C9/4/2

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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CO-PROSECUTORS' RESPONSE TO NUON CHEA'S APPEAL ON EXTENSION OF PROVISIONAL DETENTION

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C9/4/2

I. INTRODUCTION

1. The Charged Person NUON Chea has filed an appeal ("Appeal")[1] challenging the order of the Co-Investigating Judges that extended his detention for a further period not exceeding one year ("Extension Order").[2] He contends that (1) his continued detention is not supported by law or facts;[3] (2) the Extension Order is procedurally defective as the Co-Investigating Judges gave no reasons in support of the extension;[4] and (3) the facts justify a "house arrest" at an approved medical facility.[5]

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

   (a) The Appellant has failed to demonstrate any material change in circumstances since he was originally detained by the Co-Investigating Judges on 19 September 2007 ("Detention Order")[6] and since that detention was confirmed by the Pre-Trial Chamber on 20 March 2008 ("Detention Appeal Decision").[7]

   (b) All the five disjunctive conditions necessitating detention under Rule 63(3)(b) remain jointly and individually satisfied. Specifically, the Appellant's detention remains a necessary measure (1) to prevent him from exerting pressure on witnesses or victims; (2) to preserve evidence or to prevent its destruction; (3) to ensure his presence during the proceedings; (4) to protect his security, and (5) to preserve public order.

   (c) House arrest is not warranted as the ECCC Detention Facility is appropriately equipped to take care of medical emergencies and, in any event, the Appellant's medical conditions do not justify any modification in the conditions of his detention.

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[1] *Case of NUON Chea*, Appeal Against Order on Extension of Provisional Detention, 16 October 2008, C9/4//1, ERN 00232728-00232736 [*hereinafter* Appeal].
[2] *Case of NUON Chea*, Order on Extension of Provisional Detention, 16 September 2008, C9/3, ERN 00224203-00224204 [*hereinafter* Extension Order].
[3] Appeal, paragraph 1.
[4] Appeal, paragraph 1.
[5] Appeal, paragraph 21.
[6] *Case of NUON Chea*, Provisional Detention Order, 19 September 2007, C9 [*hereinafter* Detention Order].
[7] *Case of NUON Chea*, Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, ERN 00172907-00172934 [*hereinafter* NUON Chea Detention Appeal Decision].

II. PRELIMINARY SUMISSION

An Oral Hearing is not Required

3. Internal Rule 77(3) ("Rules") permits the Pre-Trial Chamber, after considering the views of the parties, to determine an appeal on the basis of written submissions alone. The Appellant has not asked for an oral hearing of this Appeal. While the Pre-Trial Chamber has heard substantive provisional detention appeals in oral hearings, this Appeal – which concerns only an extension of a previously determined detention - raises no new factual or legal arguments that need to be addressed in an oral hearing. Most of the arguments raised in this Appeal have been considered in previous proceedings before this Court involving the same parties. Therefore, in the interest of judicial economy, it is submitted this Appeal should be determined on written submissions alone.

III. THE LAW

Duty to Give Reasons in Detention Orders

4. Internal Rule 63(7) requires that a decision of the Co-Investigating Judges on extension of detention "shall set out the reasons for such an extension." These reasons have to be given after considering the objections of the detainee. Citing settled international jurisprudence, the Pre-Trial Chamber also found that all decisions of judicial bodies, including the Co-Investigating Judges, have to be reasoned to meet international standards.[8]

5. A judicial authority "must demonstrate, through a discussion of all relevant factors" how the defendant has met or failed to meet his burden that he will appear for trial and will not pose a danger to victims, witnesses or third persons.[9] A judicial body is not obliged to deal with all possible factors which it can take into account when deciding whether the defendant will appear for trial; it is sufficient to indicate all the relevant factors that it has taken into account in reaching its decision. In other words, the authority "must render a reasoned opinion."[10]

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[8] *Case of NUON Chea*, Decision on Nuon Chea's Appeal Against Order Refusing Request for Annulment, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), 28 August 2008, ERN 001219322-00219333, D55/I/8, paragraph 21.

[9] *Prosecutor v. Popovic*, Decision on Defence's Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin Provisional Release, Case No. IT-05-88-AR65.2, Appeals Chamber, 30 June 2006, paragraph 8 [*hereinafter* Popovic Decision].

[10] *Prosecutor v. Haradinaj*, Decision on Lahi Brahimaj's Motion for Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 3 May 2006, paragraph 16.

Conditions Necessitating Detention

6. Under Rule 63 (3), the Co-Investigating Judges may order provisional detention where:

   (a) there is well-founded reason to believe that the defendant may have committed the crimes specified in the Introductory Submission; and

   (b) they consider provisional detention to be a necessary measure to:

      (i) prevent the defendant from exerting pressure on any witness or victim, or prevent any collusion between him and his accomplices;

      (ii) preserve evidence or prevent its destruction;

      (iii) ensure the presence of the defendant during the proceedings;

      (iv) protect the security of the defendant; or

      (v) preserve public order.

7. The five grounds of detention under Rule 63 (3) (b) are disjunctive.[11] There is no requirement for the Co-Investigating Judges to find that every ground is satisfied before they consider that detention is a necessary measure or that its extension is warranted. On the contrary, should they consider that any one of these five grounds exist, the test for detention is met. This approach is also followed before other criminal tribunals dealing with similarly serious international crimes.[12]

Exercise of Discretion in Considering Detention

8. A trial chamber has the discretion on how it concludes that detention is a necessary measure or its extension is warranted. Such discretion is usually exercised by taking into account all documents on the case file and all relevant facts of the case, including the gravity of the charges, the cogency of the evidence, the past and present character and behaviour of the

[11] IENG Sary Detention Appeal Decision, paragraph 121.

[12] *Prosecutor v Sainovic and Odjanic,* Decision Refusing Ojdanic Leave to Appeal, Case No. IT-99-37-AR65.2, ICTY Appeals Chamber, 27 June 2003, page 3, ERN 00154039-42) and has been adopted by the ECCC PTC: *Co-Prosecutors v KAING Guek Eav alias "DUCH"*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), 3 December 2007, ERN 00154284-00154302, C5 / 45, paragraph 59 [*hereinafter* DUCH Detention Appeal Decision].

defendant, the interests of witnesses and victims, and the interests of justice as a whole.[13] This conforms to the accepted practice in international criminal tribunals that has also been adopted by this Court.[14]

9. The Rules require that the Co-Investigating Judges must "consider" that the grounds of provisional detention are satisfied. There is no requirement to prove the existence of any of these grounds beyond a reasonable doubt, nor even on the balance of probabilities. Even if the defendant fully discharges his burden in relation to each ground of detention, he must then satisfy the Co-Investigating Judges that, having regard to all the circumstances, they should exercise their discretion to order release.[15]

Extension of Detention

10. Rule 63(6) provides for an automatic periodic review of detention of a defendant. Such a provision is absent in the basic documents of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") and the Special Court for Sierra Leone ("SCSL"). Those *ad hoc* tribunals, however, maintain that for a successful renewed application for release, the defendant must demonstrate "a material change of circumstances."[16]

11. Similar to the Internal Rules of this Court, Rule 118 of the Rules of Procedure and Evidence of the International Criminal Court ("ICC") requires that the pre-trial detention of a defendant must be reviewed by its Pre-Trial Chamber at least every 120 days. The Pre-Trial Chamber of the ICC has a "distinct and independent obligation [...] to ensure that a person is not detained for an unreasonable period prior to trial".[17] The Pre-Trial Chamber can modify

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[13] *Prosecutor v Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, paragraph 4, ERN 00153946-54.

[14] DUCH Detention Appeal Decision, paragraph 27.

[15] *Prosecutor v Dragomir Milosevic*, Decision on Defence Motion for Provisional Release, Case No. IT-98-29-I/PT, ICTY Trial Chamber, 13 July 2005, paragraph 4.

[16] *Prosecutor v Boskoski and Tarculovski*, Case No. IT-04-82-PT, Decision Concerning Renewed Motion for Provisional Release of Johan Tarculovski, 17 January 2007, paragraph 9.

[17] Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germaine Katanga, Case No. ICC—01/04-01/07, Pre-Trial Chamber, 9 July 2008, page 4.

its ruling on detention "if it is satisfied that the change in circumstances so require".[18] At the ICC, "the Prosecution has the burden of proof in relation to the continuing existence of the conditions [...] of pre-trial detention."[19]

12. Before this Court, the Rules do not provide for hearing the Co-Prosecutors, or any other party, while determining the extension of detention.[20] They only provide for objections to be submitted by the detainee.[21] The Rules, therefore, place an additional burden on the Co-Investigating Judges to justify by a reasoned decision that the conditions of detention under Rule 63(3) continue to be met to warrant an extension.

House Arrest

13. The Rules do not provide for alternative forms of detention.[22] Rule 65(1), however, envisions that a defendant may be released from detention by a bail order, under conditions necessary to ensure his presence during the proceedings and the protection of others.[23] However, if any of the conditions necessitating detention under Rule 63(3)(b) are met, a defendant cannot be released on bail.[24]

14. Even if a defendant were to be put under house arrest or "hospital detention", there may be high risks to his personal safety. He would be required to come to the ECCC premises on different occasions and it will be difficult to ensure his safety during transportation from the hospital or his house to the ECCC to attend publicly scheduled hearings.[25]

15. Statutes or rules of procedure of international criminal tribunals do not provide for "house arrest". The ICTY has sparingly considered such requests. In *Blaskic*, it granted a request for

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[18] Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui, Review of the Decision on the Conditions of the Pre-Trial Detention of Germaine Katanga, Case No. ICC—01/04-01/07, Pre-Trial Chamber, 18 August 2008, page 6.

[19] Situation in the Democratic Republic of the Congo, In the Case of the Prosecutor v. Germaine Katanga and Mathieu Ngudjolo Chui, Decision Concerning Observations on the Review of the Pre-Trial Detention of Germaine Katanga, Case No. ICC—01/04-01/07, Pre-Trial Chamber, 9 July 2008, page 4.

[20] Internal Rules, rule 63(7) [*hereinafter* Rules].

[21] Rules, rule 63(7).

[22] *Case of IENG Sary,* Decision on Appeal Against Provisional Detention Order of Ieng Sary", Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03), 17 October 2008, ERN 00232830-00232861, C22/I/ 73, paragraph 119 [*hereinafter* IENG Sary Detention Appeal Decision].

[23] IENG Sary Detention Appeal Decision, paragraph 120.

[24] IENG Sary Detention Appeal Decision, paragraph 121.

[25] IENG Sary Detention Appeal Decision, paragraph 122.

detention in a safe house on the ground that the accused met the pre-conditions for provisional release, that he voluntarily surrendered to the tribunal at a time when his country (Croatia) could not have legally arrested or extradited him, and that he volunteered to cover all the costs of his detention in the safe house.[26] In *Plavsic*, the accused requested to be held in a safe house claiming that the detention unit was inadequately designed and maintained to receive women detainees. She subsequently withdrew her request to be detained outside the detention unit in lieu of modified conditions within the detention unit.[27] Basic instruments of the ICTY notably do not permit an accused to be detained in a private dwelling solely nominated by him.[28]

IV. FACTS AND ARGUMENT

A. Appeal does not Identify Material Change of Circumstances to Justify Reconsideration

16. The Appellant has not identified any material change of circumstance to necessitate a reconsideration of his detention. While the length of time in detention has been considered by international tribunals as a relevant factor,[29] the Appellant has not demonstrated how it can, in and of itself, justify a reconsideration of detention.[30]

17. In their impugned Extension Order (16 September 2008), the Co-Investigating Judges noted that well founded reasons continued to exist for them to believe that the Appellant may have committed the crimes specified in the Introductory Submission. They recalled that the judicial investigation has since progressed and new evidence, especially from Case File No. 001, has been received indicating the Appellant's role in the charged crimes. The Co-Investigating Judges also noted that conditions for the Appellant's detention under Rule

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[26] *Prosecutor v. Blaskić*, Decision on the Motion of the Defence Filed Pursuant to Rule 64 of the Rules of Procedure and Evidence, Case No. IT-94-14-T, 43 April 1996, paragraph 13-24.

[27] *Prosecutor v. Halilovic*, Order of the President on the Renewed Defence Motion Concerning Conditions of Detention During Trial, Case No. 1 IT-01-48-PT, President of the ICTY, 24 January 2005, paragraphs 18 & 23.

[28] *Prosecutor v. Ljubicic*, Decision on Request for Modification of Conditions of Detention, Case No. IT-00-41-PT, President of the ICTY, 23 November 2005, paragraph 3.

[29] Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, Review of the Decision on the Application for the Interim Release of Mathieu Ngudjolo Chui, Case No. 01/04-01/07, Pre-Trial Chamber of the ICC, 23 July 2008, page 12.

[30] Appeal, paragraph 16.

63(3)(b) continued to be satisfied. Therefore, they extended his detention for a period not exceeding one year.[31]

18. Rule 63(7) requires the Co-Investigating Judges to "set out the reasons" for an extension of detention. The Co-Investigating Judges' duty to provide reasons stems from the scheme of the process of extension. Pursuant to Rule 63(7), the extension proceedings take place solely between the Co-Investigating Judges and the charged person. Before extending detention, the Co-Investigating Judges hear only the charged person's objections. No other party (including the Co-Prosecutors) is heard or is involved in this process. The process of extension of detention under Rule 63(7) is markedly different from the process of initial detention under Rule 63(3). The latter takes place during an "adversarial hearing" where the Co-Prosecutors are also heard and the burden of seeking and justifying detention arguably rests on the Co-Prosecutors.

19. The Appeal alleges that the Extension Order is procedurally defective as the Co-Investigating Judges did not provide sufficient factual or legal basis to justify extension.[32] The Co-Prosecutors note that the Appellant has an automatic right of appeal to this Chamber from the Co-Investigating Judges' Extension Order and this Chamber can "undertake its own analysis of the conditions set out in Internal Rule 63(3)."[33] Regardless, the Appellant has failed to demonstrate – both to the Co-Investigating Judges and to this Chamber – that (1) there was a material change of circumstances necessitating a reconsideration of detention, and (2) that the reasons justifying detention no longer exist. The Co-Prosecutors submit that the only material change that has occurred since the last determination of detention is the addition of evidence on the case file confirming the allegations in the Introductory Submissions that some of the most egregious crimes of the twentieth century were committed by the *Khmer Rouge* and that the Appellant was at the apex of this nationwide system of abuse.

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[31] Extension Order, page 2.
[32] Appeal, paragraph 20.
[33] IENG Sary Detention Appeal Decision, paragraph 68.

B. Well Founded Reasons - Rule 63 (3) (a) – Not Challenged

20. The Appellant concedes the existence of a well founded reason to believe that he may have committed "some of the crimes" specified in the Introductory Submission.[34] He clarifies that he "may bear responsibility – strictly in the Rule 63(3)(a) sense – only for those alleged crimes related to the activity of Office S-21."[35] He, therefore, does not challenge the well founded reasons determination of the Extension Order. Rule 63(3)(a) does not require that for this Court to order detention there must be well founded reason to believe that the defendant may have committed all the crimes specified in the Introductory Submission.

21. In its Detention Appeals Decision, the Pre-Trial Chamber found that material on the case file "would satisfy an objective observer that [the Appellant] may have been responsible for, or committed, the alleged crimes specified in the Introductory Submission in this stage of the investigations."[36] Since that Decision, the evidence on the case file incriminating the Appellant has increased both in volume and gravity. The Co-Investigating Judges have issued at least nine Rogatory Letters in Case File No. 002 (*e.g.* Document Nos. D25, D40, D43, D82, D91, D92, D93, D94 and D104) and they or their investigators have interviewed more than a hundred witnesses regarding the role of the five persons charged in the case file.

22. The Appellant has also acknowledged without challenge that DUCH's statements before this Court have "implicated [him] in criminal activity."[37] Besides DUCH, there are numerous witnesses who have implicated him not just in the charged crimes committed at the S-21 Security Centre but also elsewhere in Cambodia throughout the period of Democratic Kampuchea. For example, evidence on the case file, added after the Pre-Trial Chamber's Detention Appeals Decision of 20 March 2008, supports a well founded reason to believe that the Appellant was part of the high command structure of the *Khmer Rouge* that was responsible for the making and execution of the criminal policies of that regime.[38] One witness saw the Appellant participate in weekly meetings at Office B-1 with IENG Sary,

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[34] Appeal, paragraph 6.
[35] Appeal, paragraph 16.
[36] NUON Chea Detention Appeal Decision, paragraph 58.
[37] Appeal, paragraph 16.
[38] [REDACTED].

POL Pot, SON Sen, DUCH, and Ta MOK.[39] Another witness saw the Appellant along with KHIEU Samphan, IENG Sary, and IENG Thirith during study meetings at Borei Keila and Olympic Stadium between 1976 and 1977.[40] One witness saw the Appellant with SON Sen at an army meeting near Wat Phnom.[41] Other witnesses saw similar meetings of the Appellant with other senior leaders of the *Khmer Rouge*.[42]A witness noted that the Appellant was the Deputy Secretary and POL Pot was the Secretary of the Communist Party of Kampuchea.[43]

23. The evidence collected by the office of the Co-Investigating Judges has confirmed the occurrence of numerous crimes alleged in the Introductory Submission and the Appellant's responsibility for them. Evidence has confirmed that the *Khmer Rouge* evacuated Phnom Penh[44] and later subjected people to forced labour.[45] Evidence also indicates that they committed mass killings[46] and torture.[47] People under the *Khmer Rouge* regime lived in inhumane living conditions,[48] without adequate food[49] and medical treatment. [50] Witnesses state that the *Khmer Rouge* desecrated pagodas[51] and severely limited peoples' freedom of movement by separating families.[52]

24. No significant exculpatory evidence has been found to undermine this determination of the existence of well founded reasons. The Appellant, to date, has not placed any material, much less exculpatory material, on the case file that should trigger a reconsideration of this determination. The Co-Prosecutors, therefore, submit that well founded reasons continue to exist that the Appellant may have committed the crimes specified in the Introductory Submission.

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[39] [REDACTED].
[40] [REDACTED].
[41] [REDACTED].
[42] [REDACTED].
[43] [REDACTED].
[44] [REDACTED].
[45] [REDACTED].
[46] [REDACTED].
[47] [REDACTED].
[48] [REDACTED].
[49] [REDACTED].
[50] [REDACTED].
[51] [REDACTED].
[52] [REDACTED].

C. Provisional Detention Remains a Necessary Measure - Rule 63(3)(b)

25. The Appellant does not identify any material change of circumstances to show that conditions under Rule 63(3)(b) necessitating his detention are no longer met. He also does not challenge any specific condition of detention on any specific ground or reasoning. He only makes an unsubstantiated assertion that "the OCIJ has failed to explain how the *generally formulated* risks used to justify [his] initial detention has been further bolstered by *concrete evidence*, as required."[53]

26. While the Co-Investigating Judges have given summary reasoning for the continued satisfaction of conditions of detention, the Pre-Trial Chamber can "undertake its own analysis of the conditions set out in Internal Rule 63(3)."[54] The Co-Prosecutors, therefore, shall now demonstrate that all the conditions of detention under Rule 63(3)(b) are and continue to be satisfied to justify an extension of the Appellant's detention.

Exerting Pressure on Witnesses - Rule 63 (3) (b) (i)
and
Preserving Evidence or Preventing the Destruction of any Evidence - Rule 63 (3) (b) (ii)

27. The Appellant has not specifically challenged these grounds of detention except for implicating the lack of reasoning in the Extension Order. [55] These two grounds for provisional detention can be analysed together since they are supported by the same argument.[56] In this analysis, the statements made by witnesses can be considered as "evidence" within the meaning of Rule 63(3)(b)(ii).[57]

28. The whole case file has now been made available to the Appellant, including the names of the victims, civil parties and potential witnesses.[58] There are only a few surviving witnesses that can testify to the Appellant's involvement in the alleged crimes.[59] Some of those witnesses have not yet been interviewed by the Co-Investigating Judges.[60] Even if the

[53] Appeal, paragraph 17. Emphasis in original.
[54] IENG Sary Detention Appeal Decision, paragraph 68.
[55] Appeal, paragraph 17.
[56] IENG Sary Detention Appeal Decision, paragraph 95.
[57] IENG Sary Detention Appeal Decision, paragraph 95.
[58] IENG Sary Detention Appeal Decision, paragraph 96.
[59] IENG Sary Detention Appeal Decision, paragraph 96.
[60] IENG Sary Detention Appeal Decision, paragraph 96.

witnesses have already been heard and have given evidence, there is still a chance that they may have to be heard later during further investigations or hearings.[61]

29. The Appellant in the past has tried to threaten witnesses or sought to destroy evidence.[62] The Pre-Trial Chamber has noted that there is a likelihood that he would do so in the future.[63] Considering the expressed fear of testifying before this Court by potential witnesses, if this propensity of the Appellant becomes known to victims and witnesses, it could adversely affect their willingness to testify before this Court, especially if he is released.[64] The Appellant has already "conceded" that there may be well founded reasons that he may have committed the crimes at the S-21 Security Centre.[65] There are even fewer surviving witnesses of the crimes in that Security Centre.

30. The Appellant has admitted, and the witnesses have confirmed, that he occupied senior positions in the *Khmer Rouge* movement. Certain influence is necessarily attached to such senior positions; influence which can be applied even today.[66] The Appellant's detention is, therefore, necessary to prevent him from exerting influence on the witnesses or destroying evidence.[67]

Ensuring the Presence of the Charged Person - Rule 63 (3) (b) (iii)

31. The Appellant has not specifically challenged this ground of detention in his Appeal.[68] In view of the gravity of the charges against him, the Appellant is likely to be convicted for life in prison.[69] International criminal tribunals trying crimes similar to this Court have held that

[61] NUON Chea Detention Appeal Decision, paragraph 60.
[62] NUON Chea Detention Appeal Decision, paragraphs 61-2.
[63] NUON Chea Detention Appeal Decision, paragraph 62.
[64] NUON Chea Detention Appeal Decision, paragraph 63.
[65] Appeal, paragraph 6. Emphasis in original.
[66] NUON Chea Detention Appeal Decision, paragraph 62.
[67] NUON Chea Detention Appeal Decision, paragraph 64.
[68] Appeal, paragraph 17.
[69] Detention Appeal Decision, paragraph 65.

seriousness of the crimes charged, combined with other factors, can be a relevant factor to deny release.[70] Lengthy sentence is an incentive not to appear at trial.[71]

32. The Pre-Trial Chamber noted the proximity of the Appellant's residence in Pailin to Cambodia's border with Thailand and the attendant risk of his flight.[72] This risk is compounded by the location of his residence "in an area well known as a *Khmer Rouge* centre of support".[73] The Pre-Trial Chamber found it likely that the Appellant's contacts in the area are "well known" and that they may contribute to the possibility of his flight.[74]

33. These facts are show that the Appellant's release would diminish the likelihood of his presence before this Court. Therefore, his continued detention is a necessary measure.

Protecting the Security of the Charged Person - Rule 63 (3) (b) (iv)

34. The Appellant has not specifically challenged this ground of detention in his Appeal.[75] Like other senior leaders of the *Khmer Rouge* detained by this Court, the Appellant is a well known figure in Cambodia.[76] The Pre-Trial Chamber has noticed the threats made against Co-Charged Person DUCH during the first public hearing of this Court and has anticipated that such aggression could also be vented against the Appellant, especially after sufficient evidence having been recorded implicating him in those crimes.[77] Contrary to the Appellant's submission, a passage of time will not diminished the relevance of such threats. In fact, the relevance of the threats will increase as the general public is beginning to believe that there is now an end to impunity for the *Khmer Rouge* leadership.

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[70] *Prosecutor v. Gotovina, Cermak and Markac,* Decision on Ante Govina's Appeal Against Denial of Provisional Release, Case No. IT-06-90-AR65.1, ICTY Appeals Chamber, 17 January 2008, paragraph 15 (C40.1, Annex entitled "*Table des Sources*", Attachment 30, ERN 00228948-56) [*hereinafter* Gotovina Decision].

[71] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo,* Decision on the Application for the Interim Release of Thomas Lubanga Dyilo, Case No. 01/04-01/06, Single Judge of the ICC, 18 October 2006, pages 5-6 (C11/11, Authority C 13, ERN 00153776).

[72] NUON Chea Detention Appeal Decision, paragraph 67.

[73] NUON Chea Detention Appeal Decision, paragraph 68.

[74] NUON Chea Detention Appeal Decision, paragraph 68.

[75] Appeal, paragraph 17.

[76] IENG Sary Detention Appeal Decision, paragraph 107. This holding in the context of Co-Charged Person IENG Sary is equally applicable in the context of this Appellant.

[77] NUON Chea Detention Appeal Decision, paragraph 71.

35. These facts show that the Appellant's release would actually be harmful to his personal security. Therefore, his continued detention is a necessary measure.

Preserving Public Order - Rule 63 (3) (b) (v)

36. The Appellant has not specifically challenged this ground of detention in his Appeal.[78] A passage of time has not diminished the impact of the Democratic Kampuchea regime on the Cambodian society.[79] A proportion of the Cambodian population that lived through that period still suffers from Post Traumatic Stress Disorder (PTSD).[80] Specialists argue that the commencement of judicial activities of this Court "may pose a fresh risk to the Cambodian society" and may "lead to the resurfacing of anxieties and a rise in the negative social consequences that accompany them".[81]

37. The Pre-Trial Chamber has noted that the hearings before this Court have generated a great deal of interest among the Cambodian population and the press as well as the international community.[82] This interest demonstrates that these proceedings, even in their pre-trial phase, are still of a great concern for the Cambodian people and the international community.[83]

38. Although specific evidence is required to support an actual risk that the public order may be disrupted if a defendant is released, this assessment necessarily involves a measure of prediction, particularly in the context of the crimes falling within the jurisdiction of this Court. The perceived threat to security is not illusory.[84] In so deciding, the Pre-Trial Chamber took judicial notice of "everyday disturbances or even violent crimes".[85] These facts show that the Appellant's release would actually disturb public order. Therefore, his continued detention is a necessary measure.

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[78] Appeal, paragraph 17.
[79] NUON Chea Detention Appeal Decision, paragraph 77.
[80] NUON Chea Detention Appeal Decision, paragraph 77.
[81] NUON Chea Detention Appeal Decision, paragraph 77.
[82] NUON Chea Detention Appeal Decision, paragraph 79.
[83] NUON Chea Detention Appeal Decision, paragraph 79.
[84] *Case of IENG Thirith*, Decision on Appeal against the Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/I/27, ERN 00201633-49, paragraphs 65 and 69.
[85] NUON Chea Detention Appeal Decision, paragraph 80.

D. Conditions do not Warrant a Bail Order

39. The Appellant claims that neither the Co-Investigating Judges nor the Pre-Trial Chamber has considered "a less restrictive alternative regime" in the nature of a bail order in lieu of detention. Seeking proximity to emergency medical services, he wishes to be placed under "house arrest" at an approved medical facility in central Phnom Penh.[86]

40. In its Detention Appeal Decision, the Pre-Trial Chamber noted that, in the Appellant's case, all the five grounds justifying detention under Rule 63(3)(b) have been met, though any one of them would have been sufficient to justify detention.[87] The Chamber found that detention was necessary to ensure the security of the witnesses and the Appellant, to preserve evidence, to ensure the presence of the Appellant during proceedings and to preserve public order.[88] It concluded that no bail order would be rigorous enough to address these concerns.[89]

41. As stated above, the Rules do not expressly provide for an alternative form of detention.[90] In the case of IENG Sary, who had sought similar relief, the Pre-Trial Chamber found that even if a defendant were to be placed in "hospital detention" there may be high risks to his personal safety.[91] He would be required to come to the seat of this Court on different occasions and it will be very difficult to ensure his safety during his transportation from the hospital or his house to this Court to attend publicly scheduled hearings.[92] The Chamber found that the ECCC Detention Facility was "properly equipped to provide medical assistance, as required."[93]

42. On 9 October 2008, during a hearing before the Co-Investigating Judges on the conditions of his detention, the Appellant noted: "My detention conditions are correct. I find them acceptable."[94] The Pre-Trial Chamber has also found that the Co-Investigating Judges have

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[86] Appeal, paragraph 21.
[87] NUON Chea Detention Appeal Decision, paragraph 83.
[88] NUON Chea Detention Appeal Decision, paragraph 83.
[89] NUON Chea Detention Appeal Decision, paragraph 83.
[90] IENG Sary Detention Appeal Decision, paragraph 119.
[91] IENG Sary Detention Appeal Decision, paragraph 122.
[92] IENG Sary Detention Appeal Decision, paragraph 122.
[93] IENG Sary Detention Appeal Decision, paragraph 123.
[94] *Case of NUON Chea*, Written Record of Interview on Conditions of Detention, Case No. 002/19-09-2007-ECCC-OCIJ, ERN 00229527-00229529, C39, 9 October 2008, page 2.

already appointed four cardiologists (French, Thai and Cambodian) to assess the Appellant's medical condition.[95] Recently, the Co-Investigating Judges have appointed two cardiologists to further assess the Appellant's medical condition.[96] The appointed experts to date have concluded that, while due to the Appellant's advanced age a continuous monitoring was essential, his general health and memory were appropriate for his age and condition.[97] The French cardiologist concluded: "It is difficult to foretell the future, but in the light of this thorough check-up, [the Appellant] enjoys at present a real stability of pathologies from which he suffers. [...] It is to keep in mind that the patient is an old man who requires a periodical updating *every few months*."[98]

43. Besides referring to the distance between the ECCC and "central Phnom Penh", the Appellant does not identify any specific ground to justify his permanent hospitalization at "an approved medical facility".[99] Hospitalization or medical evacuation is not amenable to judicial determination; they are essentially medical decisions to be left to physicians and experts.[100] The Co-Prosecutors note that at many instances, when this Court's detained defendants have required medical attention they have been sent to appropriate external medical facilities. Some have indeed been hospitalized for longer durations. The same shall likely happen should this Appellant require any emergency medical attention.

44. The Appeal, therefore, fails to make a case for a bail order.

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[95] *Case of NUON Chea*, Decision on Nuon Chea's Appeal Regarding Appointment of an Expert, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 07), ERN 00233587-00233598, D54/V/5, 22 October 2008, paragraphs 36, 39.
[96] *Case of NUON Chea*, Expertise Order, Case No. 002/19-09-2007-ECCC-OCIJ, ERN 00226126-00226128, B14, 6 October 2008, page 2.
[97] *Case of NUON Chea*, Co-Prosecutors' Response to NUON Chea's Appeal Regarding Appointment of an Expert to Assess His Fitness to Stand Trial, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 07), ERN 00196845-00196854, D54/V/2, 17 June 2008, paragraph 8.
[98] *Case of NUON Chea*, Co-Prosecutors' Response to NUON Chea's Appeal Regarding Appointment of an Expert to Assess His Fitness to Stand Trial, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 07), ERN 00196845-00196854, D54/V/2, 17 June 2008, paragraph 10. Emphasis added.
[99] Appeal, paragraph 21.
[100] *Case of NUON Chea*, Written Record of Interview on Conditions of Detention, Case No. 002/19-09-2007-ECCC-OCIJ, ERN 00229527-00229529, C39, 9 October 2008, page 2.

V. CONCLUSION

45. The Co-Prosecutors, therefore, request that the Pre-Trial Chamber dismiss the Appeal.

CHEA Leang
Co-Prosecutor

Robert PETIT
Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this twenty-second day of January 2009.