



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia

Chambres Extraordinaires au sein des Tribunaux Cambodgiens

C91417

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 (PTC13)

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

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Date: 4 May 2009

PUBLIC (REDACTED VERSION)
DECISION ON APPEAL AGAINST ORDER ON EXTENSION OF PROVISIONAL DETENTION
OF NUON CHEA

Co-Prosecutors

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Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

Charged Person

NUON Chea

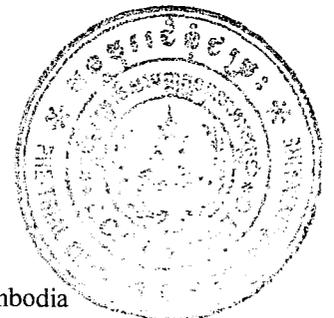
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C9/14/17

THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the “Appeal against Order on Extension of Provisional Detention” of Nuon Chea filed on 16 October 2008 (“the Appeal”).

I. PROCEDURAL BACKGROUND

1. On 16 September 2008, the Co-Investigating Judges rendered an Order on Extension of Provisional Detention of the Charged Person (“Extension Order”).
2. On 25 September 2008, the Co-Lawyers of the Charged Person filed a notice of appeal, and on 16 October 2008, they filed the Appeal Brief.
3. On 30 October 2008, the Co-Prosecutors filed their Response to the Appeal. In their Response to the Appeal, the Co-Prosecutors submitted that it “should be determined on written submissions alone”¹.
4. On 6 November 2008, the Co-Lawyers advised the Pre-Trial Chamber that no hearing is required.
5. On 12 December 2008, the Pre-Trial Chamber, after considering the views of the Co-Prosecutors and the Co-Lawyers for the Charged Person (“the Parties”), decided that the Appeal shall be determined on the basis of the written submissions of the Parties only. In accordance with Article 8.4 of the Practice Direction on the Filing of Documents before the ECCC, it allowed the Charged Person to file a reply to the Co-Prosecutors’ Response within five (5) days of the notification of this decision. The Co Lawyers of the Charged Person did not file a reply.
6. Upon notice of the Appeal, the Pre-Trial Chamber received the case file, which was updated. For the purposes of considering this Appeal, the Pre-Trial Chamber reviewed the documents in the case file and all the evidence submitted further until the date when the Charged Person was allowed to file a reply to the Co-Prosecutors’ Response, which is the last day when the Parties could comment upon anything or submit evidence in their advantage.

II. ADMISSIBILITY OF THE APPEAL

7. On 16 September 2008, the Co-Investigating Judges rendered an Order on Extension of Provisional Detention of Nuon Chea. On 25 September 2008, the Co-Lawyers of the Charged

¹ Co-Prosecutors’ Response to Nuon Chea’s Appeal on Extension of Provisional Detention, 30 October 2008; C9/4/2 (“Co-Prosecutors’ Response”), para. 3.

Person filed a notice of appeal. The Appeal Brief was filed on 16 October 2008 and therefore within the time frame provided for in Rule 75(3) of the ECCC Internal Rules (“the Rules”).

8. The Co-Lawyers for the Charged Person submit that the Pre-Trial Chamber has jurisdiction to hear this Appeal. The Appeal is filed with the Pre-Trial Chamber against the Order of the Co-Investigating Judges on Extension of Provisional Detention of Nuon Chea pursuant to Rules 73, 74 and 75 of the Internal Rules. They request the Pre-Trial Chamber to “vacate the Extension Order and release Mr. Nuon [Chea] subject to the conditions originally proposed in the Detention Appeal”².
9. The Co-Prosecutors in their Response to the Appeal do not directly comment on matters related to jurisdiction.
10. Internal Rule 73 provides:

“Rule 73. Additional Jurisdiction of the Pre-Trial Chamber

In addition to its power to adjudicate disputes between the Co-Prosecutors or the Co-Investigating Judges, as set out in the Agreement and the ECCC Law, the Chamber shall have sole jurisdiction over:

- a) appeals against decisions of the Co-Investigating Judges, as provided in Rule 74; [...]

11. Internal Rule 74(3) further provides:

“Rule 74. Grounds for Pre-Trial Appeals

3. The Charged Person may appeal against the following orders of the Co-Investigating Judges:

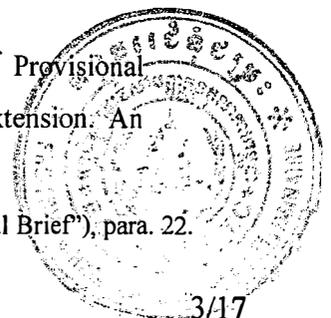
- [...]
- f) relating to provisional detention or bail; [...]

12. Internal Rule 63(7) provides:

“Rule 63. Provisional Detention

7. Any decision by the Co-Investigating Judges concerning extension of Provisional Detention shall be in writing and shall set out the reasons for such extension. An

² Appeal against Order on Extension of Provisional Detention, 16 October 2008, C9/4/1 (“Appeal Brief”), para. 22.



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extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-Investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.

[...]”

13. The Pre-Trial Chamber finds, reading the above-mentioned Internal Rules together, that these provide the Pre-Trial Chamber jurisdiction over the Appeal against the Order on Extension of Provisional Detention.

III. SCOPE OF REVIEW

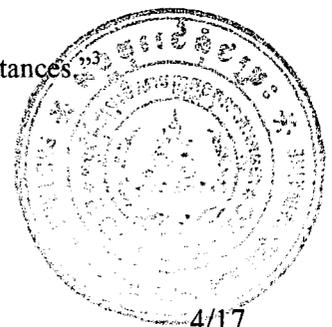
14. The Pre-Trial Chamber will examine whether there are still well-founded reasons to believe that the Charged Person may have committed crimes specified in the Introductory Submission, although the Charged Person did not contest this. The Pre-Trial Chamber has an obligation to verify whether the Co-Investigating Judges could conclude so on the basis of the continuing investigations and has to examine the case file until the date mentioned in paragraph 6 of this Decision in order to examine if these well-founded reasons still exist. The Pre-Trial Chamber finds this appropriate, as during the continuing investigations, the Co-Investigating Judges investigate inculpatory and exculpatory evidence which is added to the case file.
15. The Pre-Trial Chamber will further examine the issues raised in the Appeal and finally the Pre-Trial Chamber will analyse whether the Co-Investigating Judges have exercised their discretion reasonably.

IV. THE APPEAL

16. In their Appeal Brief, the Co-Lawyers submit that:

- 1) “Nuon Chea’s continued detention is neither factually or legally justified;
- 2) The Extension Order is procedurally defective; and
- 3) Provisional release subject to conditions is appropriate under the circumstances³

³ Appeal Brief, para. 1.



on the following grounds:

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(1) “The Defence incorporates by reference the submissions contained at paragraphs 24-29 of the Detention Appeal and paragraphs 8-9 of the Extension Objections. It bears repeating that the applicable human-rights jurisprudence has consistently found that the risks initially justifying provisional detention (i.e. those concerns enumerated in Rule 63(3)(b)) diminish over time. Indeed, relying specifically on case-law of the European Court of Human Rights (the “ECHR”), this Chamber has recently held that ‘while a generally formulated risk [...] ‘may possibly’ be accepted as the basis for detention at the initial stages of the proceeding, with the passage of time, there needs to be some ‘other factor capable of showing that the risk relied on *actually existed*’.”⁴

“The existence of a well-founded reason to believe that Mr. Nuon [Chea] has committed crimes is, standing alone, insufficient to support an order of provisional detention. In this regard, the Defence adopts by reference the submissions contained in the Detention Appeal [paras 44-53] and advances them again for re-consideration. Based on the ECHR jurisprudence cited above, these arguments—particularly those with respect to Rules 63(3)(b)(i) and (ii)—are made stronger by the fact that the OCIJ [Office of the Co-Investigating Judges] has had a full year to conduct its investigation. In spite of this well-accepted proposition, the OCIJ has failed to explain how the *generally formulated* risks used to justify Mr. Nuon [Chea]’s initial detention have been further bolstered by *concrete evidence*, as required.”⁵

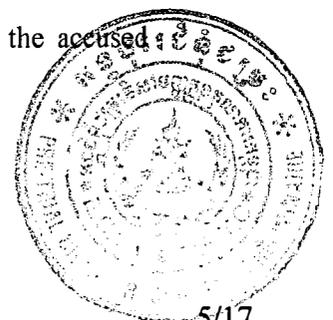
(2) “According to the Rules [see Rule 63(2)(a)], a provisional detention order must ‘set out the legal grounds and factual basis for detention’. Any order extending such detention should be equally reasoned [see Rule 63 (7)], and mere reference to the applicable statutory provision is insufficient. Moreover, abstract or stereotyped analysis is inadequate; rather, a detaining court must ‘record the arguments for and against release in a reasoned ruling’. The rationale is two-fold: (i) to allow the charged person to effectively exercise his right to appeal and (ii) to maintain public confidence in the administration of justice.”⁶

(3) “Human-rights law recognizes ‘a *prima facie* right to bail pending trial’. Because the detention of one presumed innocent is such a serious measure, it can only be justified where less severe options have been considered and found to be insufficient to safeguard the individual or public interest. If bail is ultimately denied, the accused

⁴ Appeal Brief, para. 10.

⁵ Appeal Brief, para. 17.

⁶ Appeal Brief, para. 11.



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person is entitled 'to have his case treated as a priority by the prosecution and the court'.⁷

17. The Co-Lawyers conclude:

"For the reasons stated above, the Defence submits that [the Pre-Trial Chamber] should vacate the Extension Order and release Mr. Nuon [Chea] subject to the conditions originally proposed in the Detention Appeal. In the alternative, the [Pre-Trial Chamber] should make the necessary arrangements for Mr. Nuon [Chea]'s transfer to an approved medical facility in central Phnom Penh. Finally and in any event, this Chamber should instruct the Co-Investigating Judges to conform their drafting practices to the applicable Rules and relevant jurisprudence."⁸

V. THE CO-PROSECUTORS' RESPONSE TO THE APPEAL

18. The Co-Prosecutors request the Pre-Trial Chamber to dismiss the Appeal on the following grounds:

- "(a) The Appellant has failed to demonstrate any material change in circumstances since he was originally detained by the Co-Investigating Judges on 19 September 2007 ("Detention Order")⁹ and since that detention was confirmed by the Pre-Trial Chamber on 20 March 2008 ("Detention Appeal Decision")¹⁰.
- (b) All the five disjunctive conditions necessitating detention under Rule 63(3)(b) remain jointly and individually satisfied. Specifically, the Appellant's detention remains a necessary measure: (1) to prevent him from exerting pressure on witnesses or victims; (2) to preserve evidence or to prevent its destruction; (3) to ensure his presence during the proceedings; (4) to protect his security, and (5) to preserve public order.
- (c) House arrest is not warranted as the ECCC Detention Facility is appropriately equipped to take care of medical emergencies and, in any event, the Appellant's medical conditions do not justify any modification in the conditions of his detention."¹¹

⁷ Appeal Brief, para. 14.

⁸ Appeal Brief, para. 22.

⁹ Provisional Detention Order, 19 September 2007, C11/1.

¹⁰ Decision on Appeal against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54.

¹¹ Co-Prosecutors' Response, para. 2.



VI. THE ORDER OF THE CO-INVESTIGATING JUDGES

19. The Order of the Co-Investigating Judges, dated 16 September 2008, on Extension of Provisional Detention of Nuon Chea (“Order on Extension of Provisional Detention”) states:

“The Co-Investigating Judges found, in their Provisional Detention Order dated 19 September 2007, that there were well founded reasons to believe that Nuon Chea had committed the crimes as charged. On appeal the Pre-Trial Chamber considered, in its decision of 20 March 2008, the evidence on the case-file at that stage of the proceedings (see, in particular, paragraphs 43-58 thereof) sufficient to demonstrate the same well founded belief. Since then, the judicial investigations against all Charged Persons have continued. The Co-Investigating Judges have taken note of the additional evidence thereby gathered and placed on the present case-file including, in particular, the 23 additional statements of the Charged Person Kaing Guek Eav to the Co-Investigating Judges concerning the context and operation of S-21 as well as the role played by the Charged Person, Nuon Chea, in those and other related respects. The Co-Investigating Judges therefore consider that the condition set out in Article 63(3)(a) of the Internal Rules remains satisfied.”¹²

20. The Order on Extension of Provisional Detention also states that the Co-Investigating Judges further consider “that the conditions set out under Article 63(3)(b) of the Internal Rules are also still met, the reasons of the Pre-Trial Chamber in its Decision of 20 March 2008 remaining valid”. The Co-Investigating Judges order the “extension of provisional detention of Nuon for a maximum duration of one year [...]”¹³.

VII. THE STANDARD USED BY THE CO-INVESTIGATING JUDGES ON THE WELL-FOUNDED REASONS

21. The Pre-Trial Chamber notes that, pursuant to Internal Rule 63(7), the Co-Investigating Judges are obliged to give reasons for an extension order. The Pre-Trial Chamber, in its decision in Nuon Chea’s appeal regarding the Request for Annulment, found that “all decisions of judicial bodies are required to be reasoned, as this is an international standard”¹⁴. A Co-Investigating Judges’ order on extension of detention matters must therefore state the reasons for extension of detention.

¹² Order on Extension of Provisional Detention, 16 September 2008, C9/3 (“Extension Order”), p. 2.

¹³ Extension Order, p. 2.

¹⁴ Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, D55/I/8, para. 21.



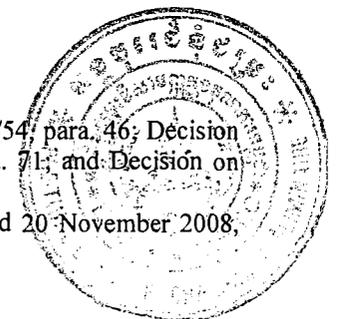
22. The Pre-Trial Chamber considers that the extension of provisional detention may only be ordered where it is established that the conditions set out in Internal Rule 63(a) are still met notwithstanding the passage of time and taking into consideration the results of the judicial investigation.
23. The Co-Investigating Judges extended the detention by reinstating the existing reasons for detention in the previous Pre-Trial Chamber appeal decision and by giving a numeric account of some new inculpatory evidence. The Co-Investigating Judges are collecting inculpatory and exculpatory evidence in their investigations. The Pre-Trial Chamber concludes that the Co-Investigating Judges did not find exculpatory evidence sufficient to mention in their order. Considering this and that the Co-Lawyers of the Charged Person did not raise any exculpatory evidence when requested by the Co-Investigating Judges to raise objections to the extension of provisional detention, the Pre-Trial Chamber finds that the Co-Investigating Judges correctly fulfilled their obligation of reasoning this part of their decision and the correct standard has been used.

Well-founded reasons to believe, at present, that the Charged Person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

24. The Pre-Trial Chamber notes that the threshold used for extending detention is the satisfaction of an objective observer that the Charged Person may have been responsible for or committed the alleged crimes specified in the Introductory Submission. This is the standard previously followed by the Pre-Trial Chamber¹⁵. The Co-Lawyers of the Charged Person do not contest the existence of well-founded reasons to believe that the Charged Person may bear responsibility for those crimes related to the activity of Office S-21; therefore the Pre-Trial Chamber will not review the evidence in the case file before the Appeal Brief was filed. The Pre-Trial Chamber finds that the recent statements by [redacted], dated 19 and 20 November 2008, add to the existing body of evidence that supports the well-founded reasons to believe that the Charged Person was already part of the high command structure of the Khmer Rouge that was allegedly responsible for making and implementing of the policies of that regime¹⁶. The Pre-Trial Chamber notices that no exculpatory evidence has been placed in the case file during the period of time between when the Detention Order was issued and when the Order on Extension of the Provisional Detention was issued.

¹⁵ Decision on Appeal against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, para. 46; Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, C22/1/74, para. 71; and Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/1/27 para. 21.

¹⁶ Written Records of Interviews of Charged Person [redacted], 19 November 2008, D117, and 20 November 2008, D118.



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25. There are new statements of evidence relating to the alleged role of the Charged Person in connection with activity that is not only related to S-21 [redacted].
26. In one of these statements¹⁷, it is mentioned how the serious-offence prisoners were allegedly treated in the [redacted], which was a detention location. In [redacted], there was just one building for the serious-offense prisoners which was tightly closed, had no windows and had just an entry door. At night the door was locked and was under militia guard. Prisoners were allowed outside only to work and with their legs chained. Their daily meal was watery gruel, which was made in large pans with four cans of rice per 30 persons. One of these witnesses has personally seen how in the forest, inside the [redacted] compound, the militia beat five families with clubs and killed them¹⁸. The Charged Person also, allegedly, convened meetings to prepare plans to purge internal enemies like the soldiers and commandos with connections to the Sângkum Reastr Niyum and LON Nol era or that were accused of resisting the Khmer Rouge regime in general¹⁹.
27. Another statement demonstrates how the Charged Person was, allegedly, the person who set the plans and met frequently with Sector, District and Zone Commanders who followed his orders to purge, to arrest and kill people just because they were related to people from Vietnam or because they suggested negotiations with Vietnam in order to avoid fighting²⁰.
28. Both these statements allege that District and Sector Chiefs were ordered directly by the Charged Person to go to study in Phnom Penh and thereafter were found killed in a brutal manner or disappeared forever²¹.
29. According to the witnesses' recent testimonies, the Charged Person, allegedly, was in a position to give orders to staff in addition to those of S-21 and the outcome of implementation of such orders were the purges, arrests, killings and maltreatment of prisoners. These would satisfy an objective observer, at present that the Charged Person may have been responsible for, or committed, the alleged crimes [redacted].

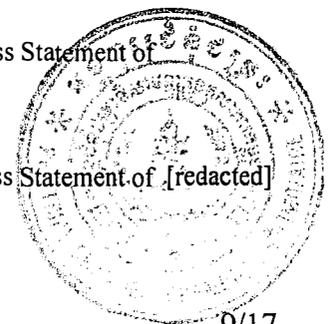
¹⁷ Written Record of Interview of Witness [redacted], 23 November 2008, D125/162 ("Witness Statement of [redacted]"), p. 4.

¹⁸ Witness Statement of [redacted] D125/162 p. 5.

¹⁹ Witness Statement of [redacted], D125/162 pp. 2 and 3.

²⁰ Written Record of Interview of Witness [redacted], 21 November 2008, D125/160 ("Witness Statement of [redacted] D125/160"), pp. 3, 4 and 7.

²¹ Witness Statements of [redacted] D125/162 and D125/160.



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

30. The Charged Person did not present new facts or circumstances that show that conditions under Rule 63(3)(b) have changed in order to convince the Co-Investigating Judges or this Chamber that detention is not warranted at present. The Co-Investigating Judges did not reason in their Extension Order how the risks that substantiated initial detention still exist. In this respect, the Order of the Co-Investigating Judges lacks sufficient reasoning²². The Pre-Trial Chamber shall therefore undertake its own analysis on whether the conditions under Rule 63(3)(b) are still applicable.

Rule 63(3)(b): (i) to “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 (ii) to “preserve evidence or prevent the destruction of any evidence”

31. The Pre-Trial Chamber finds that the passage of time has not eliminated the risk of pressure towards witnesses or collusion. On the contrary, the risk is more critical at this stage of the investigations when more records from the case file are available. The level of knowledge of the Charged Person about identity and details of witnesses and civil parties has increased compared with the time when he was initially detained. This increases the possibilities that the Charged Person may exert pressure on witnesses who have been interviewed and might be re-interviewed and upon those who have not yet been interviewed. This probability is based upon the past behaviour of the Charged Person. Thus, in addition to the example elaborated by the Pre-Trial Chamber in its previous decision on provisional detention²³, there is fresh evidence in the case file upon which the Pre-Trial Chamber finds that the Charged Person exerted pressure on [redacted] by threatening him in order to withdraw confessions that implicated “members of the upper echelon”²⁴. Other evidence found in the case file shows that the fear of witnesses from intimidation remains a reality²⁵.

32. The Pre-Trial Chamber finds that provisional detention still remains a necessary measure to prevent the Charged Person from exerting pressure on witnesses or destroying evidence.

²² Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, para. 21.

²³ Decision on Appeal against Provisional Detention Order of Nuon Chea, para.. 61.

²⁴ See Written Record of Interview of [redacted], 25 November 2008, D119, pp. 4 and 5.

²⁵ Written Record of Interview of Witness [redacted], 20 April 2008, D123/1, pp. 12-14.



The third ground in Internal Rule 63(3)(b): (iii) to “ensure the presence of the Charged Person during the proceedings”

33. 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. Nothing placed on the case file since this Chamber’s previous decision on provisional detention²⁶ leads to a conclusion that the circumstances have changed. Moreover, the new evidence counted above adds on the arguments supporting a connection between the alleged acts and the Charged Person hence putting more pressure on him.
34. The Pre-Trial Chamber therefore finds that provisional detention still remains a necessary measure to ensure the Charged Person’s presence during the proceedings.

The fourth ground in Internal Rule 63(3)(b): (iv) to “protect the security of the Charged Person”

35. 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, the aggression ventilated from the public against Kaing Guek Eav during the first public hearing could also be vented towards this Charged Person²⁷.
36. 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 guarded²⁸. 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.
37. The Pre-Trial Chamber finds that provisional detention still remains a necessary measure to protect the Charged Person’s safety.

²⁶ Decision on Appeal against Provisional Detention Order of Nuon Chea.

²⁷ Erika Kinetz and Yun Samean, *The Cambodia Daily*, 21 November 2007, “Duch Faces Judges in 1st Public ECCC Hearing” (Co-Prosecutors’ Response to Nuon Chea’s Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 24).

²⁸ See Interview of [redacted], 10 June 2006 (ERN 00000925-00000935); Don Pathan, *Associated Press*, 9 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).

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The fifth ground in Internal Rule 63(3)(b): (v) to “preserve public order”

38. In the Appeal Brief, the Co-Lawyers do not bring up arguments that demonstrate any change in circumstances in order to challenge this ground of detention. The Co-Prosecutors in their Response submit that the “passage of time has not diminished the impact of the Democratic Kampuchea regime on the Cambodian society” and, by recalling the arguments of this Chamber in its previous decision on provisional detention of the Charged Person, concludes that “continued detention is a necessary measure”²⁹.
39. The Pre-Trial Chamber finds that its analysis of the reasons for this ground of detention applies to the current circumstances as well. 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”³⁰.
40. 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 [...]

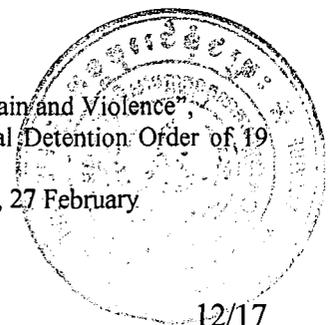
³¹

41. The hearings of the Charged Person’s appeals generated a great deal of interest amongst the Cambodian population and press, as well as the international community. Hundreds of people,

²⁹ Co-Prosecutors’ Response, paras 36 and 38.

³⁰ 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).

³¹ *Resolution adopted by the General Assembly – Khmer Rouge Trials*, GA Res A/RES/57/228, 27 February 2003, Preamble.



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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.

42. The Pre-Trial Chamber finds that the perceived threat to security is still 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 instability³².

43. 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 still remains a necessary measure to preserve public order.

Reasonableness of the Length of Provisional Detention and Progress of Investigations

44. The Pre-Trial Chamber notices that the nexus between the length of time a defendant spends in detention and the diligence displayed in the conduct of investigations is a relevant factor when considering continuation of detention or release.

45. The ECCC Internal Rules that apply in this regard are: in relation to the length of time allowed, Internal Rule 63(7) provides that "no more than 2 (two) such extensions [of provisional detention] may be ordered"; and in relation to due diligence, Internal Rule 21(4) provides that "[p]roceedings before the ECCC shall be brought to a conclusion within a reasonable time". "Proceedings before the ECCC" include judicial investigations. While the limit set for the

³² John Aglionby, *The Guardian*, "Thais cut links with Cambodia after riots", 31 January 2003 (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 15); BBC News, "Thai diplomats return to Cambodia", 10 February 2003 (Co-Prosecutors' Response to Nuon Chea's Appeal against Provisional Detention Order of 19 September 2007, Annex A, Attachment A 16); CNN.com, "Cambodia apologizes for riots", 30 January 2003 (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, "Cambodia: Freedom of expression under attack", 11 February 2003 (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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progress of investigations is that the time spent is “reasonable”, the limit set for the time that a Charged Person can spend in provisional detention is very specific. The Rules make clear how these limits are set, that in the case when a Charged Person is detained, the stakes are higher, as the right to liberty of a person still presumed innocent is in question. Therefore, an analysis of what steps have been taken by the investigation authorities and to what degree they affect the situation of the Charged Person is continuously necessary.

46. The international bodies refer to this matter in a similar manner. The International Criminal Court (ICC) has required that investigations and proceedings be undertaken in an expeditious manner, within the bounds envisaged by the Statute of the Court. As long as proceedings are in accordance with the time regime of the ICC, the requirement of expediency will be considered to be met³³. The Appeals Chamber in the *Lubanga* case noted:

“[P]aragraph 4 of article 60 of the Statute casts a duty upon the Pre-Trial Chamber to make certain that the detention of a person is not prolonged for an unreasonable period of time owing to inexcusable delay on the part of the Prosecutor; delay in this context signifies a failure to take timely steps to move the judicial process forward, as the ends of justice may demand. If such a delay is noticed, the Chamber is empowered to release the person, conditionally or unconditionally.”³⁴

47. Guidance can be sought in the practise of the ECHR which has determined a standard of “special diligence” on the part of national authorities when undertaking investigations³⁵. Where grounds given by the national judicial authorities are found by the court to justify continued detention, the Court will then ascertain whether the national authorities displayed diligence in the conduct of their proceedings.

48. The Pre-Trial Chamber finds that in the case in question there is evidence in the case file that demonstrates that the investigations have progressed expeditiously during the period under consideration. New evidence has been transferred from Case File No. 001 to Case File No. 002 which adds to the previous well-founded reasons to believe that the Charged Person may have

³³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, “Review of the ‘Decision on the Application for Interim Release of Mathieu Ngudjolo Chui’”, Pre-Trial Chamber I, 23 July 2008, p. 12. See also *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, “Review of the ‘Decision on the Application for the Interim Release of Thomas Lubanga Dyilo’”, Pre-Trial Chamber I, 14 February 2007, pp. 6 and 7.

³⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 4, “Judgment in the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release”, 9 June 2008, para.14.

³⁵ ECHR, *Ilykov v. Bulgaria*, Application no. 33977/96, “Judgment”, 26 July 2001, para. 77. See also *Labita v. Italy*, Application no. 26772/95, “Judgment”, 6 April 2000, paras 152 and 153; *Assenov and others v. Bulgaria*, Application no. 90/1997/874/1086, “Judgment”, 28 October 1998; *Stögmüller v. Austria*, Application no. 1602/62, “Judgment”, 10 November 1969; and *Wemhoff v. Germany*, Application no. 2122/64, “Judgment”, 27 June 1968.

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committed the crimes specified in the Introductory Submission. The number of witness statements already taken and of pending rogatory letters shows that investigative actions during the period under consideration are considerable. The conduct of the investigating authorities in this case fulfils the requirement of due diligence.

49. The Pre-Trial Chamber further finds that the gravity and nature of the crimes with which the Charged Person is charged require large-scale investigative actions to be undertaken, and in view of the scope and current development of the investigations, the Co-Investigating Judges used their discretion to order the extension of the provisional detention reasonably.

VIII. WHETHER CONSIDERATION OF THE OPTION OF RELEASE IS APPROPRIATE

50. The Defence further assert in their Appeal Brief that the Co-Investigating Judges have not considered alternative forms of detention. They suggest that “provisional release subject to conditions is appropriate under the circumstances”³⁶. However, they have not provided any evidence of how circumstances have changed.

51. The Co-Prosecutors request that the Pre-Trial Chamber reject any request for house arrest or bail.

52. The Pre-Trial Chamber has previously decided that the ECCC “Internal Rules do not specifically provide for alternative forms of detention”³⁷. The Pre-Trial Chamber shall confine itself into treating this matter within the boundaries of the Appeal and not consider release of the Charged Person as a separate application, as the Defence initially presented their suggestion for release as part of its Objections to the notification of Co-Investigating Judges for extension of detention. This procedure is governed by Internal Rule 63(7). According to Internal Rule 63(7), the only party that can give an opinion on the matter is the Defence. Internal Rule 64 gives the Defence the right to specifically apply for release and for the Prosecution to have the right to give its opinion in respect of such application, which is not the case when the procedure under Internal Rule 63(7) is applied. Had the Co-Investigating Judges considered the suggestion to release, as presented by the Defence, as part of their Objections pursuant to Internal Rule 63(7), the right of the Co-Prosecutors to give their opinion on such request would have been infringed.

³⁶ Appeal Brief, para. 1.

³⁷ Decision on Appeal against Provisional Detention Order of Ieng Sary, para. 119.



53. The request to release should be read as following on from the submissions of the Co-Lawyers, that no grounds exist to consider Provisional Detention to be a necessary measure as prescribed in Internal Rule 63(3)(b). This request must be rejected. As reasoned above, the Pre-Trial Chamber finds that several of the grounds are still met and each ground alone is sufficient reason to find that extension of provisional detention can be ordered.
54. The request to release the Charged Person on certain conditions must be read as a request for bail orders, as provided for in Internal Rule 65. The Pre-Trial Chamber notes that the Co-Lawyers did not submit anything new to their submissions in the appeal against the Order of Provisional Detention. On this appeal, the Pre-Trial Chamber has decided. Under these circumstances, the Co-Investigating Judges should have referred to the fact that no new circumstances were raised in the appeal against the Order of Extension of Provisional Detention and this would have been sufficient to reason for the rejection of this request. In this respect, the Order of the Co-Investigating Judges was not sufficiently reasoned and before-mentioned reasoning will be substituted in the Extension Order. The request before this Chamber is rejected for the same reason.

IX. CONCLUSIONS

55. Considering the before-mentioned findings, the Pre-Trial Chamber finds that the Co-Investigating Judges' Order was sufficiently reasoned on their finding that the condition set out in Internal Rule 63(3)(a) remains satisfied. In addition, the Pre-Trial Chamber has found that at this moment this condition is still met.
56. On its own examination of the conditions of Internal Rule 63(3)(b), the Pre-Trial Chamber finds that the measure of extension of provisional detention is still necessary on the following grounds: i) to 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) to preserve evidence or prevent the destruction of any evidence; iii) to ensure the presence of the Charged Person during the proceedings; iv) to protect the security of the Charged Person; and v) to preserve public order.



57. As the Order of the Co-Investigating Judges was not reasoned sufficiently on this part of the decision, the reasoning of the Pre-Trial Chamber will be substituted for that of the Co-Investigating Judges in the Order.
58. The Pre-Trial Chamber finds that the Co-Investigating Judges properly exercised their discretion to order the extension of provisional detention. The Appeal will therefore be dismissed.
59. The requests for release on conditions will be rejected and the related reasoning of the Pre-Trial Chamber will be substituted for that of the Co-Investigating Judges.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

1. The Appeal is admissible in its form;
2. The Order of the Co-Investigating Judges is affirmed with the reasons expressed in this decision, in part, being substituted for the reasons of the Co-Investigating Judges;
3. The request for release (on conditions) is rejected;
4. The Appeal is dismissed.

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

Phnom Penh, 4 May 2009

Pre-Trial Chamber







Rowan DOWNING **NEY Thol** **Katinka LAHUIS** **HUOT Vuthy** **PRAK Kimsan**

