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Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

Criminal Case File N° 001/18-07-2007-ECCC-OCIJ (PTC01)

PRE-TRIAL CHAMBER

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge PEN Pichsaly
Judge Katinka LAHUIS
Judge HUOT Vuthy

Greffiers CHUON Sokreasey
Anne-Marie BURNS

Date: 3 December 2007

បានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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VICHET

**DECISION ON APPEAL AGAINST PROVISIONAL DETENTION ORDER
OF KAING GUEK EAV ALIAS "DUCH"**

PURSUANT TO the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea and Rule 63(4) of the Internal Rules

Co-Prosecutors

CHEA Leang
Robert PETIT

Charged Person

KAING Guek Eav alias "DUCH"

Defence Counsel

KAR Savuth
François KOUCHE

ORIGINAL DOCUMENT
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NUP SOTHUNVICHET
ACTING CASE FILE OFFICER



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”);

NOTING the significant public interest in the proceedings and the need for members of the public, without legal training, to understand and appreciate the meaning of its decision, and writing in a style reflecting this need;

HEREBY DECIDES as follows:

I. INTRODUCTION

1. The Pre-Trial Chamber refers to, repeats and adopts the Report of Examination (“the Report”), dated 19 November 2007, on the Proceedings, Legal Provisions and Facts at issue in this case, which forms part of this Decision.
2. On 15, 20 and 21 November 2007, the Pre-Trial Chamber held hearings partly *in camera*, partly in public.
3. Before the hearings, the Pre-Trial Chamber received the Case File, which was updated.

II. ADMISSIBILITY OF THE APPEAL

4. On 23 August 2007, the Co-Lawyers of the Charged Person filed a notification of appeal. By order of the Chief of Greffiers dated 4 September, the Pre-Trial Chamber allowed the Co-Lawyers to file their pleadings within fifteen days after receiving the notification of that order. The Appeal Brief was filed on 5 September 2007. The Appeal Brief was filed within the time-limit set by the Pre-Trial Chamber and is therefore admissible.
5. The Co-Prosecutors invited the Pre-Trial Chamber to clarify whether the thirty-day time limit in Rule 75 of the Internal Rules of the ECCC (“the Internal Rules”) is a time limit to file substantive appeals or merely notices of appeal. Unless there is a need to clarify the Rules because of the arguments of the parties and the consequences this might bear, the Pre-Trial Chamber does not clarify rules in general. In this particular case, any ambiguity in the Rule was overridden when the Pre-Trial Chamber accepted the notice of appeal.



III. THE NATURE OF THE APPEAL

6. The decision of the Co-Investigating Judges on provisional detention is given pursuant to Rule 63(2) of the Internal Rules from which an appeal may be made, according to Internal Rule 63(4), to the Pre-Trial Chamber. The nature of this appeal is not defined in the Internal Rules. The Pre-Trial Chamber has therefore to determine the scope of its review of the provisional detention and whether it is bound in its considerations by the grounds in the pleadings of the appellant.
7. In the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea of 6 June 2003 (“the Agreement”) and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia of 27 October 2004 (“the ECCC Law”), there is no direct provision for appeal against orders of provisional detention from the Co-Investigating Judges. Article 12(1) of the Agreement specifically provides that the procedure shall be in accordance with Cambodian Law. The Internal Rules specifically make provision for a right of appeal in respect of provisional detention orders, knowing that the *Code de procédure pénale du Royaume du Cambodge* (“the Cambodian Code of Criminal Procedure”)¹ makes such a provision with regards to *La Chambre d’instruction*. The Pre-Trial Chamber fulfils this role in the ECCC. Therefore, the manner in which the Pre-Trial Chamber must approach appeals on provisional detention orders is directed by *Livre 4: L’Instruction, Titre 2: La Chambre d’instruction*.

Article 261. (examen de la régularité de la procédure)

Chaque fois qu’elle est saisie, la chambre d’instruction examine la régularité de la procédure et s’assure du bon déroulement de celle-ci.

Elle peut, d’office, lorsqu’elle constate des causes de nullité, annuler tout ou partie de la procédure. Elle procède ainsi qu’il est dit à l’article 280 (effet de l’annulation) de ce code.

Article 262. (actes d’instruction complémentaires)

La chambre d’instruction peut ordonner tout acte d’instruction complémentaire qu’elle juge utile.

¹ This code was in the drafting process when the Internal Rules were adopted. It was signed by the King on 19 August 2007 and entered into force in Cambodia on 20 August 2007. It is currently available only in Khmer and French.



Elle commet pour y procéder soit l'un de ses membres, soit un juge d'instruction qu'elle délègue.

Le magistrat chargé de procéder aux actes d'instruction complémentaires dispose, dans les limites fixées par la chambre d'instruction, des pouvoirs accordés au juge d'instruction.

Lorsque les actes d'instruction sont accomplis, le dossier de la procédure est déposé au greffe de la chambre d'instruction. Le président de la chambre d'instruction fixe une nouvelle date d'audience. Les dispositions de l'article 259 (consultation du dossier et mémoire) de ce code sont applicables.

8. Reading the Internal Rules in relation to these Articles of the Cambodian Code of Criminal Procedure, the Pre-Trial Chamber is directed to review the Provisional Detention Order ("the Order") by an examination of:
- a. the procedures of the Co-Investigating Judges prior to the Order being issued;
 - b. the exercise of discretion by the Co-Investigating Judges to consider the application of Internal Rule 63(3);
 - c. the sufficiency of the facts for reaching the conclusion under 63(3) of the Internal Rules;
 - d. whether the circumstances on which the Order was based still exist today; and
 - e. any additional issues not otherwise dealt with which are the subject of specific grounds of appeal.

IV. EXAMINATION OF THE PROCEDURES OF THE CO-INVESTIGATING JUDGES PRIOR TO THE ORDER BEING ISSUED

9. The Pre-Trial Chamber has examined whether the Co-Investigating Judges have reminded the Charged Person of his right to remain silent at every stage of the proceedings as prescribed in Internal Rule 21(1)(d), which provides:

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.



² This Internal Rule is in accordance with Article 35(new) of the ECCC Law.

10. It is apparent that the Charged Person was only informed of his right to remain silent at the commencement of the initial hearing he attended. He was not informed of this right prior to the adversarial hearing or during any interviews. Following questions posed at the hearing of the Pre-Trial Chamber, the Co-Lawyers for the Charged Person advised the Chamber that they consider that the Co-Investigating Judges complied with the requirement to inform the Charged Person of his right to remain silent "at every stage of the proceedings". The Co-Lawyers consider that the Charged Person was reminded of this right during the initial hearing of the Co-Investigating Judges, which is the commencement of an investigative "stage". This matter would have raised an issue as to what is meant by the phrase "at every stage of the proceedings" had the Co-Lawyers for the Charged Person not advised the Chamber in this manner. The Co-Lawyers were present during each hearing and interview of the Charged Person and the Charged Person was aware of his right to remain silent during each hearing and interview. The Pre-Trial Chamber notes that the Charged Person exercised this right during his hearings and interviews and that the Charged Person also voluntarily delivered written statements to the Co-Investigating Judges. Following questions asked by the Pre-Trial Chamber, the Co-Lawyers also made clear that they would not request annulment of the proceedings because of this issue. We therefore find that any right to request annulment of the proceedings based on this procedural defect has been waived by the Charged Person. Given these circumstances, the Pre-Trial Chamber considers it of no further interest to rule on the meaning of the words "at every stage of the proceedings shall be informed of his right to remain silent" in Internal Rule 21(1)(d).
11. The Pre-Trial Chamber has further examined whether the Charged Person was defended by a lawyer of his choice as prescribed in Internal Rule 21(1)(d). In the records of the Co-Investigating Judges, the Charged Person made it clear that he wanted the assistance of an international lawyer as well as a national lawyer as prescribed in Internal Rule 22. Although it was not clear from the record of the adversarial hearing, the Co-Lawyers and the Co-Prosecutors made clear to the Pre-Trial Chamber that the international lawyer was present and that he was allowed to defend the Charged Person through the national lawyer. Therefore, the right of the Charged Person was not violated, and no objection to the contrary was made.
12. The Pre-Trial Chamber concludes, given the concessions of the Co-Lawyers, there is no need to consider these matters further.



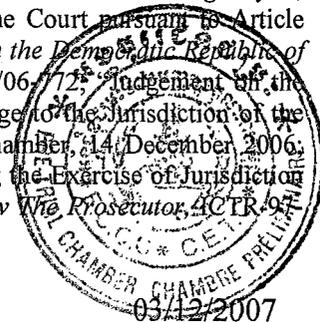
**V. THE EXERCISE OF DISCRETION BY THE CO-INVESTIGATING JUDGES TO
CONSIDER THE APPLICATION OF INTERNAL RULE 63(3)**

13. The Co-Lawyers set out in their Appeal Brief their arguments as to why the more than eight years of prior detention violates both the relevant provisions of Cambodian law and applicable human rights law, as contained in Article 9 of the ICCPR, with reference to the jurisprudence related to the abuse of process doctrine.³ The Co-Lawyers submit that this period of prior detention may be imputed to the judicial authorities responsible for the present case. In effect, they submit that such prior detention was a bar to the exercise of a discretion to apply Internal Rule 63(3) and consider the issue of a provisional detention order with respect to proceedings before the ECCC. The Co-Prosecutors opposed these arguments, as set out in the Report. In their decision, the Co-Investigating Judges considered they had no jurisdiction to determine the legality of the Charged Person's prior detention. The Pre-Trial Chamber finds it appropriate to examine this matter, noting that it is a specific ground of appeal.

14. Article 9 of the ICCPR reads:

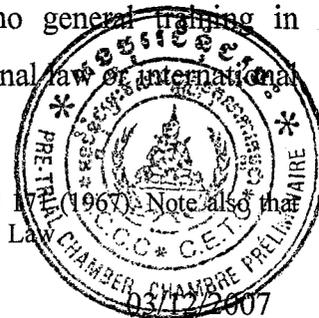
- i. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
- ii. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- iii. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

³ See: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-512, "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute", Pre-Trial Chamber I, 3 October 2006, at page 10; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, "Judgement on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of 3 October 2006", Appeals Chamber, 14 December 2006; *Prosecutor v Dragan Nikolic*, IT-94-2-PT, "Decision on Defence Motion Challenging the Exercise of Jurisdiction of the Tribunal", Trial Chamber II, 9 October 2002, paragraphs 114-5; *Barayagwiza v The Prosecutor*, ICTR 97-19-AR72, "Decision", Appeals Chamber, 3 November 1999, paragraphs 73-77.



- iv. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
 - v. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.⁴
15. The question is whether previous actions by other than ECCC judicial authorities have caused a violation of the above-mentioned Article entailing consequences for decisions taken by organs of the ECCC such as the Co-Investigating Judges and the Pre-Trial Chamber itself. The Pre-Trial Chamber is of the view that it can only take a violation of this Article into account when the organ responsible for the violation was connected to an organ of the ECCC, or had been acting on behalf of any organ of the ECCC or in concert with organs of the ECCC.
16. The question of the relationship between the ECCC and the Military Court is therefore relevant to a consideration of whether the Co-Investigating Judges and the Pre-Trial Chamber have any jurisdiction to inquire into the legality of the prior detention.
17. According to, and as provided in the Internal Rules, the Co-Investigating Judges have jurisdiction to decide on provisional detention and release, and the Pre-Trial Chamber has jurisdiction to decide on appeals against these decisions. The Agreement, the ECCC Law, the Internal Rules and Cambodian law do not explicitly or implicitly give any jurisdiction to the Co-Investigating Judges or the Pre-Trial Chamber to rule upon any matter related to decisions or actions of the investigating judges of the Military Court or any other court within the Cambodian court system. The jurisdiction of the Pre-Trial Chamber and other organs of the ECCC is expressly limited to the subject matter of the ECCC Law. There is no provision for interaction between the ECCC and any other judicial bodies within the Cambodian court structure.
18. The ECCC is distinct from other Cambodian courts in a number of respects. The judiciary includes both national and foreign judges. The foreign judges would not normally qualify for appointment within the Cambodian court structure as they have no general training in Cambodian law, but rather are chosen for their "experience [...] in criminal law or international

⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS (1967). Note also that Article 14(3) of the ICCPR is substantively reproduced in Article 35(new) of the ECCC Law.



law, including international humanitarian law and human rights law”.⁵ The ECCC is entirely self-contained, from the commencement of an investigation through to the determination of appeals. There is no right to have any decision of the ECCC reviewed by courts outside its structure, and equally there is no right for any of its Chambers to review decisions from courts outside the ECCC. In the structure of the Cambodian criminal courts, appeals from the Military Court may be made to the Appeals Court and from there to the Supreme Court.

19. For all practical and legal purposes, the ECCC is, and operates as, an independent entity within the Cambodian court structure and therefore has no jurisdiction to judge the activities of other bodies. The Co-Prosecutors have submitted that this independence, which makes the ECCC a “special internationalised tribunal”, is demonstrated by a number of factors that are summarised in the Report.
20. In reaching its conclusion, the Pre-Trial Chamber also refers to the decision of the Appeals Chamber of the Special Court for Sierra Leone in the case of *Taylor*, where it considered the indicia of an international court included the facts that the court is established by treaty, that it was “an expression of the will of the international community”, that it is considered “part of the machinery of international justice” and that its jurisdiction involves trying the most serious international crimes.⁶
21. As the ECCC has no direct relationship to the Military Court, it has no direct jurisdiction to review the actions of that Court or the compliance of those actions with Cambodian law. There is similarly no evidence that the Military Court acted on behalf of the ECCC in detaining the Charged Person, or of any concerted action between any organ of the ECCC and the Military Court.⁷ The Co-Lawyers for the Charged Person produced at the hearing of the Pre-Trial Chamber one document from the Case File which is said to have emanated from the Military Court. The way in which this document came into the Case File has not been disclosed, and on its face does not provide any proof of a link between the ECCC and the Military Court or demonstrate that the Military Court and the ECCC acted in concert in any way whatsoever in detaining the Charged Person for the whole or any part of the period in excess of eight years.

⁵ Article 10(new), ECCC Law.

⁶ *Prosecutor v Charles Ghankay Taylor*, SCSL-2003-01-1, “Decision on Immunity from Jurisdiction”, Appeals Chamber, 31 May 2004, paragraphs 38-39.

⁷ See *Barayagwiza*, “Decision”, at paragraph 61 and *Lubanga*, “Judgement on Appeal against Decision on Defence Challenge”, at paragraph 42, as above in note 3.

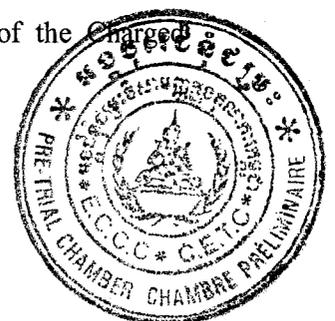


22. In fact, the ECCC only existed in any form after the swearing-in of the judges of the ECCC, which took place on 3 July 2006. The ECCC did not exist as an organ before this date. The first task of the judges was to formulate the Internal Rules, on the basis of which the prosecutions could take place. These Rules were adopted in the plenary meeting of judges on 12 June 2007. Thus, there cannot have been any connection or any actions on behalf of any organ of the ECCC by the authorities of the Military Court prior to these dates. To the extent that the Military Court purported to base certain actions on the pre-amendment and amended ECCC Law, this cannot have been at the direction of the ECCC.
23. The Pre-Trial Chamber finds on the basis of the above reasoning that the Co-Investigating Judges could use their discretion to apply Internal Rule 63(3), as they did.
24. The Pre-Trial Chamber further observes that the Co-Investigating Judges and Co-Prosecutors of the ECCC have acted in accordance with Article 9 of the ICCPR, and it notes that the Co-Lawyers did not argue that the Co-Investigating Judges violated this Article themselves.
25. The Pre-Trial Chamber further observes that the Trial Chamber and the Supreme Court Chamber may determine, as submitted by the Co-Prosecutors, that it is appropriate to take any previous provisional detention, whether or not it was illegal, into account at a later stage of the proceedings. The Pre-Trial Chamber notes that the maximum sentence for the crimes with which the Charged Person is charged is life imprisonment and that the Charged Person has thus far not contested the allegations made against him. The release from provisional detention due to the mere fact of the length of such detention should only be considered when it would clearly exceed any likely sentence that may be given.

VI. EXAMINATION OF THE CONDITIONS WHICH HAVE TO BE MET ACCORDING TO RULE 63(3) OF THE INTERNAL RULES

26. Rule 63(3) of the Internal Rules provides:

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.

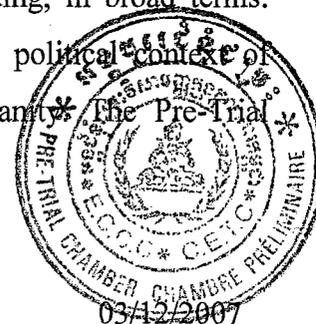
27. In order to decide if the grounds for provisional detention as set out in Rule 63(3) are met, the Pre-Trial Chamber has taken into account the written and oral submissions of both parties, the evidence they have submitted, and the whole Case File of the Co-Investigating Judges up to the date of the hearing.

- a) There are well-founded reasons to believe that the Charged Person may have committed the crimes specified in the Introductory Submission (Internal Rule 63(3)(a)).

28. The Charged Person does not contest that he was the Deputy, and then the Chairman, of S-21, from 1975 to 1979. At the hearing on 20 November 2007, his national lawyer, Kar Savuth, introduced himself at the hearing of the Pre-Trial Chamber as follows: "I, Kar Savuth, the lawyer to defend the Charged Person named Kaing Guek Eav, alias Duch, who was also the Chief of the S-21."

29. The Defence has not challenged, at any time during the appeal proceedings, the fact that there are well-founded reasons to believe that the Charged Person may have committed the crimes for which he has been put under investigation by the Co-Investigating Judges, namely that he was directing the Security Prison S-21 between 1975 and 1979 where, under his authority, countless abuses were allegedly committed against the civilian population, including, in broad terms: mass murder, arbitrary detention and torture, which occurred within a political context of widespread and systematic abuses and constitute crimes against humanity. The Pre-Trial Chamber concludes that the conditions of Internal Rule 63(3)(a) are met.

- b) Provisional detention is a necessary measure;



- (i) to prevent the Charged Person from exerting pressure on any witnesses or victims and to preserve evidence or prevent the destruction of any evidence (Internal Rules 63(3)(b)(i) and 63(3)(b)(ii))
30. These two grounds for provisional detention will be analysed together since they are supported by the same arguments. In fact, the statements made by the witnesses of the events at S-21 can be considered as “evidence” within the meaning of Internal Rule 63(3)(b)(ii).
31. As admitted by the Charged Person himself, S-21 was a security centre devoted to collecting “confessions” from detainees, which were sent to the central committee of the party.⁸ It is documented that many people were killed in this centre and, according to the Co-Prosecutors, only a few witnesses are left.
32. The surviving witnesses, either inmates or staff, were submitted to a cruel regime of terror. Some of them have expressed publicly their “ubiquitous feeling of fear” while serving as prison guards under the Charged Person at S-21.⁹ It is foreseeable that this fear will return and prevent them from testifying should the Charged Person be released. In the particular context of the events that happened at S-21, the mere presence of the Charged Person in society can exert pressure on witnesses and prevent them from testifying.
33. More broadly, a survey conducted by the Documentation Centre of Cambodia among potential witnesses and official representatives in the Takeo Province reports that some potential witnesses have expressed their fear of testifying before the ECCC based, amongst other grounds, on the fact that they are afraid that the charged persons or their relatives can put pressure on them or seek revenge.¹⁰ This has to be put in the social context prevailing in Cambodia, where measures to protect witnesses may be limited and weapons easily accessible. Therefore, the witnesses’ willingness to testify is already fragile, and the balance could be easily upset by the release of the Charged Person.
34. The Pre-Trial Chamber notes that it has been reported that the Charged Person has uttered threats in the past in order to ensure that his activities at S-21 not be disclosed. In an interview, a

⁸ Nic DUNLOP, *The Lost Executioner: A Story of the Khmer Rouge*, (Bloomsbury, 2005), page 271 (“The Lost Executioner”).

⁹ EA Meng-Try and SIM Sorya, *Victims and Perpetrators – Testimony of Young Khmer Rouge Comrades*, (Phnom Penh: Documentation Centre of Cambodia, 2001) page 35.

¹⁰ Geerteke JANSEN, *Voices of Takeo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia* (Phnom Penh: Documentation Centre of Cambodia, 2006).



former Khmer Rouge cadre named Chek Sim said that during the Democratic Kampuchea period, the Charged Person warned him that if he talked to anyone regarding his association with the S-21 Security Centre, the Charged Person would report him to Ieng Sary to have him killed.¹¹ This suggests that the Charged Person might utter threats again to intimidate witnesses.

35. It is not contested that the whole Case File has now been made available to the Charged Person, including the names of potential witnesses. The Charged Person has asserted that he has no reason to interfere with the witnesses, for his lawyer says that all of them have now been interviewed by the Co-Investigating Judges. Even if the 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 and/or hearings.

36. Moreover, the testimonies of the few witnesses of S-21 events are crucial to the investigation and, eventually, to the trial. It is essential that they are not in any fear or suffering from any pressure preventing them from testifying. The Pre-Trial Chamber finds that the provisional detention is a necessary measure to prevent the Charged Person from exerting pressure on witnesses or destroying any evidence.

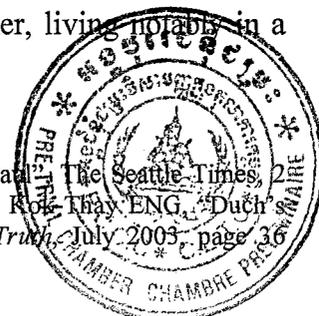
(ii) to ensure the presence of the Charged Person during the proceedings (Internal Rule 63(3)(b)(iii))

37. From 1979 to 1999, when he was arrested by the Military Court, the Charged Person disappeared from public view. While all the details of his whereabouts and the names he used remain unclear, many factors indicate that he took different measures to conceal his past and avoid being recognised as Duch, the former Chairman of S-21:

- from 1986, he used the name of Hang Pin;
- he changed his job many times, working as a teacher, director of education, and medical aid worker;¹²
- after the Democratic Kampuchea period, he did not return to live in his hometown but instead moved from one location to another, living notably in a

¹¹ Interview of Chek Sim conducted by Ysa Osman, 12 July 2002, Kampong Chhnang.

¹² Set MYDANS, "Khmer Rouge Torturer Converts, Feels His Life is Like That of St Paul," *The Seattle Times*, 2 May 1999; *The Lost Executioner*, pages 252-253, 270-279; John D. CIORCIARI and Roy Hay ENG, "Duch's Mother: Family Fears for the Tuol Sleng (S-21) Prison Chief", *Searching for the Truth*, July 2003, page 36 ("Duch's Mother").



Khmer Rouge-controlled area in northwestern Cambodia, in Samlaut, and in a refugee camp called Ban Ma Muang, in Thailand;¹³

- he wrote false information in his resume regarding his identity, e.g. that he was born in Acha Leak village, in Kampong Thom, and that his mother was dead;¹⁴ and
- he did not visit his family between 1979 and 1996, so his mother even believed he was dead.¹⁵

38. In April 1999, the Charged Person was discovered by two journalists in Samlaut district.¹⁶ When the story of his discovery and confession was made public, he disappeared.¹⁷

39. Now facing the possibility of being sentenced for life imprisonment, there is a risk that he will disappear again. Moreover, the fact that he will be tried publicly before his victims and their relatives, for the crimes he is charged with, could provide an additional incentive for him to abscond.

40. The mere facts that the Charged Person's lawyer alleged that he does not have a passport and that he and his family are poor will not prevent him from attempting to flee if he were to be released, for he could always hide himself in Cambodia, as he did before, or even cross the border illegally.

41. Therefore, the Pre-Trial Chamber finds that the provisional detention is a necessary measure to ensure the presence of the Charged Person during the proceedings.

(iii) to protect the security of the Charged Person (Internal Rule 63(3)(b)(iv))

42. Since his discovery by journalists in 1999, the Charged Person has given many interviews to journalists and to a representative of the United Nations High Commissioner for Human Rights regarding his activities in Democratic Kampuchea and has confirmed his position as Chairman of S-21 Security Centre. He told journalists that he was ready to expose the other leaders of the

¹³ *The Lost Executioner*, pages 252-253; *Duch's Mother*, pages 36-37.

¹⁴ *The Lost Executioner*, page 252.

¹⁵ *Duch's Mother*, page 36.

¹⁶ *The Lost Executioner*, pages 270-278.

¹⁷ *The Lost Executioner*, page 278.



regime and has given many details about the organisation of said regime, notably by identifying some of the senior leaders and stating their roles.¹⁸

43. The threat to the Charged Person's safety comes from the victims and their relatives and members of the staff working for him at S-21. Now that the Charged Person has admitted that he was Chairman of S-21, where thousands of inmates were tortured before being executed by the cruellest means, the victims and their relatives could be tempted to seek revenge. They have been awaiting justice for more than thirty years and their reaction could be one of violence if they were to learn that the Charged Person had been released, even if such liberty might be temporary.
44. The Charged Person's Co-Lawyers have asserted that he was at liberty between 1979 and 1999, and that no threat was made to his safety. Once he was discovered by journalists, the Charged Person himself reportedly expressed a fear for his safety. Journalist Nate Thayer has quoted the Charged Person in an article entitled "I am in Danger" as follows:

"I don't want any man to know our relationship," he told the REVIEW. "They will make me unsafe. I have no secrets from the Far Eastern Economic Review, but I fear the people around me. I don't know who is the man of Nuon Chea, of Ta Mok, of Khieu Samphan. I am in danger. My life is at risk. [...] They can kill me. [...]"¹⁹

45. In another article released the same day, Nate Thayer reported:

Now that his past has been revealed, Duch clearly fears for his life. He sometimes spoke only in whispers, referring to Khmer Rouge leaders by their initials so that any listeners would not recognise their names. At other times, he asked to be driven to remote areas to speak in a vehicle where he couldn't be overheard.²⁰

46. The United Nations and Amnesty International also expressed their concerns about the Charged Person's safety at that time, since the interviews he was giving exposed crimes committed by Khmer Rouge leaders. Amnesty International issued an "Urgent Action" on 23 April 1999, in

¹⁸ Nate Thayer, *Far Eastern Economic Review* 13 May 1999, "Death in Detail" (ERN: 00087513-00087514) (*Death in Detail*).

¹⁹ Nate Thayer, *Far Eastern Economic Review* 13 May 1999, "I am In Danger" (ERN: 00087513-00087514) (*I am in Danger*). p. 1. See also: *The Lost Executioner*, pages 270-278

²⁰ *Death in Detail*, pages 3-4.



which they mentioned that the Charged Person “may be killed to stop him testifying against others involved in crimes against humanity”.²¹

47. The Pre-Trial Chamber finds no relevant information to suggest that the threat to the Charged Person’s safety has diminished with time. Now that the Charged Person’s identity has been made public, his safety is more at risk than ever.

48. Because of the nature of this decision, exercise of common sense is appropriate. The Pre-Trial Chamber considers that provisional detention is a necessary measure to protect the Charged Person’s safety.

(iv) to preserve public order (Internal Rule 63(3)(b)(v))

49. It is estimated that 1.7 million Cambodians died during the three years, eight months and twenty days that the Democratic Kampuchea regime ruled the country. This was approximately one quarter of the population at the time. A large portion of today’s Cambodian population has not only been personally subject to the harsh regime imposed by the Khmer Rouge but has also lost one or more of their relatives or friends.

50. Contrary to what the Charged Person’s Co-Lawyers have said, it appears to the Pre-Trial Chamber that the passage of time has not diminished the impact of the Democratic Kampuchea regime on society. It is believed that a proportion of the population that lived through this period from 1975 to 1979 suffers from Post-Traumatic Stress Disorder. Specialists believe that the commencement of judicial activities before the ECCC “may pose a fresh risk to the Cambodian society”. It may “lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them”.²²

51. The General Assembly of the United Nations has recognised that the crimes committed during the Democratic Kampuchea period from 1975 to 1979 is still a matter of concern for Cambodian society, and for humanity:

²¹ Amnesty International’s Urgent Action 93/99 “Fear for Safety” 29 April 1999 AI Index ASA 23/08/99, page 1.
²² Rob SAVAGE, “Post Traumatic Stress Disorder: A Legacy of Pain and Violence”, *Monthly South Eastern Globe* July 2007, pages 24-27.



Recalling that the serious violations of Cambodian and international law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole,

[...]

Recognizing that the accountability of individual perpetrators of grave human rights violations is one of the central elements of any effective remedy for victims [...]²³

52. The first public hearing of the ECCC, held on 20 and 21 November 2007, has generated a great deal of interest amongst the Cambodian population and press, as well as the international community. Hundreds of people, including members of the public, the press, non-governmental organisations and the international community, came to attend this hearing. This interest is demonstrative of the fact that the trials of senior leaders and those most responsible for the crimes committed during the Kampuchea Democratic period from 1975 to 1979 are still a matter of great concern today for the Cambodian population and the international community.
53. The Cambodian people have been waiting thirty years for justice, to see an end to impunity and to see in evidence what happened during this tragic period of their history.
54. The Charged Person has publicly acknowledged, since 1999, that he was Chairman of S-21 Security Centre, where thousands of men, women and children were detained, tortured and killed. He has been kept in detention since that time. It is expected that he will be brought to trial before the ECCC around June 2008. Public order may therefore be disturbed if he were to be released now.
55. The Defence has argued that when the Charged Person was at liberty between 1979 and 1999, public order was not disrupted. The Pre-Trial Chamber considers that the situation is different today, now that the Charged Person's identity is well-known, that he has publicly admitted that he was Chairman of S-21 and that the process of justice has started. Because of the different circumstances, there is no justification to rely on the past to assert that public order will not be disrupted if the Charged Person were to be released.

²³ Preamble, *Resolution adopted by the General Assembly – Khmer Rouge Trials*, GA Res. A/RES/57/228, 27 February 2003.



56. Therefore, the Pre-Trial Chamber finds that the provisional detention of the Charged Person is a necessary measure to preserve public order.
57. The Pre-Trial Chamber finds on the basis of above-mentioned reasoning that the Co-Investigating Judges could order the provisional detention and that the grounds for that detention are still satisfied.
58. The Charged Person asks to be released on bail as a remedy, in part, for the violation of his right to be tried within a reasonable time. The Charged Person has suggested that he could be put under house arrest. At the hearing, his Co-Lawyers also suggested that the Charged Person be released under the following conditions: 1) the Charged Person gives his address to the Pre-Trial Chamber and; 2) the Charged Person reports to the nearest police office weekly. They also added that the Charged Person does not have any money or passport, so he cannot go out of the country.
59. The Pre-Trial Chamber finds that, in the present case, the conditions of Rule 63(3)(a) and all of the five grounds set out in Rule 63(3)(b) have been met, though any of these would have been sufficient to justify the provisional detention of the Charged Person. This means that the provisional detention is a necessary measure to ensure the security of the witnesses and the Charged Person, to preserve evidence, to ensure the presence of the Charged Person during the proceedings and to preserve public order. In these circumstances, the Pre-Trial Chamber considers that the Charged Person cannot be released on bail, for any of the conditions proposed by the Charged Person are outweighed by the necessity for his provisional detention.
60. It is sufficient to say that even if the Charged Person were to be put under house arrest, there may still be high risks to his personal safety. As mentioned before, the Charged Person will be required to come to the ECCC on different occasions and it will be very difficult to ensure his safety during the transportation from his house to the Chambers. This reason is sufficient, in itself, for the Pre-Trial Chamber to reject the Charged Person's request to be released on bail.
61. Furthermore, the Pre-Trial Chamber is not convinced that any bail conditions that it could impose would ensure the presence of the Charged Person during the hearing and the protection of others, as set out in Internal Rule 65(1).

VII. APPLICATION FOR REPARATIONS



62. In the Appeal Brief by the Co-Lawyers for the Charged Person – in effect, an application consequent upon a finding that the Charged Person should either be released due to an illegal detention or that his detention had “exceeded all legal limits” – it is submitted that:

- [I]n the event of an acquittal, financial compensation should be paid to [the Charged Person] as a reparation for both the eight years plus he has spent in provisional detention and also for the harm he has suffered as a result of the violation of his entitlement to trial within a reasonable time or to release;
- in the event of a conviction, the eight years he has already served will have to be deducted from the sentence to be served and a further sentence reduction will have to be granted as compensation for the harm he has suffered as a result of the violation of his entitlement to trial within a reasonable time or to release.²⁴

63. Given the findings of the Pre-Trial Chamber, it is inappropriate for the Chamber to make such statements. It would not be appropriate for the Pre-Trial Chamber to make the statements requested when another judicial body may well become seized of this case for trial and will have to make its own decisions on the basis of the evidence and the submissions made before it.

VIII. CONCLUSION AND ORDERS

Noting that the Charged Person and his lawyers are present;

The Pre-Trial Chamber decides unanimously that:

- 1) The appeal is admissible in its form;
- 2) The Co-Investigating Judges properly exercised their discretion to consider ordering the provisional detention of the Charged Person;
- 3) The grounds for provisional detention are still satisfied;
- 4) The applications for release are refused;
- 5) The Order of the Co-Investigating Judges is affirmed with the reasons expressed in this decision being substituted for the reasons of the Co-Investigating Judges;

²⁴ *Appeal Brief*, paragraph 127.



- 6) The safeguard copy of the Case File N° 001/18-07-2007-ECCC(PTC01) shall be sent to the Greffier of the Co-Investigating Judges;
- 7) The appeal is dismissed;
- 8) In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal.

GIVEN IN PUBLIC BY the Pre-Trial Chamber,

Phnom Penh, 3 December 2007

Pre-Trial Chamber

President

Rowan DOWNING

PEN Pichsaly

Katinka LAHUIS

HUOT Vuthy

PRAK Kimsan

Greffiers

CHUON Sokreasey

Anne-Marie BURNS

