

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

**Criminal Case File No.: 002/19-09-2007-ECCC/OCIJ (PTC 02)**

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**Civil Party Co-Lawyers' Joint Response to the Appeal of Ieng Thirith  
against the Provisional Detention Order**

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**Defence of Ieng Thirith**

Phat Pouy Seang  
Diana Ellis

**Co-Prosecutors**

Ms. Chea Leang  
Mr. Robert Petit

## **I. Procedural Background**

1. On 14 November 2007, the Office of the Co-Investigating Judges (“OCIJ”) issued a Provisional Detention Order (“Order”) against Ieng Thirith for a period not exceeding one year.
2. On 02 January 2008, the Charged Person filed an Appeal (“Appeal”) against this Order, replaced by the version of 08 January 2008, requesting provisional release on any conditions considered appropriate.
3. On 20 March 2008, the Pre-Trial Chamber (“PTC”) decided the issue of Civil Party Participation in Provisional Detention Appeals and on 24 March 2008, directed the Lawyers of the Civil Parties to file a response within 15 days. The Legal Representatives of the Civil Parties, however, were not notified of the Direction of the PTC until 3 April 2008. As a result of the late notice, the Legal Representatives of the Civil Parties requested on 7 April 2008 an extension of the deadline. This request was granted, permitting an extension of the deadline until 25 April 2008.<sup>1</sup>

The Civil Parties’ Co-Lawyers herewith submit a joint response to the Appeal.

## **II. Summary of the Arguments**

4. The discretion of the OCIJ has been properly exercised and shows no unreasonable and unsustainable grounds. The Appeal of the Defence shows no error in the detention order.

Pursuant to Rule 63 (3) (a), there are well-founded reasons to believe that the Charged Person is strongly suspected of having committed the crimes detailed in the Introductory Submission. Furthermore, the order of provisional detention is a necessary measure to prevent the Charged Person from interfering with victims and witnesses, to preserve the Public Order, to secure her safety and to ensure her presence in the upcoming trial.

The order fulfils the requirements of Rule 63 (3) (b)(i-v).

## **III. Relevant Facts**

5. In her Appeal the Charged Person argues that:
  - (i) the Order is not based on well-founded grounds to believe that the Charged Person may have committed such severe crimes as contained in the Introductory Submissions, conversely, she denies any.

<sup>1</sup> PTC Decision on 9 April 2008; Court Document C 20/I/16

- responsibility, declares the facts relied upon were “100 % false” and declares that she worked only for the benefit of the people,<sup>2</sup>
- (ii) there is no risk of flight and that she demonstrated this absence of risk when, while being aware of the establishment of the ECCC and informed about her forthcoming arrest, she did not take steps to flee the country and always returned from trips abroad,<sup>3</sup>
  - (iii) the Public Order will not be disturbed by a provisional release and her safety will not be put at risk, as evidenced by the fact that prior to her detention, she lived openly without incident,<sup>4</sup>
  - (iv) the Order of the OCIJ did not present any evidence that she might interfere with witnesses and victims and did not undertake any such attempt,<sup>5</sup>
  - (v) her state of health is weak.<sup>6</sup>

#### **IV. Scope of the Appeal and role of the Pre-Trial Chamber**

6. In the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) it has been acknowledged that the Trial Chamber exercises discretion in many different situations – such as when imposing a sentence, determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure.<sup>7</sup>
7. The OCIJ before the ECCC has the same function to order provisional detention or release on bail as the Trial Chamber at the ICTY and exercises likewise the same discretion in its decisions. The Pre-Trial Chamber is competent to decide appeals against provisional detention orders and is in this respect comparable with Appeal Chambers in other International or Internationalised Courts.<sup>8</sup>
8. Where an appeal is brought from a discretionary decision of a Trial Chamber, the issue

<sup>2</sup> see para 11 of the Appeal

<sup>3</sup> see para 17, 40, *ibid.*

<sup>4</sup> see para, 43-47, *ibid.*

<sup>5</sup> see para 48-54, *ibid.*

<sup>6</sup> see para 17 (iv) and the medical report in Annex A, *ibid.*

<sup>7</sup> *Prosecutor v. Milosevic*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case No. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, 18 April 2002 (hereinafter “Refusal to Order Joinder”), para 3

<sup>8</sup> Very clear in this respect in: *Prosecutor v. Moinina Fofana*, Case No. SCSL-04-14-AR65, Appeal against Decision refusing bail, 1 March 2005, para 20, where the Chamber notes “function of a *judge or Trial Chamber*” to grant bail (emphasis added)

in that appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with that decision, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently. That is fundamental to any discretionary decision. Only when an error in the exercise of discretion has been demonstrated, may the Appeals Chamber substitute its own exercise of discretion in place of the discretion exercised by the Trial Chamber.<sup>9</sup>

9. The OCIJ decision on provisional detention order is discretionary and the Pre-Trial Chamber on review determines only whether the Judges “correctly exercised its discretion in reaching this opinion.”<sup>10</sup>

At the Special Court for Sierra Leone (“SCSL”) the Appeals Chamber stated that the *Judge or Trial Chamber* has to exercise his or their discretion to grant or refuse bail. The Appeals Chamber will not substitute its own discretion for that of the Judge or Trial Chamber.<sup>11</sup>

The parties challenging a provisional detention order or a provisional release decision bear the burden of showing that the Judges committed a “discernible error.”<sup>12</sup>

10. The Appeals Chamber will only overturn a Trial Chamber’s decision on provisional release where it is found to be “(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.”<sup>13</sup>
11. In order to meet this test, there must be a showing either that the Trial Chamber (1) “misdirected itself [...] as to the principle to be applied;” (2) misdirected itself “as to the law which is relevant to the exercise of discretion;” (3) “gave weight to extraneous or irrelevant considerations;” (4) “failed to give weight or sufficient weight to relevant considerations;” (5) “made an error as to the facts upon which it has exercised its

<sup>9</sup> *Prosecutor v. Milosevic*, Refusal to Order Joinder, para 3

<sup>10</sup> *Prosecutor v. Stanasic*, Case No. IT-04-79-AR65.I, Decision on Prosecution’s Interlocutory Appeal of Mico Stanasic’s Provisional Release, 17 October 2005, para 6

*Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-AR65.2, Decision on Ljube Boskoski’s Interlocutory Appeal on Provisional Release, 28 September 2005, para 5

<sup>11</sup> *Prosecutor v. Moinina Fofana*, Case No. SCSL-04-14-AR65, Appeal against Decision refusing bail, 1 March 2005, para 20 (later: “Fofana Bail Decision”)

<sup>12</sup> Ibid.

<sup>13</sup> *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defence Counsel, 1 November 2004, para. 10

discretion;" or (6) rendered a decision "so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."<sup>14</sup>

The Appeals Chamber at the SCSL even noted that they may quash a decision only if it "is logically perverse or evidentially unsustainable."<sup>15</sup>

12. A Trial Chamber is not obliged to consider *all* possible factors and must take the particular circumstances of each case into account. It must, however, render a reasoned decision.<sup>16</sup>
13. Therefore, it has been shown that the scope of the appeal and role of the Pre-Trial Chamber is rather limited.

#### **V. Relevant Law**

14. Pursuant to Rule 63 (3) Internal Rules ("IR") the Co-Investigating Judges may order the Provisional Detention of a Charged Person under the following conditions:

"a) there is well founded reason to believe that the person may have committed the crimes specified in the Introductory or Supplementary Submission; and

b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:

(i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;

(ii) preserve evidence or prevent the destruction of any evidence;

(iii) ensure the presence of the Charged Person during the proceedings;

(iv) protect the security of the Charged Person; or

(v) preserve public order."

15. The "or" at the end of measure (b) (iv) indicates that every single point under (i)-(v) has to be understood alternately and not cumulatively to assess if Provisional Detention is a necessary measure.

Compliance with one of the enumerated conditions is sufficient.

<sup>14</sup> *Prosecutor v. Tolimir et al.*, Case No. IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, para. 4, referring to *Prosecutor v. Milosevic*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, 1 November 2004, para 5 ; *Prosecutor v. Milosevic*, Refusal to Order Joinder, para 5

<sup>15</sup> see footnote 10

<sup>16</sup> *Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para 6

## VI. Examination of the relevant Defence arguments

16. As outlined above, the Provisional Detention Order which is a discretionary decision must match the standards of other International Tribunals, National and International Law and can be reviewed only according to the criteria of whether it is a reasonable decision and whether discretion was properly exercised.
17. The Appeal fails in this regard. It does not analyse if the OCIJ erred in facts or law. Moreover, the Appeal demands to replace the exercised discretion of the OCIJ by the discretion of the Pre-Trial Chamber.
18. Concerning the question of whether there are well-founded reasons to believe that the Charged Person may have committed the crimes specified in the Introductory Submission, the Civil Party Lawyers follow the statements of the Co-Prosecutors.<sup>17</sup>

### a) Presumption of Innocence<sup>18</sup>

19. The general principle of the presumption of innocence is not at all violated by the statement in the Order that "*there are well-founded reasons to believe that she committed the crimes with which she is charged*". To the contrary, it is the wording of Rule 63 (3) (a) and the task of the OCIJ to assess the evidence at this stage and to conclude if there are sufficient grounds for strong suspicion.

The defence fails with its claim that there has been a violation of a general principle.

### b) Public Order and Personal Safety<sup>19</sup>

20. The Defence argues that the OCIJ did not give evidence to substantiate its claim that the release of the Charged Person could "*in the fragile context of the today's Cambodian society, risk provoking protests of indignation which could lead to violence*" and could perhaps "*imperil the very safety of the Charged Person.*"
- Assessing a potential risk to public order and to the safety of the Charged Person is always a question of probability and balancing of the given situation. Although, the OCIJ presented no details or facts to *prove* the believed risk in question, it is quite evident that in Cambodia's current fragile society, the danger of violence is rather high. Only since the ECCC have been established and the Court has become operational has there been the promise of an end to 30 years of impunity. Trust in a Court that is also composed of international staff provides the Cambodian society much more hope that the rule of law will be enforced and impunity for these heinous

<sup>17</sup> see para 19-21 and 22

<sup>18</sup> see para 41-42 of the Appeal

<sup>19</sup> see para 43-47 *ibid.*

crimes will end. On the other side, however, these same circumstances (lack of overall faith in the Cambodian criminal judicial system and the substantial length of time with no consequence to perpetrators) increase the risk of violence if the Charged Person would be set free.

The lack of intimidations against the Charged Person before her arrest does not mean that a release would be accepted by the Cambodian society without confusion, indignation, and protest.

As the PTC pointed out in its decision<sup>20</sup> of the appeal of Nuon Chea against his Detention Order, the actual social and political concerns and movements in the Cambodian society are so visible that a danger both for the safety of the Charged Person and the Public Order are a virtual risk.

Additionally, the Civil Party Lawyers follow the appropriate statements of the Co-Prosecutors on this point.<sup>21</sup>

21. However, the lack of sufficient facts in the appraisal by the OCIJ is not appealable error.

**c) Interference with victims and witnesses by the Charged Person or her sympathizers<sup>22</sup>**

22. The Defence argues that the OCIJ fails to give evidence of interference with victims and witnesses.

There was no evidence presented by the OCIJ that the Charged Person already threatened or interfered with victims and witnesses in the past, but this does not mean, that a (denying) Defendant would not try to interfere with them in the future. During long years of negotiations establishing the ECCC, there was no real expectation that the ECCC would ever become operational, so there was no "need" in the past to take steps to intimidate witnesses. Now, however, the Charged Person has access to the case file and knows very well the identities of the witnesses and victims. One cannot underestimate the respect, influence and authority that the Charged Person still enjoys in a part of the Cambodian society because of her former position as a Minister and her numerous contacts to powerful persons. Her son Ieng Vuth is Deputy Governor in Pailin.

A municipal Deputy Governor and a Governor nominated by the ruling Government of Cambodia have the necessary influence and authority to prevent the Charged

<sup>20</sup> see para 71,72, 77-81 of the PTC decision *Case of Nuon Chea, Decision on Appeal against Provisional Detention Order of Nuon Chea*, Case No. 02/19-09-2007-ECCC/CIJ (PTC (01) later "Nuon Chea appeal decision"

<sup>21</sup> see para 42, 43, 48, 49 of the Co-Prosecutor's submission

<sup>22</sup> See para 48-54 of the Appeal

Person from being prosecuted in the ECCC, and victims and witnesses may be strongly discouraged to testify.

23. In Cambodia, the processes and resources for protection of victims and witnesses is still weak and protection outside of the Court is not at all guaranteed. The risk is rather high that a single threat could dissuade others to testify in the ongoing investigations and upcoming trials. As stated in the last U.S. survey about Human Rights and the rule of law, Cambodian authorities are not in a position to effectively prosecute potential intimidators.<sup>23</sup>

Thus, the argument of the OCIJ that since investigations have taken place and the file has become open to the Charged Person, there is a realistic fear of pressure being exercised upon victims and witnesses is sufficiently grounded to consider the Provisional Detention necessary.

24. Additionally, the Civil Party Lawyers follow the appropriate statement of the Co-Prosecutors to this point.<sup>24</sup>
25. Furthermore, the Defence's position does not present an appealable error in the exercised discretion of the impugned decision.

**d) Failure to attend trial<sup>25</sup>**

26. The arguments of the Defence do not show that the OCIJ has erred in the appreciation of the facts and that its decision is evidentially unsustainable. The assessment of whether the Charged Person might flee calls for a calculation of odds based on subjective arguments. Dealing with any decision to grant or deny bail involves questions which are not susceptible to concrete proof but rather turn on assessing whether there are substantial grounds for belief.<sup>26</sup>
27. The OCIJ relies on the fact that the Charged Person has a residence abroad, has made numerous voyages to countries without extradition agreements with Cambodia, she has the material means to flee, and that she expects, if convicted, to be sentenced to life imprisonment. All these reasons satisfy a showing of sufficient grounds to believe that the Charged Person might flee if released. Therefore, the discretion of the OCIJ is reasonable exercised.

<sup>23</sup> see the last U.S. Survey in Cambodian Daily, 14 March 2008, page 27, "The Gov'tment Rejects US Human Rights Assessment" by Douglas Gillison quotes: "An array of human rights guarantees, such as freedom from unlawful deprivation of life, fair public trials and freedom of speech were lacking ..."

<sup>24</sup> See para 26-29 of the Co-Prosecutor's submission

<sup>25</sup> see para 55-68 of the Appeal

<sup>26</sup> see Fofana Bail Decision, para 21



28. It should be noted that those who live in Pailin have access to so called "VIP cards" which are accepted as an allowance to cross the border even without passport or visa. If she should be released, her family ties to Pailin afford her an opportunity to easily leave the country.
- Moreover, the Cambodian authorities do not have sufficient means to ensure that the Charged Person will not flee in the case of provisional release or to search effectively if she should abscond.
29. The Defence objects to these grounds by underlining that the Charged Person has strong family ties, did not hide before, is old, that she needs medical treatment and that she came always back from Thailand.
- The Defence did not argue the facts submitted by the OCIJ concerning her financial means, her residence abroad and the voyages to countries without an extradition agreement with Cambodia. Thus, it is assumed that these facts are true.
30. The Civil Parties' Lawyers follow the additional submissions of the Co-Prosecutors at this point.<sup>27</sup>
31. The Defence must fail with its arguments because an abuse of discretion is neither asserted nor apparent.
- e) The burden of proof**<sup>28</sup>
32. The Defence errs in its opinion that in a decision to grant or deny bail "*it is contrary to Cambodian Law where the burden [of proof] rests on the Prosecutor.*"
33. In neither Cambodian Law (the relevant Criminal Procedure Code "CPC"), nor in the Internal Rules is there a provision about the burden of proof in the questions of the conditions in Rule 63 (3) of the IR. In case of *lacuna*, the procedural rules on international level are relevant and give the guidance.
34. Even if in the rules of the ICTY (and subsequently ICTR) the accused is no longer required to prove "exceptional circumstances" before being admitted to bail, the ICTY in practice, maintains the requirements for the question of bail and places the burden on the accused to establish his entitlement to provisional release.<sup>29</sup>
- To place this burden of proof on the Charged Person does not violate the principle of innocence as the Defence argues. It is in question if the Charged Person can be

<sup>27</sup> see para 33-36

<sup>28</sup> see para 38 of the Appeal

<sup>29</sup> *Prosecutor v. Radoslav Brdanin & Momir Talic*, ICTY-Appeal Chamber, case No. IT-99-36, Decision on Application for Leave to Appeal, 7 September 2000; See also Fofana, Bail Decision, para 36

released (on bail) and to consider if one of the prerequisites in Rule 63 (b) IR comply and justify the detention and it is on her to satisfy the Chamber that provisional release could be ordered. But this burden of proof does not affect the presumption of innocence and of course does not shift onto the Defence the Prosecution's burden to prove that she may have committed the crimes with which she is charged.

**f) State of Health**

35. The submitted certificates about the Charged Person's state of health do not indicate that she should be released for these reasons. She can receive the necessary medical treatment while she is in detention.

**VI. Conclusion**

The Appeal must fail. The Provisional Detention Order of the OCIJ is reasonable, justifiable and the discretion is properly exercised.

**For these reasons,**

**may it please the Pre-Trial Chamber**

To reject the Defence' Appeal

**Co-Lawyers for the Civil Parties**

Hong Kimsoun  
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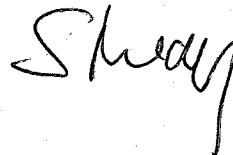
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Done on 25 April 2008

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To the Appeal of Ieng Thirith against Provisional Detention Order