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Extraordinary Chambers in the Courts of Cambodia
Chambres extraordinaires au sein des tribunaux cambodgiens

C2615/26
ព្រះរាជាណាចក្រកម្ពុជា

ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
Nation Religion King

Royaume du Cambodge
Nation Religion Roi

អង្គបុរេជំនុំជម្រះ

Pre-Trial Chamber
Chambre Préliminaire

In the name of the Cambodian people and the United Nations and 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.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC 14 and 15)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Greffiers SAR Chanrath
Anne-Marie BURNS

Date: 3 July 2009

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PUBLIC (REDACTED VERSION)

DECISION ON KHIEU SAMPHAN'S APPEALS AGAINST ORDER REFUSING REQUEST FOR RELEASE AND EXTENSION OF PROVISIONAL DETENTION ORDER

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THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of Khieu Samphan’s Appeals against the Order Refusing Request for Release, filed on 27 November 2008 (“Release Appeal”),¹ and the Order on Extension of Provisional Detention, filed on 4 December 2008 (“Appeal against Extension of Detention”).²

I. PROCEDURAL BACKGROUND

1. The Pre-Trial Chamber refers to, repeats and adopts the Reports of Examination dated 25 February 2009 and 26 February 2009 pertaining respectively to the Release Appeal and the Appeal against Extension of Detention, which form part of this Decision.
2. On 28 October 2008, the Co-Investigating Judges issued their Order Refusing Request for Release of the Charged Person (“Order Refusing Release”), dismissing the Charged Person’s application for provisional release.³
3. On 4 November 2008, the Co-Lawyers for the Charged Person filed a Notice of Appeal against the Order Refusing Release,⁴ and filed their Appeal Brief on 27 November 2008.⁵
4. On 18 November 2008, the Co-Investigating Judges issued an Order on Extension of Provisional Detention (“Extension Order”) extending the Charged Person’s provisional detention for a period not exceeding one year.⁶
5. On 25 November 2008, the Co-Lawyers for the Charged Person filed a Notice of Appeal against the Extension Order,⁷ and filed their Appeal Brief on 4 December 2008.⁸ The same day, the Co-Lawyers for the Charged Person filed within this appeal an “extremely urgent supplemental application for release” addressed to the President of the Pre-Trial Chamber.⁹

¹ Appeal Brief Against the Order of 28 October 2008 Refusing Release, 27 November 2008, C40/5/1 (“Release Appeal”).

² Appeal Brief Against the Order on Extension of Provisional Detention, 4 December 2008, C26/5/2 (“Appeal Against Extension of Detention”).

³ Order Refusing Request for Release, 28 October 2008, C40/4 (“Order Refusing Release”).

⁴ Record of Appeals, 4 November 2008, C40/5.

⁵ Release Appeal.

⁶ Order on Extension of Provisional Detention, 18 November 2008, C26/4 (“Extension Order”).

⁷ Record of Appeals, 25 November 2008, C26/5.

⁸ Appeal against Extension of Detention.

⁹ Extremely Urgent Supplemental Application for Release, 4 December 2008, C26/5/2.



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This application was declared inadmissible by a decision of the President issued on 24 December 2008.¹⁰

6. The Co-Prosecutors submitted their Response to the Appeal against Extension of Detention on 9 January 2009,¹¹ after having been given a three day extension of time.¹² The Co-Prosecutors submitted their Response to the Release Appeal on 22 January 2009.¹³ In both Responses, the Co-Prosecutors requested that the Appeals be determined on the basis of written submissions alone.
7. By a response filed on 30 January 2009, the Co-Lawyers for the Charged Person opposed the Co-Prosecutor's request that the Appeals be determined on the basis of written submissions alone.¹⁴ The Co-Lawyers for the Charged Person requested that the Pre-Trial Chamber schedule a public hearing, in order to hear the two Appeals together as they both concern the illegality of the Charged Person's provisional detention.
8. On 6 February 2009, the Pre-Trial Chamber rejected the Co-Prosecutors' request that the Appeals be determined on the basis of written submissions alone and scheduled a hearing of both Appeals for 27 February 2009.¹⁵
9. No response was filed by the Civil Parties to either the Release Appeal or the Appeal against Extension of Detention.
10. Before the hearing, the Pre-Trial Chamber was given access to the Case File, which had been updated.
11. On 27 February 2009, the Pre-Trial Chamber commenced the hearing in public. At the opening of the hearing, the Charged Person and his National Co-Lawyer requested an adjournment owing to the absence of the International Co-Lawyer. By a decision delivered

¹⁰ Decision on Khieu Samphan's Supplemental Application for Release, 24 December 2008, C26/5/5.

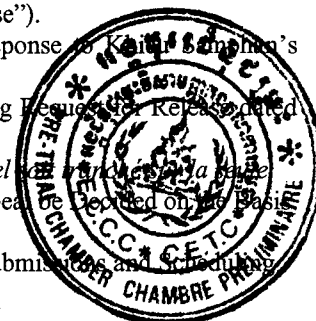
¹¹ Co-Prosecutors' Response to Khieu Samphan's Appeal Against the Order on Extension of Provisional Detention dated 18 November 2008, 9 January 2009, C/26/5/10 ("OCP Provisional Detention Response").

¹² Decision on the Co-Prosecutors' Application for Extension of Time to File their Response to Khieu Samphan's Appeal Against Extension of Provisional Detention, 8 January 2009, C26/5/9.

¹³ Co-Prosecutors' Response to Khieu Samphan's Appeal Brief Against the Order Refusing Request for Release dated 28 October 2008, 22 January 2009, C40/5/2 ("OCP Release Response").

¹⁴ *Réponse de la défense à la requête formulée par les Co-Procureurs visant à ce que l'appel soit déterminé sur la base des conclusions écrites* (Defense response to the Co-Prosecutors' Request that the Appeals be Determined on the Basis of Written Submissions), 30 January 2009, C26/5/12.

¹⁵ Decision on Co-Prosecutors' Request to Determine the Appeal on the Basis of Written Submissions and Scheduling Order, 6 February 2009, C26/5/13.



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orally, the Pre-Trial Chamber adjourned the hearing until 3 April 2009 on the basis that, although it was in the interest of the Charged Person to proceed as soon as possible due to the fact that his Appeals concerned his liberty, the Charged Person himself and his National Co-Lawyer requested the Pre-Trial Chamber not to proceed in the absence of the International Co-Lawyer. This decision was delivered in writing on the same day.¹⁶

12. On 3 April 2009, the Pre-Trial Chamber held a public hearing and began with the Release Appeal. The Co-Lawyers for the Charged Person requested that the two Appeals be heard together, allowing them to present their oral submissions on both Appeals simultaneously. The Co-Prosecutors opposed this request on the basis that they were not prepared to present their oral submissions on the two Appeals together, as the Conduct of Criminal Proceedings issued prior to the hearing provided for each Appeal to be treated separately. The Pre-Trial Chamber denied the Co-Lawyers' request and proceeded first with the hearing of the Release Appeal and then the hearing of the Appeal against Extension of Detention, as prescribed in the Conduct of Criminal Proceedings.

13. Considering the relationship between the two Appeals, they will be treated in a common decision in order to avoid repetition, although each will be addressed specifically.

II. RELEASE APPEAL (PTC 14)

A. Admissibility of the Appeal

14. The Order Refusing Release was issued on 28 October 2008 and notified to the Parties on 29 October 2008. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 4 November 2008, in accordance with Internal Rule 75. The Appeal Brief was filed on 27 November 2008, therefore in time.

B. Applicable Law

15. Internal Rule 63, on provisional detention, provides in relevant part:

“3. The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

¹⁶ Written Version of the Oral Decision on Defence's Request to Adjourn the Hearing, 27 February 2009, para. 4.



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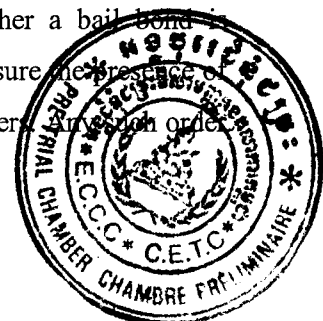
- a) there is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
- b) the Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
 - i) prevent the Charged Person from exerting 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.”

16. Internal Rule 64, on release of a Charged Person, provides in relevant part:

- “1. At any time during a Charged Person’s detention, either on their own motion or at the request of the Co-Prosecutors, the Co-Investigating Judges shall order a Charged Person’s release where the requirements of Provisional Detention set out in Rule 63 above are no longer satisfied. [...]
- 2. At any moment during the period of the Provisional Detention, the Charged Person or his or her lawyer may submit an application for release to the Co-Investigating Judges. As soon as possible after receiving the application, the Co-Investigating Judges shall forward it to the Co-Prosecutors, who shall provide their opinion within 5 (five) days. Subject to the provisions of Rule 72(2), the Co-Investigating Judges shall issue a reasoned decision within 5 (five) days from receipt of the Co-Prosecutors’ opinion. All such orders are open to appeal.”

17. Internal Rule 65(1), pertaining to release on bail, provides:

- “1. On their own motion, or at the request of the Co-Prosecutors, the Co-Investigating Judges may order that a Charge Person remain at liberty or be released from detention. They may order release from detention on bail. The order by the Co-Investigating Judges shall specify whether a bail bond is payable, and impose such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others. This order is subject to appeal.”



C. Nature of the Appeal

18. By their Release Appeal, the Co-Lawyers request the Pre-Trial Chamber to quash the Order Refusing Release on the grounds that the Order contains several mistakes of facts and law. The Co-Lawyers argue that the Order is null and void because it fails to take into account the “procedural defects and serious violations of the rights of the Defence,”¹⁷ including a long delay connected with the hearing on the Appeal Against the Provisional Detention Order (“Appeal against Provisional Detention”) and the lack of translation of the Case File. The Co-Lawyers also argue that the Order relied only on the gravity of the crimes charged to deny release¹⁸ and that “the Co-Investigating Judges have not established any of the conditions to justify Khieu Samphan’s detention.”¹⁹ The Co-Lawyers submit that release of the Charged Person is the only necessary and appropriate measure, considering that the detention is arbitrary, that it has lasted for longer than a year and that it can ultimately be found to be an offence against the Charged Person’s dignity.

19. In their response, the Co-Prosecutors request the Pre-Trial Chamber to dismiss the Release Appeal on the primary grounds that the Co-Lawyers have not established any change in circumstances since the initial Order on Provisional Detention was issued and that the criteria contained in Internal Rule 63(3) continue to be met.²⁰

20. The Pre-Trial Chamber notes that the Co-Investigating Judges issued, on 19 November 2007, an Order on Provisional Detention for a period not exceeding one year (“Detention Order”).²¹ The Charged Person lodged an appeal against the Detention Order on 21 December 2007 but withdrew it on 8 October 2008, the same day he filed his Request for Release. Thus, it shall be considered that the Detention Order was, unless an order for release be issued, in force until 18 November 2008.

21. The Pre-Trial Chamber notes that Internal Rule 64(1), when read together with Internal Rule 64(2), directs that a Charged Person shall be released “where the requirements of Provisional Detention set out in Rule 63 above are no longer satisfied.” In the context of a Release Appeal, where the Defence seeks to put an end to a valid provisional detention

¹⁷ Release Appeal, para. 28.

¹⁸ Release Appeal, paras 36 and 37.

¹⁹ Release Appeal, para. 45.

²⁰ OCP Release Response, para. 2.

²¹ Provisional Detention Order, 19 November 2007, C26.



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order in force, in principle, until 18 November 2008, the Pre-Trial Chamber finds that it is for the Defence, in this instance, to demonstrate that the conditions set out in Internal Rule 63(3) are no longer satisfied.

22. In these circumstances and considering the arguments raised by the Charged Person, the Pre-Trial Chamber will review the Order Refusing Release by an examination of:
- i. the regularity of the procedure prior to the issuance of the Order Refusing Release;
 - ii. whether, in light of the arguments raised by the Co-Lawyers, the requirements of Internal Rule 63(3)(a) and (b) are no longer met;
 - iii. the exercise of discretion by the Co-Investigating Judges in denying the Request for Release; and
 - iv. the request for release on bail.

D. Examination of the Regularity of the Procedure

23. The Defence contends that the Co-Investigating Judges failed to take into account the “overall circumstances of the case.” They submit that:

“The request was brought in an unusual procedural context, in that there were procedural defects and serious violations of the rights of the Defence, the hearing on the appeal against provisional detention was adjourned for more than seven months and ultimately called off, and the Defence was truncated.”²²

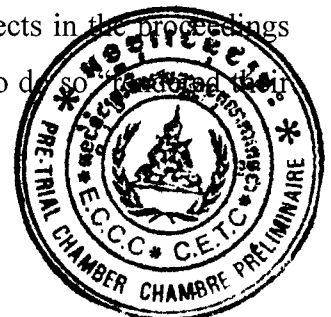
24. In particular, the Co-Lawyers argue that because the International Co-Lawyer cannot examine the Case File in a language he understands, they can no longer represent their client effectively. As a consequence, “they consider the proceedings unlawful and, *de facto*, that the provisional detention is arbitrary.”²³ They further submit that “the translation problem led to the adjournment of the hearing on the appeal against provisional detention” for an “unjustifiable” delay of seven months.²⁴ They argue that the Co-Investigating Judges were “under the obligation to take action regarding the delay and the defects in the proceedings relating to the appeal against provisional detention” and the failure to do so rendered their decision devoid of legal basis.”²⁵

²² Release Appeal, para. 28.

²³ Release Appeal, para. 30.

²⁴ Release Appeal, para. 31.

²⁵ Release Appeal, paras 32-33.



25. The Co-Prosecutors respond that the Order Refusing Release is “sufficiently and adequately reasoned,”²⁶ as the Co-Investigating Judges are only required “to set out the legal grounds and facts taken into account before coming to a decision”²⁷ and “are not obliged to indicate a view on all the factors but only the relevant ones.”²⁸ They contend that “the issue of translation rights and obligations pending before the [Pre-Trial Chamber] [...] is not directly linked to the legality of provisional detention.”²⁹
26. The Pre-Trial Chamber notes that the Urgent Application for Release submitted to the Co-Investigating Judges was based on the following grounds:
- a. An improper delay in the investigation proceedings as a closing order is not forthcoming;
 - b. The conditions of 63(3)(b) are not met;
 - c. The Charged Person’s advanced age and poor state of health;
 - d. The uncertainty as to whether the ECCC “has the financial resources and the mandate to compensate detainees for time spent in detention unjustly, in the event of an acquittal”;³⁰
 - e. The release of the Charged Person would demonstrate the ECCC’s commitment to the presumption of innocence.
27. The Pre-Trial Chamber notes that the problems raised by the Defence in relation to the translation and the delays in the provisional detention appeal were not part of the arguments raised in support of the application for release but only mentioned to explain the background of their Request for Release.³¹ As no argument has been put before the Co-Investigating Judges in relation to the translation issue or the alleged delays in the provisional detention appeal, the Pre-Trial Chamber finds the Defence’s argument that the Order Refusing Release is insufficiently reasoned to be unfounded.

28. As to the alleged irregularity of the procedure, the Pre-Trial Chamber rec



²⁶ OCP Release Response, para. 11.

²⁷ OCP Release Response, para. 11.

²⁸ OCP Release Response, para. 11.

²⁹ OCP Release Response, para. 12.

³⁰ Urgent Application for Release, 8 October 2008, C40, para. 47.

³¹ Urgent Application for Release, paras 2-9.

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- a. On 19 November 2007, the Co-Investigating Judges issued a Provisional Detention Order for a period not exceeding one year.³²
- b. On 21 December 2007, the Charged Person lodged an Appeal against Provisional Detention on the basis that there are no well founded reasons to believe that he may have committed the crimes specified in the Introductory Submission, thus challenging the fulfilment of the condition set out in Internal Rule 63(3)(a).³³
- c. On 23 April 2008, the Pre-Trial Chamber commenced the hearing of the Appeal against Provisional Detention. This hearing was adjourned at the request of the Charged Person, on the basis that his International Co-Lawyer declined to continue to act on his behalf for the reason that all documents in the Case File were not available in the French Language. The Charged Person submitted that he was deprived of legal representation by one of his lawyers and no longer felt confident in the hearing of his appeal. The hearing was adjourned until “a date to be advised” so as to allow time for the Co-Lawyers to organise themselves in the best interests of their client and advise the Pre-Trial Chamber of their readiness to proceed.³⁴
- d. On 19 June 2008, the Co-Investigating Judges issued their Order on Translation Rights and Obligations of the Parties (“Order on Translation”)³⁵ in which they determined the rights and obligations of the parties in Case File 002/19-2007-ECCC/OCIJ in relation to translation during the investigation. In light of the Charged Person’s right to a fair trial within a reasonable time, the Co-Investigating Judges identified the categories of documents a Charged Person is entitled to receive in his/her own language and the language of his/her lawyer. They also provided for the assignment of a translator to each defence team and the possibility for these teams to identify specific documents and request their translation.
- e. On 22 July 2008, the Charged Person lodged an Appeal against the Translation Order (“Translation Appeal”)³⁶ alleging notably that the lack of translation affects the legality of his detention. Specifically, the Co-Lawyers contended that it was no longer possible to uphold the Charged Person’s right to a fair trial and that he should thus be released immediately and unconditionally.
- f. On 15 August 2008, after almost four months without any advice being given to the Pre-Trial Chamber concerning the Defence’s readiness to proceed with the Appeal

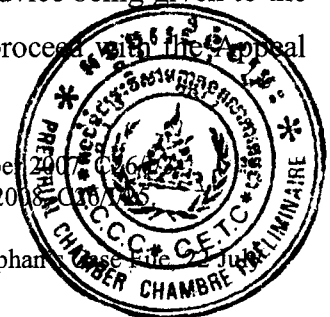
³² Provisional Detention Order.

³³ Appeal Brief Against the Provisional Detention Order of 19 November 2007, 21 December 2007.

³⁴ Decision on Application to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008.

³⁵ Order on Translation Rights and Obligations of the Parties, 19 June 2008, A190.

³⁶ Defence Appeal Against the Decision to Deny the Request for Translation of Khieu Samphan, 22 July 2008, A190/I/1.



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against Provisional Detention, the Pre-Trial Chamber issued a Direction requiring the Defence to state their position on the continuation of this Appeal.³⁷

- g. On 21 August 2008, the Defence answered by reiterating their request that all the documents in the Case File be translated into the French Language.³⁸ The Co-Lawyers added that without the translation, the Defence would not be able to cooperate with the Court.
- h. On 2 October 2008, the Pre-Trial Chamber determined that there was no reason to delay its decision on the Appeal on Provisional Detention further, as the Defence's Appeal raised no issue as to translation or the inability to effectively challenge the "charges underpinning the Charged Person's provisional detention."³⁹ Further, the Pre-Trial Chamber noted that Internal Rule 75(4) barred the Defence from raising additional matters of fact or law which are not already set out in the written submissions on appeal. Given that it considered that the statements of the Defence must be seen as a refusal to participate further in an oral hearing, the Pre-Trial Chamber decided to determine the Appeal on the basis of written submissions and allowed the Defence to file a reply to the Co-Prosecutors' Response within seven days.
- i. On 8 October 2008, the Defence withdrew their Appeal against Provisional Detention, stating that they did so on the ground that the Pre-Trial Chamber had failed to render a decision on the Appeal almost ten months after it was filed.⁴⁰ The Defence also submitted that the Pre-Trial Chamber did not provide any reason for this delay and ignored the rights of the Defence by deciding to determine the Appeal on the basis of written submissions alone.
- j. On 15 October 2008, the Pre-Trial Chamber allowed the withdrawal, considering that it is a right of the Charged Person to do so.⁴¹
- k. On 8 October 2008, the Defence filed an Urgent Application for Release, requesting that the Co-Investigating Judges order the immediate release of the Charged Person.⁴²
- l. On 28 October 2008, the Co-Investigating Judges issued their Order Refusing Release on the basis that the conditions set out in Internal Rule 63(3) are still satisfied.⁴³

³⁷ Direction to the Defence Concerning the Appeal Against Provisional Detention Order, 15 August 2008, C26/1/28.

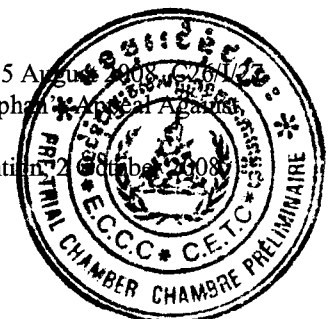
³⁸ Notification of the Pre-Trial Chamber of the Defence's Position Concerning Khieu Samphan Appeal Against Provisional Detention Order, 21 August 2008, C26/1/28.

³⁹ Directions on Continuation of Proceedings Related to Appeal Against Provisional Detention Order, 2 October 2008, C26/1/29 ("Directions on Continuation of Proceedings"), para. 7.

⁴⁰ Notice of Withdraw of Appeal, 8 October 2008, C26/1/30.

⁴¹ Decision Relating to Notice of Withdrawal of Appeal, 15 October 2008, C26/1/31.

⁴² Urgent Application for Release.



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- m. On 20 February 2009, the Pre-Trial Chamber delivered its Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties ("Decision on Translation Appeal")⁴⁴ in which it declared the Appeal inadmissible. In particular, the Pre-Trial Chamber found that the Appeal did not fall within the ambit of appealable matters set out in Internal Rule 74(3)(b). The Pre-Trial Chamber further found that because the Order on Translation is in accordance with international standards and the Charged Person's right to a fair trial has not been violated, it was not compelled to interpret the rules dealing with its jurisdiction in such a way that the Appeal should be declared admissible.
- n. On 3 April 2009, the Pre-Trial Chamber held a hearing on the Release Appeal. The Pre-Trial Chamber notes that the Co-Lawyers did not discuss, in their oral submissions, the effect of the Decision on Translation Appeal on their Release Appeal.
29. The Pre-Trial Chamber notes that at the time the Order Refusing Release was issued, the Order of the Co-Investigating Judges on the translation issue was in force. As an appeal does not stay the proceedings, an order shall be considered valid and effective until a decision is made on appeal. The arguments raised by the Co-Lawyers in their Release Appeal fail to take this principle into consideration, as the Co-Lawyers assumed that the Co-Investigating Judges' Order on Translation would be quashed by the Pre-Trial Chamber.⁴⁵ Not only does such an assumption fail to take into account that the Order on Translation was still effective despite the Appeal, but the Co-Lawyers' assumption was confirmed as unfounded by the Pre-Trial Chamber in its Decision on Translation Appeal. The Pre-Trial Chamber finds that the translation issue did not affect the legality of the detention at the time the Order Refusing Release was issued, nor did it affect the legality of the detention at a later stage.
30. As to the procedure relating to the Appeal on Provisional Detention, the Pre-Trial Chamber notes that the Co-Lawyers have not identified any particular procedural defect. They only state that "no justification was provided for the seven-month delay imposed on the proceedings as a whole [by the Pre-Trial Chamber]. And it is easy to understand why; it is because the delay is unjustifiable!"⁴⁶ The Pre-Trial Chamber notes that there was no delay in

⁴³ Order Refusing Release.

⁴⁴ Decision on Khieu Samphan's Appeal against the Order on Translation Rights and Obligations of the Parties, February 2009, A190/I/20 ("Decision on Translation Appeal").

⁴⁵ Release Appeal, para. 9.

⁴⁶ Release Appeal, para. 31.



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the Appeal on Provisional Detention other than that caused by the inactivity of the Defence, as follows from the considerations in paragraph 28. This delay could thus not have affected the legality of provisional detention.

31. The Pre-Trial Chamber finds that the procedure followed by the Co-Investigating Judges leading to the Order Refusing Release was correct as no procedural defect has been identified.

E. Well founded reasons to believe that the Charged Person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

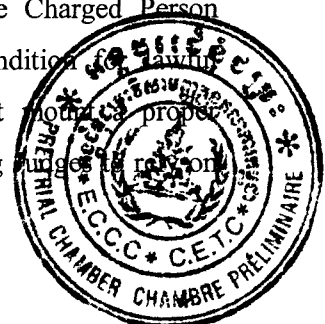
32. In the Order Refusing Release, the Co-Investigating Judges stated:

“In determining ‘whether there are well-founded reasons to believe that the Charged Person may have committed the crime or crimes specified in the Introductory Submission’, it is necessary to ascertain ‘whether facts or information exist which would satisfy an objective observer that the person concerned may have committed the offence.’ This condition must always be present with the passage of time and the progress of the judicial investigations. Also, the term ‘committed’ is understood as referring to the forms of participation specified in Article 29 of the Law on the ECCC.”⁴⁷

33. Recalling their Provisional Detention Order of 19 November 2007, the Co-Investigating Judges held that there continue to exist well founded reasons to believe that Khieu Samphan “instigated the commission of crimes charged against him,”⁴⁸ or aided and abetted in the perpetration of these crimes, thus concluding that the criterion of Internal Rule 63(3)(a) is still met.

34. In their Appeal, the Co-Lawyers submit that:

“[T]he existence of well-founded reasons to believe that the Charged Person committed the alleged crimes is the only *sine qua non* condition for provisional detention. However, the Co-Lawyers for the Defence cannot prove the absence of such reasons; therefore, it was impermissible for the Co-Investigating



⁴⁷ Order Refusing Release, para. 7.

⁴⁸ Order Refusing Release, para. 11.

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this criterion in denying release. At any rate, this criterion ceases to be relevant after a period of time in detention. The Defence therefore urges the Pre-Trial Chamber to simply disregard the Co-Investigating Judges' observations on this point."⁴⁹

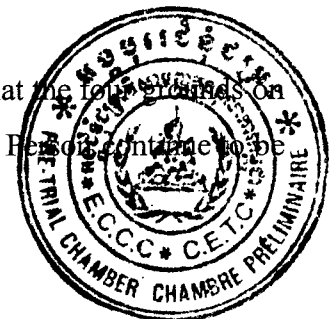
35. The Co-Prosecutors respond that the Defence has not shown any change in circumstances since the Provisional Detention Order was issued and that the condition of 63(3)(a) is still met in light of the new evidence gathered during the investigation.⁵⁰
36. The Pre-Trial Chamber notes that in their Urgent Application for Release filed before the Co-Investigating Judges, the Co-Lawyers did not raise any change in circumstances in relation to the condition set out in Internal Rule 63(3)(a). In light of the considerations expressed by the Pre-Trial Chamber in paragraph 21 of this Decision, the Co-Investigating Judges had no obligation to reason more extensively their conclusion that there are still well founded reasons to believe that the Charged Person may have committed the crimes for which he has been placed under investigation. In addition, the Pre-Trial Chamber, after having undertaken the review of the evidence contained in the Case File necessary when seised of an appeal against an order refusing request for release, has not found any obvious information which would undermine the Co-Investigating Judges' conclusion on the fulfilment of the condition set out in 63(3)(a) at the time they issued the Order Refusing Release and at present.
37. In case the Co-Lawyers meant to say, by their submissions, that the Co-Investigating Judges only based their decision to refuse the application for release on the presence of well founded reasons, the Pre-Trial Chamber considers that this argument is unfounded. It is clear from their reasoning that the Co-Investigating Judges have taken into account other considerations than that mentioned in Internal Rule 63(3)(a) when deciding to refuse the Charged Person's Urgent Application for Release, as notably apparent in paragraphs 16 to 21 of their Order Refusing Release.

F. Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b))

38. In their Order Refusing Release, the Co-Investigating Judges found that the conditions on which they had initially ordered provisional detention of the Charged Person continue to be

⁴⁹ Release Appeal, para. 44.

⁵⁰ OCP Release Response, para. 2.



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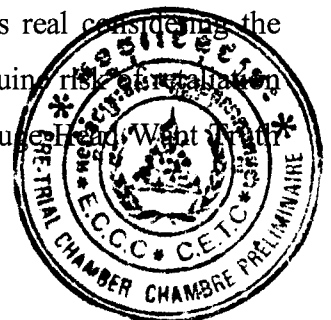
satisfied, thus concluding that provisional detention is still a necessary measure to prevent the destruction of evidence, to prevent the exercise of pressure on witnesses and victims, to protect the security of the Charged Person and to preserve public order.⁵¹

39. The Pre-Trial Chamber will review the conclusion of the Co-Investigating Judges pertaining to each of these four grounds in order to determine whether they are still met. The third ground mentioned in Internal Rule 63(3)(b)(iii) – to ensure the presence of the Charged Person during the proceeding – will not be analysed as it was not part of the Co-Investigating Judges’ Order Refusing Release and no arguments have been raised in this regard by the parties.

i) The first and second grounds in Internal Rule 63(3)(b): to 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 and to preserve evidence or prevent the destruction of evidence

40. These two grounds for provisional detention can be analysed together since they are supported by the same arguments. The statements made by witnesses are considered “evidence” within the meaning of Internal Rule 63(3)(b)(ii).

41. In their Order Refusing Release, the Co-Investigating Judges found that the passage of time has not diminished the risk that the Charged Person might exercise pressure on witnesses or Victims or destroy evidence. They considered that: (i) the Charged Person now has knowledge of the identity of inculpatory witnesses and Victims involved in the proceedings, as well as knowledge of a large body of evidence containing details on his possible role, notably within Office 870 and the evacuation of Phnom Penh; (ii) many of these witnesses might be interviewed again and have given names of other potential witnesses who have not been interviewed yet; (iii) there is a real risk that witnesses might refuse to participate in the proceedings in the future if the Charged Person is released; (iv) these witnesses could be subjected to pressure because they were the Charged Person’s subordinates or because of the senior positions occupied by the Charged Person; (v) the risk is real considering the Charged Person’s public statements to the effect that there was a genuine risk of retaliation if he was brought to trial, as reported in an article titled “Khmer Rouge Head, What Next?”



⁵¹ Order Refusing Release, para. 22.

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Commission Instead of Trial” published on 1 December 2002 (“Article dated 1 December 2002”).⁵²

42. The Co-Lawyers argue that the Co-Investigating Judges failed to show evidence of past actions or behaviour by the Charged Person that demonstrate a concrete risk that he might exert pressure on witnesses and Victims.⁵³
43. The Co-Prosecutors respond that in circumstances where there is a small number of key witnesses, a widespread fear of testifying before the ECCC and an absence of current witness protection measures, the Charged Person’s declaration reported in the Article dated 1 December 2002 should be viewed as evidence of the Charged Person’s “tendency toward thwarting the course of justice.” In the Co-Prosecutors’ view, “[t]hese threats should be given added weight as a result of the support the Charged Person continues to enjoy in certain parts of the country and the attitude of some of his supporters towards the proceedings at the ECCC.”⁵⁴
44. The Pre-Trial Chamber notes that the whole Case File has been made available to the Charged Person, including the names of Civil Parties and potential witnesses. There appears to be a limited number of remaining witnesses who can directly testify to the Charged Person’s involvement in the alleged crimes. Some of these witnesses have not yet been interviewed by the Co-Investigating Judges. The Pre-Trial Chamber has not, though, specifically identified witnesses stating that they were the Charged Person’s subordinates, contrary to what is mentioned by the Co-Investigating Judges.
45. The Charged Person has recognized that he was the Head of State and a member of the Central Committee of the Communist Party of Democratic Kampuchea. The Charged Person also appears to have been active in politics after 1979.⁵⁵ The Pre-Trial Chamber finds that a degree of influence is necessarily attached to such senior positions and involvement in political movements. This influence does not stop when one no longer occupies such positions and this influence can therefore still be exerted today.

⁵² Order Refusing Release, para. 16.

⁵³ Release Appeal, paras 58-59.

⁵⁴ OCP Release Response, para. 37.

⁵⁵ Nayan Chanda, *Brother Enemy: The War After the War: A History of Indochina Since the End of the Vietnam War*, 1986, D29, Annex A, Attachment 67, ERN 0149372-0149373, p. 394; Philip Short, *Pol Pot: The Man and the Regime*, 1985, D29, Annex A, Attachment 68, ERN 0149375-0149378, pp. 419-423.



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46. In these circumstances, the Pre-Trial Chamber considers that the Charged Person has some ability to organise others to place pressure on witnesses and Victims.

47. The Pre-Trial Chamber notes that the Co-Investigating Judges' finding that there is a real risk that the Charged Person might exert pressure on witnesses or Victims is solely based on the Article dated 1 December 2002. This article mentions:

“Former prime minister Khieu Samphan told AFP that he and other senior leaders would be prepared to give evidence on the internal workings of the highly secretive ultra-Maoist regime, headed by Brother Number One Pol Pot, if a South Africa-style truth commission was set up.

A UN-sponsored trial risked ‘retaliation’ if he and other leaders were put in the dock for crimes against humanity allegedly committed between 1975 and 1979.

‘At trial, people would not understand,’ he said from his home in a remote forest clearing 10 kilometres (six miles) west of Pailin, on the Thai border.

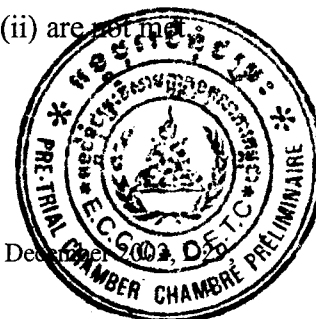
‘And we can’t afford a defence and therefore we won’t get a fair trial.’

[...]

Old guard Khmer Rouge leaders maintain they still have some support among hardliners who would avenge any convictions.”⁵⁶

48. The Pre-Trial Chamber finds that the Article dated 1 December 2002 is not sufficient to support the Co-Investigating Judges' conclusion that there is a concrete risk that the Charged Person may exercise pressure on Victims or witnesses. The Pre-Trial Chamber has not found evidence of any past actions and/or behaviour of the Charged Person which in themselves would display a concrete risk that he might use that influence to interfere with witnesses and Victims or that he would destroy evidence.

49. The Pre-Trial Chamber therefore finds that detention is not a necessary measure to prevent the Charged Person from exerting pressure on witnesses or Victims and destroying evidence. Thus, the conditions set out in Internal Rule 63(3)(b)(i) and (ii) are not met.



⁵⁶ “Khmer Rouge Heads Want Truth Commission Instead of Trial”, *Agence France Presse*, 1 December 2002, Annex A, Attachment 74, ERN 00149391-00149393.

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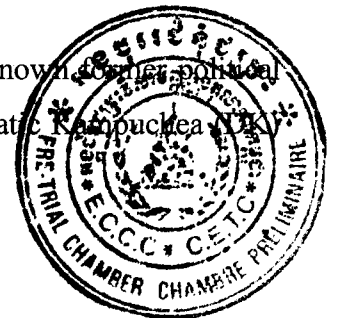
ii) *The fourth ground in Internal Rule 63(3)(b): to protect the security of the Charged Person*

50. The Co-Investigating Judges considered that “the gravity of the crimes and the threat to public order if the Charged Person was released could endanger his personal safety.” They added that “while the events of 1991 during which Khieu Samphan was chased by an angry mob and struck on the head do not in themselves help determine if there is a real risk for the Charged Person, they support the arguments *supra* and [the fact that it cannot be excluded that such events might happen again].”⁵⁷ Owing to the media interest in the trial, they found that this risk is more acute than it was at the time the initial Provisional Detention Order was issued.

51. The Co-Lawyers argue that “the risk referred to by the Co-Investigating Judges is neither real nor current; it is simply presumed and purely hypothetical.”⁵⁸ In particular, they contend that: (i) the fact that proceedings are underway and receive wide media coverage; (ii) the perception of the situation; (iii) the gravity of the alleged crimes; (iv) the risk of disrupting public order; and (v) the events of 1991 which “were quite unique in character and occurred during a particularly turbulent period” are not relevant considerations when assessing a risk to the Charged Person’s safety.⁵⁹

52. Referring to statements made to the press by two Victims and to an incident that occurred during a press conference after the hearing of the Charged Person’s Translation Appeal, the Co-Prosecutors contend that “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 [Charged Person].”⁶⁰ They suggest that the “emotional reactions of the victims are symptomatic of the post-traumatic stress disorder still persisting among the victims as the ECCC proceedings led to the resurfacing of anxieties.”⁶¹

53. The Pre-Trial Chamber observes that the Charged Person is a well-known and prominent figure in Cambodia and considered one of the leaders of the Democratic Kampuchea (DK).



⁵⁷ Order Refusing Release, para. 21.

⁵⁸ Release Appeal, para. 80.

⁵⁹ Release Appeal, para. 79.

⁶⁰ OCP Release Response, para. 39.

⁶¹ OCP Release Response, para. 39.

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regime. As former Head of State of DK, the Charged Person was nearly lynched when he returned to Phnom Penh in November 1991, after the Paris Agreement.⁶²

54. According to an article published in the *Phnom Penh Post* in 2000, the Charged Person himself made guarantees for his safety a condition for speaking in a public forum in 2000.⁶³

55. Two Victims issued statements to the press displaying their emotional reactions as the proceedings before the ECCC progressed. *The New York Times* of 17 June 2008 reports that ██████████, referring to the Khmer Rouge leaders, declared that “only killing them will make [him] feel calm.” He reportedly said: “I want them to suffer the way I suffered. I say this from the heart.” ██████████ declared that “if she had her way, she would slice the elderly man [Nuon Chea] into ribbons and pour salt into his wounds. She would beat him up and torture him and give him electric shocks to make him talk.”⁶⁴ Threats were also made against Kaing Guek Eav, alias Duch, during the first public hearing of the Pre-Trial Chamber, held in November 2007, where a victim named ██████████ declared that “[a]ll of us want to get up and punch him.”⁶⁵

56. During a press conference held after the hearing on the Charged Person’s Translation Appeal, Victims again displayed angry and emotional reactions. The video recording of this conference shows that a female Victim, identified by the Co-Prosecutors as ██████████, shouted and pointed her finger at the national Co-Lawyer, notably saying that all her parents died during the regime. ██████████ warned that if the Tribunal does not proceed smoothly to deliver justice, he will “call a terrorist from Al Qaida and ask him to perform a terrorist act at the ECCC”.⁶⁶

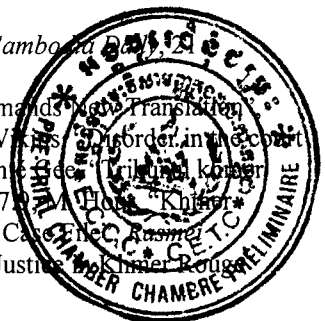
⁶² “He Has No Right to Live”, *Time*, 9 December 1991, D29, Annex A, Attachment 96, ERN S 00041075.

⁶³ “Former top Khmer Rouge leader Khieu Samphan is now willing to come forward and speak out in a public forum [...] However, Samphan made it a condition that either the international community or an independent organization guarantees his safety at a possible public performance.” Anette Marcher and Yin Soeum, “Kieu Samphan wants to go public”, *Phnom Penh Post*, 4-17 February 2000, D29, Annex A, Attachment 95, ERN 00149557-00149560.

⁶⁴ Seth Mydans, “In Khmer Rouge Trial, Victims Will not Stand Idly By”, *The New York Times*, 17 June 2008, C20/5/7.7.

⁶⁵ Erika Kinetz and Yun Samean, “Duch Faces Judges in 1st Public ECCC Hearing”, *The Cambodia Daily*, 14 November 2007, C11/11, Annex A, Attachment A 24.

⁶⁶ Claire Duffet, “Khmer Rouge Genocide Tribunal tumbles as French Defense Lawyer Demands Trial Translation as hearing ends in disarray”, *The Phnom Penh Post*, 5 December 2008, C20/5/7.12; Stéphane Gies, “L’exaspération des victimes intensifiée par un clash avec la défense”, *Ka-Set*, C20/5/7.11; “Khmer Rouge Court Holds Hearing of Khieu Samphan’s Appeal against Decision on Translation of Case”, *The Cambodia Daily*, 5 December 2008 (translation), C20/5/7.11; Barbara Crossette, “Farce Meets Justice in Khmer Rouge Trial”, *The Nation*, 17 December 2008, C20/5/7.10.



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57. These emotional reactions displayed by the Victims show, as anticipated by psychiatrists, that the proceedings before the ECCC could lead to a resurfacing of anxieties amongst Victims who suffer from post-traumatic stress and “a rise in the negative social consequences that may accompany them.”⁶⁷ These reactions indicate that the release of the Charged Person might degenerate into violence directed against him.

58. The Pre-Trial Chamber therefore finds that provisional detention is still a necessary measure to protect the Charged Person’s safety.

iii) The fifth ground in Internal Rule 63(3)(b): to preserve public order

59. Adopting the interpretation given by the Pre-Trial Chamber, the Co-Investigating Judges considered that: (i) for this ground to be met, “facts showing that the accused’s release would actually disrupt public” order must exist; (ii) this determination necessarily involves a measure of prediction; and (iii) detention will continue to be legitimate only if public order remains actually threatened.⁶⁸

60. The Co-Investigating Judges considered that “30 years on, the impact of the Khmer Rouge regime on Cambodian society is still being felt and that a whole segment of Cambodia’s population suffers from post-traumatic stress disorder. The interest of the population and the media in the Extraordinary Chambers and the ongoing proceedings [demonstrate] that this is still a major preoccupation for Cambodians.” They found that “it is not excessive, considering the gravity of the crimes charged against the Charged Person, to conclude that a decision to grant release within the fragile context of today’s Cambodia could provoke protests of indignation which could lead to violence.”⁶⁹

61. While they agree with the criteria applied by the Co-Investigating Judges,⁷⁰ the Co-Lawyers assert that these are not met in the current case as the “proof of the persistence of distress among victims” is not a “proof of disruption of public order.”⁷¹ They further contend that the “fragility of the Cambodian society” has not been established. In their view, the Charged

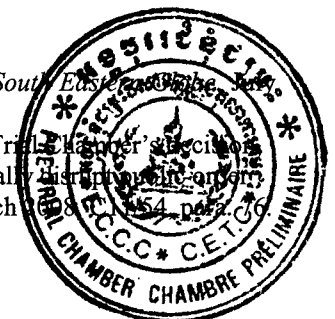
⁶⁷ Rob Savage, “Post Traumatic Stress Disorder: A legacy of pain and violence”, *Monthly South East Asia Human Rights Review*, 2007, pp. 24-27, C11/11, Annex A, Attachment A 25.

⁶⁸ The Pre-Trial Chamber notes that the English version of the Order does not reflect the Pre-Trial Chamber’s decision which mentioned that “facts capable of showing that the Charged Person’s release would actually disrupt public order must exist.” Decision on Appeal Against Provisional Detention Order of Nuon Chea, 20 March 2008, paras 154, 155.

⁶⁹ Order Refusing Release, paras 18-19.

⁷⁰ Release Appeal, paras 61-62.

⁷¹ Release Appeal, para. 65.



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Person's release would "send the message that the presumption of innocence actually exists."⁷²

62. The Co-Prosecutors respond that "the close links between persistent distress and risk of public disorder have been confirmed by the explosive manner in which such stress was expressed at the press conference of December 4 2008."⁷³ The Co-Prosecutors also refer to a report from the Institute for Economics and Peace evaluating the Global Peace Index in 2008 for Cambodia which indicates that there is a high likelihood of violent demonstrations, a high level of violent crime and an easy access to weapons of minor destruction.⁷⁴ They argue that in this context, "the release of a person alleged to be amongst the senior leaders of the DK regime would be likely to cause negative reactions among the population and be perceived as a major setback in the long awaited process of bringing those leaders to justice."⁷⁵
63. Taking into account the statements made by the Victims and their reactions during the press conference of 4 December 2008, the fact that it is believed that a portion of the population that lived through the period from 1975 to 1979 suffers from post-traumatic stress disorder, and the fragile context of Cambodian society today, as expressed in the report referred to above, the Pre-Trial Chamber finds that there are facts capable of showing that the release of the Charged Person would actually disrupt public order. Thus, the Pre-Trial Chamber finds that the condition set out in Internal Rule 63(3)(b)(v) is still met.

G. Exercise of Discretion by the Co-Investigating Judges

i) *Length of detention*

64. In the Order Refusing Release, the Co-Investigating Judges acknowledged that "the passage of time is relevant to determining the legitimacy of continued provisional detention." They considered that "[t]he time spent in provisional detention cannot be deemed unjustified if it is demonstrated that due diligence is shown in conducting the proceedings."⁷⁶

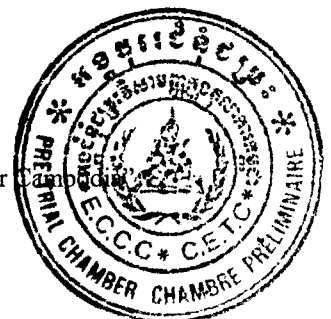
⁷² Release Appeal, para. 72.

⁷³ OCP Release Response, para. 41.

⁷⁴ The Institute for Economics and Peace Global Peace Initiative, "Global Peace Index 2008 for Cambodia", <http://www.visionofhumanit.org/gpi/results/cambodia/2008>.

⁷⁵ OCP Release Response, para. 42.

⁷⁶ Order Refusing Release, para. 27.



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65. The Co-Investigating Judges found that the twelve-month period during which the Charged Person has been in detention is not excessive “in view of the scope of the investigations [and] the complexity and gravity of the crimes of which the Co-Investigating Judges are seised.”⁷⁷ They further considered that “[s]ince the opening of the judicial investigation proceedings, [they] have undertaken large-scale investigations into crimes” of which they are seised and “collected a large body of evidence [...]”⁷⁸
66. In their Release Appeal, the Co-Lawyers “recall that they have specifically complained about the lack of diligence in the conduct of the proceedings.”⁷⁹
67. The Co-Prosecutors respond that the length of pre-trial detention is reasonable given the gravity of the crimes charged, the complexity of the case and the extent of ongoing investigations being carried out by the Co-Investigating Judges.⁸⁰
68. The Pre-Trial Chamber notes that the Charged Person has now been in detention for one year and six months. In its Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea dated 4 May 2009, the Pre-Trial Chamber found that the nexus between the length of time a defendant spends in detention and the diligence displayed in the conduct of investigations is a relevant factor when considering continuation of detention or release.⁸¹
69. In its Decision on Ieng Thirith’s Appeal against Order of Extension of Provisional Detention dated 11 May 2009, the Pre-Trial Chamber, referring to the jurisprudence of international tribunals, considered that the following criteria should be examined when considering whether the length of provisional detention is reasonable:

- “1) the effective length of the detention;
- 2) the length of the detention in relation to the nature of the crime;
- 3) the physical and psychological consequences of the detention on the detainee;
- 4) the complexity of the case and the investigations;

⁷⁷ Order Refusing Release, para. 28.

⁷⁸ Order Refusing Release, para. 29.

⁷⁹ Release Appeal, para. 85.

⁸⁰ OCP Release Response, paras 17 and 18.

⁸¹ Decision on Appeal against Order on Extension of Provisional Detention on Nuon Chea, 4 May 2009, paras 20-21.

44. See also Decision on Ieng Thirith’s Appeal against Order of Extension of Provisional Detention of 11 May 2009, C20/5/18 (“Decision on Extension of Provisional Detention of Ieng Thirith”), para. 66.



5) the conduct of the entire procedure.”⁸²

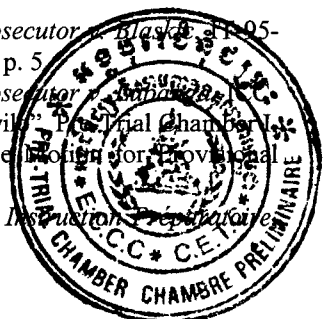
70. The Pre-Trial Chamber further considered, in relation to the conduct of the authorities, that the length of detention would be proportional to the circumstances of a case if “the organs of the Court have acted swiftly and that at no moment were proceedings dormant” or if “the investigation into the crimes has been ongoing and conducted in a reasonable manner.”⁸³
71. The Charged Person is being investigated for his alleged participation, through various modes of liability, in the perpetration of crimes against humanity (murder, extermination, imprisonment, persecution and other inhumane acts) and grave breaches of the Geneva Conventions of 12 August 1949 (wilful killing, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial of a prisoner of war or civilian, unlawful deportation or transfer or unlawful confinement of a civilian) that were allegedly committed on a massive scale throughout Cambodia between 17 April 1975 and 6 January 1979.
72. It is observed that, pursuant to Internal Rule 55(5), the Co-Investigating Judges may, in the conduct of their investigation, “take any investigative action conducive to ascertaining the truth.” They are independent in the way they conduct their investigation.⁸⁴
73. The Pre-Trial Chamber notes that since the Charged Person was arrested on 12 November 2007, the Co-Investigating Judges have, themselves or upon delegation of power to their investigators, conducted twenty-one interviews of the five Charged Persons (thirteen of these being interviews of Duch), interrogated 290 witnesses and collected over 900 documents. Seventeen additional rogatory letters to interview witnesses or collect evidence and an Expertise Order have been issued and are currently being processed.
74. The Pre-Trial Chamber further notes that a large amount of material has been transferred from Case File 001, in which the facts committed inside the framework of S-21 were investigated separately, to Case File 002.⁸⁵ This evidentiary material includes twenty-one

⁸² Decision on Extension of Provisional Detention of Ieng Thirith, para. 58, referring to *Prosecutor v. Blaskovic*, IT-05-14-T, “Order Denying a Motion for Provisional Release”, Trial Chamber, 20 December 1996, p. 5.

⁸³ Decision on Extension of Provisional Detention of Ieng Thirith, para. 59, referring to: *Prosecutor v. Ieng Thirith*, IT-01/04-01/06-586, “Decision on the Application for the interim release of Thomas Luganga Dyilo”, Pre-Trial Chamber I, 18 October 2006, p. 6; *Prosecutor v. Mrksic et al.*, IT-95-13/1-PT, “Decision on Defence Motion for Provisional Release”, Trial Chamber II, 9 March 2005, para. 25.

⁸⁴ The French system has been used to interpret Internal Rule 55(5). See Christian Guéry, *Les procédures pénales internationales*, *Rép. pén. Dalloz*, January 2008, para. 56.

⁸⁵ Separation Order, 19 September 2007, D18.



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interviews of Duch, sixty-eight witness interviews, two Written Records of Crime Scene re-enactment at Choeung Ek and Tuol Sleng, three Written Records of Confrontation of Duch with eleven witnesses and two Civil Parties and over a hundred documents. Given the alleged implication of the Charged Person in the purges that occurred in the framework of S-21, this material that has been collected in Case File 001 should also be considered when assessing the progress of the investigation in Case File 002.

75. The Pre-Trial Chamber finds that the Co-Investigating Judges were justified to conclude that the duration of the Charged Person's provisional detention is reasonable in light of the crimes that are being investigated and the actions the Co-Investigating Judges have undertaken.

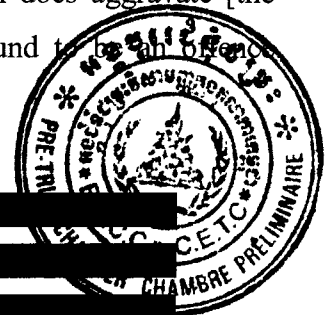
ii) *The Charged Person's age and state of health*

76. The Co-Investigating Judges considered that Internal Rule 64(2) would allow the Charged Person to be released if "it is demonstrated that his state of health is incompatible with continued provisional detention." They stated that advanced age is not an obstacle to detention and that "[c]ompatibility of detention with a charged person's state of health is determined on a case-by-case basis in light of the overall circumstances of the case."⁸⁶

77. On the basis of medical expertises performed by two neurologists on 24 June 2008 and two cardiologists in October 2008, the Co-Investigating Judges concluded that the Charged Person's state of health is "compatible with his continued detention."⁸⁷

78. Although the Defence does not consider the Charged Person's state of health to be incompatible with detention, the Co-Lawyers submit that "detention does aggravate [the Charged Person's] state of health and [...] could ultimately be found to be against his dignity." The Co-Lawyers more particularly allege that:

[REDACTED]



⁸⁶ Order Refusing Release, para. 33.

⁸⁷ Order Refusing Release, para. 38.

⁸⁸ Release Appeal, para. 86.

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79. The Pre-Trial Chamber observes that the ECCC constitutive documents,⁸⁹ the Internal Rules and Cambodian law do not specifically address the possibility that a charged person be released from provisional detention on the basis of health considerations. As prescribed in Article 12 of the Agreement, the Pre-Trial Chamber will therefore seek guidance in procedural rules established at the international level.

80. The jurisprudence of international tribunals indicates that a person might exceptionally be released on humanitarian grounds when his/her condition is “incompatible with detention.”⁹⁰ In the case *Prosecutor v. Talic*, the Trial Chamber for the International Criminal Tribunal for the former Yugoslavia (ICTY) found:

“There can be no doubt that when the medical condition of the accused is such as to become incompatible with a state of continued detention, it is the duty of this Tribunal and any court or tribunal to intervene and on the basis of humanitarian law provide the necessary remedies. In this context the Trial Chamber makes reference to the recent decision of the First Section of the European Court of Human Rights *in re Mouisel v. France*.”⁹¹

81. The Pre-Trial Chamber notes that Internal Rule 51(6), which implicitly provides for the possibility that a suspect be released from police custody when he/she “has any health conditons that make him or her unsuitable for further custody,” refers to a threshold similar to the one developed by international tribunals for granting release from provisional detention.

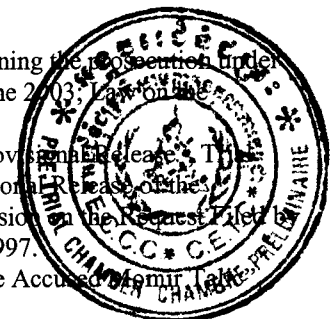
82. In light of the jurisprudence of international tribunals and Internal Rule 51(6), the Pre-Trial Chamber considers that only when there is evidence that his/her health condition is “incompatible with detention” may a charged person be released from provisional detention on humanitarian grounds.

83. In the current case, not only have the Co-Lawyers not brought such evidence, but they concede that the Charged Person’s condition is not incompatible with detention. The Pre-

⁸⁹ 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, and the Establishment of the ECCC of 27 October 2004.

⁹⁰ *Prosecutor v. Drljača and Kovačević*, IT-97-24-T, “Decision on Defence Motion for Provisional Release,” Trial Chamber, 20 January 1998, para. 12; *Prosecutor v. Simić*, IT-95-9-T, “Decision on Provisional Release of the Accused,” Trial Chamber, 26 March 1998; *Prosecutor v. Rutaganda*, ICTR-96-3-T, “Decision on the Request Filed by the Defence for Provisional Release of Georges Rutaganda,” Trial Chamber, 7 February 1997.

⁹¹ *Prosecutor v. Talic*, IT-99-36-T, “Decision on the Motion for Provisional Release of the Accused,” Trial Chamber II, 20 September 2002, p. 6.



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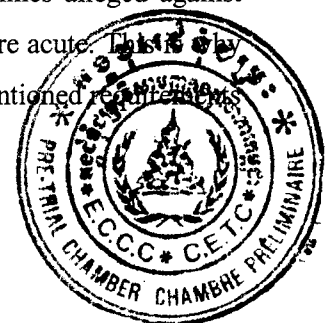
Trial Chamber notes that the position put forward by the Co-Lawyers is untenable: either the Charged Person's condition is incompatible with detention or it is not. Only the first situation would justify his release on humanitarian grounds.

84. The Pre-Trial Chamber finds the Co-Investigating Judges' conclusion that the health condition of the Charged Person is compatible with detention to be fully supported by the expert reports they refer to. The Pre-Trial Chamber further notes that no additional information has been placed in the Case File since the issuance of the Order Refusing Release that would undermine the Co-Investigating Judges' conclusion.
85. Therefore, the Pre-Trial Chamber finds that the Co-Investigating Judges properly exercised their discretion when deciding to refuse the Charged Person's Urgent Application for Release.

H. Release on bail

86. In their Urgent Application for Release, the Co-Lawyers argue that a measure restricting the liberty of a charged person must be "necessary and proportionate to the circumstances." Although they do not specifically request that the Charged Person be released on bail, the Co-Lawyers submit that "if an alternative measure [to detention], which is less restrictive to the charged person's liberty is possible, it should be adopted."⁹²
87. The Co-Investigating Judges concluded as follows:

"The Co-Investigating Judges adopt the same position as the Pre-Trial Chamber, which has on several occasions considered that the fact that the majority of the conditions of Article 63(3)(b) are met, even though any one of them alone would have been sufficient to justify the provisional detention, is a strong indication that no other form of detention can outweigh the necessity for continued provisional detention. Also, the Co-Investigating Judges reiterate their position in this regard, as contained in the Provisional Detention Order, that the particular gravity of the crimes alleged against Khieu Samphan renders the risks set out in Rule 63(3)(a) even more acute. Thus, by no bail order would be rigorous enough to ensure that the abovementioned requirements would be sufficiently satisfied."⁹³



⁹² Urgent Application for Release, para. 33.

⁹³ Order Refusing Release, para. 25.

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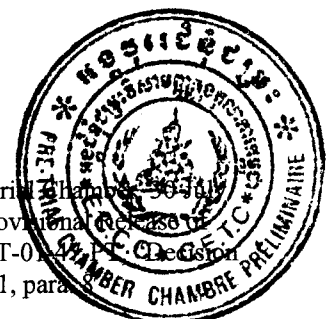
88. In their Release Appeal, the Co-Lawyers argue that “the Co-Investigating Judges relied solely on the gravity of the crimes in denying release on bail”⁹⁴ and that “[t]he mere fact that extended detention could be an effective preventive measure does not mean that it is the only measure available.”⁹⁵ They contend that “the Pre-Trial Chamber must ensure that the Charged Person is not kept in detention unnecessarily, especially considering that alternative solutions are available. Such solutions must be examined *in concreto* irrespective of the gravity of the alleged crimes.”⁹⁶
89. Considering its finding that two of the grounds on the basis of which the Co-Investigating Judges have ordered provisional detention are no longer met, the Pre-Trial Chamber shall set aside the reasoning of the Co-Investigating Judges pertaining to the request for release on bail and review the request *de novo*.
90. Article 35(new) of the ECCC Law and Internal Rule 21(1)(d) mandate that the Charged Person shall be presumed innocent until proved guilty. These provisions reflect and refer to international standards as enshrined in Article 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”). Furthermore, Article 9(3) of the ICCPR provides that “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.”
91. Internal Rule 65 shall be read in light of these principles, which dictate that a decision not to release a charged person should be based on an assessment of whether public interest requirements as set out in Internal Rule 63(3)(b), notwithstanding the presumption of innocence, outweigh the need to ensure respect of a charged person’s right to liberty. To balance these competing interests, proportionality must be taken into account. It is generally recognized that “a measure in public international law is proportional only when 1) it is suitable, 2) necessary and when 3) its degree and scope remain in a reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied.”⁹⁷

⁹⁴ Release Appeal, para. 40.

⁹⁵ Release Appeal, para. 41.

⁹⁶ Release Appeal, para. 42.

⁹⁷ *Prosecutor v. Prilić et al.*, IT-04-74, “Order of Provisional Release of Slobodan Praljak”, Trial Chamber II, 28 March 2004, paras 14-16; *Prosecutor v. Blagojević et al.*, IT-02-53-PT, “Decision on Request for Provisional Release to Accused Jokić”, Trial Chamber II, 28 March 2002, para. 18; *Prosecutor v. Hadžihasanović*, IT-01-47-PT, “Decision Granting Provisional Release to Enver Hadžihasanović”, Trial Chamber II, 19 December 2001, para. 10.



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92. The Pre-Trial Chamber considers that provisional detention continues to be not only an adequate but also a necessary measure in order to ensure the Charged Person's security and preserve public order. The reasons on the basis of which the Pre-Trial Chamber found that the grounds mentioned in Internal Rules 63(3)(b)(iv) and (v) were still met indicate high risks for the Charged Person's security and for public order. No measure other than provisional detention would be sufficient to overcome these risks. As reasoned above,⁹⁸ the length of provisional detention remains reasonable in light of the crimes that are being investigated and the actions the Co-Investigating Judges have undertaken.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

- 1) The Appeal is admissible in its form;
- 2) 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;
- 3) The Appeal is dismissed.

In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal.

III. APPEAL AGAINST EXTENSION OF DETENTION (PTC 15)

A. Admissibility of the Appeal

93. The Extension Order was issued on 18 November 2008 and notified to the Parties on 19 November 2008. The Co-Lawyers for the Charged Person filed a Notice of Appeal on 25 November 2008, in accordance with Internal Rule 75. The Appeal Brief was filed on 4 December 2008, therefore in time.

B. Applicable Law

94. In addition to Internal Rule 63(3) quoted in paragraph 15 above, the following provisions govern the extension of provisional detention:

“6. Provisional Detention may be ordered as follows:



⁹⁸ *Infra*, para. 75.

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- a) for genocide, war crimes and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the Provisional Detention for further 1 (one) year periods;

[...]

7. Any decision by the Co-Investigating Judges concerning extension of Provisional Detention shall be in writing and shall set out the reasons for such extension. An extension shall be made only after the Co-Investigating Judges notify the Charged Person and his or her lawyer and give them 15 (fifteen) days to submit objections to the Co-Investigating Judges. No more than 2 (two) such extensions may be ordered. All such orders are open to appeal.”

C. Nature of the Appeal

95. By their Appeal against Extension of Detention, the Co-Lawyers request the Pre-Trial Chamber to: i) note that the Charged Person is being held on the basis of a null and void measure; ii) order his immediate release; and iii) award him compensation for being detained arbitrarily and without legal authority.⁹⁹ They do so on the grounds that the Co-Investigating Judges had to defer their decision, that they issued an unnecessary decision extending an arbitrary detention and that the Charged Person is being held without legal authority.

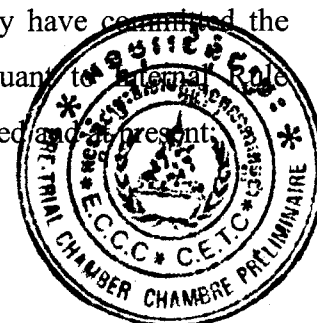
96. In their response, the Co-Prosecutors request the Pre-Trial Chamber to dismiss the Appeal against Extension of Detention on the main grounds that the Co-Investigating Judges “had no obligation to defer their decision” and that the Charged Person “has failed to demonstrate any material change in circumstances since he was originally detained.”¹⁰⁰

97. The Pre-Trial Chamber will review the Extension Order by an examination of:

- i) the regularity of the procedure prior to the making of the Extension Order;
- ii) the sufficiency of evidence to conclude that there are well founded reasons to believe that the Charged Person may have committed the crimes with which he has been charged pursuant to Article 63(3)(a) at the time the Extension Order was issued and at present;

⁹⁹ Appeal against Extension of Detention, para. 80.

¹⁰⁰ OCP Provisional Detention Response, para. 2.



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- iii) whether, in light of the arguments raised by the Co-Lawyers, provisional detention is still a necessary measure pursuant to the criteria set out in Rule 63(3)(b); and
- iv) the exercise of discretion by the Co-Investigating Judges in applying Internal Rule 63(3).

D. Examination of the Regularity of the Procedure

i) Co-Investigating Judges' obligation to defer their decision

98. The Co-Lawyers submit that the Co-Investigating Judges were, for two reasons, under an obligation to defer the decision relating to the extension of provisional detention.

99. First, they argue that the proceedings were fundamentally flawed and delayed primarily as a result of the Co-Investigating Judges' refusal "to order translation of all the materials in the Khieu Samphan Case File" which "severely impair Khieu Samphan's rights."¹⁰¹ The Co-Lawyers point out that they have appealed the Co-Investigating Judges' refusal to order the translation of the Case File before the Pre-Trial Chamber and that proceedings concerning extension of detention should have been stayed pending the outcome of this appeal.¹⁰² Moreover, in their view, the delay in those proceedings should have obliged the Co-Investigating Judges to defer their decision with regard to extension of detention.¹⁰³

100. Second, the Co-Lawyers argue that "the Co-Investigating Judges could not decide impartially, in view of their position on the translation issue and the exceptional circumstances surrounding the proceedings."¹⁰⁴

101. In response, the Co-Prosecutors submit that the Co-Investigating Judges "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."¹⁰⁵ In addition, they argue that "[t]his is not the proper forum to hear [...] contentions regarding the impartiality of the [Co-Investigating Judges] which are in any event baseless."¹⁰⁶



¹⁰¹ Appeal against Extension of Detention, para. 33.

¹⁰² Appeal against Extension of Detention, para. 39.

¹⁰³ Appeal against Extension of Detention, para. 39.

¹⁰⁴ Appeal against Extension of Detention, para. 47.

¹⁰⁵ OCP Provisional Detention Response, para. 2.

¹⁰⁶ OCP Provisional Detention Response, para. 2.

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102. Considering that the Appeal on Translation did not stay the proceedings, the Pre-Trial Chamber finds that the Co-Investigating Judges did not have to defer their decision on the extension of provisional detention. Nothing prevented the Co-Investigating Judges from deciding, at the expiry of the Provisional Detention Order and after having given the Charged Person the opportunity to present his observations, whether provisional detention shall be extended.

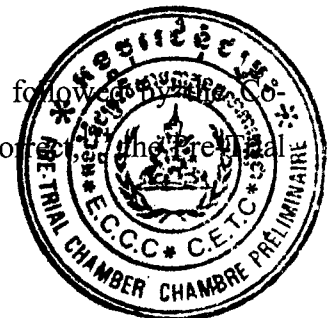
103. The Co-Investigating Judges were justified in deciding upon the arguments raised by the Co-Lawyers by applying the principles set forth in their Order on Translation as this Order continued to produce its effects despite the fact that it was under appeal. Thus, it cannot be said, as asserted by the Co-Lawyers, that the Co-Investigating Judges were in a position that would lead them to lack impartiality.

ii) Legal authority underpinning provisional detention

104. The Co-Lawyers for the Charged Person consider that the initial Order on Provisional Detention issued by the Co-Investigating Judges “is null and void,”¹⁰⁷ as the lack of translation of the Case File had led to a “nullity of the proceedings.”¹⁰⁸ As a result, they submit that the subsequent Extension Order “should be considered to be non-existent” in that “there is no legal authority underpinning Khieu Samphan’s detention.”¹⁰⁹ Further, the Co-Lawyers add that the Pre-Trial Chamber’s delay in issuing a decision concerning detention obliged the Co-Investigating Judges to release the Charged Person from detention per Article 278 of the Cambodian Code of Criminal Procedure.

105. The Co-Prosecutors respond that “[t]his argument is without merit for two reasons: (1) the Defence voluntarily withdrew their appeal against the [Provisional] Detention Order, and thus failed to submit any alleged violation of the Charged Person’s rights to the [Pre-Trial Chamber]; (2) article 278 of Cambodian Code of Criminal Procedure, which is the lynchpin of the Defence’s argument, is inapplicable before the ECCC.”¹¹⁰

106. For the same reasons which led it to conclude that the procedure followed by the Co-Investigating Judges in relation to the Order Refusing Release was correct, the Pre-Trial Chamber



¹⁰⁷ Appeal against Extension of Detention, para. 75.

¹⁰⁸ Appeal against Extension of Detention, para. 69.

¹⁰⁹ Appeal against Extension of Detention, para. 75.

¹¹⁰ OCP Provisional Detention Response, para. 22.

¹¹¹ *Infra*, paras 27-30.

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Chamber finds that no procedural defect has been identified in the proceedings leading to the making of the Extension Order.

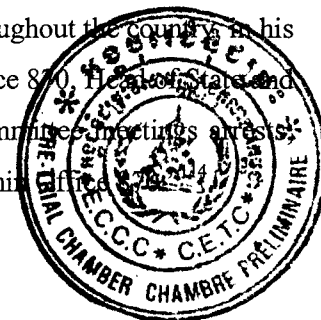
E. Well founded reasons to believe that the Charged Person may have committed the crime or crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

107. Noting that they have evaluated, with the passage of time, the fulfilment of the condition set out in Internal Rule 63(3)(a) in their Order Refusing Release issued a few days before the filing of the Appeal against Extension of Detention, the Co-Investigating Judges stated that “[s]ince that date, no change in circumstances has occurred that could call into question the position adopted by the Co-Investigating Judges in the aforementioned Order.”¹¹² Thus, “[t]hey reiterate[d] that well-founded reasons still exist to believe that the Charged Person encouraged the commission of the crimes charged against him or that he aided and abetted perpetration thereof.”¹¹³

108. In their Order Refusing Release, the Co-Investigating Judges found that:

“Indeed, at this stage of the investigation, there are well-founded reasons to believe that Khieu Samphan, in his capacity as Head of State (Chairman of the State Presidium), a leader within the Centre Political Office (Office 870) and as a full rights member of the Central Committee of the Communist Party of Kampuchea, had knowledge of, facilitated and encouraged the crimes charged against him, including:

- contrary to what he has said, the forced transfer of people from Phnom Penh in April 1975;
- the forced labour and living conditions imposed on Cambodians, the executions and religious persecution, and his visits to a number of sites throughout the country and the information he received;
- the dissemination of CPK ideology and policies through the speeches he made and the political training he conducted or directed;
- defining CPK ideology, its dissemination and implementation throughout the country in his capacity as member of the Central Committee, a leader within Office 870, Head of State and his participation in meetings including many of the Standing Committee meetings and its imprisonments and executions within the ranks of the CPK and within the Office 870.



¹¹² Extension Order, para. 26.

¹¹³ Extension Order, para. 27.

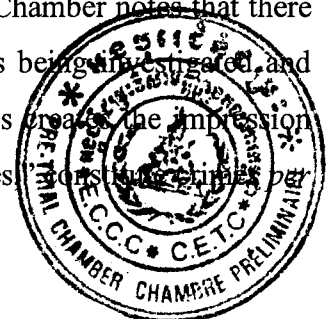
¹¹⁴ Order Refusing Release, para. 9.

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109. Relying on the Pre-Trial Chamber's previous decisions, the Co-Investigating Judges found that "there are well-founded reasons to believe that these crimes were committed as part of an international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam and a widespread or systematic attack targeting a civilian population."¹¹⁵
110. The Pre-Trial Chamber notes that the Co-Lawyers did not raise any argument in relation to the condition set out in Internal Rule 63(3)(a) for ordering the extension of provisional detention. The Co-Lawyers only mentioned, when presenting their argument, that the Co-Investigating Judges are not impartial, that "in the absence of translation, the Defence cannot make its case on the question of 'well-founded reasons'. Yet, it is the only *sine qua non* condition for ordering detention and it is also a substantive requirement for ordering extension of detention."¹¹⁶
111. The Pre-Trial Chamber notes that Internal Rule 21(2) provides that "[a]ny coercive measures to which [a Charged Person] may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities." As mentioned by the Co-Investigating Judges, the condition set out in Internal Rule 63(3)(a) must always be present with the passage of time and the progress of the judicial investigation for ordering the extension of the Charged Person's provisional detention. When seised of an appeal against the extension of provisional detention, the Pre-Trial Chamber has to verify whether the Co-Investigating Judges could conclude that there continue to be well founded reasons to believe that the Charged Person may have committed the crimes for which he has been placed under judicial investigation in light of the continuing investigation. It has also to ensure that these reasons still exist today. For this purpose, the Pre-Trial Chamber shall examine the Case File up until the date of the hearing, which is the last opportunity for the parties to present their observations on the evidence contained in the Case File. The Pre-Trial Chamber finds this examination necessary as the Co-Investigating Judges have a duty to collect inculpatory as well as exculpatory evidence during their continuing investigation, such evidence being periodically added to the Case File.
112. Reading paragraph 9 of the Order Refusing Release, the Pre-Trial Chamber notes that there is confusion between the crimes for which the Charged Person is being investigated, and some alleged facts related to his participation in these crimes. This creates the impression that some acts, like the "dissemination of CPK ideology and policies" are not crimes per

¹¹⁵ Order Refusing Release, para. 10.

¹¹⁶ Appeal against Extension of Detention, para. 49.



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se while this is not the case. The Pre-Trial Chamber identifies the following crimes as being the basis of the Co-Investigating Judges' conclusion on Internal Rule 63(3)(a):

- (i) forced transfers of people from Phnom Penh in April 1975;
- (ii) forced labour and "living conditions imposed on Cambodians";
- (iii) executions and religious persecutions of Cambodians; and
- (iv) arrests, imprisonments and executions within the ranks of the CPK and within Office 870.

113. The remainder of the allegations in paragraph 9 of the Order Refusing Release are considered to relate to the Charged Person's participation in the above mentioned crimes:

- (i) the Charged Person's visits to a number of sites throughout the country and the information he received;
- (ii) the Charged Person's dissemination of CPK ideology and policies through the speeches he made and the political training he conducted and directed;
- (iii) the Charged Person's participation in the definition of CPK ideology, its dissemination and implementation;
- (iv) the Charged Person's role in the Central Committee, Office 870 and as a Head of State; and
- (v) the Charged Person's participation in meetings, including many of the Standing Committee.

i) Charged Person's position in the DK regime

114. The Pre-Trial Chamber is satisfied that the evidence referred to by the Co-Investigating Judges supports, at this stage of the investigation, a reasonable belief that the Charged Person was Head of State (Chairman of the State Presidium), a full rights member of the Central Committee of the Communist Party of Democratic Kampuchea¹¹⁷ and a leader within the Centre Political Office (Office 870).¹¹⁸

115. The Pre-Trial Chamber notes that evidence in the Case File supports the Co-Prosecutors' allegation that Office 870 acted as a secretariat for the CPK Standing Committee and was in

¹¹⁷ Written Record of Interview of Khieu Samphan, 13 December 2007, D46, p. 11.

¹¹⁸ [REDACTED]



118. [REDACTED]
 [REDACTED]
 [REDACTED] 131

119. After having reviewed the witness interviews referred to by the Co-Investigating Judges, the Pre-Trial Chamber is also satisfied that there is evidence to support a reasonable belief that the Charged Person gave training where he disseminated the CPK ideology.¹³²

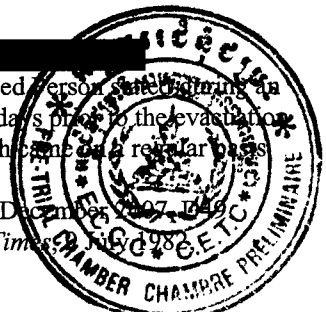
ii) *Forced transfers*

120. [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED] 133

121. Other documents in the Case File contribute to support, at this stage of the investigation, a well founded reason to believe that the Charged Person may have participated in the evacuation of Phnom Penh despite the fact that he had recently denied such participation during interviews conducted by the Co-Investigating Judges.¹³⁴ Collin Campbell, who conducted an interview with Khieu Samphan in 1982, wrote in *The New York Times*: “And he acknowledged that millions of Cambodians the Charged Person gave training where he disseminated the CPK ideology had been sent out of Phnom Penh and into the countryside, as a result of ‘a collective decision.’ Had he joined in the decision: Mr. Khieu Samphan chuckled dryly and replied in French, ‘Yes, evidently.’”¹³⁵ It was reported in *Newsweek* on 28 April 1975 that the Charged Person entered Phnom Penh dressed in a simple black pajama suit and a krama. He proclaimed “the triumph of his new leftist regime.”¹³⁶

iii) *Forced labour and inhuman living conditions*

131 [REDACTED]
 132 [REDACTED]
 133 [REDACTED] The Charged Person stated during an interview conducted by the Co-Investigating Judges that he was with Pol Pot for about ten days prior to the evacuation of Phnom Penh. During that time, commanders who led the battle to overthrow Phnom Penh came on a regular basis.
 Written Record of Interview, D46, 13 December 2007, pp. 2-3.
 134 Written Record of Interview, 13 December 2007, D46; Written Record of Interview, 14 December 2007, D46.
 135 Colin Campbell, “3 Unlikely Cambodian Allies Map War on Vietnam”, *The New York Times*, July 1978, p. 1.
 136 Fay Willey et al., “White Flags over Phnom Penh”, *Newsweek*, 28 April 1975, p. 18.



129. [REDACTED]
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130. [REDACTED]:
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147 [REDACTED]
 148 [REDACTED]
 149 [REDACTED]
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133. In addition to the material referred to by the Co-Investigating Judges, the Pre-Trial Chamber notes the Decision of the Central Committee, of which the Charged Person was a member, dated 30 March 1976:

“1. The right to smash, inside and outside the ranks

Objective:

1. That there is a framework in absolute implementation of our revolution,
2. To strengthen our socialist democracy,

All this to strengthen our state authority.

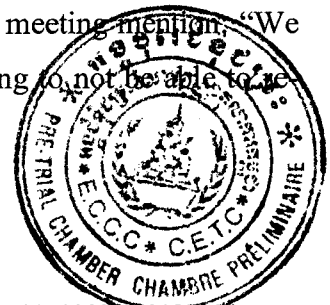
- If the base framework, to be decided by the Zone Standing Committee.
- Surrounding the Center Office, to be decided by the Central Office Committee.
- Independent Sectors, to be decided by the Standing Committee.
- The Center Military, to be decided by the General Staff.”¹⁵¹

134. [REDACTED]

[REDACTED] ¹⁵²

135. According to the Charged Person’s testimony, Office 870 was, at some stage, “tasked to monitor suspected members of the party for the standing committee.”¹⁵³ The Charged Person further mentioned that “[he] learned this after the revolution collapsed, when [he] reached Pailin” but the credibility of this statement raises doubts considering the position occupied by the Charged Person within Office 870, as mentioned in paragraph 114 above.

136. The Minutes of the Standing Committee meeting held on 9 October 1975 show that the Charged Person attended at least one meeting where the situation of “traitors” and their potential execution was discussed. In particular, the minutes of this meeting mention, “We must closely grasp Party matters. Sometimes it is too serious, leading to not being able to educate.”¹⁵⁴



¹⁵¹ Decision of the Central Committee Regarding a Number of Matters, 30 March 1976, ERN 00182809-00182814.

¹⁵²

¹⁵³ Written Record of Interview, 14 December 2007, D47, p. 5.

¹⁵⁴ CPK Standing Committee Meeting Minutes, 9 October 1975, ERN 00183393-00183408, p. 12.

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137. The Pre-Trial Chamber considers that it would have been preferable for the Co-Investigating Judges to give more details about the evidence they have gathered which supports their conclusion that there continue to be well founded reasons to believe that the Charged Person may have committed the crimes with which he has been charged. However, the Pre-Trial Chamber finds that their conclusion on the fulfilment of the condition set out in Internal Rule 63(3)(a) is supported by the material to which they refer and the other evidence contained in the Case File quoted above, taken as a whole. This conclusion is not undermined by the evidence of potential exculpatory nature that had been placed in the Case File before the Extension Order was issued.¹⁵⁵ The Pre-Trial Chamber further notes that it has not identified any evidence of exculpatory nature placed in the Case File after the making of the Extension Order, leading it to conclude that the condition set out in Internal Rule 63(3)(a) continues to be met.

F. Consideration of the grounds making provisional detention a necessary measure (Internal Rule 63(3)(b))

138. The Co-Lawyers submit that “the Order dated 28 October 2008 does not demonstrate the need for detention”¹⁵⁶ and that expiry of provisional detention in itself constitutes a change which should be considered by the Co-Investigating Judges. Further, they state that:

“[T]he Co-Lawyers for the Defence clearly demonstrated that in releasing Khieu Samphan, there was no risk of pressure being exerted on any witnesses or victims or prejudice to public order or, for that matter, putting his personal security at risk. Therefore the Co-Investigating Judges could have deemed an alternative to detention to be an appropriate measure. They declined to do so, and have no reason for their refusal.”¹⁵⁷

139. In response, the Co-Prosecutors assert that the Co-Lawyers do not “identify any material change of circumstance to show that the conditions necessitating his detention under Rule 63(3)(b) are no longer met.”¹⁵⁸

140. It is observed that the Co-Lawyers have not raised any new argument of change in circumstances that would lead the Pre-Trial Chamber to a different conclusion than the one

¹⁵⁵ [REDACTED]

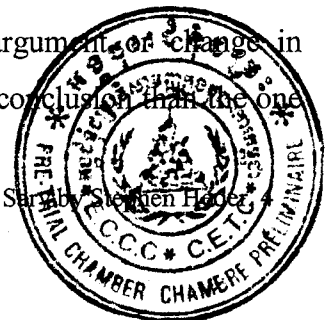
January 1999, ERN 00081571-00081572, p. 2

¹⁵⁶ Appeal against Extension of Detention, para. 60.

¹⁵⁷ Appeal against Extension of Detention, para. 60.

¹⁵⁸ OCP Provisional Detention Response, para. 38.

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expressed in its Decision on the Release Appeal. Therefore, the Pre-Trial Chamber concludes that provisional detention could be extended for a period of one year on the grounds that it is necessary to protect the security of the Charged Person and to preserve public order.

G. Exercise of Discretion by the Co-Investigating Judges

141. For the same reasons that it found that the Co-Investigating Judges properly exercised their discretion when deciding to refuse the Charged Person’s Urgent Request for Release, the Pre-Trial Chamber finds that the Co-Investigating Judges have properly exercised their discretion to extend the Charged Person’s provisional detention. No argument leading to a different conclusion has been raised by the Co-Lawyers.

THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

- 1) The Appeal is admissible in its form;
- 2) 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;
- 3) The Appeal is dismissed.

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, in the presence of the Charged Person and his national Co-lawyer.

Phnom Penh, 3 July 2009

Pre-Trial Chamber

President

[Signature]

Rowan DOWNING

[Signature]

NEY Thol

[Signature]

Katinka LAHUIS

[Signature]

HUOT Vuthy



[Signature]
SAR Chaurin

[Signature]
Anne-Marie BURNS