C26/5/10

BEFORE THE PRE-TRIAL CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Case Numbers	:	002/19-09-2007-ECCC/OCIJ (PTC 15)
Date of Filing	:	22 January 2009
Party Filing	:	Office of the Co-Prosecutors
Original Language	:	English
Type of Document	:	PUBLIC (REDACTED VERSION)

REDACTED VERSION OF THE CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPEAL AGAINST THE ORDER ON EXTENSION OF PROVISIONAL DETENTION DATED 18 NOVEMBER 2008

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I. INTRODUCTION

1. The Co-Prosecutors respond to a Defence Appeal (the "Appeal"),[1] filed on 4 December 2008 that seeks a reversal of the order of the Co-Investigating Judges extending the provisional detention of the Charged Person KHIEU Samphan (the "Charged Person" or the "Appellant") for a further period not exceeding one year (the "Extension Order").[2] The Defence contend that the Charged Person should be released because[3] (1) the Co-Investigating Judges (the "CIJs") had the obligation to defer their decision; (2) the CIJs are not impartial and thus could not rule on the Extension Order;[4] (3) the CIJs issued an unnecessary decision extending an arbitrary detention,[5] and; (4) the Extension Order is based on a non-existent measure.[6]

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

   (a) The CIJs had no obligation to defer their decision; on the contrary, they had to make a decision on the extension of provisional detention before its expiry;

   (b) This is not the proper forum to hear Appellant's contentions regarding the impartiality of the CIJs which in any event are baseless. Rather, the Appellant should file an application for disqualification under Rule 34 of the Internal Rules and in any event is baseless.

   (c) The Appellant has failed to demonstrate any material change in circumstances since he was originally detained by the CIJs on 19 November 2007 ("Detention Order")[7] and since the CIJs issued their Order Refusing Provisional Release on 28 October 2008.[8] In the Extension Order, which evaluated evidence on the Case File, the CIJs noted that the

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1 *Case of KHIEU Samphan*, Appeal Brief Against the Order on Extension of Provisional Detention, 4 December 2008, **C26/5/1**, ERN 00251782-00251798 (ENG)[*hereinafter* Appeal].
2 *Case of KHIEU Samphan*, Order on Extension of Provisional Detention, 18 November 2008, **C26/4**, ERN 00250773-00250781 (ENG) [*hereinafter* Extension Order].
3 Appeal, **C26/5/1**, paragraph 6.
4 Appeal, **C26/5/1**, paragraph 4.
5 Appeal, **C26/5/1**, paragraph 5.
6 Appeal, **C26/5/1**, paragraph 6.
7 *Case of KHIEU Samphan*, Provisional Detention Order, 19 November 2007, **C26**, ERN 00152991-96 (FRE), 00156700-05 (ENG) and 00152973-78 (KHM) [*hereinafter* Detention Order].
8 *Case of KHIEU Samphan*, Order Refusing Request for Release, 28 October 2008, **C40/4**, ERN 00236261-71 (ENG) and ERN 00235033-44 (FRE) [*hereinafter* Order Refusing Request for Release].

requirements of Rules 63(3) (a) and 63(3)(b) (i), (ii), (iv), and (v) were met and provisional detention was still a necessary measure on the basis of those grounds.[9]

(d) The Case File today contains evidence capable of satisfying an objective observer, at this stage of investigation, that the Appellant may have committed the crimes for which he is currently under investigation. In addition, four of the five disjunctive conditions necessitating detention under Rule 63(3) (b) are satisfied so as to justify provisional detention. Specifically, the Appellant's detention is still a necessary measure (1) to protect victims and witnesses; (2) to preserve evidence and protect the destruction of evidence, (3) to protect his security, and (4) to preserve public order.

II. RELEVANT PROCEDURAL BACKGROUND

3. On 18 July 2007, the Co-Prosecutors submitted an Introductory Submission detailing criminal facts and naming the Appellant and four other suspects as responsible for certain crimes under the jurisdiction of this Court. On 18 October 2007, the Co-Prosecutors filed "Additional Materials and Authorities in support of grounds for provisional detention for the suspects".[10] The Charged Person was arrested on 19 November 2007 and brought before the CIJs for an initial appearance[11] and an adversarial hearing,[12] and was charged with crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949.[13] The CIJs ordered the Charged Person's provisional detention for a period not exceeding one year (the "Detention Order") on 19 November 2007.[14] The Defence appealed this decision by filing a written submission on 21 December 2007 solely based on Internal Rule 63 (3) (a) (the "Rules). The Co-Prosecutors filed their response to the appeal on 6 February 2008 and

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9 Extension Order, **C26/4**, paragraph 27.

10 *Case of KHIEU Samphan*, Notice of Disclosure of Additional Materials and Authorities in Support of Grounds for Provisional Detention for the Suspects, 18 October 2007, **D29** and **D29/1**, ERN 00148902-04 and 00148965-00149841(ENG). This includes 33 factual documents specific to KHIEU Samphan in Annex A (ERN 00149340-00149566 -ENG).

11 *Case of KHIEU Samphan*, Written Record of Initial Appearance, CIJ, 19 November 2007, **D42**, ERN 00153319-00153322 (ENG), 00153333-36 (FRE) and 00153304-08 (KHM).

12 *Case of KHIEU Samphan*, Written Record of Adversarial Hearing, CIJ, 19 November 2007, **C25**, ERN 00153266-00153270 (ENG), 00153296-00153301 (FRE) and 00153228-00153235 (KHM).

13 On the same day, the Co-Prosecutors filed additional grounds in *support* of provisional detention: *Case of KHIEU Samphan*, Co-Prosecutors' Additional Grounds in Support of Provisional Detention in the Case of the suspect KHIEU Samphan, 19 November 2007, **C28**, ERN 00153050-00153065 (KHM), 00153041-00153049 (ENG) and 00161635-00161643 (FRE).

14 Detention Order, **C26**.

the Civil Parties on 17 April 2008.[15] The PTC held a hearing on 23 April 2008, which was adjourned as "a consequence of the attitude of the international co-lawyer", who was warned by the PTC pursuant to Rule 38.[16] On 22 July 2008, the Defence filed an appeal before the PTC against the CIJ's Order on Translation Rights and Obligations of the Parties, which is pending (the "Translation Appeal").[17] On 8 October 2008, the Defence withdrew their appeal against the Provisional Detention Order[18] and filed an Urgent Application for Release with the CIJs pursuant to Rule 64 (2)[19], which was refused by the CIJs on 28 October 2008.[20] The Defence filed an Appeal against the Order Refusing the Request for Release on 27 November 2008.[21] On 28 October 2008, pursuant to Rule 63 (7), the CIJs notified the Charged Person and his lawyers that they were considering an extension of his provisional detention and requested them to submit their observations within 15 days[22], which they did on 14 November 2008.[23] Finally, the CIJs issued their Extension Order on 18 November 2008[24] and

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15 *Case of KHIEU Samphan*, Appeal Brief against the Provisional Detention Order of 19 November 2007, 21 December 2007, **C26/I/3**, ERN 00158303-14 (ENG); Co-Prosecutors' Response to Khieu Samphan's Appeal against Provisional Detention Order of 19 November 2007, 6 February 2008, **C26/I/9**, ERN 00160767-95 (ENG); Civil Party Co-Lawyers' Joint Response to the Appeal of Khieu Samphan against the Provisional Detention Order, 17 April 2008, **C26/I/21**, ERN 00178205-52 (ENG).

16 *Case of KHIEU Samphan*, PTC Decision on Application to Adjourn Hearing on Provisional Detention Appeal dated 23 April 2008, **C26/I/25**, ERN 00180341-44 (ENG); PTC Written Record of the Hearing of 23 April 2008 on the Appeal against the Provisional Detention Order, 2 May 2008, **C26/I/25**, ERN 00185534-41 (ENG).

17 *Case of KHIEU Samphan*, Defence Appeal against the Decision to Deny the Request for Translation of Khieu Samphan's Case File, 22 July 2008, **A 190/I/1**, ERN 00212334-52 (ENG) and 00207411-29 (FRE); CIJ Order on Translation Rights and Obligations of the Parties dated 19 June 2008, **A190**, ERN 00196923-30 (ENG).

18 *Case of KHIEU Samphan*, Defence Notice of Withdrawal of Appeal, 8 October 2008, **C26/I/30**, ERN 00228787-00228793 (FRE), 00231936-42 (ENG); PTC Decision Relating to Notice of Withdrawal of Appeal dated 15 October 2008, **C26/I/31**, ERN 00231971-74 (ENG).

19 *Case of KHIEU Samphan*, Defence Urgent Application for Release dated 8 October 2008, **C40**, ERN 00228906-18.

20 Order Refusing Request for Release, **C40/4**; See also Co-Prosecutors' Response to the Co-Investigating Judges Forwarding Order Regarding Khieu Samphan's Urgent Application for Release dated 24 October 2008, **C40/3**, ERN 00234631-45 (ENG).

21 *Case of KHIEU Samphan,* Appeal Brief against the Order of 28 October 2008 Refusing Release dated 27 November 2008, **C40/5/1**, ERN 00242949-68 (FRE), 00269865-82 (ENG).

22 *Case of KHIEU Samphan*, CIJ Notification Pursuant to Internal Rule 63 (7) dated 28 October 2008, **C 26/2**, ERN 00235400-01 (FRE).

23 *Case of KHIEU Samphan*, Objections de la Défense concernant la prolongation de la détention dated 14 November 2008, C26/3, ERN 00238930-41 (FRE). No English translation is available to date.

24 Extension Order, **C26/4**, ERN 00250773-81 (ENG).

the Defence filed their Appeal on 4 December 2008.[25] On 8 January 2009, the PTC directed the Co-Prosecutors to file their Response by 9 January 2009.[26]

III. PRELIMINARY SUBMISSION

An Oral Hearing is not Required

4. Rule 77(3) permits the PTC, 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 Co-Prosecutors generally support oral hearings for appeals, the current Appeal concerns only an extension of detention and the appeal does not raise any new factual or legal arguments necessitating an oral hearing. Therefore, in the interest of judicial economy, they request that the PTC determine this Appeal on written submissions alone.

IV. THE LAW

Duty to Give Reasons in Detention Orders

5. Rule 63(7) requires the Co-Investigating Judges to "set out the reasons" for an extension of detention. These reasons have to be given after considering the Case File and the objections of the detainee.[27] Citing settled international jurisprudence, the PTC has found that all decisions of judicial bodies, including the CIJs, have to be reasoned to meet international standards.[28]

6. The PTC has determined that the obligation to state reasons only requires that the CIJs set out the legal grounds and facts taken into account before coming to a decision. The CIJs can discharge this obligation "by referring to the Case File in general and other circumstances",

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[25] Appeal, **C26/5/1**. The Appeal was notified to OCP in English language on 23 December 2008. The Co-Prosecutors filed on 29 December an Application for Extension of Time to File their Response, **C26/5/6**, ERN 00267906-09 (ENG).

[26] *Case of KHIEU Samphan*, Decision on the Co-Prosecutors' Application for Extension of Time to File their Response to Khieu Samphan's Appeal against the Order on Extension of Provisional Detention dated 8 January 2009, **C26/5/9**, ERN 00269790-92 (ENG).

[27] Pursuant to Rule 63 (7), the extension proceedings take place solely between the CIJ and the Charged Person as, before extending a provisional detention, the CIJ hear only the Charged Person's objections. No other party is heard or is involved in this process. The process of extension under Rule 63 (7) is therefore markedly different from the process of initial detention under Rule 63 (3), which includes an adversarial hearing before the CIJ.

[28] *Case of NUON Chea*, Decision on Nuon Chea's Appeal against Order Refusing Request for Annulment dated 28 August 2008, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 06), **D 55/I/8**, ERN 001219322-33 (ENG), paragraph 21.

as the CIJs are not obliged to indicate a view on all the factors.[29] The Extension Order is sufficiently and adequately reasoned.

Conditions Necessitating Detention

7. 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.

8. The five grounds of detention under Rule 63 (3) (b) are disjunctive.[30] There is no requirement that the CIJs 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.[31]

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29 *Case of IENG Sary,* Decision on Appeal against Provisional Detention Order of Ieng Sary, Case No. 002/19-09-2007-ECCC-OCIJ (PTC 03) dated 17 October 2008, **C 22/I/74**, ERN 00232976-004 (ENG), paragraphs 64-66 (*hereinafter* IENG Sary Detention Appeal Decision); See also ICTY case law: *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, 1 March 2007, paragraph 13; *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.

30 IENG Sary Detention Appeal Decision, **C 22/I/74**, paragraph 121.

31 *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: *Case of KAING Guek Eav alias "DUCH"*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch" dated 3 December 2007Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), **C5/45**, ERN 00154284-302 (ENG), paragraph 59 [*hereinafter* DUCH Detention Appeal Decision].

Exercise of Discretion in Considering Detention

9. A Judge or Chamber has the discretion on how it concludes that pre-trial detention is a necessary measure or that an extension of pre-trial detention 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 defendant, the interests of witnesses and victims, and the interests of justice as a whole.[32] This conforms to the accepted practice in international criminal tribunals adopted by this Court.[33]

V. FACTS AND ARGUMENT

10. The Defence argue that the CIJs had an obligation to defer their decision (i) because the proceedings are fundamentally flawed and delayed, (ii) because of the irregularities that are inextricably linked to the issue of detention and (iii) because the CIJs are unable to rule impartially on the extension of detention.

A. The CIJs had no obligation to defer their decision but were obliged to take a decision on the extension of provisional detention.

11. The Defence stated that the CIJs had an obligation to defer the impugned order until the PTC had reached a decision on the Translation Appeal.[34]

12. The Co-Prosecutors submit that the request to defer the order relies exclusively on issues which the PTC has yet to deliberate upon. Neither the CIJs nor the PTC ever concluded that the Charged Person's rights have been violated by any absence of translation of Case File documents and / or that the provisional detention is illegal or irregular. As a consequence, the following Defence assertions do not constitute anything more than mere assumptions:

-"The Extension Order is arbitrary"[35];

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[32] *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.

[33] DUCH Detention Appeal Decision, **C5/45**, paragraph 27.

[34] *Translation Appeal* **A190/I/1**, ERN 00212334-52 (ENG) and 00207411-29 (FRE); Order on Translation Rights and Obligations of the Parties, CIJ, 19 June 2008, **A190**, ERN 00196923-30 (ENG).

-"The absence of translation and the measures which were ordered in remedy thereof severely impair KHIEU Samphan's rights; and violation of his rights is unremitting";[36]

-"All the procedural measures against him are fundamentally flawed, in particular the Provisional Detention Order".[37]

Consequently, the request to defer the decision relies solely on a hypothetical decision of the PTC that can neither, at present, produce a legal effect nor be a basis for the CIJs to decide not to extend provisional detention.

13. No Internal Rule or provision of the Criminal Procedure Code ("CPC") obliges the CIJs to defer their decision until the PTC has reached a decision in a separate procedure; an appeal to the PTC does not stay any proceedings. This principle has been recalled by the CIJs in their Extension Order.[38]

14. Rules 63(4) and (7) of the Rules do not provide any suspending effects for appeals of the Charged Person against any CIJs' order. The CIJs are not obliged to defer proceedings. The contrary would oblige the CIJs, pending a decision on any appeal that is hypothetically favourable to the Defence, to abstain from conducting their investigations, such a premise would be nonsensical. It is not sufficient to argue a procedural irregularity before the PTC to prevent the CIJs from taking all measures that they believe necessary in pursuing investigations (and notably a decision to extend provisional detention). The alleged violations of the defence rights related to the translation issue, repeated in every Defence submission since April 2008, remain vague and purely hypothetical. The arguments raised by the Defence in those submissions constitute delaying measures and may amount to an "abuse of process."

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35 Appeal, **C26/5/1**, paragraphs 5, 33, title above paragraphs 53-62, paragraph 78.
36 Appeal, **C26/5/1**, paragraph 33.
37 Appeal, **C26/5/1**, paragraph 33.
38 Extension Order, **C26/4**, paragraphs 15-16.

15. Moreover, the consequences of deferring the decision to extend detention would be particularly damaging to the investigations, as this would result in the Charged Person's release, despite the CIJs' findings that such a release represents a concrete risk for the victims and witnesses; the preservation of evidence; the personal security of the Charged Person and the public order and thus circumvent the findings under 63 (3) (a) and (b).

16. The CIJs are mandated, by virtue of the Rules, to decide on the placement in, as well as, the maintenance and extension of, provisional detention. This power is to be exercised within the limits of the control exercised by the PTC, and after the Defence has had the opportunity to seek remedies. Therefore, the CIJs cannot be faulted for exercising one of the competences accorded to them by the Rules. As the CIJs stated in the Extension Order, as they must order the release of a Charged Person if the requirements of Rule 63 are no longer satisfied, they had the positive obligation to re-assess the conditions for continued detention before the 19 November 2008 and decide whether to extend the provisional detention order or not.[39]

17. In any event, should the PTC consider in its future decision regarding the translation rights that the rights of the Charged Person were violated in any way, the CIJs would have to implement immediately any decision to release him, this constitutes an appropriate remedy. Meanwhile, the CIJs' orders dated respectively 19 June, 28 October and 18 November 2008[40] are applicable under the Internal Rules until reviewed by the PTC on appeal.

B. The Appellant cannot Question the Impartiality of the CIJ in this Appeal

18. The Appellant argues that the CIJs are not impartial and therefore any decision extending the provisional detention of the Charged Person is unlawful.[41] This accusation has no place in the present appeal. The principal issue in the determination of the appeal against an Extension Order is whether the conditions set out in Rule 63 (3) are still met.

19. Furthermore, the Rules provide an avenue for a Charged Person to challenge a lack of impartiality by a judicial organ of the ECCC through an application for disqualification under

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39 Extension Order, **C26/4**, paragraph 16.
40 **A190**, **C40/4** and **C26/4**.
41 Appeal, **C26/5/1**, paragraphs 47-52.

Rule 34. It is submitted that any arguments presented in the Defence Appeal regarding an alleged lack of impartiality or any alleged bias, cannot be considered by the PTC because that issue is beyond the scope of an appeal against an Extension Order.

20. Should the Defence believe they have legal grounds justifying a disqualification of a judicial officer of the ECCC, the Charged Person should file an application for disqualification under Rule 34.[42]

21. In any case, the assertion that the CIJs are partial cannot succeed. In effect, the Defence cannot rely on an unfavourable but independent earlier decision of the CIJs on the question of translation to conclude that the Extension Order was partial. It should be recalled that the CIJs discharge their functions in an impartial and independent manner regardless of whether the parties play an active role during the investigations. The decision to extend provisional detention is based solely on the legal criteria of Rule 63 (3). It cannot be reasonably argued that the CIJs' decision to extend provisional detention results directly from a separate decision on translation rights which is not directly linked to the legality of provisional detention as the PTC has already determined.[43].

22. The Defence further argue that the Extension Order is null and void and should be considered "inexistent" as a result of the late Direction to the Defence issued by the PTC on 2 October 2008.[44] This argument is without merit for two reasons: (1) the Defence voluntarily withdrew their appeal against the Detention Order, and thus failed to submit any alleged violations of the Charged Person's rights to the PTC; (2) article 278 of CPC, which is the lynchpin of the Defense's argument, is inapplicable before the ECCC.

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[42] So far the International Co-Lawyer challenged the legitimacy and impartiality of the ECCC in the media: "Jacques Vergès, Khieu Samphan's lawyer and Pol Pot's friend: 'There Is No Such Thing as Absolute Evil", Der Spiegel dated 22 November 2008. **Annex B – Attachment No. 1.**

[43] *Case of KHIEU Samphan*, PTC Directions on Continuation of Proceedings Related to Appeal against Provisional Detention dated 12 October 2008, **C26/I/27**, ERN 00212353-55 (ENG), paragraphs 7-10.

[44] Appeal, **C26/5/1**, paragraphs 75 and 71-74; *Case of KHIEU Samphan*, PTC Directions on Continuation of Proceedings Related to Appeal against Provisional Detention dated 12 October 2008, **C26/I/27**, ERN 00212353-55 (ENG).

C. The Appeal does not Identify Material Change of Circumstances to Justify Reconsideration of Detention

23. Rule 63(6) and (7) provide for an automatic periodic review of a Charged Person's detention. 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 renewed application for release to be successful, the defendant must demonstrate "a material change of circumstances".[45]

24. Similar to the 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".[46] The Pre-Trial Chamber can modify its ruling on detention "if it is satisfied that the change in circumstances so require".[47] At the ICC, "the Prosecution has the burden of proof in relation to the continuing existence of the conditions [...] of pre-trial detention."[48]

25. Before this Court, the Rules do not require the CIJs to hear the Co-Prosecutors, or any other party excepting the Charged Person, while determining the extension of detention. They only provide for objections to be submitted by the Charged Person. The existence of an automatic review of an extension of detention provides the detainee with a set opportunity to put

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[45] *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.

[46] 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.

[47] 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.

[48] 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.

forward his position and, if warranted, exercise his right to Appeal against a reasoned decision.[49]

26. The Appellant has not identified any material change of circumstance to necessitate a reconsideration of his detention, or even a change in conditions of detention. Rather, the Defence rely upon semantic arguments submitting that the decision to extend the detention of the Charged Person was reached arbitrarily and that such a decision was not necessary. Unfortunately, the Appeal offers no facts in support of these assertions. The CIJs refused to provisionally release the Charged Person on 28 October 2008, because the conditions of Rule 63(3) were met and the length of the Charged Person's detention was not excessive.[50] The Defence have not submitted any evidence since that ruling, and indeed since the initial Provisional Detention Order in November 2007, that would demonstrate a change in circumstances justifying a reconsideration of the Ruling issued by the CIJs.

27. The Defence point to the "expiry of the lawful detention term" as a "change" that must be "taken into account."[51] However, 1) provisional detention remains lawful under Rule 63(6)[52]; and 2) the CIJs took the length of the detention into account to reach their decision.[53] While the length of time in detention has been considered by international tribunals as a relevant factor in determining the legitimacy of detention,[54] the Defence have not demonstrated how the one-year detention has prejudiced the Appellant's case in such a manner as to prevent a fair trial and / or to demonstrate how it can, in and of itself, justify a reconsideration of provisional detention.[55]

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49 Internal Rules, Rule 63 (7).
50 Order Refusing Request for Release, **C40/4**.
51 Appeal, **C26/5/1**, paragraph 59.
52 Rules, Rule 63 (6).
53 Extension Order, **C26/4**, paragraph 29; Order Refusing Request for Release, **C40/4**, paragraphs 26 – 30.
54 *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14- Trial Chamber, 20 December 1996: The ICTY has established in that decision that in order to establish the reasonable nature of the length of provisional detention, it is necessary to evaluate the circumstances of each case in light of the following criteria: (a) The effective length of the detention; (b) The length of the detention in relation to the nature of the crimes; (c) The physical and psychological consequences of the detention on the detainee; (d) The complexity of the case and the investigations; (e) The conduct of the entire proceedings.; 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.
55 Appeal, **C26/5/1**, paragraph 59.

28. The Co-Prosecutors shall now address the arguments justifying detention. The two conditions set out in Rule 63 (3) are still fulfilled and justify the extension of the provisional detention for an additional period of one year.

D. Well Founded Reasons Exist to Believe that the Appellant may have Committed the Charged Crimes - Rule 63 (3) (a)

29. The Case File today contains evidence capable of satisfying an objective observer, at this stage of the investigation, that the Appellant may have committed the crimes for which he is currently under investigation. This is the test articulated by the PTC.[56]

30. In the Appeal, the Defence do not submit any relevant arguments based on Rule 63 (3) (a). Indeed the Defence do not challenge the existence of a well-founded reason to believe that the Charged Person may have committed the crimes specified in the Introductory Submission.

31. Therefore, the Co-Prosecutors deem it necessary only to mention some new elements under Rule 63 (3) (a) that have intervened since the arrest of the Appellant. As for the evidence supporting the Introductory Submission, which in itself is still sufficient for justifying the criteria of "well-founded reason to believe", the Co-Prosecutors incorporate by reference the submissions contained at paragraphs 24-26 and 33-52 of their "Response to KHIEU Samphan's Appeal against Provisional Detention Order of 19 November 2007".[57] They also refer to the CIJs' Order Refusing the Request for Release dated 28 October 2008, paragraphs 7-11.[58]

32. On 18 November 2008, in their impugned Extension Order, the CIJs noted that well founded reasons continued to exist to believe that the Appellant may have committed the crimes specified in the Introductory Submission. The CIJs also noted that the judicial investigation

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[56] PTC Decision on Appeal against Provisional Detention Order of NUON Chea dated 20 March 2008, **C11/54**, ERN 00172907-34, paragraph 46; PTC Decision on Appeal against Provisional Detention Order of IENG Thirith dated 9 July 2008, **C22/I/27**, ERN 00201633-49, paragraph 21; IENG Sary Detention Appeal Decision, **C2/I/73**, paragraph 71.

[57] *Case of KHIEU Samphan*, Co-Prosecutors' Response to KHIEU Samphan's Appeal against Provisional Detention Order of 19 November 2007 dated 6 February 2008, **C 26/I/9**, ERN 00160767-95 (ENG).

[58] Order Refusing Request for Release, **C40/4**.

has progressed since the arrest of the Charged Person as additional evidentiary materials have been collected and that the passage of time had been taken into consideration.[59]

33. The Co-Prosecutors submit that the PTC should confirm its previous findings of the existence of a well-founded reason to believe that the Charged Person may have committed the crimes alleged.[60] It is clear from a review of the Case File that the basis of this belief is now even stronger than one year ago, as the evidence incriminating the Appellant has increased both in volume and gravity in recent months. The CIJs have issued at least thirteen Rogatory Letters in Case File No. 002 (Document Nos. D25, D40, D43, D78, D82, D91, D92, D93, D94, D104, D107, D115, D123)[61] and they, or their investigators, have interviewed more than a hundred witnesses in relation to the crimes that the five persons charged in that Case File, including the Appellant, may have committed.[62] In addition, the substantive content of the Case File No. 001, largely relevant to the Appellant's case, has been transferred to the Case File No. 002 by a note of the CIJs dated 28 October 2008;[63] the 28 written records of interview of KAING Guek Eav alias DUCH conducted in the context of Case File No. 001 had already been integrated by the CIJs in Case File No.002 on 30 May 2008.[64] Moreover, [REDACTED].[65] [66]

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59 Extension Order, **C 26/4**, paragraph 25-25 referring to paragraphs 7-11 of the CIJs Order Refusing Request for Release, **C40/4**.

60 In its decision on appeal against provisional detention order of IENG Sary, the PTC noted that the term "have committed" had to be understood as "incur individual responsibility for" which includes planning, instigating, ordering, aiding and abetting, or committing and superior criminal responsibility: IENG Sary Detention Appeal Decision, **C 22/I/74**, paragraph 71.

61 Among those Rogatory Letters, eight relate to witness interviews: **D 25** (36 witness interviews), **D 40** (25 witness interviews), **D 91** (24 witness interviews), **D 92** (8 witness interviews), **D 94** (16 witness interviews), **D 107** (at least one witness interview), **D 115** [REDACTED] and **D123** (3 witness interviews) for a total of at least 118 witness interviews placed on the Case File. According to the CIJ however, numerous rogatory letters are in the course of being executed. It is not a surprise as the parties are usually -but unfortunately- informed of the existence of such Rogatory Letters at the time they are completed. It means that in reality, it is highly likely that many more witness statements have been collected by the OCIJ since the 115 witness interviews were placed on the Case File. The Co-Prosecutors encourage the practice of placing the witness statements as soon as possible on the Case File before the Rogatory Letters' reports are completed.

62 Now that the Closing Order has been issued in Case File No. 1, it is expected that the pace of investigations will drastically accelerate in the near future.

63 *Case of NUON Chea et al.*, Note by the Co-Investigating Judges dated 28 October 2008, **D 108**, ERN 00236076-77 (ENG) and its annex **D 108/1**.

64 *Case of NUON Chea et al.*, Note by the Co-Investigating Judges dated 30 May 2008, **D 86**, ERN 00194661-67 (ENG).

65 [REDACTED].

66 [REDACTED].

34. The Co-Prosecutors also contributed to the investigation by filing a large number of evidentiary materials since the Introductory Submission and the arrest of the Appellant.[67] It is recalled that the evidence placed in the Case File by the CIJs at the request of the Co-Prosecutors (Introductory Submission and subsequent filings) as well as the evidence collected by the CIJs in the last year cover all the modes and types of the Appellant's contribution to the crimes against humanity and war crimes he is charged with, including crime base evidence, evidence linking crime base to leadership structures within which the Appellant exercised command authority, evidence supporting his participation in the JCE and evidence supporting jurisdictional elements such as the widespread and systematic attack against a civilian population.

35. As detailed by the CIJs in their Order Refusing the Request for Release, at paragraph 9, at least 12 witness statements made before the OCIJ investigators between October 2007 and March 2008 and other evidence corroborate the knowledge of the Charged Person and his participation in the crimes charged against him.[68]

36. [REDACTED].[69] [70] [71]

37. Finally, one must mention that while other Charged Persons have filed investigative requests, the Appellant has filed none and no significant exculpatory evidence has been found by the CIJs to undermine this determination of the "existence of a well founded reason". To date, the Appellant has not placed any material, much less exculpatory material, on the Case File that should trigger a reconsideration of this determination.

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67 [REDACTED]..
68 Order Refusing Request for Release, **C40/4**. [REDACTED].
69 [REDACTED].
70 [REDACTED].
71 [REDACTED].

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

38. The Appellant does not identify any material change of circumstances to show that conditions necessitating his detention under Rule 63 (3) (b) are no longer met (see above, paragraphs 23-27) except for a reference to the "expiry of the lawful detention term".

39. Furthermore, the Defence do not seriously contest in the Appeal the existence of any of the alternative and disjunctive conditions of Rule 63 (3) (b) for determining whether the provisional detention is a necessary measure to (i) prevent the defendant from exerting pressure on any witness or victim; (ii) preserve evidence or prevent its destruction; (iv) protect the security of the defendant; or (v) preserve public order. They simply refer to the arguments they developed in a request which has been rejected by the CIJs.[72] Therefore the Co-Prosecutors incorporate by reference the submissions contained at paragraphs 53 to 73 of their "Response to KHIEU Samphan's Appeal against Provisional Detention Order[73] and paragraphs 15-25 of their Response to the Co-Investigating Judges Forwarding Order Regarding Khieu Samphan's Urgent Application for Release dated 24 October 2008.[74] They also refer to the CIJs Order Refusing the Request for Release dated 28 October 2008, paragraphs 15-21.[75]

40. As regards the threats posed to personal security and public order - 63 (3) (b) (iv) and (v) -, the recent statements and behaviour of some victims or civil parties show that any release of the five charged persons may degenerate into violence directed against the former Khmer Rouge leaders, including the Appellant, the defence teams or the ECCC. In an article published in the New York Times on 17 June 2008[76] two victims said that they wanted respectively to "slice (Nuon Chea) into ribbons and pour salt into his wounds (...), beat him up and torture him and give him electric shocks to make him talk" and to have them (the

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72 Appeal, **C26/5/1**, paragraph 60, referring to the Defence Urgent Application for Release dated 8 October 2008, **C 40**, ERN 00228906-18, paragraphs 36-42 and 46-82.

73 Co-Prosecutors' Response to Khieu Samphan's Appeal against Provisional Detention Order of 19 November 2007, 6 February 2008, **C26/I/9**, ERN 00160767-795 (ENG).

74 Response to the Co-Investigating Judges Forwarding Order Regarding Khieu Samphan's Urgent Application for Release dated 24 October 2008, **C40/3**, ERN 00234631-45 (ENG).

75 Order Refusing the Request for Release, **C40/4**.

76 "In Khmer Rouge Trial, Victims Will Not Stand Idly by" dated 17 June 2008, by Seth Mydans, *The New York Times*,. accessed at http://www.nytimes.com/2008/06/17/world/asia/17cambodia.html?scp=1&sq=Seth%20Mydans%20in%20Khmer%20Rouge%20Trial%20Victims&st=cse on 4 January 2009.

Charged Persons) "suffer the way I suffered" as "only killing them will make me feel calm". Three persons reiterated those statements / threats (against Khieu Samphan and his Defence team but also against the court) at a press conference held after the PTC hearing on 4 December 2008.[77] These emotional reactions are symptomatic of post-traumatic stress disorders still persisting among the victims as the ECCC proceedings led to the resurfacing of anxieties.[78] Therefore, the potential threat to public order and personal security of the Charged Person is not illusory but is still vivid and concrete.

41. The Co-Prosecutors therefore, request the Pre-Trial Chamber to hold that conditions of detention under Rule 63 (3) (b) (i), (ii), (iv) and (v) are, and continue to be, satisfied thereby justifying an extension of the Appellant's detention.

C. - No Bail Order

42. No bail order would be rigorous enough to satisfy the needs of protecting of the Charged Person's personal safety, the preservation of public order, and to prevent the Charged Person exerting pressure on witnesses and victims and therefore, destroying evidence.

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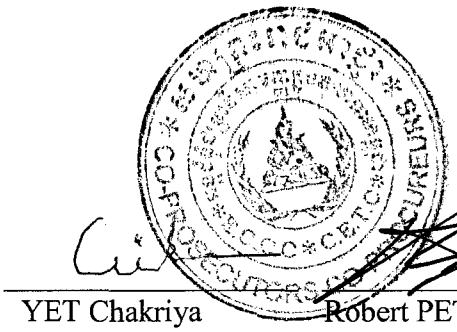
[77] As the ECCC video of the press conference dated 4 December 2008 indicates, a first female Khmer Rouge victim shouted and pointed the finger at the national Defence Co-lawyer during the press conference. Ly Monysar, a victim now security guard threatened the court with a terrorist act against the Khmer Rouge leaders "if the court continues to be a comedy" during the Victims' Press Conference and a female civil party (applicant), Sok Chear, repeated that if she could catch Khieu Samphan she would "tear and eat him". See also "Tribunal Khmer Rouge: l'exaspération des victims intensifiées par un clash avec la défense" dated 5 December 2008, Ka-Set (site d'information sur le Cambodge), Stéphanie Gée, accessible at the following web address : http://ka-set.info/index2.php?option=com_content&task=view&id=783&pop=1&page=0&Itemid=46; "Farce Meets Justice in Khmer Rouge Trial", *The Nation (New York, USA)*, Barbara Crossette, 17 December 2008, 4th paragraph; "Khmer Rouge Court Holds Hearing of Khieu samphan's Appeal against decision on Translation of Case File" dated 5 December 2008, English translation, *Rasmei Kampuchea*, vol.16 #4760; "Disorder in the court as hearing ends in disarray" dated 5 December 2008, *The Phnom Penh Post*, by Georgia Wilkins; "Le Cirque Vergès" dated 11-17 December 2008, *Cambodge Soir*, by Adrien Le Gal. These four press clippings are accessible on the ECCC G:Drive at their respective dates of publication (G:\Public Affairs\Daily Clippings International\12. Dec).

[78] Rob Savage states that the commencement of judicial activities before the ECCC "may pose a fresh risk to the Cambodian society" which could "lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them". Rob Savage, "Post Traumatic Stress Disorder: A Legacy of Pain and Violence", *Monthly South Eastern Globe,* July 2007, pp. 24-27, ERN 00153657 – 61 (ENG).

VI. CONCLUSION

43. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to DISMISS the Defence Appeal in totality.



YET Chakriya — Deputy Co-Prosecutor
Robert PETIT — Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this 22th day of January, 2009.