales :

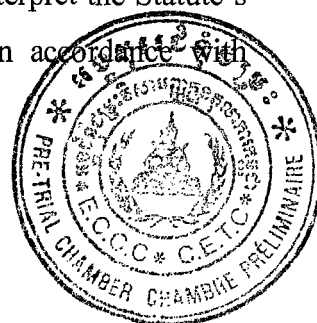
c) s’il a été arrêté et détenu en vue d’être conduit devant l’autorité judiciaire compétente, lorsqu’il y a des raisons plausibles de soupçonner qu’il a commis une infraction ou qu’il y a des motifs raisonnables de croire à la nécessité de l’empêcher de commettre une infraction ou de s’enfuir après l’accomplissement de celle-ci.

44. The European Court of Human Rights (“ECHR”) has consistently held that:

[...] l’existence de soupçons plausibles présuppose celle de faits ou renseignements propres à persuader un observateur objectif que l’individu en cause peut avoir accompli l’infraction. Ce qui peut passer pour “plausible” dépend toutefois de l’ensemble des circonstances.<sup>21</sup>

45. In the recent decision of the Pre-Trial Chamber of the International Criminal Court (“ICC”) in the case of Ahmad Muhammad Harun (‘Ahmad Harun’) and Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’), the Chamber considered that it was required to interpret the Statute’s expression for well founded reason, “reasonable grounds to believe”, in accordance with internationally recognized human rights. The Chamber held:

<sup>21</sup> CEDH (ECHR), *Affaire Fox, Campbell et Hartley v. Royaume-Uni*, 30 August 1990, para. 32.



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Thus, in interpreting and applying the expression “reasonable grounds to believe”, the Chamber will be guided by the “reasonable suspicion” standard under article 5(1)(c) of the *European Convention on Human Rights* and the jurisprudence of the Inter-American Court of Human Rights on the fundamental right to personal liberty under article 7 of the *American Convention on Human Rights*.<sup>22</sup>

46. The Pre-Trial Chamber will, as the ICC has done, interpret the words “well founded reason” by seeking guidance in the above-mentioned jurisprudence of the ECHR. This means that the Pre-Trial Chamber has to decide whether facts or information exist which would satisfy an objective observer that the person concerned may have committed the offence.
47. Rule 63(3)(a) of the Internal Rules requires furthermore that this well founded reason is related to the belief that the Charged Person “*may have committed the crime or crimes as specified in the Introductory Submission*”. In accordance with Article 29 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia of 27 October 2004, the term ‘committed’ includes planning, instigating, ordering, aiding and abetting, or committing and superior criminal responsibility.
48. The Pre-Trial Chamber notes, in order to ensure that the investigation is not compromised, that in this public decision it will not set out the evidence related to the specific alleged crimes in the Introductory Submission or the contextual elements of the charged crimes. After an examination of the Case File, the Pre-Trial Chamber is satisfied that there is well founded reason to believe that the specific alleged crimes mentioned in the Introductory Submission may have been committed in the context of an international armed conflict and/or as part of widespread and systematic attacks on discriminatory grounds. The Co-Lawyers did not contest the alleged facts set out in the Introductory Submission, rather they contested the alleged involvement of the Charged Person in respect of such matters.
49. In relation to the responsibility of the Charged Person, for the specific alleged crimes mentioned in the Introductory Submission, the Case File contains, amongst other documents, several statements of the Charged Person Kaing Guek Eav. In his interview with a representative of the UNHCR, he reportedly stated that :

“Son Sen passed the reports of S-21 through Nuon Chea to the countryside. Second, there was Nuon Chea. He was the First Deputy Secretary General of the CPK. He was

<sup>22</sup> *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, ICC-02/05-01/07, “Decision on the Prosecution Application under Article 58(7) of the Statute”, Pre-Trial Chamber, 27 april 2007, para. 28.





the person who decided on every task, and especially in security work his role was to coordinate between S-21 and each of the Zones. So with regard to security work as well as internal Party work, Nuon Chea was above Son Sen, although the person who did the figuring out himself and led things directly was Son Sen”.<sup>23</sup>

“Question 5: on the distinction between Nuon Chea and Son Sen in cases relating to S-21. As I have already made clear, Nuon Chea was the big shot. Son Sen was his underling for figuring out overall security matters throughout the country and not only just in S-21. [break in tape] ... In the first case, was that Pol Pot issued a view on rectifying the work methods of Nuon Chea and Son Sen. The second case was the case of the arrest of Chhouk, the Chairman of East Zone Sector 24. Nuon Chea and Son Sen reported this matter to Pol Pot. I don’t know how many times to get Pol Pot to take up the Chhouk problem for ... and to convene a meeting to make a decision on it. I had clear knowledge of this when Son Sen ordered me to compile the documentation. I knew clearly because Son Sen had me prepare the documentation, the enemies’ responses [...] after the meeting Son Sen told me that Sao Pheum was content because he had been convinced that Chhouk was an enemy. [...] Therefore, in order to make Sao Pheum willing, maybe Nuon Chea wasn’t .. to make the arrest, so he intervened with Pol Pot to get him to persuade Sao Pheum. ...”.<sup>24</sup>

“In the last months, in late 1978. I don’t remember how many hundreds there were, but they were mostly combatants from the East Zone army, and Nuon Chea said [there were so many] that there was no need to interrogate them, just smash them” [...] No such order had ever been received before, nor had we ever worked this way before [...] There were both civilians and soldiers”.<sup>25</sup>

“I was put into service to photograph certain persons after they had been killed. [...] [French voice:] The order came from Nuon Chea? [Duch:] Yes”.<sup>26</sup>

50. In his interview with Nate Thayer, Kaing Guek Eav reportedly stated:

“After liberation in 1975, Pol Pot said: ‘We must protect our party and country by finding the enemies within the party. We are not strong enough to attack the enemies from outside, so we must destroy them from within’. First we arrested the people in the north, then the southwest, then the northwest, then the east. He used NUON Chea to do

<sup>23</sup> English translation of an interview with Kaing Guek Eav by UNHCR, 4-6 May 1999, as compiled by Steve H. Heder, as of 3 July 1999 (ERN: 00002494-00002557) (“UNHCR interview with Kaing Guek Eav”), p. 1.

<sup>24</sup> UNHCR interview with Kaing Guek Eav, p. 3, 4.

<sup>25</sup> UNHCR interview with Kaing Guek Eav, p. 9 and 10.

<sup>26</sup> UNHCR interview with Kaing Guek Eav, p. 11.



the work. Pol Pot never directly ordered the killings. NUON Chea was always cruel and pompous. He never explained to the cadre, he only ordered them.”

“Vorn Vet and Chay Kim Hour were ordered killed by NUON Chea”.

“NUON Chea ordered me to burn their bodies with tyres to leave no bones”.

“The decision to kill were made not by one man, not just Pol Pot, but the entire central committee. Nuon Chea, he was the principal man for the killings. Pol Pot was interested in military strategy. Khieu Samphan did not have the right to decide who to arrest and order killed”.

“Pol Pot knew about S-21, but did not direct it personally. He left that job to Nuon Chea as No. 2 in the party and to Son Sen as head of the army and police”.

“Nuon Chea ordered 300 [Khmer Rouge] soldiers arrested. He called to meet me and said, ‘Don’t bother to interrogate them – just kill them’ And I did”.

“I was called by NUON Chea to his office and he ordered me to kill all the remaining prisoners”.<sup>27</sup>

51. In an interview conducted by the Co-Investigating Judges on 23 August 2007, Kaing Guek Eav stated:

“First, let me speak about the victims imprisoned at S-21. On the 2<sup>nd</sup> and 3<sup>rd</sup> of January 1979 (I do not remember clearly), Nuon Chea called me in to receive an absolute order. That is, he required that S-21 smash (kill) all the victims. Regarding this matter, I was very terrified. I told Comrade Hor about this order”.<sup>28</sup>

“Question by YBL: The orders of Nuon Chea to smash on the 2<sup>nd</sup> or 3<sup>rd</sup> of January, how many victims were imprisoned, and how were they smashed?

Answer: The actual number of victims, I cannot remember. To be exact, I did not concentrate on this point. I remember that there were two categories of victims. First, the Cambodians; second, the Vietnamese soldiers who had raised their hands and surrendered at the frontier.

<sup>27</sup> Nate Thayer, *Far Eastern Economic Review*, 13 May 1999, “Death in Detail” (ERN: 00087513-00087514).

<sup>28</sup> Charged Person Kaing Guek Eav, Written Record of Interview of Charged Person, 23 August 2007 (Case File: 002/19-09-2007-ECCC-OCIJ, D13), p. 3.



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Question by ML: Were they prisoners of war?

Answer: Yes.

[...] In total about 200 persons. [...] I believe that all of them were killed”.<sup>29</sup>

“After Nuon Chea agreed with my request to assign Hor, about two or three months later, Nuon Chea told me that the Chairman at S-21 was not me, Duch, but he, Nuon Chea, was Chairman. I disseminated these words to everyone”.<sup>30</sup>

“Answer: My power was to carry the words of upper echelon and to disseminate them, no more, no less. When S-21 was first created, my task was to read confessions and report to Son Sen by telephone every day. When Son Sen was gone, I took them to tell Nuon Chea once every three or four, or at most five days. As for my power, it was to take the words of upper echelon to disseminate to lower level and to report about the confessions to upper echelon. [...] Nuon Chea said that I could not handle the work”.<sup>31</sup>

52. In his Written Record of 05 September 2007, Kaing Guek Eav stated in relation to the arrest of the group Y8, the four persons arrested and sent to S-21 in January 1979:

“[...] I asked Nuon Chea to keep the four persons for interrogation. And Nuon Chea said “you must be master of the situation.

[...] Nuon Chea decide to smash all the prisoners, but allowed me to keep those four prisoners by telling me that “[you] must manage the situation by self-mastery” which meant smash those people when necessary. [...]

Question by Francois Roux: Can we say that Nuon Chea gave you the orders and then you gave those orders to your subordinates as orders from the Party, and these people gave the orders to the executors, such that each person according to his level became the person bearing direct responsibilities in implementing the Party decisions?

Answer: Yes”.<sup>32</sup>

“Question by ML: So, usually was it really you who gave order to kill?

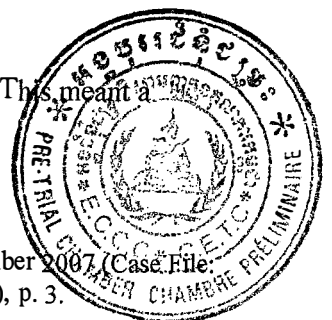
Answer: Yes. I would like to clarify: All security offices functioned alike. This meant a

<sup>29</sup> Written Record of Kaing Guek Eav, 23 August 2007, p. 5.

<sup>30</sup> Written Record of Kaing Guek Eav, 23 August 2007, p. 6.

<sup>31</sup> Written Record of Kaing Guek Eav, 23 August 2007, p. 7.

<sup>32</sup> Charged Person Kaing Guek Eav, Written Record of Interview of Charged Person, 05 September 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D16) (“Written Record of Kaing Guek Eav, 05 September 2007”), p. 3.



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general decision was made by the Central level. For S21 Nuon Chea clearly told me that all people whom were sent to S21 had to be killed. As I was in charge of S21, I followed implemented his orders. I would like to clarify that I did not have authority over other security offices".<sup>33</sup>

"Question by YBL: What were the major mistakes that were considered cause for arrest and being sent to S21? If compared with other security offices, how were they similar or different? Who made the decision to arrest those people from various ministries?

Answer: There were two types of decision-makers: for members of the Central Committee the decision had to be made by the Standing Committee of the Central Committee. For others, Nuon Chea called the Chief of the relevant unit to discuss with him and they made a joint decision".<sup>34</sup>

"Question by YBL: When Son Sen was in charge, did Son Sen do the same as what Nuon Chea did?

Answer: I would like to remind [you] that Son Sen was the 7<sup>th</sup> person, but Nuon Chea was the 2<sup>nd</sup> person. Everything had to pass through Nuon Chea even if it was in scope of the military.

[...] Nuon Chea was the superior of Son Sen".<sup>35</sup>

53. In the Statement of the CPK to the Communist Workers' Party of Denmark of July 1978, Nuon Chea stated:

"Our Party did its best and liberated Phnom Penh on 17 April 1975... Immediately after liberation, we evacuated the cities".<sup>36</sup>

54. In his interview with Meng-Try, Nuon Chea reportedly stated:

"Meng-Try: What is S-21? Nuon Chea: It was established to search for the enemy of the country. Meng-Try: How did they search for the enemy? Nuon Chea: "Somebody who wanted to harm people. It was set up to take care of that matter. Sadly, there were bad comrades there. Meng-Try: Did they find the enemy? Nuon Chea: They did. But S-21 comrades went too far. They sometimes did not follow the plan and sometimes they

<sup>33</sup> Written Record of Kaing Guek Eav, 05 September 2007, p. 4.

<sup>34</sup> Written Record of Kaing Guek Eav, 05 September 2007, p. 5.

<sup>35</sup> Written Record of Kaing Guek Eav, 05 September 2007, p. 6.

<sup>36</sup> Statement of the CPK to the Communist Workers' Party of Denmark, July 1978 (ERN 00001170-00001485), p. 4-5.



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did too much. For example, we asked them to work 8 hours then they did 12 hours. We asked them to provide rice to people, they provided porridge for people. We asked them to do farming, they did not do. We fail to pay attention to the lower cadres that was why our regime failed".<sup>37</sup>

55. In December 1996, Steve Heder interviewed Ieng Sary, who reportedly stated::

"IS: In September 1975 there was a meeting at which it was decided what had to be done in order to make it impossible for Viet Nam to take over Cambodia.

SH: So this was decided at the Standing Committee level or by the Central Committee as a whole?

IS: It was only the Standing Committee, not the whole Central Committee.

[...] Virtually all of the Standing Committee was there: Pol Pot, Nuon Chea, Sao Pheum, me [...]"<sup>38</sup>

"SH: Am I right in understanding that was a Central or Standing Committee commission responsible for both military and security affairs: a single body, not two separate bodies?

IS: Yes, one responsible for both.

SH: And that during the five-year war period, it comprised Pol Pot, Nuon Chea, Sao Pheum, Ta Mok and Son Sen?

IS: Yes".<sup>39</sup>

56. On 13 December 2007, Khieu Samphan was interviewed by the Co-Investigating Judges. The Written Record of his interview states:

"In principle, the most important body was the central committee, but in practice it was the standing committee. [...] Therefore, the central committee did not have effective power as opposed to the standing committee, and in this committee, based on the

<sup>37</sup> Interview of Khieu Samphan and Nuon Chea by Meng-Try, 10 June 2006 (ERN 00000925-00000935) p. 10.

<sup>38</sup> Steve Heder interview of Ieng Sary, 17 December 1996 (ERN: 00003660-00003669), p. 2.

<sup>39</sup> Steve Heder interview of Ieng Sary, 17 December 1996 (ERN: 00003660-00003669), p. 6.



principle of centralized democracies, the most important persons were the secretary and deputy secretary, who were Pol Pot and Nuon Chea".<sup>40</sup>

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57. According to the Statement of Meas Mut, former Secretary of Division 164, Meas Mut stated on 20 July 2001:

"I met with NUON Chea. He went everywhere [around the country] and looked at the situation of the people".<sup>41</sup>

58. According to the witnesses' testimonies, the Charged Person was in a position to give orders and used this position to give orders to the staff of S-21, in which prison crimes were allegedly committed. This would satisfy an objective observer that the Charged Person may have been responsible for, or committed, the alleged crimes specified in the Introductory Submission in this stage of the investigations.

b. Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b))

i. *The first and second grounds in Internal Rule 63(3)(b) provide: 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" and to "ii) preserve evidence or prevent the destruction of evidence"*

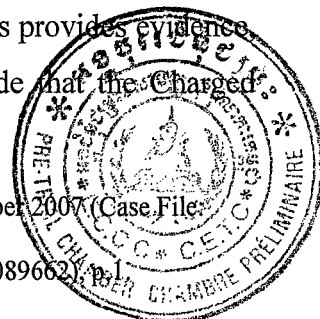
59. These two grounds for provisional detention can be analysed together since they are supported by the same arguments. In fact, the statements made by witnesses can be considered as "evidence" within the meaning of Internal Rule 63(3)(b)(ii).

60. The Pre-Trial Chamber notes that the whole Case File has been made available to the Charged Person, including the names of potential witnesses. Even if the witnesses have already been heard and have given evidence, there is still a chance that they may have to be heard later during further investigations and/or hearings.

61. The interview of Kaing Guek Eav conducted by the Co-Investigating Judges provides evidence at this preliminary stage, upon which the Pre-Trial Chamber can conclude that the Charged

<sup>40</sup> Charged Person Khieu Samphan, Written Record of Interview of Charged Person, 13 December 2007 (Case File: 002/19-09-2007-ECCC/OCIJ, D46), p. 10.

<sup>41</sup> See Interview with Meas Muth by Christine Chaumeau and Bo Saroeun (ERN: 00089661-00089662), p. 1.



Person destroyed 'evidence' in the past and that he reprimanded Kaing Guek Eav for not doing the same. The Written Record of Interview of Charged Person Kaing Guek Eav reads:

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"Question by ML: Were you blamed?

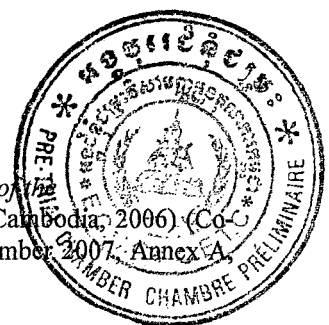
Answer: Yes. In 1983.

[...] When Nuon Chea called me to have a conversation. First, he spoke about me going to meet Khieu Samphan, not him. This point, I told you about this morning. Second, after questioning me, he blamed me saying: "Comrade you are useless. My documents, I smashed them all, but with you, they were left in heaps".<sup>42</sup>

62. The Pre-Trial Chamber finds in the first place that this statement suggests that the Charged Person might utter threats against witnesses or try to destroy evidence in the future. Moreover, now the Case File contains evidence which establishes a well founded reason that the Charged Person occupied senior positions within the Khmer Rouge movement. The Pre-Trial Chamber notes that certain influence is necessarily attached to such a senior position, influence which can still be applied today.
63. Furthermore, although this allegation refers to an event which occurred twenty-five years ago, the Pre-Trial Chamber finds that, taking the expressed fear of testifying before the ECCC by potential witnesses into consideration<sup>43</sup>, this incident, if known by the victims, could adversely affect the willingness of the witnesses to testify if the Charged Person were released.
64. The Pre-Trial Chamber has found that the Case File contains well founded reason that the Charged Person may have been responsible for the alleged crimes related to S-21. The few witnesses of S-21 events are crucial to the investigation and, eventually, to the trial. The Pre-Trial Chamber concludes that provisional detention is a necessary measure to prevent the Charged Person from exerting pressure on witnesses or destroying any evidence.
- ii. *The third ground in Internal Rule 63(3)(b): to ensure the presence of the Charged Person during the proceedings*

<sup>42</sup> Written Record of Kaing Guek Eav, 23 August 2007, p. 8.

<sup>43</sup> Geerteke Jansen, *Voices of Takeo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia* (Phnom Penh: Documentation Center of Cambodia, 2006) (Co-C Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 21).



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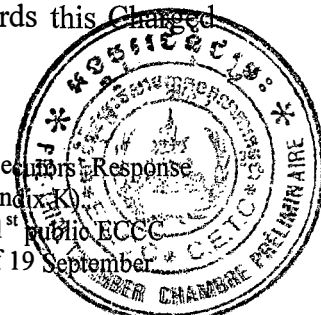
65. The Pre-Trial Chamber observes that, in view of the gravity of the charges, the Charged Person could face a sentence of imprisonment from five years to life if he is found guilty.
66. Although the risk of flight cannot be evaluated solely on the basis of the gravity of the crimes and possible sentence, the Pre-Trial Chamber observes that in this case other factors are to be taken into account.
67. The Pre-Trial Chamber notes that several statements, including that of the Charged Person, show that the Charged Person's residence is very close to the Thai border. The Charged Person pointed out in this respect: "If I wanted to flee, I would have done it a long time ago. Where would I go? I could flee in just one step to the Thai border. It's near my house".<sup>44</sup> Whether or not the Charged Person is in possession of a passport does not change his opportunity to cross the border; it only changes the way in which the border might be crossed.
68. The Pre-Trial Chamber further observes that the Charged Person's residence is located in an area well known as a former Khmer Rouge centre of support. The Chamber finds it likely that contacts of the Charged Person in the region are well known within the border area and may have contacts on both sides, contributing to the Charged Person's possibilities to flee.
69. The Co-Lawyers' assertion that the Charged Person has publicly and consistently stated his willingness to participate in these proceedings are, in the view of the Pre-Trial Chamber, not persuasive since the Charged Person has, until now, exercised his right to remain silent.
70. The Pre-Trial Chamber considers that provisional detention is a necessary measure to ensure the Charged Person's presence during the proceedings.

*iii. The fourth ground in Internal Rule 63(3)(b): to protect the security of the Charged Person*

71. Taking reported threats made against Kaing Guek Eav during the first public hearing into consideration, the Pre-Trial Chamber finds that, after establishing well founded reasons to believe that the Charged Person committed alleged crimes which are related to the crimes that Kaing Guek Eav is charged with, this aggression could also be vented towards this Charged Person.<sup>45</sup>

<sup>44</sup> Teymoor Nabili, *Aljazeera English News*, 14 June 2007, "Meeting brother number two" (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex B, Appendix K).

<sup>45</sup> Erika Kinetz and Yun Samean, *The Cambodia Daily*, 21 November 2007, "Duch faces judges in 1<sup>st</sup> public ECCC hearing" (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 24).





72. With regard to the Co-Lawyers' assertion that the Charged Person has been peacefully re-integrated into Cambodian society for almost ten years, during which time there have been no acts of violence in protest against his liberty or attempted acts of revenge against him, the Pre-Trial Chamber observes that such non-interference could be placed in the context of the impunity that reigned for almost thirty years. Moreover, the Charged Person's house was already guarded.<sup>46</sup> The necessity of these guards is an indication to the Pre-Trial Chamber that there has not been a peaceful reintegration as asserted by the Co-Lawyers and indeed proves that the Charged Person himself feared for his safety.

73. The Pre-Trial Chamber considers that provisional detention is a necessary measure to protect the Charged Person's safety.

*iv. The fifth ground in Internal Rule 63(3)(b): to preserve public order*

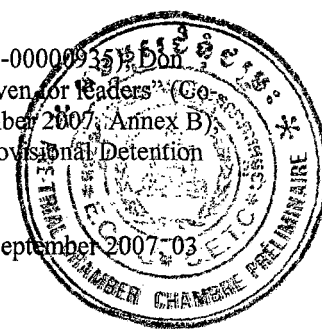
74. In this appeal, the Co-Lawyers and Co-Prosecutors disagree on the scope of this ground. The Co-Lawyers submit that detention on grounds of public order "must be invoked only where it is justified by precise facts and where it is the only means of quelling an actual disturbance".<sup>47</sup> The Co-Prosecutors submit that the jurisprudence cited by the Co-Lawyers to support their case, in particular the jurisprudence from the European Court of Human Rights, cannot be strictly applied in cases of war crimes, crimes against humanity and genocide before the ECCC. "A domestic court [...] may be able to determine whether the release of a suspect charged with the commission of domestic crimes would inevitably cause public unrest in a localized area. In contrast, it would be nearly impossible for the ECCC to predict with any certainty whether the release of a person charged with the commission of international crimes inevitably would cause public unrest in a country of millions".<sup>48</sup>

75. The Internal Rules do not contain an interpretation of this ground. Having reference to Article 12 of the Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic

<sup>46</sup> See Interview of Khieu Samphan and Nuon Chea by Meng-Try, 10 June 2006 (ERN 00000925-00000935), Don Pathan, *Associated Press*, 09 January 1999, "Former Khmer Rouge stronghold becoming safe haven for leaders" (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex B); Rasmei Kampuchea, 26 July 2007 (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex B).

<sup>47</sup> Nuon Chea's Appeal against Order of Provisional Detention, 12 November 2007, para. 29.

<sup>48</sup> Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007-03 December 2007, para. 35.



Kampuchea<sup>49</sup>, the Pre-Trial Chamber observes that the Statutes and Rules of the international criminal tribunals do not contain a similar ground. Article 21(3) of the Rome Statute of the ICC reads: "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]".<sup>50</sup> Considering the domestic resonance of this ground and article 21(3) of the Rome Statute, the Pre-Trial Chamber finds it appropriate to seek guidance from the case-law of the ECHR.

76. In their Appeal Brief, the Co-Lawyers referred to the case of *Letellier*. The Pre-Trial Chamber notes that in this case the ECHR considered that "facts capable of showing that the accused's release would actually disturb public order must exist. In addition detention will continue to be legitimate only if public order remains actually threatened [...]".<sup>51</sup>
77. The Pre-Trial Chamber finds that the passage of time has not diminished the impact of the Democratic Kampuchea regime on society. It is believed that a proportion of the population that lived through this period from 1975 to 1979 suffers from post-traumatic stress disorder. Specialists have stated that the commencement of judicial activities before the ECCC "may pose a fresh risk to the Cambodian society". It may "lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them".<sup>52</sup>
78. The General Assembly of the United Nations has recognised that the crimes committed during the Democratic Kampuchea period from 1975 to 1979 are still a matter of concern for Cambodian society, and for humanity:

Recalling that the serious violations of Cambodian and international law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole,

[...]

Recognizing that the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims [...]<sup>53</sup>

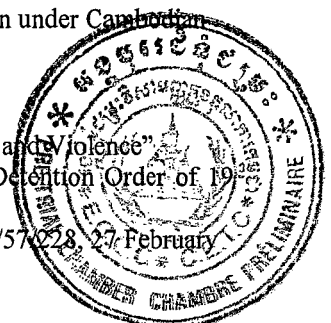
<sup>49</sup> Agreement between the UN and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 2003, Article 12.

<sup>50</sup> *Rome Statute of the International Criminal Court*, A/CONF.183/9, 17 July 1998.

<sup>51</sup> ECHR, Case of *Letellier v. France*, 26 June 1991, para. 51.

<sup>52</sup> Rob Savage, *Monthly South Eastern Globe*, "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 19 September 2007, Annex A, Attachment A 25).

<sup>53</sup> Preamble, *Resolution adopted by the General Assembly – Khmer Rouge Trials*, GA Res A/RES/57/228, 27 February 2003.



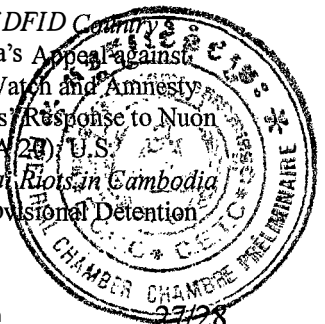
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79. The hearing of the Charged Person's appeal generated a great deal of interest amongst the Cambodian population and press, as well as the international community. Hundreds of people, including members of the public and representatives of the press, non-governmental organisations and the international community, came to attend the hearings. This interest is demonstrative of the fact that the trials, even in the pre-trial phase, of senior leaders and those most responsible for the crimes committed during the Kampuchea Democratic period from 1975 to 1979 are still a matter of great concern today for the Cambodian population and the international community.
80. The Pre-Trial Chamber further observes that the perceived threat to security is not illusory. This is firstly demonstrated by everyday disturbances or even violent crimes, of which the Pre-Trial Chamber takes notice as facts of common knowledge. Secondly, the example of the anti-Thai riots in 2003 points towards the potential for politically motivated instability.<sup>54</sup>
81. The Pre-Trial Chamber finds that the facts mentioned above are capable of showing that the Charged Person's release would actually disturb public order. Therefore, the Pre-Trial Chamber finds that the provisional detention of the Charged Person is a necessary measure to preserve public order.

### Bail

82. The Co-Lawyers submit that none of the concerns expressed by the Co-Investigating Judges would be able to materialise if the Charged Person were released subject to their proposed conditions. Therefore, the Charged Person should in their opinion be released on bail.
83. The Pre-Trial Chamber finds that, in the instant case, the conditions of Rule 63(3)(a) and all of the five grounds set out in Rule 63(3)(b) have been met, though any one of these would have

<sup>54</sup> John Aglionby, *The Guardian*, 31 January 2003, "Thais cut links with Cambodia after riots" (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 15); BBC News, 10 February 2003, "Thai diplomats return to Cambodia", (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 16); CNN.com, 30 January 2003, "Cambodia apologizes for riots" (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 17); Michael Flint, *Evaluation of DFID Country Programmes, Country Study: Cambodia 1997-2003*, p. 4 (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 19); Human Rights Watch and Amnesty International, 11 February 2003, "Cambodia: Freedom of expression under attack" (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 20); U.S. Department of State, Bureau of East Asian and Pacific Affairs, *Report to Congress on the Anti-Thai Riots in Cambodia on January 29, 2003*, 14 May 2003 (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 26).




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been sufficient to justify the provisional detention of the Charged Person. This means that provisional detention is a necessary measure to ensure the security of the witnesses and the Charged Person, to preserve evidence, to ensure the presence of the Charged Person during the proceedings and to preserve public order. In these circumstances, the Pre-Trial Chamber considers that the Charged Person cannot be released on bail, for any of the conditions proposed by the Charged Person are outweighed by the necessity for his provisional detention.

**THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:**

- 1) The appeal is admissible in its form;
- 2) The Co-Investigating Judges properly exercised their discretion to order the provisional detention of the Charged Person;
- 3) The grounds for provisional detention are still satisfied;
- 4) The Order of the Co-Investigating Judges is affirmed with the reasons expressed in this decision being substituted for the reasons of the Co-Investigating Judges;
- 5) The appeal is dismissed.

In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal.

**GIVEN IN PUBLIC BY** the Pre-Trial Chamber, in the presence of the Charged Person and his Co-Lawyers, 

Phnom Penh, 20 March 2008

**Pre-Trial Chamber**

**President**

Rowan DOWNING

NEY Thol

Katinka LAHUIS

HUOT Vuthy

PRAK Kimsan

**Greffiers**

KEO Vanny

Dirk Jan LAMAN

