

C9/4/1

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA  
BEFORE THE PRE-TRIAL CHAMBER

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APPEAL AGAINST ORDER ON EXTENSION  
OF PROVISIONAL DETENTION

<b>ឯកសារចម្លងត្រឹមត្រូវតាមច្បាប់ដើម</b>
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Filed by

Counsel for NUON Chea:  
SON Arun  
Michiel PESTMAN  
Victor KOPPE  
MAM Thanna  
Andrew IANUZZI

Distribution

Pre-Trial Chamber:  
PRAK Kimsan  
HOUT Vuthy  
Rowan DOWNING  
NEY Thol  
Katinka LAHUIS  
PEN Pichsaly

**Co-Prosecutors:**

CHEA Leang  
Robert PETIT  
TAN Senarong  
Anees AHMED

## I. INTRODUCTION

1. Pursuant to Rules 73, 74, and 75 of the ECCC Internal Rules (the "Rules"), counsel for Charged Person NUON Chea (the "Defence") submit this appeal to the Pre-Trial Chamber (the "PTC") against the 'Order on Extension of Provisional Detention' (the "Extension Order")<sup>1</sup> issued by the Office of the Co-Investigating Judges (the "OCIJ"). For the reasons stated below, the Defence submits that: (i) the appeal is admissible; (ii) Mr Nuon's continued detention is neither factually nor legally justified; (iii) the Extension Order is procedurally defective; and (iv) provisional release subject to conditions is appropriate under the circumstances.

## II. RELEVANT FACTS

2. Mr Nuon stands accused by the Office of the Co-Prosecutors (the "OCP") of bearing responsibility for over twenty different crimes, by way of seven distinct modes of liability, committed in more than twenty-six discrete locations within the territory of Democratic Kampuchea ("DK") between April 1975 and January 1979.<sup>2</sup> On the strength of these allegations, he was arrested, brought before the OCIJ, and formally charged with planning, instigating, ordering, directing, and otherwise aiding and abetting crimes against humanity and grave breaches of the Geneva Conventions of 1949.<sup>3</sup>
3. Based on its allegations as well as additional material submitted to the case file, the OCP claimed that the conjunctive conditions of Rule 63(3) were satisfied and Mr Nuon therefore should be provisionally detained pending trial.<sup>4</sup> Specifically, the OCP argued that (i) there was a well-founded reason to believe that Mr Nuon may have committed the crimes specified in the Introductory Submission *and* (ii) provisional detention was necessary to prevent the exertion of any pressure on witnesses; to prevent the destruction of evidence; to ensure his presence during the proceedings; to protect his safety; and to preserve public order.<sup>5</sup>

<sup>1</sup> Document No. C-9/3, 16 September 2008.

<sup>2</sup> See Document No. C-9/2, 'Objections to Extension of Provisional Detention', 10 September 2008 (the "Extension Objections"), paras. 2-4 (citing Document No. D-3, Introductory Submission, 20 July 2007, paras. 37-72, 75-81, 115, 117, 122 and Document No. D-83, 'Co-Prosecutors' Supplementary Submission Regarding the North Zone Security Center', 28 March 2008 (the "Supplementary Submission", paras. 5-11)).

<sup>3</sup> See Document No. C-6, 'Arrest Warrant', 17 September 2007; Document No. D-20, 'Written Record of Initial Appearance', 19 September 2007, pp. 2-3.

<sup>4</sup> See Document No. C-8, 'Written Record of Adversarial Hearing', 19 September 2007.

<sup>5</sup> *Ibid.*

4. Over Mr Nuon's pointed objections, the OCIJ sustained the application in summary fashion, upholding each of the OCP's submissions with respect to Rule 63(3)'s various criteria.<sup>6</sup> No particular evidence was mentioned by the OCIJ, and no concrete support for the order was provided. Furthermore, no alternative (i.e. less restrictive) measures were considered.
5. On appeal, the Defence suggested that (i) there was insufficient evidence to connect Mr Nuon to the crimes charged and (ii) each of the Rule 63(3)(b) criteria was supported by abstract notions rather than grounded in actual fact.<sup>7</sup> Nevertheless, the Defence proposed a set of conditions for Mr Nuon's release on bail intended to allay these hypothetical concerns.<sup>8</sup> In its decision, this Chamber upheld the Provisional Detention Order in its entirety, substituting its own analysis for the "reasons" of the OCIJ.<sup>9</sup> The Defence's bail proposal was dismissed out of hand, and no alternative regime was considered.<sup>10</sup>
6. Upon receiving notice of the OCIJ's intention to extend Mr Nuon's detention by an additional year, the Defence objected: while conceding the existence of a well-founded reason to believe that Mr Nuon may have committed *some* of the crimes specified in the Introductory Submission,<sup>11</sup> it was argued that the Rule 63(3)(b) criteria were no longer (and never had been) satisfied.<sup>12</sup> Additionally, the Defence suggested that the Detention Order was procedurally defective for its failure to set out the factual basis for detention and urged the OCIJ to avoid a similar oversight in its new order.<sup>13</sup> Finally, the Defence renewed its request for Mr Nuon's release "pursuant to reasonable conditions which would ensure his presence at any future trial".<sup>14</sup>

<sup>6</sup> See Document No. C-9, 'Provisional Detention Order', 19 September 2007, paras. 5–6 (the "Detention Order").

<sup>7</sup> See Document No. C-11/4, 'Appeal Against Order of Provisional Detention', 12 November 2007 (the "Detention Appeal"), paras. 41–53.

<sup>8</sup> *Ibid.*, paras. 55–58 and Annex A.

<sup>9</sup> See Document No. C-11/54, 'Decision on Appeal against Provisional Detention Order of Nuon Chea', 20 March 2008 (the "Detention Decision"), paras. 41–81 and p. 28.

<sup>10</sup> *Ibid.*, para. 83.

<sup>11</sup> See Extension Objections, para. 10.

<sup>12</sup> *Ibid.*, para. 11.

<sup>13</sup> *Ibid.*, paras. 12–14.

<sup>14</sup> *Ibid.*, para. 11 (referring to the original proposals contained in Annex A of the Detention Appeal).

7. Over these objections and despite the request for specificity, the OCIJ extended Mr Nuon's provisional detention for an additional year in perhaps its least articulate order to date. Again, the bail proposal was ignored, and no alternative measures were considered.

### III. APPLICABLE LAW

#### A. Jurisdiction of the Pre-Trial Chamber

8. Rule 73 vests this Chamber with "sole jurisdiction over [...] appeals against decisions of the Co-Investigating Judges, as provided in Rule 74". Pursuant to Rule 74(3)(f), a charged person may appeal against any order of the Co-Investigating Judges "relating to provisional detention or bail". This category presumably includes orders extending provisional detention, which "are open to appeal".<sup>15</sup>

#### B. Standard of Appellate Review

9. Pursuant to well-established civil-law appellate practice, this Chamber should review the question of provisional detention *de novo* without any deference to the legal or factual findings of the OCIJ. In making its determination, the PTC has unfettered discretion to uphold, modify, or suspend the detention order based upon the existing case-file and any additional information presented by the parties on appeal.<sup>16</sup>

#### C. Conditions for and Extension of Provisional Detention

10. 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

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<sup>15</sup> Rule 63(7).

<sup>16</sup> See Document No. C-22/1/29, Pre-Trial Chamber, 'Decision on Ieng Sary's Requests for Leave to Suspend the Consideration of His Appeal on Provisional Detention & for an Order Directing the OCIJ to Place Ieng Sary in a Hospital Facility', 30 April 2008, para. 7 ("The Pre-Trial Chamber has jurisdiction in 'Ieng Sary's Appeal against Provisional Detention Order' to modify the conditions of detention and to suspend the detention on conditions.")

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*.'<sup>17</sup>

#### D. The Right to a Reasoned Order

11. According to the Rules, a provisional detention order must "set out the legal grounds and factual basis for detention".<sup>18</sup> Any order extending such detention should be equally reasoned,<sup>19</sup> and mere reference to the applicable statutory provision is insufficient.<sup>20</sup> Moreover, abstract or stereotyped analysis is inadequate; rather, a detaining court must "record the arguments for and against release in a reasoned ruling".<sup>21</sup> 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.<sup>22</sup>

#### E. Provisional Release

12. The Defence incorporates by reference the submissions contained at paragraph 30 of the Detention Appeal.
13. Additionally, it has been noted that a distinction in approach to provisional release exists between human-rights bodies and international tribunals: while the former "disfavor pre-trial detention and place the burden on States to justify continued detention", the latter "have treated pre-trial release as the exception and in practice have placed the burden on the defence to show that release is warranted".<sup>23</sup> This divergence is explained, in part, by the language of the various 'Rules of Procedure and Evidence' of the international tribunals. These rules mandate that accused persons *shall* be initially detained, and the

<sup>17</sup> Document No. C-33/I/7, Pre-Trial Chamber, 'Decision on Nuon Chea's Appeal Concerning Provisional Detention Conditions', 26 September 2008, para. 15 (emphasis in original) (In this case, the PTC was specifically addressing the risk that a defendant might put pressure on witnesses or obstruct the proceedings based on the fact that he had been a member of an organized group.); *see ibid.*, para 21 ("With the passage of time, the threshold becomes higher as the investigation progresses and the risk necessarily decreases.")

<sup>18</sup> Rule 63(2)(a).

<sup>19</sup> *See* Rule 63(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.")

<sup>20</sup> Jessica Simor and Ben Emmerson QC, HUMAN RIGHTS PRACTICE, (Sweet & Maxwell 2006), § 5.045.

<sup>21</sup> *Ibid.*, § 5.052.

<sup>22</sup> *Ibid.*, § 5.044 ("The purpose of the obligation to give reasons is to enable the detained person to apply to a court to challenge the lawfulness of the detention [...].")

<sup>23</sup> *See, e.g.*, Anne Heindel, Legal Advisor of the Documentation Center of Cambodia, "Nuon Chea Detention Extension" ("The jurisprudence of human rights bodies such as the Inter-American Commission, European Court of Human Rights, and Human Rights Committee disfavors pre-trial detention and places the burden on states to justify continued detention. In contrast, international and hybrid criminal courts have treated pre-trial release as the exception and in practice have placed the burden on the defence to show that release is warranted.")

burden of subsequently demonstrating that release is appropriate is placed squarely on the defence.<sup>24</sup> To the contrary, the ECCC has adopted a more discretionary approach whereby the OCIJ determines whether or not to detain or release a charged person based on an initial analysis of the conditions set forth in Rule 63(3).<sup>25</sup> The language of that Rule—well known to the civil-law jurisdictions whose laws are the subject of ECHR analysis—strongly suggests that it was drafted with human-rights jurisprudence in mind. Therefore, with respect to the above-mentioned distinction, this tribunal should give due consideration to the following established principles.

14. Human-rights law recognizes “a *prima facie* right to bail pending trial”.<sup>26</sup> 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.<sup>27</sup> If bail is ultimately denied, the accused person is entitled “to have his case treated as a priority by the prosecution and the court”.<sup>28</sup>

#### IV. ARGUMENT

##### A. The Appeal is Admissible

15. The instant appeal is admissible pursuant to Rules 63(7) and 74(3)(f). Furthermore, it has been submitted within the time-frame imposed by Rule 75(3).

##### **B. There is no Well-Founded Reason to Believe that Mr Nuon May Have Committed All of the Crimes Specified in the Introductory and Supplementary Submissions**

16. After a full year of judicial investigation,<sup>29</sup> there is a well-founded reason to believe that Mr Nuon *may* bear responsibility—strictly in the Rule 63(3)(a) sense<sup>30</sup>—only for those

<sup>24</sup> See ICTY, ICTR, and SCSL Rules 64 (“Upon being transferred to the seat of the Tribunal, the accused *shall be detained* in facilities provided by the host country, or by another country.”) and 65(A) (“Once detained, an accused may not be released *except* upon an order of a Chamber.”) (emphasis added).

<sup>25</sup> See Rule 63(1)(a) (“The Co-Investigating Judges *may* order the Provisional Detention of a Charged Person after an adversarial hearing. [...] If Provisional Detention is not ordered, the Charged Person shall be released.”) (emphasis added).

<sup>26</sup> Simor and Emerson, § 5.048; *see also ibid.* § 5.052 (“A person charged with an offence must always be released pending trial unless the state can show there are ‘relevant and sufficient’ reasons to justify his continued detention.”)

<sup>27</sup> *See, e.g., Jaworski v. Poland*, ECHR, Case No. 25715/02, ‘Judgment’, 28 March 2006 (the “Jaworski Judgment”), paras. 41–42.

<sup>28</sup> Simor and Emerson, § 5.055.

<sup>29</sup> *See* Document Nos. D-25, D-40, D-43, D-68, D-82, D-86–D-90, D-91, D-92, D-93, D-94, D-95 and corresponding sub-files.

alleged crimes related to the activity of Office S-21. With respect to the many remaining accusations contained in the Introductory and Supplementary Submissions, there is no evidence on the case file which would satisfy an objective observer that the OCP's version of events is an accurate one. Nor is there any reason to believe that such material exists. Of the witnesses interviewed by the OCIJ<sup>31</sup> (apart from Duch), none appear to have implicated Mr Nuon in any criminal activity.<sup>32</sup> Additionally, none of the documents collected by the OCIJ<sup>33</sup> (apart from those related to Office S-21) appear to link Mr Nuon to the commission of any crime.<sup>34</sup> Arguably, the case against Mr Nuon—to the extent that one exists at all—is limited to events said to have taken place in connection with the work of Office S-21.

### **C. No Additional Grounds Exist to Justify Mr Nuon's Continued Provisional Detention**

17. The existence of a well-founded reason to believe that Mr. Nuon 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<sup>35</sup> 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 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's initial detention have been further bolstered by *concrete evidence*, as required.

### **D. The Extension Order Does Not Sufficiently Set Out the Factual Basis for Mr Nuon's Detention**

18. It has finally been clarified by the OCIJ that Mr Nuon is being detained on the perceived strength of the claim that he may bear direct and/or superior responsibility for killing, torture, and physical and/or mental abuse said to have taken place in connection with the

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<sup>30</sup> That is, putting aside issues of the admissibility, weight, and/or reliability of the material currently on the case file—none of which has yet to be tested or rebutted. *N.B.* The Defence considers the reliability of Duch's statements to be highly suspect and will likely make further submissions in this regard to the OCIJ.

<sup>31</sup> See Document Nos. D-25, D-40, D-68, D-91, D-92, D-94 and corresponding sub-files.

<sup>32</sup> *N.B.* Not all of these witness interviews have been translated into English.

<sup>33</sup> See Document Nos. D-43, D-82 and corresponding sub-files.

<sup>34</sup> *N.B.* Not all of these documents have been translated into English.

<sup>35</sup> See Detention Appeal, paras. 44–53.

work of Office S-21.<sup>36</sup> Yet that is only one of the many permutations arising from the OCP's sweeping allegations, and no specific assessment by the OCIJ with regard to the remaining charges has been forthcoming.<sup>37</sup> This failure gives the impression that there is no well-founded reason to believe that Mr Nuon is responsible for the additional allegations. The Defence, however, seriously doubts that this is the OCIJ position.

19. Far more puzzling is the OCIJ's cursory treatment of the Rule 63(3)(b) analysis. While the Rules and the relevant human-rights jurisprudence require the OCIJ to produce a reasoned decision which goes beyond mere reference to the applicable statutory provisions, the Extension Order indicates only 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".<sup>38</sup> Given this rather perfunctory assessment, it can only be assumed that no further analysis on this important point has been undertaken.
20. In short, the Extension Order is best described as an uncritical endorsement of a stale decision. The purpose of periodically revisiting the question of provisional detention is to assess the situation afresh and not—as the OCIJ has done—to simply resurrect an outdated order. Unfortunately, the analytical rigor normally associated with the judicial process appears to have been replaced by a rubber-stamp approach to the evaluation of "evidence". Deference to received wisdom—while perhaps to be expected from the OCP and Civil Parties—is wholly inconsistent with the OCIJ's mandate to conduct itself "impartially".<sup>39</sup> Judicial decisions such as the Extension Order suggest either an inability or an unwillingness to grapple with issues, thereby raising serious doubts as to this Tribunal's commitment to "ascertaining the truth".<sup>40</sup>

#### **E. Provisional Release Subject to Conditions is Appropriate**

21. Neither the OCIJ nor this Chamber has seriously considered the imposition of a less-restrictive alternative regime designed to alleviate the putative Rule 63(3)(b) issues. Both Chambers have simply stated—without explanation—that no bail order would be

<sup>36</sup> See Extension Order, p. 2.

<sup>37</sup> *N.B.* The OCIJ's original order referred simply to "the many documents and witness statements implicating Nuon Chea" without further detail. Detention Order, para. 5.

<sup>38</sup> Extension Order, p. 2.

<sup>39</sup> Rule 55(5).

<sup>40</sup> Rule 55(5).



rigorous enough to protect the public interest.<sup>41</sup> Yet the presumption of innocence requires a more searching analysis grounded in the practical realities of the case. Assuming (but not conceding) the concerns expressed to date, “house-arrest” at an approved medical facility in central Phnom Penh would address them as effectively as continued detention at the ECCC premises. This alternative would have the added benefit of situating Mr Nuon in close proximity to emergency medical services, which are currently forty-five critical minutes out of reach—at best.<sup>42</sup> As previously argued, “[t]here is every reason to believe that [the Cambodian] authorities are up to the task of monitoring [...] a man in so frail a condition as Mr Nuon”.<sup>43</sup>

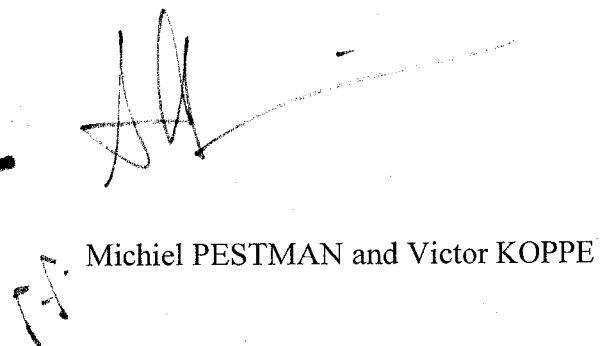
## V. CONCLUSION

22. For the reasons stated above, the Defence submits that this Chamber should vacate the Extension Order and release Mr Nuon subject to the conditions originally proposed in the Detention Appeal. In the alternative, the PTC should make the necessary arrangements for Mr Nuon’s transfer to an approved medical facility in central Phnom Penh. Finally and in any event, this Chamber should instruct the OCIJ to conform its drafting practices to the applicable Rules and relevant jurisprudence.

CO-LAWYERS FOR NUON CHEA



SON Arun



Michiel PESTMAN and Victor KOPPE

<sup>41</sup> See Detention Order, para. 6; Detention Decision, para. 83.

<sup>42</sup> Anyone familiar with the daily commute from Phnom Penh to the ECCC premises is well-aware that, at times of peak traffic congestion, the journey can take over two hours. See Document No. C-39, ‘Written Record of Interview on Conditions of Detention’, 13 October 2008, p. 2 (where the Defence requested the provision of a helicopter in case of the need for emergency medical evacuation).

<sup>43</sup> Detention Appeal, para. 57.