

**គណៈកម្មាធិការប្រតិភូតិកម្ម នៃ អង្គការសមាគមការពារសិទ្ធិមនុស្សកម្ពុជា**

**CAMBODIAN HUMAN RIGHTS ACTION COMMITTEE**

ADHOC - CARAM Cambodia - CCPCR - CDP - CHHRA - CKIMHRDA - CSD - CWCC - GENEROUS - HROTP  
IDA - KID - KIND - KKKHRO - KKKHRDA - KSA - KYA - LAC - OUTREACH - PDP - PIJ - TASK FORCE - VIGILANCE  
#9Eo, St. 330, Sangkat Boeung Kengkang III, Khan Chamkarnom, Phnom Penh, Tel/Fax: 023 351 415, E-mail: chrac@forum.org.kh

No.:.....៩៤/០៧.....CHRAC

**Judges of Pre-Trial Chamber**

Extraordinary Chambers in the Courts of Cambodia (ECCC)

# National Road 4, Chaom Chau Commune,

Dangkao District, Phnom Penh, Cambodia

P.O. Box: 71, Phnom Penh

Tel: 023 219 814

Fax; 023 219 841

Phnom Penh, 13 December 2007

**Re: Submitting CHRAC Amicus Brief in relations to Appeal made by Nuon Chea against the Provisional Detention Order of the Co-Investigating Judges**

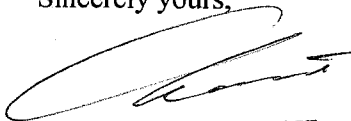
Dear Honorable Judges of Pre-Trial Chambers,

The Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 local NGOs, is interested in submitting an amicus curiae brief regarding the appeal on the detention of Mr. Nuon Chea, according to the public announcement issued by the Pre-Trial Chambers of the Extraordinary Chambers in the Courts of Cambodia (ECCC) on 27 November 2007.

CHRAC is in agreement with the court that it is necessary to carefully review and consider the detention order issued by the Co-Investigating Judges of the ECCC. We are confident that the hearing of appeal by the Pre-Trial Chamber will be held in accordance with international standards and urge the court to continue to strive to ensure that the human rights of all are respected throughout this process.

Please find attached, the amicus curiae brief for your consideration.

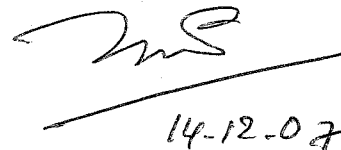
Sincerely yours,



**CHUN SATH**

*on behalf of*  
Chairman of CHRAC  
President of ADHOC

*Handwritten signature*



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**គណៈកម្មាធិការរក្សាសិទ្ធិមនុស្ស នៃ អង្គការសហគមការពារសិទ្ធិមនុស្សកម្ពុជា**  
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**AMICUS CURIAE BRIEF**

**RELATING TO THE APPEAL BY *NOUN CHEA*, AGAINST THE ORDER OF PROVISIONAL DETENTION BY THE CO-INVESTIGATING JUDGES**

**អង្គជំនុំជម្រះនៃអង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា**  
**THE PRE TRIAL CHAMBER OF THE ECCC**  
 លេខ No. :... ០០២ .....  
 ថ្ងៃទី..... ១៤... ខែ... ១២០៧ .....  
 Date.....  
 ម៉ោងនិង ១៤ ៣០ .....  
 Time.....

Respectfully Submitted By:

The Cambodian Human Rights Action Committee  
(CHRAC)

Phnom Penh, December 13, 2007

- For more information, please contact CHRAC Representatives :*
- Mr. THUN Saray, Chairman of CHRAC/President of ADHOC (Tel : 016 880 509)
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**បានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម**  
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 ឆ្នាំ (Year/Année)..... ២០០៧ .....  
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## *INTEREST OF THE AMICI CURIAE*

The Cambodian Human Rights Action Committee (CHRAC), a coalition of 23 local NGO members, was established in 1994 to address the human rights situation in Cambodia. CHRAC also has the Khmer Rouge Trials Project, which works on outreach, advocacy and monitoring in relation to the Extraordinary Chambers in the Courts of Cambodia (ECCC). CHRAC submits a brief to the ECCC as amicus curiae based on its long relationship with the court, its connection with the people of Cambodia, and its extensive background on issues relating to the ECCC.

## *STATEMENT OF FACTS*

NUON CHEA has appealed the Order of Provisional Detention filed by the Office of the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") dated September 19, 2007. Mr. NUON bases his appeal on the claims that the Rule 63(1) adversarial hearing was held in breach of his right to counsel as provided by the rules and international legal standards. Mr. NUON alleges that the waiver of counsel during his Initial Appearance and the Adversarial Hearing was neither voluntary, informed, nor unambiguous, and thus legally invalid. Additionally, Mr. NUON claims that the conditions for pretrial detention under Rule 63 of the Internal Rules have not been met.

## *SUMMARY*

It is imperative that the human rights of all persons be respected at all times and in all places. The fact that an individual is accused of committing particular acts which offend the sensibilities of the general population does not alter the fact that the presumption of innocence must prevail and the accused person's human rights must be preserved. The right to counsel is a fundamental aspect of these human rights and must be preserved. Mr. NUON has asserted that his right to counsel was breached and that he is being held without the conditions for pretrial detention having been met. The member organizations of CHRAC believe strongly in upholding human rights standards, and it is for this reason that we have reviewed this case.

CHRAC is of the opinion that if the Defense's characterization of the circumstances surrounding Mr. NUON's Initial Appearance and Detention Hearing are correct, then it appears that Mr. NUON's right to counsel has been breached, both under the Internal Rules and international standards. CHRAC notes, however, that it has not had the opportunity to consult the Prosecution's brief in response, which may shed further light on the circumstances surrounding Mr. NUON's detention hearing. Since that brief is unavailable, CHRAC must make its determination based on the information before it and therefore urges the ECCC to conduct a new hearing that complies fully with the right to counsel. We also encourage the court to disregard any statements made on 19 September or at any time before Mr. NUON gained access to his lawyer.

While CHRAC supports a re-hearing of Mr. NUON's Initial Appearance and Detention Hearing, it does not support his release on bail. CHRAC is of the opinion that the conditions for provisional detention outlined in Internal Rule 63(3) are met, and thus the request for release on bail should be denied.

## *ARGUMENTS*

CHRAC believes it is imperative for this Court, as a hybrid international tribunal, to send a strong message to the international community and the domestic Cambodian judiciary by upholding the norms of international criminal law, which require any waiver of counsel to be voluntary, informed,

and unequivocal.<sup>1</sup> This is especially important since the right to counsel is a relatively new concept in Cambodian law, and must be properly demonstrated by the ECCC to help ensure its entrenchment into practice by Cambodian courts. Ensuring Mr. NUON's right to counsel during these proceedings is crucial not only for the perceived validity of the ECCC, but also for helping to build capacity and instill international standards in the domestic judiciary – one of the foremost reasons that the ECCC was established as a hybrid tribunal.<sup>2</sup> The Court should take steps to ensure that any waiver of the right to counsel is done in a setting that bears no trace of coercion, where the Accused is fully aware of what the right to counsel entails and the consequences of waiving it, and that any such waiver is clear, unequivocal, and recorded in accordance with the Internal Rules of the ECCC.

This is also in keeping with the stated goal of the Cambodian Constitution, which underlies the ECCC.<sup>3</sup> The Constitution's preamble asserts that, "having awakened and resolutely rallied" from the tragic rule of the Khmer Rouge, Cambodia is striving to become "an 'Island of Peace' based on a multi-party liberal democratic regime guaranteeing human rights, abiding by law, and having high responsibility for the nation's future destiny."<sup>4</sup> Mr. NUON's appeal presents the Court with an opportunity to assist Cambodia in this quest by strongly affirming the importance of the right to counsel and adherence to firm guidelines in determining whether such right has been waived.

The right to be represented by counsel is a fundamental human right that has been recognized in a variety of international treaties, including the International Covenant on Civil and Political Rights ("ICCPR"),<sup>5</sup> the African Charter on Human and Peoples' Rights,<sup>6</sup> and the American and European Conventions on Human Rights.<sup>7</sup> In particular, the rights enshrined in the ICCPR are explicitly guaranteed in Article 13 of the Agreement establishing the ECCC.<sup>8</sup> In addition, both the 1993 Cambodian Law on Criminal Procedure<sup>9</sup> and the 1992 UNTAC Provisions Relating to the Judiciary and Criminal Law,<sup>10</sup> both of which remain in force and thus underlie the law of the ECCC,<sup>11</sup> recognize the right of the accused not to answer any questions without the assistance of a lawyer. International war crimes tribunals with charters similar to that of the ECCC have also recognized the fundamental nature of the right to counsel.<sup>12</sup> Furthermore, the UN's Human Rights Committee,<sup>13</sup> the Inter-

<sup>1</sup> See *Prosecutor v. Delalic et. al.*, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for Exclusion of Evidence, 2 September 1997, para. 42; *Prosecutor v. Bagosora, et. al.*, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Material Under Rule 89(c), 14 October 2004 ("*Bagosora*"), para. 12, see also *Pfeifer and Plankl v. Austria*, ECHR, 25 February 1002, para. 37.

<sup>2</sup> See Sok An, Deputy Prime Minister of Cambodia, *The Khmer Rouge Tribunal, What it Means for Cambodia*, in JUSTICE INITIATIVES, April 2006, 28, stating that: "We were all too acutely aware of the weaknesses of our judiciary, and wanted to make certain that the trial will meet internationally accepted standards." Available at: [http://www.justiceinitiative.org/db/resource2?res\\_id=103182](http://www.justiceinitiative.org/db/resource2?res_id=103182) (last visited December 11, 2007).

<sup>3</sup> See Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea ("The Law of the ECCC"), Article 20 new, (stating that "the Co-Prosecutors shall prosecute in accordance with existing procedures in force," and shall look to international standards if there is a question concerning the validity or application of such procedures.)

<sup>4</sup> Preamble to the Constitution of the Kingdom of Cambodia, available at <http://www.embassy.org/cambodia/cambodia/constitu.htm> (last visited 6 December 2007).

<sup>5</sup> International Covenant on Civil and Political Rights ("ICCPR"), Article 14(3)(d).

<sup>6</sup> African Charter on Human and Peoples' Rights, Article 7(1)(c).

<sup>7</sup> American Convention on Human Rights, Article 8(2)(d); European Convention on Human Rights, Article 6(3)(c).

<sup>8</sup> Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("The Agreement"), Article 13.

<sup>9</sup> Law on Criminal Procedure, adopted by the National Assembly of the State of Cambodia on the 28th of January, 1993 at its 24th session of its First Legislature, Article 75.

<sup>10</sup> Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia During the Transitional Period, Article 10(1).

<sup>11</sup> See The Law of the ECCC, Article 20 new.

<sup>12</sup> ICTY Statute, Article 21(4)(d), ICTR Article 20(4)(d), ICC Article 67(1)(d).

<sup>13</sup> Concluding Observations of the HRC: Georgia, UN Doc. CCPR/C/79/Add.74, 9 April 1997, para. 28.

American Commission on Human Rights<sup>14</sup> and the European Court of Human Rights have all recognized that the right to a fair trial requires access to a lawyer during detention, interrogation and preliminary investigations.<sup>15</sup>

The established norms of international criminal law hold that the right to counsel can only be waived in circumstances where the waiver is voluntary, informed, and unequivocal. Mr. NUON's waiver seems not to have been valid under these standards, and CHRAC urges the Court to conduct a new hearing that fully complies with his right to counsel and to disregard any statements made on 19 September 2007 or at any other time before he received access to a lawyer. It is important to note, however, that for reasons discussed *infra*, CHRAC does not support the remedy of releasing Mr. NUON on bail.

### The waiver by Mr. NUON appears not to have been voluntary

It appears that Mr. NUON did not comprehend the legal ramifications of his decision to proceed without the assistance of counsel. Thus, it is CHRAC's opinion that all questioning should have stopped when he asserted his desire to have Mr. SON serve as his counsel, and should not have resumed until Mr. NUON had a lawyer. This is in accordance with the standards of the tribunals in Yugoslavia, Sierra Leone, and Rwanda,<sup>16</sup> as well as the Internal Rules of the ECCC.<sup>17</sup>

One of the main reasons for soliciting international assistance in the creation of the ECCC is that Cambodian domestic courts lack experience with international legal standards of due process.<sup>18</sup> The right to be represented by counsel was unheard of during the time of the Khmer Rouge and even during the subsequent Vietnamese occupation. Today, it remains in its infancy. In fact, under the Khmer Rouge regime, which this Court has recognized still has a profound effect on the national psyche to this day,<sup>19</sup> merely being questioned by authority figures would have been a threatening and coercive experience. Thus, in the legal and cultural reality of Cambodia, a decision to proceed with questioning in the absence of a lawyer may be less a voluntary waiver than an instinctual reaction to authority and to a legal proceeding that one has never before encountered and does not understand.

Rule 58(1) of the ECCC's Internal Rules states that "when a charged person has a lawyer, the Co-Investigating judges *shall* summon the lawyer at least 5 (five) days before the interview takes place," and that "during that period, the lawyer may consult the case file."<sup>20</sup> Mr. NUON made clear from his initial meeting with the Defense Support Section (DSS) that he *did* have a lawyer, yet there is no indication that any attempt was made to summon Mr. SON, nor to wait the prescribed five days before questioning Mr. NUON. While Rule 58(2) does provide a mechanism for waiving the right to counsel, under these circumstances, it would hardly be surprising if Mr. NUON did not believe he had a real choice, but rather felt coerced, given the apparent contradiction of the Co-Investigating Judges' (CIJ) words and actions. At his Initial Appearance, Mr. NUON appears to have been informed of his right to remain silent and to have counsel present during questioning. However, given his poor health, the potentially intimidating authority of the CIJs, and the legal culture of Cambodia, it is conceivable that Mr. NUON did not believe that he would actually be allowed to avail himself of his right to counsel, and that he felt coerced into waiving it.

<sup>14</sup> Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc. 8 rev. 1, 1986, p. 154, El Salvador.

<sup>15</sup> *Murray v. United Kingdom*, (41/1994/488/570), 8 February 1996.

<sup>16</sup> See ICTY, ICTR and SCSL, Rules 42(B) and 63(A).

<sup>17</sup> See Extraordinary Chambers in the Courts of Cambodia: Internal Rules, 12 June 2007 ("ECCC Rules") Rule 58.

<sup>18</sup> *Supra* note 2 at 28.

<sup>19</sup> Decision on Appeal Against Provisional Detention Order of Kiang Guek Eav alias "Duch," December 3, 2007, para. 50. ("It appears to the Pre-Trial Chamber that the passage of time has not diminished the impact of the Democratic Kampuchea regime on society.")

<sup>20</sup> ECCC Rules, Rule 58(1) (Emphasis Added).

Mr. NUON specifically informed the DSS that he had already retained a lawyer who would not be available until the next day.<sup>21</sup> He reiterated this when he met with the CIJs shortly thereafter.<sup>22</sup> Nonetheless, the CIJs, though again stating Mr. NUON's right to counsel, appear to have pressed him, saying that, if he wished to make a statement at that time, without his lawyer, they would record it immediately.<sup>23</sup> For a man in Mr. NUON's vulnerable position, unaccustomed to the requirements of due process, the apparent contradiction between being offered a "right" and then feeling pressured to waive it may have implied that the right to counsel existed only in words, but not in fact. This may have been especially true since Mr. NUON had twice expressed his desire to have Mr. SON serve as his lawyer. Under these circumstances, any waiver of the right to counsel may be seen not as a voluntary decision, but as a result of the constructive coercion of the situation in which Mr. NUON was placed.

### The waiver appears not to have been informed

Customary international law holds that a waiver of the right to counsel must be made "with full knowledge of the rights the procedure is enacted to protect and the effect that waiver will have on those rights."<sup>24</sup> Based on the facts presented in his appeal, it appears that Mr. NUON cannot be said to have had such knowledge. Throughout his initial appearance and the Adversarial Hearing, Mr. NUON continued to state that he wished to be represented by his lawyer, Mr. SON. It seems likely, having retained and asserted his right to a lawyer, that Mr. NUON was not fully aware, if at all, of the consequences that might flow from proceeding with questioning and the Initial Hearing without the presence of counsel. As previously explained, it is CHRAC's position that the Court should use this opportunity to emphasize to the Cambodian courts that a defendant must fully understand what he or she is giving up in order for a waiver to be valid.

While Mr. NUON was informed of his rights during his initial appearance, there is no indication that the CIJs made any attempt to explain the importance or significance of those rights, nor the consequences that might flow from waiving them. It also appears that Mr. NUON may not have been informed at all of his right to remain silent during the Adversarial Hearing, as distinct from the Initial Appearance. At this stage, even the Office of the Co-Prosecutors expressed concern, asking the CIJs to provide "a clear explanation" to Mr. NUON precisely because he "requested a lawyer then later said it was not necessary to have a lawyer for this hearing."<sup>25</sup> The contradiction of asking for a lawyer and then claiming not to require one indicates clearly the Mr. NUON did not fully understand the consequences of waiving his right to counsel, as even the Prosecution acknowledged. This oversight should be corrected to ensure compliance with international standards and to encourage the adoption of similar protections in the Cambodian domestic courts after the ECCC has concluded its work.

### The waiver appears not have been unequivocal

International standards require the waiver of right to counsel to be unequivocal.<sup>26</sup> In the case of Mr. NUON, discussed *supra*, his consistent assertion that he did, indeed, want the assistance of counsel makes any purported waiver of that right far from unequivocal. In his statements during the Initial Appearance, both with regards to giving a statement and proceeding with the Adversarial Hearing, Mr. NUON referred to his lawyer.<sup>27</sup> As previously explained, there is reason to believe that Mr. NUON

<sup>21</sup> Appeal Against Order of Provisional Detention, November 12, 2007 ("Appeal") Appeal Against Order of Provisional Detention at Paragraph 5, *citing* Document No. A-28, Letter from DSS to OCIJ, 19 September 2007.

<sup>22</sup> Appeal at para. 6, *citing* Document No. D-20, Written Record of Initial Appearance, p. 2-3.

<sup>23</sup> *Ibid*, para. 6.

<sup>24</sup> *R. v. Morin*, Supreme Court of Canada, [1992] 1 SCR 771; *See also Miranda v. Arizona*, Supreme Court of the United States, 384 U.S. 346.

<sup>25</sup> Appeal at para. 7, *citing* Document No. C-8, Written Record of Adversarial Hearing, pp. 2-3.

<sup>26</sup> *See Bagosora*, para. 12, *see also Pfeifer and Plankl v. Austria*, ECHR, 25 February 1002, para. 37.

<sup>27</sup> Appeal at para. 6, *citing* Document No. D-20, Written Record of Initial Appearance, p. 2-3.

did not fully understand the implications of speaking without his lawyer present. Thus, his continued reference to his lawyer during the Initial Appearance is a strong indication that he had not unequivocally waived his right to representation.

Mr. NUON's statements at the Adversarial Hearing were even less unequivocal. After the CIJs refused the request of the Co-Prosecutors to more clearly explain Mr. NUON's rights, he stated that: "I want a lawyer, but I do not require the presence of my lawyer at this time."<sup>28</sup> The statement that he did, indeed, want a lawyer, makes it impossible to claim that any waiver of Mr. NUON's right to counsel was unequivocal.

### Conclusions regarding the right to counsel

CHRAC wishes to emphasize that its observations and recommendations have been made without the benefit of access to the prosecution's brief in response to Mr. NOUN's appeal. Based on the information available, CHRAC recommends that the court conduct a rehearing that scrupulously honors Mr. NOUN's right to counsel. We feel that is essential for the ECCC to send a strong message about the importance of human rights by adhering firmly to international standards regarding the right to counsel and insisting that any waiver thereof be voluntary, informed and unequivocal. We respectfully remind the court that it is not the responsibility of the Charged Person to ensure that his waiver is voluntary, informed and unequivocal, but rather that responsibility rests with the court. While CHRAC urges the court to correct the procedural infirmities that appear to have taken place in this instance, it nonetheless supports the continued detention of Mr. NOUN, contingent upon a rehearing, as it appears that the necessary conditions for pre-trial detention under Rule 63(3) have been satisfied.

### Consideration of the conditions for pretrial detention under Internal Rule 63(3)

According to Rule 63(3), in order to justify provisional detention, it is first necessary that the court have a well-founded reason to believe that the person may have committed the crimes of which they are accused. On this ground CHRAC defers to the court, as it is the only body with the ability to comment on the evidence in the case at this stage of the proceedings. Secondly, the Co-Investigating Judges must consider it necessary to detain the charged person for one of the five following reasons: 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; to preserve evidence or prevent the destruction of any evidence; to ensure the presence of the Charged Person during the proceedings; to protect the security of the Charged Person; or to preserve the public order.

The *Decision on Appeal Against Provisional Detention Order of Kiang Guek Eav alias "Duch"*<sup>29</sup> has provided the framework that will inform subsequent decisions by the Pre-Trial Chamber regarding appeals on provisional detention. It is within the context of that decision that the following arguments are made.

In the case of Mr. NOUN, the Co-Investigating Judges indicated that four of the conditions for detention are met, namely preventing the Charged Person from exerting pressure on witnesses and victims, ensuring his presence throughout the proceedings, protecting his safety, and ensuring public order.

As was stated by the Pre-Trial Chamber of the ECCC "the mere presence of the Charged Person in society can exert pressure on witnesses and prevent them from testifying."<sup>30</sup> The member

<sup>28</sup> Appeal at para. 7, *citing* Document No. C-8, Written Record of Adversarial Hearing, pp. 2-3.

<sup>29</sup> *Supra* note 19.

<sup>30</sup> *Ibid* at para 32.

organizations of CHRAC are concerned about the effect that a release on bail might have on victims and witnesses. As this court aims specifically to involve victims and to use their knowledge and experiences throughout the proceedings, with the full knowledge that their participation can lead to a certain level of societal healing, it is a wholly logical inference to be wary and to predict that the degree of victims' involvement within the process would be affected if Mr. NOUN was released. This effect may be felt through direct pressure exerted on victims and witnesses or through a psychological barrier to participation brought on by fear and indirect intimidation. CHRAC is concerned that Mr. NOUN may be in a position to exert influence over victims and witnesses based on both his past and current status. The potential loss not only of evidence but also of the possibility to encourage a sense of peace and justice in the country would be immeasurable. The court stated that the ability of a Charged Person to seek revenge must be "put in the social context prevailing in Cambodia, where measures to protect witnesses may be limited and weapons easily available. Therefore, the witnesses' willingness to testify is already fragile, and the balance could be easily upset by the release of the Charged Person."<sup>31</sup> CHRAC, however, is not aware of any specific evidence regarding threats made by Mr. NOUN against victims and witnesses. Without this specific evidence, this condition for provisional detention cannot be met. CHRAC encourages the court to ensure that specific information regarding pressure placed on victims and witnesses is presented before allowing this reason to be determinative of provisional detention. Based on the information before us, it appears that this case may differ from that of Mr. DUCH, where specific threats had been made and noted.<sup>32</sup>

Should Mr. NOUN be released, the court would be unable to ensure his presence at trial. The potential of a conviction for both crimes against humanity and for war crimes also holds the potential for a life sentence. The possibility of this sentence may encourage Mr. NOUN to flee. With respect to defense counsel, a determined inability to pay for one's defense, an exceptionally costly endeavour, is not indicative of an inability to finance a departure from the jurisdiction.<sup>33</sup> The necessity of ensuring the presence of Mr. NOUN during his trial is of utmost concern.<sup>34</sup> As there are no provisions for trial in absentia at the ECCC, this situation must be avoided. The Pre-Trial Chamber expressed its opinion that Duch was capable of fleeing Cambodia even without the benefit of a passport.<sup>35</sup> In the case of Mr. NOUN, the risk of flight is intensified by his ownership of a legal passport and by the proximity of his home to the Thai border. Despite these concerns, as was the case with the previous condition, the ECCC must present evidence to indicate that Mr. NOUN has the intention to flee and to not present himself to the court if released on bail. CHRAC is unaware of the existence of this evidence and thus cannot make a determinative statement on this matter.

Third, the increased levels of publicity associated with his detention and his trial have the potential to place Mr. NOUN in a vulnerable position. The court would have no way of guaranteeing his safety were he to be released. However, unlike the case of Duch, where we now know that the Charged Person had come forward in interviews with information, and where his safety was an issue<sup>36</sup>, CHRAC does not have access to specific evidence indicating a threat to Mr. NOUN's personal safety. This evidence is required in order to meet this condition of provisional detention. To preserve Mr. NOUN's physical and mental security throughout trial, CHRAC urges the court to continue making medical services available and to allow his family to visit him in detention. These provisions may reduce the stresses placed on him throughout the proceedings and allow for his continued presence throughout the entirety of the process.

<sup>31</sup> Ibid at para 33.

<sup>32</sup> Ibid at 34.

<sup>33</sup> Supra note 21 at page 22, footnote 100.

<sup>34</sup> *Khmer Institute for Democracy*, "Survey on the Khmer Rouge Regime and the Khmer Rouge Tribunal", 2004, <http://www.bigpond.com.kh/users/kid/KRT-Tribunal.htm>. In total 536 interviews were conducted in Phnom Penh and ten provinces between the 16th and 27th August 2004. 96% respondents wanted to have trials for Khmer Rouge leaders.

<sup>35</sup> Supra note 19 at para 40.

<sup>36</sup> Ibid at para 42.



The fourth possible condition for provisional detention, relating to the need to preserve public order, is however met by the information present at this time. It is likely that should Mr. NOUN be released, public order may be compromised. The court has acknowledged that proceedings before the ECCC may trigger a significant response from victims due to the presence of Post-Traumatic Stress Disorder.<sup>37</sup> CHRAC agrees with the court when it states that "the Cambodian people have been waiting thirty years for justice, to see an end to impunity and to see in evidence what happened during this tragic period of their history."<sup>38</sup> For those individuals who were direct victims of the Khmer Rouge regime, it is essential that justice is seen to be done. For younger generations interested in this process, it is essential that the ECCC continue to act as an educational tool regarding the offences committed during that time and the possibility of justice. The defense argues that Mr. NOUN has been peacefully reintegrated into Cambodian society and that if anyone wanted him to be harmed it would likely have happened already.<sup>39</sup> However, CHRAC must agree with the statements of the Pre-Trial Chamber in the decision regarding Duch,

The Defense has argued that when the Charged Person was at liberty between 1979 and 1999, public order was not disrupted. The Pre-Trial Chamber considers that the situation is different today, now that the Charged Person's identity is well-known, that he has publicly admitted that he was Chairman on S-21 and that the process of justice has started. Because of the different circumstances, there is no justification to rely on the past to assert that public order will not be disrupted if the Charged Person were to be released.<sup>40</sup>

Additionally, this is the first time in history that a court of this type has been located within the actual country where the crimes were committed.<sup>41</sup> Because of this, the public is in a better position to react negatively against the Charged Person in a way that may compromise public order.

The release of a key defendant by the ECCC would further erode the already limited sense of faith that the Cambodian people have in the courts to provide justice. After extended periods of suffering, the release of a key player in the Khmer Rouge regime would likely lead to feelings of betrayal. The pursuit of justice must be continued in order to ensure that the memories of those who suffered under the Khmer Rouge regime are respected.

CHRAC feels strongly that this fourth condition for provisional detention has been met. The Pre-Trial Chamber in the Duch decision on provisional detention referred to general societal phenomena as being enough to meet this condition and CHRAC is strongly in agreement with this.<sup>42</sup> In this case, the identical societal phenomena are present, and thus justify the order of provisional detention. As is stated in Internal Rule 63(3), the court need only find evidence of one condition in order to justify provisional detention. Thus, CHRAC finds that provisional detention for Mr. NOUN is well justified due to the need to preserve public order, regardless of whether evidence exists to prove the other conditions.

### Recommendations

CHRAC urges the Pre-Trial Chamber of the ECCC to consider the following opinions.

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<sup>37</sup> Ibid at para 50.

<sup>38</sup> Ibid at para 53.

<sup>39</sup> Appeal at para 50.

<sup>40</sup> Supra note 19 at 55.

<sup>41</sup> The International Criminal Tribunal for the Former Yugoslavia is located in The Hague, The Netherlands. The International Criminal Tribunal for Rwanda is located in Arusha, Tanzania.

<sup>42</sup> Supra note 19 at paras 49 – 56.

Right to Counsel

CHRAC believes strongly in upholding international human rights standards, particularly including the rights to counsel. It therefore encourages the court to consider re-hearing the Initial Appearance and Detention Hearing with counsel for Mr. NOUN present and with proper preparation time allowed. Statements made by Mr. NOUN prior to the arrival of his lawyer should be disregarded.

Conditions for Provisional Detention

In the event of a re-hearing, CHRAC agrees with the Co-Investigating Judges that the conditions for provisional detention outlined in 63(3) of the Internal Rules are met due to the threat to public order that is present.

Other

CHRAC clearly understands the requirements of confidentiality that are implicit in the court's proceedings. With respect for this requirement, but also in the interests of transparency, CHRAC asks the court to consider providing information from all parties when requesting that organizations and the public submit *amicus curiae* briefs. This request is made in the interest of providing balanced and well-informed opinions to the court.

**CONCLUSIONS**

As a coalition of organizations dedicated to the realization of full human rights within the Kingdom of Cambodia, we support the ECCC and the potential that it has to restore the dignity of the justice system within Cambodia. It is for this reason that we urge the court to ensure that it is at all times conducting itself in a manner that upholds the fundamental human rights of all who come before it, victim, witness, or accused. Within this framework, CHRAC acknowledges and supports the continued detention of Mr. NOUN, which will contribute to a greater sense of justice and peace throughout Cambodia.