EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

BEFORE THE PRE-TRIAL CHAMBER

Case No: 002/19-09-2007-ECCC-PTC 01-011-C

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APPEAL AGAINST ORDER OF PROVISIONAL DETENTION

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I. INTRODUCTION

1. Pursuant to Rules 63(4) and 74(3) of the ECCC Internal Rules (the "Rules"), counsel for Charged Person NUON Chea (the "Defence") submits its pleadings in support of its appeal against the Provisional Detention Order (the "Detention Order") issued by the Office of the Co-Investigating Judges (the "OCIJ") on 19 September 2007.[1] For the reasons stated below, the Defence seeks an order of the Pre-Trial Chamber vacating the Detention Order and either (i) releasing Mr. NUON immediately subject to the proposed conditions and/or (ii) rehearing the matter in accordance with Mr. NUON's fundamental rights and established legal principles.

II. SUMMARY OF ARGUMENT

2. The Rule 63(1) adversarial hearing (the "Detention Hearing") was held in breach of Mr. NUON's right to counsel as provided by the Rules and international legal standards. Despite having nominated a lawyer to represent him, Mr. NUON appeared to waive his right to legal assistance at the Detention Hearing. However, given the OCIJ's failure to explain the consequences of such waiver and Mr. NUON's fragile state of health at the time, the waiver was legally invalid. The OCIJ's decision to accept the waiver and continue with the Detention Hearing in the absence of defence counsel was procedurally perverse and had the effect of unduly infringing upon several of Mr. NUON's fundamental rights.

3. The legal requirements for provisional detention as set out in Rule 63(3) are not satisfied. The evidence linking Mr. NUON to the crimes specified in the Introductory Submission[2] is scant. Nevertheless, assuming *arguendo* the existence of a reasonable suspicion that Mr. NUON is responsible for such crimes, none of the putative concerns justifying provisional detention have been substantiated by the OCP or the OCIJ. The Detention Order is therefore evidentially unsustainable.

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1 Document No. C-9. On 25 October 2007, the Pre-Trial Chamber issued its Order to File Pleadings, instructing "NUON Chea [...] to submit pleadings to justify and defend his interests against the Provisional Detention Order [...] within 15 days of the date of receipt of this order, and to submit them to the Pre-Trial Chamber." A copy of this order was served on the Defence on 26 October 2007 by a representative of the Court Management Section.

2 Document No. D-3, filed by the Office of the Co-Prosecutors (the "OCP") on 18 July 2007.

III. RELEVANT FACTS

4. The OCIJ issued a warrant for Mr. NUON's arrest on 17 September 2007.[3] The warrant was executed by the ECCC Judicial Police at dawn on 19 September 2007.[4] The arrest took place at Mr. NUON's residence at Pailin where he had been living peacefully and openly with his wife and family for many years. Mr. NUON was immediately flown to Phnom Penh by helicopter and delivered to the ECCC premises. During the two-day interval between the issuance and execution of the arrest warrant, Mr. NUON—82 years old and in frail condition—was not given the opportunity to submit voluntarily to the jurisdiction of the ECCC, something he had stated publicly he would be willing to do.[5]

5. Prior to the Initial Appearance which took place at 2:40 p.m. on the day of his arrest,[6] Mr. NUON met briefly with officials from the Defence Support Section (the "DSS"). He informed them that he would like to appoint SON Arun as his Cambodian lawyer but that Mr. SON was in Battambong and unavailable to appear on Mr. NUON's behalf until the following day.[7]

6. At the Initial Appearance, Mr. NUON was advised of the charges against him and of his right to be assisted by defence counsel.[8] He indicated that he had already appointed Mr. SON as his Cambodian lawyer with whom he would subsequently consult regarding the choice of international counsel.[9] The OCIJ then:

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3 Document No. C-6, Arrest Warrant.

4 Document No. C-7, Record of Brining the Suspect.

5 *See, e.g.*, Jurist Legal News & Research, University of Pittsburg School of Law, "Khmer Rouge tribunal expects cooperation from former second-in-command", 20 September 2007 ("Former Khmer Rouge official Nuon Chea has expressed his desire to cooperate fully with the [ECCC] [...] an ECCC judge told the press Wednesday. You Bunleng, a Cambodian investigating judge of the ECCC, told Reuters that Chea [...] will 'elaborate on the regime when the trial comes'."); Gulf Times, "Khmer Rouge leader denies role in atrocities", 21 July 2007 ("I'm ready to explain myself to the court when it summons me."); The Chicago Tribune, "Latest Interview with Nuon Chea—Brother Number 2 of the Killing Fields", 16 February 2007 ("We must go to court to fight," Nuon Chea said. "I will go to make them understand what happened."); The Cambodia Daily, "Nuon Chea Says He's Preparing for Prison", 2 August 2006 ("Nuon Chea says [...] that he has prepared his defence.").

6 Document No. D-20, Written Record of Initial Appearance.

7 These facts were immediately communicated to the OCIJ in writing. *See* Document No. A-28, Letter from DSS to OCIJ, 19 September 2007.

8 Document No. D-20, Written Record of Initial Appearance, p. 2–3.

9 *Ibid.*, p. 3.

> informed the charged person that he has the right to remain silent and can refuse to answer any questions. However, if he wishes to make a statement, we will record it immediately. We informed him of his right to consult his lawyer before being interviewed and to request that his lawyer be present while making his statement.[10]

Mr. NUON indicated that he "would like to make a statement despite the absence of [his] lawyer" and proceeded to do so.[11] Mr. NUON was next advised that an adversarial hearing would take place in order to determine the issue of provisional detention.[12] He responded: "Although my lawyer is not yet present, I want the Adversarial Hearing to take place immediately."[13]

7. At 4:25 p.m. on the same day, the Detention Hearing proceeded.[14] Mr. NUON was again advised that "the decision regarding his detention may only be made after such an Adversarial Hearing".[15] However, he was not specifically advised of his right to remain silent at the Detention Hearing, nor is it apparent from the written record whether he was clearly informed that his right to the assistance of counsel applied equally to the Detention Hearing, a legally distinct stage of the proceedings from the Initial Appearance.[16] In any event, the OCP was moved at this stage to request:

> that a *clear explanation* be given to the Charged Person concerning this Adversarial Hearing, because he first requested a lawyer, then later said it is not necessary to have a lawyer for this hearing. Therefore he must be given a *clear explanation* to ensure that he *clearly understands* the purpose and legal procedure for this Adversarial Hearing.[17]

Judge YOU remarked that Mr. NUON had already been so advised by Judge LEMONDE and had indicated that he did not need a lawyer.[18] Mr. NUON then stated: "Yes, that is right. I want a lawyer, but I do not require the presence of my lawyer at this time. I may defend myself at this time. Beginning tomorrow, I will

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10 *Ibid.*, p. 4.
11 *Ibid.*, p. 4.
12 *Ibid.*, p. 4.
13 *Ibid.*, p. 4.
14 Document No. C-8, Written Record of Adversarial Hearing, p. 1.
15 *Ibid.*, p. 2.
16 All that can be definitively gleaned from the written record is that the OCIJ took notice of the fact that Mr. SON was unavailable and that Mr. NUON wished to proceed in his absence. *See* Document No. C-8, Written Record of Adversarial Hearing, p. 2. Mr. SON was formally recognised as Mr. NUON's lawyer by the OCIJ on 20 September 2007. *See* Document No. D-21, Lawyer's Recognition Decision.
17 Document No. C-8, Written Record of Adversarial Hearing, pp. 2–3 (emphasis added).
18 *Ibid.*, p. 3.

have my lawyer defend me."[19] The hearing then proceeded without the clarification requested by the OCP.

8. In its Introductory Submission, the OCP argued that the "requisite conditions for the arrest and provisional detention of [...] NUON Chea [...] as set out in the ECCC Internal Rules" were met.[20] Specifically, it was submitted that there is a well-founded reason to believe that Mr. NUON has committed the crimes in question.[21] Additionally, the OCP raised the specter of three discrete threats, namely Mr. NUON's flight from the jurisdiction;[22] his interference with witnesses, victims, and third persons;[23] and the disruption of public order.[24] The same arguments were reiterated by Co-Prosecutor CHEA Leang at the Detention Hearing,[25] with the additional point being made that the failure to detain Mr. NUON could result in "acts of revenge against him".[26]

9. By way of factual support for her legal arguments, Ms. CHEA made the following submissions: that Mr. NUON holds a passport and resides near the Thai border and that he has previously criticized subordinates for not destroying evidence.[27] She then applied to "provide a number of documents as arguments and evidence in support of this request".[28] Judge LEMONDE indicated that time would need to "be reserved for the Charged Person to examine [them] first".[29] The record then indicates: "The Charged Person, after having been given sufficient time to prepare his defence, presented the following observations and requests: I can respond without having to read the documents. [...]."[30]

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19 *Ibid.*, p. 3.
20 Document No. D-3, Introductory Submission, para. 118.
21 *Ibid.*, para. 118(a).
22 *Ibid.*, para. 118(b).
23 *Ibid.*, para. 118(c).
24 *Ibid.*, para. 118(d).
25 Document No. C-8, Written Record of Adversarial Hearing, p. 3.
26 *Ibid.*, p. 3.
27 *Ibid.*, p. 3.
28 *Ibid.*, p. 3.
29 *Ibid.*, p. 3.
30 *Ibid.*, p. 3. However, no further mention of the "documents" is made, either in the Written Record of Adversarial Hearing or in the Detention Order itself. It is clear from the record that Mr. NUON did not have sufficient time to review and challenge them at the Detention Hearing. The documents are not contained in the OCIJ's file on Mr. NUON entitled "Detention and Bail", nor does that sub-file contain any reference to their location elsewhere in the greater case file.

10. In response to the OCP's claims, Mr. NUON denied any participation in criminal activity[31] and indicated that, despite having had many chances to do so already, he does not intend to flee and wishes to participate in the proceedings;[32] he would not destroy evidence;[33] he has peacefully re-integrated into Cambodian society;[34] and if anyone had wanted to harm him they would have done so already.[35]

11. Apparently without substantial deliberation, the Judges advised Mr. NUON that he would be placed in provisional detention.[36] The Detention Hearing ended at 6:30 p.m. and the Detention Order was issued immediately. With respect to the sufficiency of the evidence, the OCIJ found: "In light of the many documents and witness statements implicating NUON CHEA, there are well-founded reasons to believe that he committed the crimes with which he is charged."[37] The additional concerns were justified as follows:

    a. Risk of Flight: "[B]ecause NUON CHEA faces a maximum sentence of life imprisonment if convicted, it is feared that, regardless of his protestation to the contrary, he may be tempted to flee legal process."[38]

    b. Interference with Witnesses: "[G]iven NUON CHEA's specific hierarchical position ("Number 2" in the regime), it may be feared that, if he were to remain at liberty, he might attempt and would be in a position to pressure witnesses and victims, especially those who were under his authority."[39]

    c. Public Order and Personal Safety: "These crimes are of a gravity such that, 30 years after their commission, they still profoundly disrupt public order to such a degree that it is not excessive to conclude that the release of the charged person risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence and perhaps imperil the very safety of the charged person, given that the situation is clearly no longer seen in the same way since the official prosecution against him commenced."[40]

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31 Document No. C-8, Written Record of Adversarial Hearing, p. 4.
32 *Ibid.*, pp. 3–4.
33 *Ibid.*, p. 4.
34 *Ibid.*, p. 3.
35 *Ibid.*, p. 4.
36 *Ibid.*, p. 4.
37 Detention Order, para. 5.
38 *Ibid.*, para. 5.
39 *Ibid.*, para. 5.
40 *Ibid.*, para. 5.

12. Additionally, the OCIJ indicated that "no bail order would be rigorous enough to ensure that these needs would be sufficiently satisfied and therefore detention remains the only means to achieve these ends".[41] Apart from a general reference to "the many documents and witness statements implicating NUON CHEA",[42] the Detention Order nowhere canvasses the evidentiary support for any of its putative factual finding.

13. On 17 October 2007, counsel for Mr. NUON filed its Notice of Appeal. International counsel were appointed shortly thereafter and arrived in Phnom Penh on 22 October 2007.

14. On the morning of 7 November 2007, the OCIJ delivered to the Defence a document entitled "Co-Prosecutor's Additional Grounds and Materials in Support of Provisional Detention in the Case of the Suspect Nuon Chea" (the "Additional Materials").[43] A handwritten notation on the cover page indicates that the document was received by the OCIJ's greffier on 19 September 2007. However, the Additional Materials do not bear an official index number, and a diligent search of the physical case file[44] did not reveal a filed copy of the document. While these are no doubt the "documents" referred to by Ms. CHEA at the Detention Hearing, the Defence does not consider them to be relevant to the instant appeal as the documents do not yet form part of any official ECCC file *to which the parties have equal access*. Should the OCP wish to file the Additional Materials along with its response to these pleadings, the Defence would then be in a position to make any appropriate reply.

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41 *Ibid.*, para. 6.
42 Detention Order, para. 5.
43 The Additional Materials are dated 19 September 2007, marked "confidential", and consist of a seven-page legal submission and twelve supporting appendices.
44 The case file is presently located in Room 120 of the ECCC's premises. *N.B.* The first search of the case file for the "documents" was made upon the arrival of international counsel to Phnom Penh. When subsequent searches were unsuccessful, the Defence approached the OCIJ to inquire as to the location of the documents. This inquiry, presumably, led to the above-referenced service of the Additional Materials on the Defence by the OCIJ.

IV. RELEVANT LAW

A. Standard of Appellate Review

15. 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 the new determination, this Chamber has unfettered discretion to uphold, quash, or modify the Detention Order based upon the existing file and any additional information presented by the parties on appeal.[45]

B. Application of International Procedural Rules

16. Article 33 new of the ECCC Law provides, in pertinent part:

> The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, guidance may be sought in procedural rules established at the international level.
>
> The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights [the "ICCPR"].[46]

17. Accordingly, this Chamber is bound to take cognizance of all established norms of international criminal procedure which are based in whole or in part on the fundamental human rights guarantees contained in Articles 14 and 15 of the ICCPR.[47] This necessarily includes the relevant jurisprudence and precedents of other international criminal tribunals[48] and human rights enforcement bodies[49] where those norms and guarantees are discussed and interpreted.

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45 Because this practice applies to the municipal courts of Cambodia and conforms to international standards, there is no need to resort to the jurisprudence of other international criminal tribunals for guidance.

46 *See also* ECC Law, Article 23; ECCC Agreement, Article 12(2); Rule 2.

47 *See* ECCC Law, Article 35 new.

48 For example, the International Criminal Court (the "ICC"); the International Criminal Tribunal for the Former Yugoslavia (the "ICTY"); the International Criminal Tribunal for Rwanda (the "ICTR"); the Special Court for Sierra Leone (the "SCSL").

C. Procedural Guarantees in Determination of Provisional Detention

18. Rule 63(1) governs the procedures to be followed in determining whether to issue an order of provisional detention:

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

Four discrete but interrelated rights are expressly set out in this Rule: the right to an adversarial hearing;[50] the right to the assistance of counsel; the right to a reasonable period of time to prepare; and the right to a written order. Although not specifically stated, additional procedural guarantees are incorporated into Rule 63 by reference to other Rules, particularly the right to remain silent.[51]

1. Waiver of the Right to the Assistance of Counsel

19. Because any hearing before the OCIJ potentially involves the questioning of a charged person, Rule 63 must be read in conjunction with the following portions of Rule 58:

> 2. A Charged Person shall only be questioned in the presence of his or her lawyer, unless the Charged Person waives the right to the presence of a lawyer, in a separate written record signed by the Charged Person, included in the case file. The waiver shall be recorded pursuant to Rule 25. [...]
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> 3. In an emergency, and with the consent of the Charged Person the Co-Investigating Judges may question the Charged Person in the absence of his or her lawyer. An emergency situation arises where there is a high probability of irretrievable loss of

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49 For example, the UN Human Rights Commission and the European Court of Human Rights (the "ECHR").

50 *See also* Rule 21(1)(a) ("ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties.").

51 *See* Rule 21(1)(d) ("Every person suspected or prosecuted shall be presumed innocent as long as his/her guilt has not been established. Any such person has the right to be informed of any charges brought against him/her, to be defended by a lawyer of his/her choice, and at every stage of the proceedings shall be informed of his/her right to remain silent."); ECCC Law, Article 35 new ("In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights: [...] (g) not to be compelled to testify against themselves or to confess guilt.").

> evidence while awaiting the arrival of a lawyer, such as the impending death of the Charged Person. The reason for the emergency shall be clearly stated in the written record of the interview.

20. While Rule 58(2) refers to the possibility of waiving the right to counsel, the precise contours of such process (apart from the requirement that it be done in a "separate written record signed by the Charged Person"[52]) are not indicated. Accordingly, it is necessary to look to international standards to address this particular lacuna.

21. Pursuant to the established norms of international criminal procedure, any waiver of the right to counsel must be formally recorded.[53] Such waiver is only valid where it is voluntary,[54] informed,[55] and unequivocal.[56] The determination must take account of the characteristics of the person giving the waiver as well as the manner in which it was taken.[57] Procedures which are generally considered to be appropriate with respect to the average adult may be regarded as oppressive when applied to children, invalids, the elderly, or those unfamiliar with the particular system of criminal

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52 *N.B.* Upon diligent search of the case file, the Defence has not located the separate record required by Rule 58(2) with respect to either the Initial Appearance of the Detention Hearing.

53 The procedural rules of the ICTY, ICTR, and SCSL all require a formal waiver for a suspect or accused to be questioned by investigative authorities in the absence of a lawyer. Once such waiver has been given, questioning must immediately cease upon any subsequent expression of a desire to be assisted by counsel and may not resume again until counsel is present. *See* ICTY, ICTR and SCSL, Rules 42(B) and 63(A). The statute and rules of the ICC are similar to those of the ECCC. *See* ICC Statute, Article 55(2)(d) and ICC Rule 112(1)(b).

54 *See Prosecutor v. Delalic et al.*, Case No. IT-96-21-T, Decision on Zdravko Mucic's Motion for the Exclusion of Evidence, 2 September 1997 (the "*Delalic* Exclusion Decision"), para. 42.

55 Custodial statements taken under circumstances where the investigating authorities may have misled the accused and/or failed to address his confusion will be excluded at trial even where the accused signed a form indicating that he had read and understood his rights. *See Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on the Prosecutor's Motion for the Admission of Certain Materials Under Rule 89(C), 14 October 2004 (the "*Bagosora* Admission Decision"), paras. 10–20, 14. This reflects the well-established common-law position which requires the waiver of a fundamental right to be voluntary, knowing, and intelligent. This implies that the person is clearly informed of the nature of the right and of the consequences of abandoning it. *See Miranda v. Arizona*, Supreme Court of the United States, 384 U.S. 346 (1966), p. 475; *R v Morin*, Supreme Court of Canada, [1992] 1 SCR 771 ("such waiver must be clear and unequivocal, with full knowledge of the rights the procedure is enacted to protect and of the effect that waiver will have on those rights").

56 *See Bagosora* Admission Decision, para. 18; *see also Pfeifer and Plankl v. Austria*, ECHR, 25 February 1992, para. 37 (According to the ECHR's case-law, "the waiver of a right guaranteed by the [European Convention]—insofar as it is permissible—must be established in an unequivocal manner [...]. Moreover [...] in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance.").

57 *See Delalic* Exclusion Decision, para. 67; *Bagosora* Admission Decision, para. 15 (Actual "consent must be considered in the context of the entire conversation preceding his signature".).

justice.[58] Implicit to the concept of waiver is the charged person's understanding of both the right that is being waived and the practical consequences of so doing. This information must be communicated in a comprehensible manner and not "simply by some incantation which a [charged person] may not understand".[59]

22. Finally, an individual must be deemed legally fit to make the waiver.[60] Lengthy procedures which place the charged person in a state of weak physical and moral resistance may deprive him of the crucial ability to answer questions and consult with his lawyers—this amounts to a denial of due process and a breach of the principle of equality of arms.[61] Where it is evident that the fitness of the charged person may be diminished, the proceedings should be postponed until he is deemed well enough to continue.[62]

2. The Right to a Reasoned Order

23. The Rules require an order of detention to be "reasoned"[63] and to "set out the legal grounds and factual basis for detention".[64] These requirements are consistent with

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[58] *See Delalic* Exclusion Decision, para. 67; *see also R v. Evans*, [1991] 1 SCR 869, pp. 890–91 ("[W]here, as here, there is a positive indication that the accused does not understand his right to counsel, the police *cannot rely on their mechanical recitation of the right to the accused*; they must take steps to facilitate that understanding [...]. [A] person who does not understand his or her right cannot be expected to assert it".) (emphasis added).

[59] *See R. v. Cullen*, 1992 NZLR LEXIS 689 (CA), p. 10 ("[T]he fundamental rights conferred or confirmed by the New Zealand Bill of Rights Act 1990 are not to be regarded as satisfied simply by some incantation which a detainee may not understand. The purpose of making the suspect aware of his rights is so that he make a decision whether to exercise them and plainly he cannot do that if he does not understand what those rights are"); *S v. Melani and others*, 1995 SACLR LEXIS 290 pp. 47–48 (Sup. Ct., Eastern Cape) ("[i]n order to give effect to an accused's right in terms of section 25 (1)(c) he or she must be informed of his or her right to consult in manner that it can reasonably be supposed that he or she has understood the content of that right").

[60] The concept of "fitness for trial" refers to all those factors which may render a defendant unfit to plead; to understand the nature of the charges; to understand the course of the proceedings; to understand the details of the evidence; to instruct counsel; to understand the consequences of the proceedings; or to testify—that is anything that impacts upon the effective participation of the accused in proceedings. *See Prosecutor v Strugar*, Case No. IT-01-42-T, Decision on the Defence Motion to Terminate Proceedings, 26 May 2004 (the "*Strugar* Termination Decision"), para. 36.

[61] *Barberà, Messegué and Jabardo v. Spain*, ECHR, 6 December 1988, para. 70; *Makhfi v France*, ECHR, 19 October 2004, para. 40; *see also Stanford v. the United Kingdom*, ECHR, 23 February 1994, para. 26 (The right of an accused to participate effectively in his criminal trial, includes not only the right to be present and assisted by counsel, but to hear and follow the proceedings.).

[62] *S.C. v. The United Kingdom*, ECHR, 15 June 2004, para. 23; *Strugar* Termination Decision, para. 27 (re-affirming the position of the ECHR that temporary unfitness may be remedied by treatment and that the trial may then re-commence after a delay).

[63] Rule 44(2).

[64] Rule 63(2)(a).

the relevant jurisprudence, which requires "special diligence" in making such an important assessment.[65] While a court is not expected to elaborate in detail on every point of law,[66] where a submission is fundamental to the outcome of the case it should provide sufficient explanation. The rationale is two-fold: (i) to allow the parties to effectively exercise their right to appeal and (ii) to maintain public confidence in the administration of justice.[67]

D. Conditions for Provisional Detention

24. Rule 63(3) provides the substantive bases upon which provisional detention of a charged person may be ordered by the OCIJ:

> The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:
>
> (a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
>
> (b) the Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
>
> (i) prevent the Charged Person from exerting pressure on any witnesses or victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
> (ii) preserve evidence or prevent the destruction of any evidence;
> (iii) ensure the presence of the Charged Person during the proceedings;
> (iv) protect the security of the Charged Person; or
> (v) preserve public order.

By its plain terms, this Rule establishes a conjunctive test for the imposition of provisional detention, requiring the existence of *both* (i) a well-founded reason to believe the charged person has engaged in criminal activity[68] *and* (ii) one of the additional criteria contained in Rule 63(3)(b)'s exhaustive list.

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65 Article 6 of the European Convention on Human Rights imposes an obligation on domestic courts to produce motivated judgements. *See Bernard v. France*, ECHR, 26 September 2006, para. 37; *Letellier v France*, ECHR, 26 June 1991, para. 35; *Hood v. United Kingdom*, ECHR, 18 February 1999, para. 60; *Smirnova v. Russia*, ECHR, 24 October 2003, para. 71.

66 *Van de Hurk v. the Netherlands*, ECHR, 19 April 1994, para. 61.

67 *Hadjianastassiou v. Greece*, ECHR, 16 December 1992, para. 33.

68 The presence and persistence of a reasonable suspicion that the Charged Person has committed an offence is "a condition *sine qua non* for the validity of the continued detention." *Letellier v France*, ECHR, 26 June 1991, para. 35

25. This two-pronged approach accords with the established principle of international human rights law which provides that the character of the alleged crime alone is never sufficient to justify pre-trial detention beyond a short initial period, even where the charged person is accused of a particularly serious crime and the evidence against him is strong.[69] Allowing for periods of lengthy provisional detention based solely on the gravity of the alleged crime would amount to a regime of *de facto* mandatory detention in violation of established international principles.

26. Further, the discretionary language of the Rule—"The Co-Investigating Judges *may* order the Provisional Detention of the Charged Person *only* where the following conditions are met: [...]"[70]—supports the proposition that provisional detention should be the exception rather than the general rule.[71] The underlying rationale of Rule 63(3)'s apparently measured approach is the need to ensure that individual liberty is not unnecessarily curtailed by putative public-interest concerns.[72] Though not explicitly stated, Rule 63(3) appears to have been drafted with due regard to the presumption of innocence.[73]

1. Presence of the Charged Person

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69 *See Letellier v France*, ECHR, 26 June 1991; *Ilijkov v. Bulgaria*, ECHR, 26 July 2001, para. 81; *see also Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Ramush Haradinaj's Motion for Provisional Release, 6 June 2005 (the "*Haradinaj* Release Decision"), para. 24 ("the expectation of a lengthy sentence cannot be held against an accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences") (citing established ICTY jurisprudence).

70 Rule 63(3) (emphasis added).

71 *See* ICCPR, Article 9(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 5; American Convention on Human Rights, Article 7; African Charter on Human and Peoples' Rights, Articles 6 & 7; United Nations General Assembly Resolution 43/17, Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 9 December 1998, Principle 39; *see also Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-PT, Decision Granting Provisional Release to Amir Kubura, 19 December 2001 (the "*Hadžihasanović* Release Decision"), para. 7 ("*de jure* pre-trial detention should be the exception and not the rule as regards to prosecution before an international court").

72 In striking such a balance, only "a genuine requirement of public interest" can "justify a departure from the rule of respect for individual liberty". *Letellier v France*, ECHR, 26 June 1991, para. 35; *See also Prosecutor v Jokić*, Case No. IT-01-42/1-T, Order, 20 February 2002 (the "*Jokić* Order") (where the Trial Chamber considered the decision to release the accused should be based on a balance between public interest requirements and the accused's right to liberty of person), para. 19 (quoting *Ilijkov v Bulgaria*, ECHR, 26 July 2001, para 84).

73 *See* Rule 21(1)(d).

27. The risk that a charged person will abscond must be adequately established by facts and may not be assessed solely on the basis of the gravity of the offence.[74] Reference must be made to the specific factors which either confirm or refute the danger.[75] These include the charged person's character, state of health, family ties, material and financial resources, and other links to the jurisdiction.[76] Where the risk of flight is the only legitimate ground for provisional detention, release pending trial should be ordered if it is possible to obtain a guarantee from the charged person that he will appear for trial.[77]

2. Destruction of Evidence and Interference with Witnesses

28. As above, these risks must be based on specific facts and evidence vis-à-vis the charged person and not simply on abstract perceptions of the prevailing situation.[78] Unsubstantiated claims based on general assertions must be rejected.[79] The fact that a charged person may continue to possess some influence is not an automatic indication "that he will exercise it unlawfully".[80]

3. Preservation of Public Order and Safety of the Charged Person

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74 *Muller v. France*, ECHR, 18 February 1997, para.42; *Letellier v France*, ECHR, 26 June 1991, para. 43; *Neumeister v. Autriche*, ECHR, 27 June 1968, para.10; *Tomasi v. France*, ECHR, 27 August 1992, para.98; *Bernard v. France*, ECHR, 26 September 2006, para.45.

75 *Yagci and Sargin v. Turkey*, ECHR, 23 May 1995, para.52.

76 *Neumeister v. Autriche*, ECHR, 27 June 1968, para.10.

77 *Wemhoff v. Germany*, ECHR, 27 June 1968, para.15; *Letellier v France*, ECHR, 26 June 1991, para. 46; *Tomasi v. France*, ECHR, 27 August 1992, para.98.

78 *Haradinaj* Release Decision, para. 22 (Noting: "[t]he assessment whether the accused would pose a danger cannot be made only *in abstracto*; a concrete danger has to be identified."), paras. 47–48 (Finding: Because "it has not been shown that the Accused could pose a concrete danger to anyone, including victims and witnesses, the Trial Chamber is not satisfied that a negative impact on the public perception of the safety of potential witnesses suffices as a ground for denying provisional release. [...] [N]othing in the evidence to suggest that the Accused interfered or would interfere with the administration of justice."); *see also Labita v. Italy*, ECHR, 6 April 2000, paras. 162–163 (Where the accused was held in detention pending trial for approximately two years and seven months on the grounds that, *inter alia*, he may put pressure on witnesses or interfere with evidence, the ECHR observed that such grounds were too general: "[t]he judicial authorities referred to the prisoners as a whole and made no more than an abstract mention of the nature of the offence. They did not point to any factor capable of showing that the risks relied on actually existed and failed to establish that the applicant ... posed a danger". The Court concluded that "the grounds stated in the impugned decisions were not sufficient to justify the applicant's being kept in detention".)

79 *Haradinaj* Release Decision, paras. 44–48.

80 *Haradinaj* Release Decision, para. 47 (citing *Prosecutor v. Prlic et al.*, Case No. IT-04-74-PT, Order on Provisional Release of Bruno Stojic, 30 July 2004, para. 28).

29. Public order has been recognized as a legitimate additional justification for provisional detention.[81] However, an abstract threat to the public order based on the gravity of the offence alone cannot be used to anticipate a custodial sentence.[82] Rather, in accordance with the international legal principle of proportionality, the public order justification—like the others—must be invoked only where it is justified by precise facts and where it is the only means of quelling an actual disturbance.[83] International human rights bodies have been particularly wary of reliance on public-order concerns as a justification for pre-trial detention: "The question arises, however, whether in a democratic society governed by the rule of law, pre-trial detention, however brief, can ever be legally justified on the basis of a legal notion so easily abused as that of public order".[84] Accordingly, judicial authorities should treat such claims with added circumspection in order to ensure the proper measure of respect for the rights of the charged person.[85]

E. Conditions of Release

30. It is within the OCIJ's discretionary power to grant provisional release subject to appropriate conditions.[86] When making such determination, the general principle

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81 *See* Article 205 of the CCCP; *Letellier v. France*, ECHR, 26 June 1991, para. 35; *Bernard v. France*, ECHR, 26 September 2006, App. 27678/02.

82 *See Bernard v. France*, ECHR, 26 September 2006, para. 46; *Letellier v. France*, ECHR, 26 June 1991, para. 51 (Where the Court stated that certain offences, by reason of their particular gravity and public reaction to them, may give rise to a social disturbance capable of justifying pre-trial detention, "at least for a time". However, the Court also noted that "this ground can only be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused' s release would actually disturb public order". Moreover, the Court pointed out that "detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence".) *See also Kemmache v. France*, ECHR, 27 November 1991, para. 52; *Tomasi v. France* ECHR, 27 August 1992, para. 91; *I.A. v France*, ECHR, 23 September 1998, para. 104.

83 *Ibid.*

84 UN Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A manual on Human Rights for Judges, Prosecutors and Lawyers*, New York and Geneva, 2003, p.194.

85 The UN Human Rights Committee has stated: "[...] if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law, information of the reasons must be given, and court control of the detention must be available as well as compensation in the case of a breach. And if, in addition, criminal charges are brought in such cases, the full protection of article 9(2) and (3), as well as article 14, must also be granted." General Comment No. 8, *United Nations Compilation of General Comments*, p.118.

86 Article 5(3) of the ECHR states that "everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article [...] shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

of proportionality applies: such conditions "should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied".[87] Factors relevant to the inquiry are, *inter alia*, the gravity of the charges; the health of the charged person; the proximity of the start of trial; the availability and effectiveness of monitoring of the charged person; the circumstances of the charged person's arrest or surrender; and any guarantees offered.[88] International criminal tribunals have routinely granted provisional release in the face of very serious allegations, with the full awareness "that there will never be a total guarantee that an accused will appear for trial and, if released, will not pose a danger to sources of evidence".[89] Because detention should be the exception rather than the rule, where a charged person credibly undertakes to meet conditions of bail aimed at assuaging Rule 63(3)(b)'s concerns, he is in principle entitled to provisional release.[90]

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87 *See Hadžihasanović* Release Decision, para. 8. (A measure in public international law is proportional only when suitable, necessary and when its degree and scope remain in a reasonable relationship to the envisaged target.).

88 *See Haradinaj* Release Decision, para. 23 (citing established ICTY jurisprudence); *Jokić* Order, paras 19–25.

89 *See Hadžihasanović* Release Decision, para. 9 (where the Trial Chamber determined that it was no longer necessary to execute an order of detention in light of the accused Hadžihasanović's voluntary surrender, guarantees provided by the accused and the Government of Bosnia and Herzegovina, and the conditions imposed.); *Haradinaj* Release Decision, para. 29–48 (provisional release on bail was granted where: the accused was charged with 37 counts of war crimes and crimes against humanity; faced a long prison sentence; trial was not set to start for a long time; the accused surrendered voluntarily in an exemplary manner; the accused was known as a man of personal and political integrity, dignity, maturity, and intended to return to public service; the accused declared to comply in full with all orders made by the chamber; guarantees were provided by UNMIK; a guarantee was provided by accused not to have any contact or interfere, directly or indirectly, with any potential witness); *The General Prosecutor v. Joseph Leki*, Case No. 05/2000, 20 February 200 (The Special panel for serious crimes in East Timor decided on 20 February 2001, to release the accused, stating there was "no reasonable grounds to believe that Joseph Leki will flee to attempt to avoid criminal proceedings" and there was "grounds to issue substitute measures as an alternative to an order of detention to ensure the integrity of the witnesses".) *N.B.* While no bail applications have been granted by the SCSL, this has been due to "the particular situation of Sierra Leone, [where] public interest factors such as the ability of the authorities to uphold conditions [...] take on a greater relevance" but acknowledged that there may well be circumstances where an accused person before the Special Court can be granted bail: "As the security situation and authoritative structures in Sierra Leone evolve and improve, the public interest factors may weigh less heavily in the balance". *Prosecutor v. Sesay et al.*, Case No. SCSSL-04-15-A, Decision on Appeal Against Refusal of Bail, 14 December 2004, paras. 36–37.

90 While international human rights law does not recognise a "right to bail" as such, it surely does provide for "a right to *apply* for bail, to a court which is open to persuasion that pre-trial detention of that defendant is not necessary to secure the efficacy of the trial or for any other public interest reason". *Prosecutor v. Norman et al.*, Case No. SCSL-04-14-A, Decision on Fofana Appeal Against Decision Refusing Bail, 11 March 2005, para. 32.

V. ARGUMENT

A. The Detention Hearing was Held in Violation of Mr. NUON's Rights

1. There Was no Effective Waiver of Mr. NUON's Right to Counsel

31. Given (i) Mr. NUON's personal situation, (ii) the context in which the Detention Hearing was held, and (iii) the serious and potentially far-reaching consequences of the issue of provisional detention, no reasonable judge under the circumstances would have accepted Mr. NUON's waiver of his right to the assistance of counsel. Rather, any reasonable judge would have recognized the lack of urgency and briefly postponed the hearing in order to allow Mr. NUON to rest, hear appropriate advice from his designated lawyer, and meaningfully consider how best to proceed.

32. As noted above, in order for a waiver to be considered legally valid it must be voluntary, informed, and unequivocal. However, under the circumstances, the waiver taken from Mr. NUON late in the afternoon on 19 September 2007 was effectively coercive, decidedly uniformed, and rather ambiguous.

a. The Waiver Was Not Voluntary

33. Mr. NUON was arrested at dawn on 19 September 2007 by the ECCC Judicial Police at his family home in Pailin. He was then flown by helicopter to Phnom Penh, driven to the ECCC premises, and required to walk to the court building where he met briefly with DSS officials before attending the Initial Appearance at 2:40 p.m. While this sequence of events may not merit comment with respect to a middle-aged adult in good health, Mr. NUON is 82 years old, walks with the assistance of a cane, and suffers from persistent high blood pressure and other cardio-vascular ailments.[91] By the time the Detention Hearing commenced at 4:25

[91] It has been assessed that Mr. NUON suffers from long-standing uncontrolled hypertension; cardio-vascular disease resulting in shortness-of-breath on minimal exertion with chest discomfort; impaired cognitive function with moderately impaired recall and recent memory; and gout. *See* Document No. D-24/II, Medical Report of Dr. Nopparat Panthongwiriyakul of BNH Hospital, 28 September 2007. However, an OCIJ press release—trumpeting a clean bill of health based on an additional medical report—has spurred the local press to report "Doctors pronounce Nuon Chea mentally fit". Phnom Penh Post, Volume 16, Issue 22, 2–15 November 2007. Given the

p.m., Mr. NUON had endured a particularly stressful and arduous day for a man of his age and condition. His ability to think clearly at the Detention Hearing—a procedure of which he had no previous experience or understanding—was objectively diminished, that is, he was not fit to plead. Accordingly, the waiver must be construed as having been constructively coercive.

b. The Waiver Was Not Informed

34. At no time during the Detention Hearing was Mr. NUON informed of the consequences of proceeding without the assistance of counsel. For example, he was not advised that the issue of provisional detention is governed by a complicated procedural code as well as a large body of international jurisprudence, and that the OCP would be making legal and factual submissions to which he may wish to reply. Nor was he advised that any statement he made at the hearing would form part of his case file and subsequently could be used against him and—precisely because of this—he had the right to remain silent throughout the hearing. Furthermore, it was not explained that the hearing could be postponed until the arrival of Mr. SON or that, in the meantime, Mr. NUON may wish to seek the assistance of the DSS officials.

35. Additionally, it is unclear whether Mr. NUON was advised that his right to counsel—of which he was informed at the Initial Appearance—extended and applied equally to the Detention Hearing. Indeed, the OCP voiced its concerns regarding the sufficiency of the waiver, urging the judges to ensure that Mr. NUON's rights were explained to him in a "clear" fashion, so that he would "clearly" understand them.[92] However, Judge YOU simply referred to the earlier "incantation" given at the Initial Appearance, and the hearing ultimately proceeded without the clarification requested by the OCP.

36. In fact, very little was explained to Mr. NUON at the Detention Hearing, and the apparent eagerness of the judges to proceed as quickly as possible no doubt gave

discrepancy between the two medical reports, the Defence takes the view that Mr. NUON's state of physical and mental health is open to debate.

92 Written Record of Adversarial Hearing, OCIJ [Document No. C-8], pp. 2–3 (emphasis added).

him the impression that he had little choice but to go ahead without his lawyer. While it is not the function of the Co-Investigating Judges to dispense legal advice to a charged person, it is incumbent upon them to ensure that his fundamental rights and the consequences of waiving them are understood. Because the OCIJ failed in this regard, the waiver was not informed.

c. The Waiver Was Ambiguous

37. As noted by the OCP, Mr. NUON "first requested a lawyer, then later said it is not necessary to have a lawyer for this hearing".[93] Mr. NUON's subsequent comments that he would like to proceed without Mr. SON were obviously taken by the judges as clarifying the matter. However, under the circumstances described above, it is equally likely that Mr. NUON was bowing to the implicit pressure to proceed with the hearing. Because the OCIJ did not address the equivocation with any further clarification—but rather repeated, in the same language, what had already been said—it is not clear that Mr. NUON's objective confusion was rectified. Accordingly, it cannot be said that the waiver was unequivocal.

2. The Detention Hearing Was Consequently Unfair

38. The denial of Mr. NUON's right to the assistance of counsel—i.e. the acceptance of a defective waiver—was further compounded by the denial of three additional and fundamental rights guaranteed by the Rules, namely Mr. NUON's rights to an adversarial hearing; to a reasonable period of time to prepare his defence; to remain silent; and to the equality of arms.

39. As outlined above, Mr. NUON was transported by helicopter from his simple wooden house in Pailin to the modern urban premises of the ECCC where, upon arrival, he was immediately expected to participate in unfamiliar international criminal proceedings. Exhausted from the days travails and unassisted by his designated lawyer or any representative of the DSS, he was effectively coerced into undergoing a crucial and complex hearing without the benefit of even a cursory legal or factual briefing and without being clearly notified of his right to remain silent. His

[93] Written Record of Adversarial Hearing, OCIJ [Document No. C-8], pp. 2–3 (emphasis added).

adversaries at the Detention Hearing were the two Co-Prosecutors and additional members of their staff—all experienced attorneys well-versed in the applicable law and the facts of the case. While Mr. NUON made an admirable attempt to counter the submissions of the OCP, it is clear from the record that he was unable to participate in any meaningful way. He was, quite literally, defenceless.

40. In law the concept of an adversarial hearing denotes a minimal amount of parity between the parties, as reflected in the principle of equality of arms. However, to describe the proceedings which transpired on 19 September 2007 as "adversarial" is to stretch the meaning of that term to the point of meaninglessness.

B. The Conditions for Provisional Detention Are Not Satisfied

1. There is Insufficient Evidence to Connect Mr. NUON to the Crimes Charged

41. Rule 63(3)(a) requires a "well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission". The OCIJ found that this first prong of the test was satisfied by "the many documents and witness statements implicating NUON CHEA" attached to the OCP's Introductory Submission.[94]

42. For his part, Mr. NUON maintains his innocence of the charges and has publicly denied participation in any criminal activity.[95] The Defence submits that, despite the volume of materials filed by the OCP, those which actually implicate Mr. NUON are scant and consist mostly of unsubstantiated personal innuendo and inaccurate scholarly citation. While the Defence does not dispute that Mr. NUON's name is contained in many of the documents, little if any forensic value can be attached to these references. Indeed, it is not at all clear from the record of the Detention Hearing or the Detention Order itself that the OCIJ has engaged in anything more that a very cursory review of the case file.

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94 Detention Order, para. 5.
95 Document No. C-8, Written Record of Adversarial Hearing, p. 4.

43. In any event, assuming but not conceding the reasonableness of the OCIJ's finding in this regard, 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.

2. No Additional Grounds Exist to Justify Provisional Detention

44. As required by the Rules and established principles of international criminal procedure, the OCIJ further justified its Detention Order by reference to the following putative dangers: the risk of Mr. NUON's flight from legal process; his likely interference with potential witnesses, especially those alleged to have been under his previous control; and possible threats to the public order and to Mr. NUON's personal safety. However, each of these justifications is premised on abstract notions rather than grounded in actual fact as required.

a. There is no Actual Risk of Mr. NUON Fleeing the Jurisdiction

45. The OCP's single factual submission on this point was that Mr. NUON holds a passport and resides near the Thai border.[96] For his part, Mr. NUON indicated that, despite having had many chances to do so already, he has no intention of fleeing and wishes to participate in the proceedings.[97] The OCIJ held that, "because NUON CHEA faces a maximum sentence of life imprisonment if convicted, it is feared that, regardless of his protestation to the contrary, he may be tempted to flee legal process."[98]

46. As a matter of fact, the notion of Mr. NUON fleeing the jurisdiction of the ECCC is fanciful. First of all, Mr. NUON has stated many times—most recently at the Detention Hearing—that he is eager to participate in his trial.[99] He is a proud Cambodian citizen with many family and civic ties to the country and has no intention of leaving them behind. Mr. NUON was well-informed about his ongoing investigation and impending arrest and made no attempts to flee from his home in

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[96] *Ibid*, p. 3.
[97] *Ibid*, pp. 3–4.
[98] Detention Order, para. 5.
[99] *See* n. 5, *supra*.

Pailin. Indeed, accompanied by a journalist, he was patiently waiting for the arrival of ECCC authorities on the morning of 19 September 2007. Had it not been for the rather unnecessary, not to say overwhelming, show of force in executing the arrest warrant, Mr. NUON would have voluntarily surrendered immediately and without hesitation upon request. Even assuming, *arguendo*, that Mr. NUON intended to abscond, his age, fragile state of health, and lack of financial resources[100] would make it virtually impossible for him to do so. The Cambodian and ECCC authorities clearly have the will and material ability to ensure that Mr. NUON's movement within the country is sufficiently monitored and restricted.

47. No attempt was made at the Detention Hearing to obtain appearance guarantees from sureties or from Mr. NUON himself (although he freely gave one), and no reference was made in the Detention Order, as required, to the specific factors which either confirm or refute the risk of flight. As noted in the previous paragraph, the balance weighs heavily in favor of the latter. Simply put, there is no such danger. It is clear from the text of the Detention Order, that the OCIJ has based its assessment purely on the gravity of the charges against Mr. NUON. However, as noted above, this is legally impermissible.

b. There is no Actual Risk of Mr. NUON Interfering with Witnesses

48. By way of support for this point, the OCP suggested that Mr. NUON had previously criticized his alleged subordinates for not destroying evidence.[101] In response, Mr. NUON stated that it was "not possible" that he would destroy evidence.[102] The OCIJ held that, "given NUON CHEA's specific hierarchical position ("Number 2" in the regime), it may be feared that, if he were to remain at liberty, he might attempt and would be in a position to pressure witnesses and victims, especially those who were under his authority."[103]

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[100] The DSS has determined that Mr. NUON has insufficient means to pay for his defence. *See* Document No. A-49, DSS Letter re Determination of Means, 17 October 2007.
[101] Document No. C-8, Written Record of Adversarial Hearing, p. 3.
[102] *Ibid.*, p. 4.
[103] Detention Order, para. 5.

49. As with the risk of flight, the danger of interference with witnesses and/or destruction of evidence must be supported by specific facts related to the charged person. However, the OCP's allegation of Mr. NUON's previous criticisms is buttressed by nothing more than Ms. CHEA's unsubstantiated assertion. The Detention Order itself is equally lacking in factual support and instead amounts to a statement of pure conjecture: "it *may* be feared [...] he *might* attempt [...] and would be *in a position* to pressure witnesses and victims [...]".[104] On the current record, this is an unreasonable and legally impermissible assumption and, as such, must be rejected. As noted above, the fact that Mr. NUON may continue to possess some measure of influence does not mean that will necessarily exercise it unlawfully. There is simply no evidence on the record that Mr. NUON has had inappropriate contact with a single witness, victim, or "third person" or that he has in any way encouraged the destruction of materials relevant to the case against him.[105]

c. There is no Actual Threat to Public Order or to Mr. NUON's Personal Safety

50. The OCP made no factual submissions in support of these grounds, and Mr. NUON countered with the assertions that (i) he has been peacefully re-integrated into Cambodian society for some time[106] and (ii) if anyone had wanted to harm him they would have done so already.[107] Nevertheless, the OCIJ held that, because of their gravity, the crimes with which Mr. NUON has been charged require the imposition of provisional detention.[108] Such position is both legally impermissible and factually spurious.

51. By relying solely on the gravity of the alleged crimes to justify this particular ground, the OCIJ has run afoul of the established prohibition of this practice discussed above. In this regard, the Detention Order seems to have been issued in anticipation of a long custodial sentence and suggests that the OCIJ may have pre-

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104 *Ibid.*, para. 5.

105 Moreover, the OCP's concern in this regard must be viewed in light of the fact that the crimes were allegedly committed some thirty years ago. Assuming, *arguendo*, it was established that Mr. NUON had the intent to attempt to alter the historical record, it is highly unlikely—if not impossible—that he could succeed given the fact that Khmer Rouge activity has already been so well-documented and recorded.

106 Document No. C-8, Written Record of Adversarial Hearing, p. 3.

107 *Ibid.*, p. 4.

108 Detention Order, para. 5.

judged the issue of Mr. NUON's culpability. Pursuant to recognized international principles, provisional detention based on a threat to public order is only justified upon the demonstration by precise facts of a particular disturbance *and* where detention is the only reasonable means of quelling it. This is clearly not the case here, as demonstrated by the OCP's lack of factual submissions on this point.

52. As already noted, Mr. NUON has been living openly and peacefully in Pailin for many years, during which time there have been no acts of violence in protest of his liberty or attempted acts of revenge against him. The fact that several other well-known ECCC targets are at large in Cambodia does not seem to have caused any disturbances to the public order either. To suggest, as the OCIJ has, that Cambodian society is too "fragile" to comprehend and respond appropriately to the idea of Mr. NUON's provisional release is inaccurate at best and ignores more than ten years of Cambodian history. As stated by Mr. NUON as the Detention Hearing, "I left the jungle [...] because I understood the political line of the government of Prime Minister Samdech Hun Sen, in particular the policy of reintegration".[109] This comment, of course, refers to the well-known government policy—begun as early as 1994—of reintegrating former members of the Khmer Rouge into Cambodian society.[110] Mr. NUON began his official reintegration with a formal request to HUN Sen in December 1998[111] and was, along with KHIEU Samphan, warmly welcomed back to "society" by the Prime Minister.[112]

53. The further suggestion that keeping Mr. NUON in provisional detention will in some way curb any "protests of indignation" is also troubling. Public expressions of indignation in response to official acts—provided they fall short of violent manifestation—are to be encouraged in open societies. To the extent the ECCC is concerned about sending a message to the public, it should be one of respect for

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109 Document No. C-8, Written Record of Adversarial Hearing, p. 3.

110 *See, e.g.*, Suzannah Linton, RECONCILIATION IN CAMBODIA (DC-Cam 2004), p. 81.

111 *See* BBC News Report, 26 December 1998, http://news.bbc.co.uk/2/hi/asia-pacific/242670.stm ("Respected Samdech, I have the honor to inform the Royal Government of my personal request to return to society and the nation to live as an ordinary citizen to contribute to consolidating peace, stability, and national reconciliation, and also to develop our beloved Cambodia.").

112 *Ibid.* ("I would like to express my warmest welcome to both of you who have returned to society and the nation and have recognized the constitution of the Kingdom of Cambodia [...]").

established legal principles rather than inaccurate assessments of the security situation which depict the population as an unruly mob prone to acts of hysteria.

3. The Detention Order Was Not Factually Motivated

54. As demonstrated above, none of the grounds contained in the Detention Order were factually substantiated as required by Rule 63(2)(a). Neither the OCP nor the OCIJ went beyond mere recitation of Rule 63(3)'s legal requirements. Not only has this made it difficult for the Defence to lodge a proper appeal, it leaves one with the very distinct impression that Mr. NUON's pre-trial detention was a fait accompli—and with the very real fear that public confidence in these proceedings may be adversely affected.

C. Provisional Release is Appropriate Under the Circumstances

55. In issuing the Detention Order, the OCIJ concluded that "no bail order would be rigorous enough to ensure that [Rule 63(3)(b)'s] needs would be sufficiently satisfied and therefore detention remains the only means to achieve these ends".[113] However, given the actual state of affairs as outlined above, this assessment appears both capricious and excessive.

56. At the Detention Hearing, the OCIJ failed to explore or consider the imposition of any less restrictive measures in keeping with principle of proportionality, such as provisional release subject to appropriate conditions. In particular, the OCIJ failed to take account of Mr. NUON's age and health; the circumstances of Mr. NUON's arrest/surrender; the guarantees offered by Mr. NOUN himself; the possibility of any further guarantees by potential third-party sureties; the proximity of the start of trial; and the availability and effectiveness of monitoring by the authorities.

57. Each of these factors militates in favor of provisional release. As already noted in detail, Mr. NUON's age and health prevent him from lengthy or strenuous movement outside his home. The circumstances of his arrest confirm that he is eager to participate in the proceedings and would have voluntarily surrendered if requested. Indeed, he has

[113] Detention Order, para. 6.

made a personal attendance guarantee and would willingly seek additional guaranties if required. Further, the OCIJ has made it quite clear that it intends to proceed with the case of KAING Guek Eav in an expedited manner, indicating that the trial of Mr. NUON may not take place for some time.[114] Finally, and perhaps most convincing, is the demonstrated willingness and ability on the part of the Cambodian authorities to locate and arrest those suspected of criminal activity.[115] There is every reason to believe that these very authorities are up to the task of monitoring, and re-arresting if necessary, a man in so frail a condition as Mr. NUON.

58. Accordingly, subject to the proposed conditions set forth at Annex A, none of the abstract concerns raised by the OCP would be able to materialize into actual fact. The application of these less restrictive measures would have the added benefit of isolating Mr. NUON from other charged persons with whom he may have very real conflicts of interest.

VI. CONCLUSION

59. For all the reasons stated above, the Defence respectfully requests this Chamber to vacate the Detention Order and either release Mr. NUON immediately subject to the proposed conditions and/or rehear the matter in accordance with Mr. NUON's fundamental rights and established legal principles as soon as possible. Alternatively, so as not to impede the expeditious progress of the investigation, Mr. NUON is willing to reside at the ECCC Detention Center on a voluntary basis, subject to an order ensuring his liberty consistent with the arguments advanced in these pleadings.

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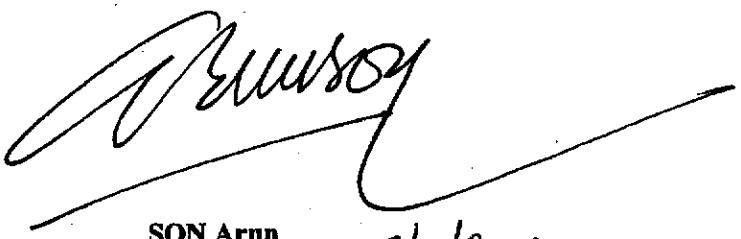
[114] *See* Document No. D-17, Forwarding Order of the Purpose of Separation, OCIJ, 18 September 2007, p. 2 ("We shall have an expedited resolution of the case of Duch, since this person has already been under temporary detention in various procedural frameworks for eight years now, as described in the Temporary Detention Order dated 31 July 2007. Furthermore, opening a public trial in the near future is substantially important to the credibility of the Court in view of the maturity of the facts of this case.")

[115] *N.B.* The Cambodian authorities have in the past arrested former Khmer Rouge figures and high-ranking government employees, for example the former mayor of Phnom Penh.

CO-LAWYER FOR NUON CHEA



SON Arun

8/11/2007 Phnom Penh

ANNEX A

Declaration of NUON Chea Regarding Conditions of Release

I, NUON Chea, hereby pledge that I am willing and able to abide by the following conditions if released on bail:

(a) I will surrender any requested documents to the ECCC authorities.

(b) I will live and remain within the town of Pailin, Cambodia, save for any internal travel approved and coordinated by the ECCC authorities.

(c) I will abide by a curfew and remain at my home from 10 pm to 7 am and consent to unannounced checks by the ECCC authorities in order to verify my presence.

(d) I will report once daily to the local police station.

(e) I will not have any contact with the other suspects, charged persons, victims, or potential witnesses.

(f) I will not engage in any political activity and will have no contact of any sort with the press and the media.

(g) I will attend all ECCC proceedings relevant to my case and will respond promptly to all orders, summonses, subpoenas, warrants, or requests issued by the ECCC.

Done on 8 November 2007 at Phnom Penh, Kingdom of Cambodia.

NUON Chea (Charged Person)