

040/5/2

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**PUBLIC REDACTED VERSION OF THE “CO-PROSECUTORS’ RESPONSE TO
KHIEU SAMPHAN’S APPEAL BRIEF AGAINST THE ORDER REFUSING REQUEST
FOR RELEASE DATED 28 OCTOBER 2008”, FILED ON 22 JANUARY 2009**

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I. INTRODUCTION

1. The Co-Prosecutors respond to a Defence Appeal (the “Appeal”),¹ filed on 27 December 2008 that seeks a reversal of the order of the Co-Investigating Judges (the “CIJs”) refusing the urgent request for release (the “Order Refusing Release”) of the Charged Person KHIEU Samphan (the “Charged Person” or the “Appellant”).² The Defence appeal is filed pursuant to ECCC Internal Rule 64(2) and 74(3) (f). The Defence contend that the Charged Person should be released because (1) the CIJs’ decision involves an error of law as it is not justified having regard to the overall circumstances of the case and is solely based on the gravity of the alleged crimes;³ (2) the CIJs’ decision involves an error of fact as it does not prove the real risk of pressure against witnesses and victims, the risk of public disorder, or a risk to his personal safety;⁴ (3) release is the only appropriate measure⁵ and there is no impediment to the Appellant’s release⁶ and; (4) the Appellant’s detention lasted longer than a year and the proceedings lacked diligence⁷.
2. The Co-Prosecutors request that the Pre-Trial Chamber (the “PTC”) dismiss the Appeal on the following grounds:
 - (a) As the Appeal concerns a provisional release, it is the burden of the Charged Person to show that the factors justifying provisional detention no longer exist;
 - (b) The Order Refusing Release is sufficiently and adequately reasoned: the CIJs set out the legal grounds and facts taken into account before issuing their Extension Order and are not obliged to indicate a view on all the factors;
 - (c) The length of time of the provisional detention is not unreasonable and there has been no lack of due diligence by the CIJs in the conduct of the proceedings;

¹ *Case of KHIEU Samphan*, Appeal Brief Against the Order of 28 October 2008 Refusing release, 27 November 2008, **C40/5/1**, ERN 00269865-82 (ENG), 00242949-68 (FRE) and 00242969-94 (KHM) [*hereinafter* Appeal].

² *Case of KHIEU Samphan*, CIJs’ Order Refusing Request for Release, 28 October 2008, **C40/4**, ERN 00236261-71 (ENG), 00235033-44 (ENG) and 00235045-65 (KHM) [*hereinafter* Order Refusing Release]; Defence Urgent Application for Release, 8 October 2008, **C40**, ERN 00233119-30 (ENG), ERN 00228906-18 (FRE) and 00228887-905 (KHM) [*hereinafter* Defence Urgent Application for Release].

³ Appeal, **C40/5/1**, paras. 3, 23-42.

⁴ Appeal, **C40/5/1**, paras. 4, 43-80.

⁵ Appeal, **C40/5/1**, paras. 5, 81-83.

⁶ Appeal, **C40/5/1**, section B, paras. 43-80.

⁷ Appeal, **C40/5/1**, paras. 84-85.

- (d) The issue of translation rights and obligations is separate from the question of legality of provisional detention and is currently pending before the PTC. The repeated Defence arguments on this issue in successive submissions are irrelevant as regards the provisional release/detention and may constitute delaying measures. An appeal to the PTC does not stay any proceedings; should the PTC decide in the future that the rights of the Charged Person were violated the CIJs would have to comply immediately with such a decision;
- (e) The Appellant has failed to demonstrate any material change in circumstances since he was originally detained by the CIJs on 19 November 2007 (“Detention Order”)⁸. In the Order Refusing Release, which evaluated evidence on the Case File, the CIJs noted that the requirements of Rules 63(3) (a) and 63 (3) (b) (i), (ii), (iv), and (v) were met and provisional detention was still a necessary measure on the basis of those grounds;⁹
- (f) The Case File today contains evidence capable of satisfying an objective observer, at this stage of investigation, that the Appellant may have committed the crimes for which he is currently under investigation. In addition, four of the five disjunctive conditions necessitating detention under Rule 63(3) (b) are satisfied so as to justify provisional detention. Specifically, the Appellant’s detention is still a necessary measure (1) to protect victims and witnesses; (2) to preserve evidence and protect the destruction of evidence, (3) to protect his security, and (4) to preserve public order.

II. RELEVANT PROCEDURAL BACKGROUND

3. On 18 July 2007, the Co-Prosecutors submitted an Introductory Submission detailing criminal facts and naming the Appellant and four other suspects as responsible for certain crimes under the jurisdiction of this Court.¹⁰ On 18 October 2007, the Co-Prosecutors filed “Additional Materials and Authorities in support of grounds for provisional detention for the

⁸ *Case of KHIEU Samphan*, CIJs’ Provisional Detention Order, 19 November 2007, **C26**, ERN 00152991-96 (FRE), 00156700-05 (ENG) and 00152973-78 (KHM) [*hereinafter* Detention Order].

⁹ Order Refusing Release, **C40/4**, paras. 11/22.

¹⁰ Introductory Submission, 18 July 2007, **D3**, ERN 00147244-7399 (ENG), 00197410-7545 (FRE) and 00185898-6167 (KHM).

suspects”.¹¹ The Charged Person was arrested on 19 November 2007 and brought before the CIJs for an initial appearance¹² and an adversarial hearing,¹³ and was charged with crimes against humanity and grave breaches of the Geneva Conventions of 12 August 1949.¹⁴ The CIJs ordered the Charged Person’s provisional detention for a period not exceeding one year (the “Detention Order”) on 19 November 2007.¹⁵ The Defence appealed this decision by filing a written submission on 21 December 2007 solely based on Internal Rule 63 (3) (a) (the “Rules). The Co-Prosecutors filed their response to the appeal on 6 February 2008 and the Civil Parties on 17 April 2008.¹⁶ The PTC held a hearing on 23 April 2008, which was adjourned as “a consequence of the attitude of the international co-lawyer”, who was warned by the PTC pursuant to Rule 38.¹⁷ The Defence filed a first application for provisional release on 13 June 2008, which was refused by a CIJs’ order on 23 June 2008. A Notice of Appeal was filed by the Defence on 30 June 2008¹⁸ but the appeal was subsequently dropped. On 22 July 2008, the Defence filed an appeal before the PTC against the CIJ’s Order on Translation Rights and Obligations of the Parties, which is pending (the “Translation Appeal”)¹⁹: a public

¹¹ *Case of KHIEU Samphan*, Notice of Disclosure of Additional Materials and Authorities in Support of Grounds for Provisional Detention for the Suspects, 18 October 2007, **D29** and **D29/I**, ERN 00148902-04 and 00148965-9841 (ENG). This includes 33 factual documents specific to KHIEU Samphan in Annex A (ERN 00149340-566 (ENG)).

¹² *Case of KHIEU Samphan*, Written Record of Initial Appearance, CIJ, 19 November 2007, **D42**, ERN 00153319-22 (ENG), 00153333-36 (FRE) and 00153304-08 (KHM).

¹³ *Case of KHIEU Samphan*, Written Record of Adversarial Hearing, CIJ, 19 November 2007, **C25**, ERN 00153266-70 (ENG), 00153296-301 (FRE) and 00153228-35 (KHM).

¹⁴ On the same day, the Co-Prosecutors filed additional grounds in support of provisional detention: Co-Prosecutors’ Additional Grounds in Support of Provisional Detention in the Case of the suspect KHIEU Samphan, 19 November 2007, **C28**, ERN 00153050-65 (KHM), 00153041-49 (ENG) and 00161635-43 (FRE).
¹⁵ Detention Order, **C26**.

¹⁶ *Case of KHIEU Samphan*, Appeal Brief against the Provisional Detention Order of 19 November 2007, 21 December 2007, **C26/I/3**, ERN 00158303-14 (ENG); Co-Prosecutors’ Response to Khieu Samphan’s Appeal against Provisional Detention Order of 19 November 2007, 6 February 2008, **C26/I/9**, ERN 00160767-95 (ENG); Civil Party Co-Lawyers’ Joint Response to the Appeal of Khieu Samphan against the Provisional Detention Order, 17 April 2008, **C26/I/21**, ERN 00178205-52 (ENG).

¹⁷ *Case of KHIEU Samphan*, PTC Decision on Application to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008, **C26/I/25**, ERN 00180341-44 (ENG); PTC Written Record of the Hearing of 23 April 2008 on the Appeal against the Provisional Detention Order, 2 May 2008, **C26/I/26**, ERN 00185534-41 (ENG).

¹⁸ *Case of KHIEU Samphan*, Defence Request for an Order for M. Khieu Samphan’s Provisional Release for Health Reasons, 13 June 2008, **C36**, ERN 00195934-35 (ENG), 00195936-37 (FRE); Co-Prosecutors’ Observations on Defence Request to Release Khieu Samphan from Provisional Detention, 19 June 2008, **C36/II**, ERN 00196966-69; CIJs’ Order refusing the Request for Release, 23 June 2008, **C36/III**, ERN 00197169-73 (FRE) and 00198508-12 (ENG); Records of Appeals and Notice of Appeal, 30 June 2008, **C36/III/1**, ERN 00198209-12 (ENG). No grounds of appeal were ever filed.

¹⁹ *Case of KHIEU Samphan*, Defence Appeal against the Decision to Deny the Request for Translation of Khieu Samphan’s Case File, 22 July 2008, **A190/I/1**, ERN 00212334-52 (ENG) and 00207411-29 (FRE) [*hereinafter* Response to Khieu Samphan’s Appeal on Order Refusing Release (Public Redacted Version)]

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hearing took place on 4 December 2008.²⁰ On 8 October 2008, the Defence withdrew their appeal against the Provisional Detention Order²¹ and filed an Urgent Application for Release with the CIJs pursuant to Rule 64 (2)²². On 24 October 2008, the Co-Prosecutors filed their response to the CIJs' forwarding order regarding Khieu Samphan's Urgent Application for Release.²³ The CIJs refused the Defence Request for Release on 28 October 2008, which is the impugned decision²⁴ and the Defence filed their Appeal against the Order Refusing Release on 27 November 2008.²⁵ The English translation of the Appeal was notified to the Co-Prosecutors on 8 January 2009.²⁶

4. Meanwhile, on 28 October 2008, pursuant to Rule 63 (7), the CIJs notified the Charged Person and his lawyers that they were considering an extension of his provisional detention and requested them to submit their observations within 15 days²⁷, which they did on 14 November 2008.²⁸ The CIJs issued their Order on Extension of Provisional Detention (the "Extension Order") on 18 November 2008²⁹ and the Defence filed their Appeal on 4

the Translation appeal]; CIJs' Order on Translation Rights and Obligations of the Parties, 19 June 2008, **A190**, ERN 00196923-30 (ENG) [*hereinafter* Order on Translation Rights].

²⁰ *Case of KHIEU Samphan*, PTC Decision on KHIEU Samphan's Request for a Public Hearing, 4 November 2008, **A190/I/8**, ERN 00236251-54 (ENG); Revised scheduling Order for Public Hearing, PTC, 14 November 2008, **A190/I/10**, 00238738-39 (ENG); Transcripts of Appeal Hearing of 4 December 2008 (PTC11)-T.S., ERN 00251973-018 (ENG), 00252019-67 (FRE) and 00252068-114 (KHM).

²¹ *Case of KHIEU Samphan*, Defence Notice of Withdrawal of Appeal, 8 October 2008, **C26/I/30**, ERN 00228787-93 (FRE), 00231936-42 (ENG); PTC Decision Relating to Notice of Withdrawal of Appeal, 15 October 2008, **C26/I/31**, ERN 00231971-74 (ENG).

²² Defence Urgent Application for Release, **C40**.

²³ Co-Prosecutors' Response to the Co-Investigating Judges Forwarding Order Regarding Khieu Samphan's Urgent Application for Release, 24 October 2008, **C40/3**, ERN 00234631-45 (ENG) [*hereinafter* OCP Response to Forwarding Order].

²⁴ Order Refusing Release, **C40/4**.

²⁵ Appeal, **C40/5/1**.

²⁶ Appeal, **C40/5/1**, ERN 00269865-82 (ENG).

²⁷ *Case of KHIEU Samphan*, CIJ Notification Pursuant to Internal Rule 63 (7), 28 October 2008, **C26/2**, ERN 00235400-01 (FRE).

²⁸ *Case of KHIEU Samphan, Objections de la Défense concernant la prolongation de la détention*, 14 November 2008, **C26/3**, ERN 00238930-41 (FRE), 00238914-23 (KHM). No English version is available to date.

²⁹ Order on Extension of Provisional Detention, 18 November 2008, **C26/4**, ERN 00250773-81 (ENG) [*hereinafter* Extension Order].

December 2008.³⁰ The Co-Prosecutors filed their Response to the Appeal against the Extension Order on 9 January 2009.³¹

5. Finally, on 4 December 2008, the Charged Person filed an Extremely Urgent Supplemental Application for Release before the PTC³² which was rejected as inadmissible by the President of the PTC on 24 December 2008.³³

III. PRELIMINARY SUBMISSION

An Oral Hearing is not Required

6. Rule 77(3) (b) permits the PTC, after considering the views of the parties, to determine an appeal on the basis of the written submissions of the parties only. The Appellant has not asked for an oral hearing of this Appeal. The current Appeal does not raise new factual or legal arguments necessitating an oral hearing. The issue of the translation rights, which is the backdrop of this appeal, was publicly debated on 4 December 2008. In the interest of judicial economy, the Co-Prosecutors request that the PTC determine this Appeal on written submissions alone.

IV. THE LAW

A. The Burden of Proof

7. The Defence state that “as a rule, the Charged Person is to remain at liberty”, the provisional detention being the exception. This statement is based on Article 203 of the Cambodian Procedure Code (the “CPC”) and on the assumption that this presumption was generally considered by the Plenary to be self-evident; therefore, the Defence conclude that it was

³⁰ *Case of KHIEU Samphan*, Appeal Brief against the Order on Extension of Provisional Detention, 4 December 2008, **C26/5/1**, ERN 00251782-98 (ENG).

³¹ *Case of KHIEU Samphan*, Co-Prosecutors’ Response to Khieu Samphan’s Appeal against the Order on Extension of Provisional Detention dated 18 November 2008, 9 January 2009, **C26/5/10**, ERN 00270279-97 (ENG) and 00270298-326 (KHM).

³² *Case of KHIEU Samphan*, Extremely Urgent Supplemental Application for Release, 4 December 2008, **C26/5/2**, ERN 00249810-14 (FRE), 00250603-07 (ENG) and 00249810-14 (KHM); Co-Prosecutors’ Response to Khieu Samphan’s Extremely Urgent Supplemental Application for Release, 16 December 2008, **C26/5/4**, ERN 00250974-80 (ENG), 00250981-91 (KHM).

³³ PTC Decision on Khieu Samphan’s Supplemental Application for Release, **C26/5/5**, 24 December 2008, ERN 00251469-74 (ENG).

pointless to include it in the ECCC Internal Rules³⁴. They argue that the CIJs failed to justify their decision in regards to the overall circumstances of the case, that their order is solely based on the gravity of the crimes and that they did not prove the existence of a risk in regard to Rule 63 (3) (b)(i), (iv) and (v).³⁵

8. As already stated in previous submissions,³⁶ there is no specific guidance in the Rules or Cambodian domestic criminal law on the burden of proof in detention hearings. However, a provisional release request based on Rule 64 (2) such as the one the Defence present here must be distinguished from the mandatory periodic review of the provisional detention conditions (Rule 63 (6) and (7)) and the possibility that the CIJs may release the Charged Person at any time where the requirements of Provisional Detention are no longer satisfied (Rule 64 (1)). In the framework of this appeal, the Defence needed to establish concrete elements justifying the release of the Charged Person, which they failed to do. Guidance can also be sought in international criminal law where the established practice is that, once the suspect is placed in provisional detention, the burden of proof falls on the Defence³⁷ to satisfy the court that he meets the conditions justifying a grant of “provisional release”.³⁸ Furthermore, international and internationalized courts have treated provisional release as the

³⁴ Appeal, **C40/5/1**, para. 24, footnote 21.

³⁵ Appeal, **C40/5/1**, paras. 3, 24-33, 34-42, 45 and 46-80.

³⁶ For example, OCP Response to Forwarding Order, **C40/3**, paras. 8-10.

³⁷ *Prosecutor v. Haradinaj*, Decision on Ramush Haradinaj’s Motion on Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 6 June 2005, para 21 (**C11/11**, Authority C24); *Prosecutor v. Prlic et al.*, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, Case No. IT-04-74-AR65, ICTY Appeals Chamber, 8 September 2004, para. 28 (**C11/11** Authority C37); *Prosecutor v. Sesay et al.*, Decision on the Motion by Morris Kallon for Bail, Case No. SCSL-04-15 PT, SCSL Trial Chamber, 23 February 2004, (**C11/11**, Authority C42), para. 29 (stating that “[i]t would appear from the majority of the jurisprudence of both the ICTY and ICTR, however, that through the weighing process of the submissions of both parties, the burden of proof continues to rest on the Defence, and not on the Prosecution”); *Prosecutor v. Issa Hasan Sesay*, Decision on Application of Issa Sesay for Provisional Release, Case No. SCSL-04-15-PT, SCSL Trial Chamber, 31 March 2004, para. 37 (**C11/11**, Authority C40); *Prosecutor v. Fatmir Limaj et al.*, Decision on Fatmir Limaj’s Request for Provisional Release, Case No. IT-03-66-AR65, ICTY Appeals Chamber, 31 October 2003, para 40 (**C11/11**, Authority C27); *Prosecutor v. Rahim Ademi*, Decision on Motion for Provisional Release, Case No. IT-01-46-PT, ICTY Trial Chamber, 20 February 2002 (**C20/I/7**, Authority B33) para. 19; *Prosecutor v. Brdjanin and Talic*, Decision on Motion by Momir Talic for Provisional Release, Case No. IT-99-36-T, ICTY Trial Chamber, 28 March 2001, paras. 17-18 (**C11/11**, Authority C16).

³⁸ At the ICTY, ICTR and SCSL, release may only be ordered if the court is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. See: Rules 65 of the ICTY Rules of Procedure and Evidence (**C11/11**, Authority C10), ICTR Rules of Procedure and Evidence (**C11/11**, Authority C8) and SCSL Rules of Procedure and Evidence (**C11/11**, Authority C11); See: *Prosecutor v. Lukic*, Decision on Defence Appeal against Trial Chamber’s Decision on Sredoje Lukic’s Motion for Provisional Release, Case IT-98-32/1-AR65.1, ICTY Appeals Chamber, 16 April 2007, para.7. (**C40/5/1**, Authority C1).

exception rather than the rule.³⁹ Judge Geoffrey Robertson, President of the Special Court of Sierra Leone, expressly stated that “(t)here is no presumption in favour of bail, which is understandable given the nature of the crimes charged”.⁴⁰

9. Although always to be balanced with the fundamental rights of the accused,⁴¹ this factor is unique to tribunals which deal with crimes of such international concern, as has been recognized at the Special Court for Sierra Leone in the case of *Prosecutor v. Issa Hasan Sesay*.⁴² In the light of the arguments abovementioned, the Co-Prosecutors submit that it is the burden of the Charged Person to show that the factors justifying provisional detention do not exist anymore. Therefore, the Defence cannot use this appeal to transfer the burden of proof to the CIJs by alleging that the CIJs failed to prove that the requirements of Rule 63 (3) (b) are met.

³⁹ Examples of refusals before the ICTY: *Prosecutor v. Darko Mrdja*, Decision on Darko Mrdja’s Request for Provisional Release, Case No. IT-02-59-P, ICTY Trial Chamber, 15 April 2002, para. 29 (C11/11, Authority C19); *Prosecutor v. Mile Mrksic*, Decision on Appeal Against Refusal to Grant Provisional Release, Case No. IT-95-13/1-AR65, ICTY Appeals Chamber, 8 October 2002 (C11/11, Authority C31); *Prosecutor v. Pasko Ljubicic*, Decision on the Defence Motion for the Provisional Release of the Accused, Case No. IT-00-41-PT, ICTY Trial Chamber, 2 August 2002 (C11/11, Authority C35); *Prosecutor v. Limaj et al.*, Decision on Provisional Release of Fatmir Limaj, Case No. IT-03-66-PT, ICTY Trial Chamber, 12 September 2003 (C11/11, Authority C26), confirmed by the Appeals Chamber in *Prosecutor v. Fatmir Limaj et al.*, Decision on Fatmir Limaj’s Request for Provisional Release, Case No. IT-03-66-AR65, ICTY Appeals Chamber, 31 October 2003, para. 40 (C11/11, Authority C27). Only around eight percent of the ICTY detainees benefited from provisional release. Among them were people who were suspected of relatively less serious offences, people who surrendered voluntarily and who co-operated fully with the ICTY (like Ademi), people suffering from terminal illnesses (like Talic) or people for whom exceptional security measures were guaranteed by the host States. SCSL cases: *Prosecutor v. Sesay et al.*, Decision on the Motion by Morris Kallon for Bail, Case No. SCSL-04-15 PT, SCSL Trial Chamber, 23 February 2004, para. 35 (C11/11, Authority C42); *Prosecutor v. Sam Hinga Norman*, Decision on Motion for Modification of Conditions of Detention, Case No. SCSL-2003-08-PT, President of the SCSL, 26 November 2003, para. 8 (C11/11, Authority C 41). Provisional release has never been granted by the Special Court for Sierra Leone: See Archbold, *International Criminal Courts: Practice, Procedure and Evidence* (London: Sweet and Maxwell 2005), section 7-129, page 284 and section 7-132, page 285 (C11/11, Authority C43). Furthermore, it has only been granted extremely rarely by the ICTR.

⁴⁰ *Prosecutor v. Sam Hinga Norman*, Decision on Motion for Modification of Conditions of Detention, Case No. SCSL-2003-08-PT, President of the SCSL, 26 November 2003, para. 8 (C11/11, Authority C 41).

⁴¹ *Prosecutor v. Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, ICTY Appeals Chamber, 5 June 2003, para.30 (5) (C11/11, Authority C 22).

⁴² *Prosecutor v. Issa Hasan Sesay*, Decision on Application of Issa Sesay for Provisional Release, Case No. SCSL-04-15-PT, SCSL Trial Chamber, 31 March 2004, para. 40 (C11/11, Authority C 40), in which it was held: “...one should bear in mind that, in the specific nature of international tribunals, the crimes over which such tribunals have jurisdiction can be categorized as the most serious crimes under international law. Therefore, it can be said that the approach to bail that prevails in national courts of law may be different than that for an international tribunal.”

B. Duty to Give Reasons in Detention Orders

10. The Defence suggest that the impugned decision is without justification or reasoned opinion as the CIJs did not take the overall circumstances of the case into account and the decision relies solely on the gravity of the crimes alleged. According to the Defence, the detention therefore serves a purely symbolic purpose and is based on an unlawful measure.⁴³ The Co-Prosecutors understand their reasoning as referring to the pending procedure on translation rights before the PTC and the alleged violation of the right to an effective defence upheld by the Defence.⁴⁴
11. Rule 64 (2) requires the Co-Investigating Judges to issue a reasoned decision on the application for release. These reasons have to be given after considering the application, the Case File and the opinion of the Co-Prosecutors. Citing settled international jurisprudence, the PTC has found that all decisions of judicial bodies, including the CIJs, have to be reasoned to meet international standards.⁴⁵ The PTC has determined that the obligation to state reasons requires only that the CIJs set out the legal grounds and facts taken into account before coming to a decision. The CIJs can discharge this obligation “by referring to the Case File in general and other circumstances”, as the CIJs are not obliged to indicate a view on all the factors but only the relevant ones.⁴⁶ The Order Refusing Release is indeed sufficiently and adequately reasoned.

⁴³ Appeal, **C40/5/1**, paras. 10 and 23-33.

⁴⁴ The Defence claim that they do not have access to the Case File in a language the international co-lawyer understands. See Appeal, **C40/5/1**, paras. 8, 28, 30-33.

⁴⁵ *Case of NUON Chea*, PTC Decision on Nuon Chea’s Appeal against Order Refusing Request for Annulment, 28 August 2008, **D55/I/8**, ERN 00129322-33 (ENG), paragraph 21 [*hereinafter* NUON Chea Detention Appeal Decision].

⁴⁶ *Case of IENG Sary*, PTC Decision on Appeal against Provisional Detention Order of Ieng Sary, 17 October 2008, **C 22/I/74**, ERN 00232976-004 (ENG), paras. 64-66 (*hereinafter* IENG Sary Detention Appeal Decision); See also ICTY case law: *Prosecutor v. Popovic*, Decision on Defence’s Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovcanin Provisional Release, Case No. IT-05-88-AR65.3, Appeals Chamber, 1 March 2007, para. 7 (**C9/4/2**, Authority 9); *Prosecutor v. Haradinaj*, Decision on Lahi Brahimaj’s Motion for Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 3 May 2006, para. 16 (**C9/4/2**, Authority 6); *Prosecutor v. Lukic*, Decision on Defence Appeal against Trial Chamber’s Decision on Sredoje Lukic’s Motion for Provisional Release, Case IT-98-32/1-AR65.1, ICTY Appeals Chamber, 16 April 2007, para. 7 (**C40/5/1**, Authority C1), in which the Appeals Chamber stated that “In deciding whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all of those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. It must then provide a reasoned opinion indicating its view on those relevant factors. [...] What these relevant factors are, as well as the weight to be accorded to them, depends upon the particular circumstances of each case”.

12. Regarding the issue of translation rights and obligations pending before the PTC,⁴⁷ repetitively mentioned by the Defence in the Appeal,⁴⁸ it is not directly linked to the legality of provisional detention. The PTC decided that it could rule on the Appeal on Provisional Detention of the Charged Person before deciding on the separate translation issue.⁴⁹ In contrast with the Defence attempt to associate these two issues, the CIJs also clearly distinguished them⁵⁰, as they ruled on the request for release and the extension of provisional detention and left the matter of translation and alleged unfair proceedings to the PTC to decide.
13. First, it should be noted that the CIJs discharge their functions in an impartial and independent manner and that the CIJs Order on Translations Rights dated 19 June 2008 was issued after taking into account the rights of all parties, including the right of the Charged Person to a fair -and expeditious- trial.⁵¹ Moreover, the Defence acknowledged that the CIJs were under no obligation to reconsider their own decision on translation⁵² prior to the PTC decision on appeal. In effect, the Defence cannot rely on an unfavourable but independent earlier decision of the CIJs on the question of translation to conclude that they should not have made a decision refusing a request for release. Second, according to the PTC, the alleged delays in the procedure on provisional detention are justified by the Defence's lack of will to proceed.⁵³ Third, contrary to the Defence's contention,⁵⁴ the CIJs correctly stated in

⁴⁷ Translation Appeal, **A190/I/1**; Order on Translation rights, **A190**.

⁴⁸ Appeal, **C40/5/1**, paras. 8-9, 11-15, 27-33, 83-85.

⁴⁹ *Case of KHIEU Samphan*, PTC Directions to the Defence concerning the Appeal against Provisional Detention Order, 15 August 2008, **C26/I/27**, ERN 00212353-55 (ENG) and 00212359-61 (KHM), paras. 7-10; PTC Directions on Continuation of Proceedings related to Appeal against Provisional Detention, 2 October 2008, **C26/I/29**, ERN 00225296-99 (ENG) and 00225304-07 (KHM).

⁵⁰ Extension Order, **C26/4**, paragraph 16: "Finally, the Order extending the provisional detention of Khieu Samphan is not contingent upon the outcome of the appeal against the Order on Translation Rights and Obligations of the Parties."

⁵¹ Order on Translation Rights, **A190**, paragraph A3; Extension Order, **C26/4**, para. 15.

⁵² Appeal, **C40/5/1**, para. 29.

⁵³ *Case of KHIEU Samphan*, PTC Decision on Application to Adjourn the Hearing, 23 April 2008, **C26/I/25**, ERN 00180341-44 (ENG) at 00180343; PTC Written Record of the Hearing of 23 April 2008 on the Appeal against the Provisional Detention Order, 2 May 2008, **C26/I/26**, ERN 00185534-41 (ENG) at 00185540; PTC Directions to the Defence concerning the Appeal against Provisional Detention Order, 15 August 2008, **C26/I/27**, ERN 00212353-55 (ENG) and 00212359-61 (KHM); see also Appeal, **C40/5/1**, para. 31; Notification of the Pre-Trial Chamber of the Defence's Position concerning Khieu Samphan's Appeal against Provisional Detention Order, 27 August 2008, **C26/I/28**, ERN 00219402-05 (ENG), 00218013-16 (FRE) and 00218017-20 (KHM); PTC Directions on Continuation of Proceedings related to Appeal against Provisional Detention, 2

paragraph 13 of the Order Refusing Release that “by withdrawing their appeal, the Charged Person’s Co-Lawyers wilfully waived their right to challenge before the competent judicial authority -in this instance, the Pre-Trial Chamber- the conditions in which the proceedings were conducted”.

14. Fourth, the Co-Prosecutors submit that the arguments developed in paragraphs 8-9, 11-15, 27-33, 83-85 of the Appeal rely exclusively on separate issues which the PTC has yet to deliberate upon. Neither the CIJs nor the PTC ever concluded that the Charged Person’s rights have been violated by any absence of translation of Case File documents and / or that the provisional detention is illegal or irregular. As a consequence, the following Defence assertions do not constitute anything more than mere assumptions: “*The proceedings (are) unlawful and, de facto, the provisional detention is arbitrary*”;⁵⁵ “*there were procedural defects and serious violations of the rights of the Defence*”;⁵⁶ “*the proceedings are fundamentally flawed (...); His detention is therefore arbitrary, and the only alternative is to release him*”.⁵⁷ The Defence rely solely on a hypothetical decision of the PTC that can at present neither produce a legal effect nor be a basis for the CIJs to decide to release the Charged Person.
15. Finally, an appeal to the PTC does not stay any proceedings. This principle was recalled by the CIJs in their Extension Order.⁵⁸ The Internal Rules do not provide any suspending effects for appeals of the Charged Person upon any CIJs’ order. The alleged violations of the defence rights related to the translation issue, repeated in every Defence written submission since April 2008 and once again at the hearing dated 4 December 2008,⁵⁹ remain vague and

October 2008, **C26/I/29**, ERN 00225296-99 (ENG) and 00225304-07 (KHM); Notice of Withdrawal of Appeal, 8 October 2008, **C26/I/30**, ERN 00231936-42 (ENG) and 00228794-802 (KHM).

⁵⁴ Appeal, **C40/5/1**, para. 28 : (...) “the hearing on the appeal against provisional detention was adjourned for more than seven months and **ultimately called off**, and the Defence was truncated” [Emphasis added], paragraph 32: The CIJs “were under the obligation to take action regarding the delay and the defects in the proceedings relating to the appeal against provisional detention”.

⁵⁵ Appeal, **C40/5/1**, para. 30.

⁵⁶ Appeal, **C40/5/1**, paras. 28 and 14.

⁵⁷ Appeal, **C40/5/1**, para. 83.

⁵⁸ Extension Order, **C26/4**, paras. 15-16.

⁵⁹ *Case of KHIEU Samphan*, PTC Decision on Application to Adjourn Hearing on Provisional Detention Appeal, 23 April 2008, **C26/I/25**, ERN 00180341-44 (ENG); PTC Written Record of the Hearing of 23 April 2008 on the Appeal against the Provisional Detention Order, 2 May 2008, **C26/I/25**, ERN 00185534-41 (ENG);

purely hypothetical. The arguments raised by the Defence in those submissions constitute delaying measures that go against the right of the Charged Person to an expeditious trial and may amount to an “abuse of process”. In effect, pending the PTC decision on translation rights and obligations, “the parties are aware of the applicable law with respect to translation of the case file at this stage of the proceedings”⁶⁰. In any event, should the PTC decide in its future ruling regarding translation rights and obligations that the rights of the Charged Person were violated in any way, the CIJs would have to immediately implement any decision to release him. This constitutes an appropriate remedy. Meanwhile, the CIJs’ orders, dated 19 June, 28 October and 18 November 2008 respectively,⁶¹ are applicable under the Internal Rules until reviewed by the PTC on appeal.

***C. Diligence in the Conduct of the Proceedings and
Other Criteria for Determining Reasonable Delay***

16. The Defence has asserted the lack of diligence in the conduct of the proceedings for a year.⁶² The PTC should dismiss this contention as the Defence arguments are unsubstantiated and irrelevant.
17. Adequate regard must be paid to the very specific nature of investigations within the jurisdiction of the ECCC. The Appellant is charged with crimes against humanity (murder, extermination, imprisonment, persecution and other inhumane acts). The Appellant is being investigated for having planned, instigated, ordered, aided or abetted, committed or for

Notification of the Pre-Trial Chamber of the Defence’s Position concerning Khieu Samphan’s Appeal against Provisional Detention Order, 27 August 2008, **C26/I/28**, ERN 00219402-05 (ENG), 00218013-16 (FRE) and 00218017-20 (KHM); Defence Notice of Withdrawal of Appeal, 8 October 2008, **C26/I/30**, ERN 00228787-00228793 (FRE), 00231936-42 (ENG); Defence Urgent Application for Release, **C40**; Defence’s Objections concerning the Extension of Provisional Detention, 14 November 2008, **C26/3**, ERN 00238930-41 (FRE), 00238914-23 (KHM); Appeal, **C40/5/1**; Extremely Urgent Supplemental Application for Release, 4 December 2008, **C26/5/2**, ERN 00249810-14 (FRE), 00250603-07 (ENG) and 00249810-14 (KHM); Appeal Brief against the Order on Extension of Provisional Detention, 4 December 2008, **C26/5/1**, ERN 00251782-98 (ENG); Transcripts of Appeal Hearing of 4 December 2008 (PTC11)-T.S., ERN 00251973-018 (ENG), 00252019-67 (FRE) and 00252068-114 (KHM). Me Jacques Vergès said (at ERN 00251993, ENG): “I am not leaving my position because the court asked me to do so, but just to say I will come again and again, requesting translations to be done”; see also Letter of KHIEU Samphan’s lawyers regarding the application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 31 December 2008, **D97/3/5**, ERN 00267726-27 (FRE) 00270652-53 (ENG) and 00267915-17 (KHM).

⁶⁰ Extension Order, **C26/4**, para. 15.

⁶¹ **A190**, **C40/4** and **C26/4**.

⁶² Appeal, **C40/5/1**, paras. 44 and 84-85. See also paras. 6-19.

having superior responsibility for various crimes against humanity. Furthermore, as articulated in the Introductory Submission and in subsequent filings,⁶³ inclusive in the charge of “committing” is the Appellant’s participation in a joint criminal enterprise (“JCE”) as a co-perpetrator that led to the commission of numerous egregious crimes throughout Cambodia and for the entire temporal mandate of this Court. These crimes are among the gravest and most complex and the Charged Person faces a potential life sentence if convicted.

18. Furthermore, as argued below (see paragraphs 24 to 31), an examination of the Case File demonstrate the progress made in the investigation and that the evidence collected corroborates the Appellant’s responsibility for the crimes with which he is charged.
19. In the Order Refusing Release, the Co-Investigating Judges acknowledge that the passage of time is relevant to determining whether the basis for a continued provisional detention persists.⁶⁴ While the length of time has been considered by international tribunals as a relevant factor in determining the legitimacy of detention,⁶⁵ the Defence has not demonstrated how the one year detention has prejudiced the Appellant’s case in such a manner as to prevent a fair trial or how it can, in and of itself, justify a provisional release. It must be mentioned that the ICTR has yet to find any period of pre-trial detention unreasonable⁶⁶ and that the ICTY, in evaluating the reasonableness of pre-trial detention, has

⁶³ *Case of IENG Sary*, Co-Prosecutors’ Response to Ieng Sary’s Motion on Joint Criminal Enterprise, 11 August 2008, ERN 00211956-70, **D97/II**; Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise, 31 December 2008, **D97/8**, ERN 00268566-92 (ENG); CIJs’ Order on the Application at the ECCC of the Form of Responsibility Known as Joint Criminal Enterprise, 16 September 2008, **D97/III**, ERN 00224208-09 (ENG).

⁶⁴ Order Refusing Release, **C40/4**, para. 27.

⁶⁵ *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14- Trial Chamber, 20 December 1996 (**C20/3**, Authority 3): The ICTY has established in that decision that in order to determine the reasonable nature of the length of provisional detention, it is necessary to evaluate the circumstances of each case in light of the following criteria: (a) The effective length of the detention; (b) The length of the detention in relation to the nature of the crimes; (c) The physical and psychological consequences of the detention on the detainee; (d) The complexity of the case and the investigations; (e) The conduct of the entire proceedings.; *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Review of the Decision on the Application for the Interim Release of Mathieu Ngudjolo Chui, Case No. 01/04-01/07, Pre-Trial Chamber of the ICC, 23 July 2008, p. 12 (**C 22/5/7**, Authority 4).

⁶⁶ The ICTR has found the complexity of cases to be relevant in holding that periods of pre-trial detention of four and a half years and five years can be reasonable. See respectively *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneze*, Decision on Prosper Mugiraneze’s application for a hearing or other relief on his motion for dismissal for violation of his right to a trial without undue delay, Case No. ICTR-99-50, Trial Chamber, 3 November 2004, para. 26 (**C20/3/I**, Authority 4);

consistently considered much longer periods of detention to be reasonable in light of the gravity of the crimes concerned.⁶⁷ Furthermore, the Internal Rules contain safeguards against indefinite provisional detention.⁶⁸ In light of the circumstances of the case and international jurisprudence, the length of the Appellant's provisional detention is reasonable under Article 9(3) of the ICCPR.

D. Exercise of Discretion in Considering Detention

20. A Judge or Chamber has the discretion to conclude that pre-trial detention is a necessary measure and to refuse a request for release.⁶⁹ Such discretion is usually exercised by taking into account all documents on the Case File and all relevant facts of the case, including the gravity of the charges, the cogency of the evidence, the past and present character and behaviour of the defendant, the interests of witnesses and victims, and the interests of justice as a whole.⁷⁰ This conforms to the accepted practice in international criminal tribunals adopted by this Court.⁷¹

E. Conditions Necessitating Detention

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

- (a) there is well-founded reason to believe that the defendant may have committed the crimes specified in the Introductory Submission; and
- (b) they consider provisional detention to be a necessary measure to:

Prosecutor v. Kanyabashi, Decision on the Defence Motion for the Provisional Release of the Accused, Case No. ICTR 96-15-T, Trial Chamber, 21 February 2001 (C20/5/7.3).

⁶⁷ For example, *Prosecutor v. Blaskic*, Order Denying a Motion for Provisional Release, ICTY Trial Chamber, 20 December 1996 (C20/3, Authority 3); *Prosecutor v. Mrdja*, Decision on Darko Mrdja's Request for Provisional Release, Case No. IT-02-59-PT, ICTY Trial Chamber II, 15 April 2002 (C11/11, Authority C19).

⁶⁸ Notwithstanding the gravity of the charges tried by the ECCC, Rules 63 (6) and (7) provide a safeguard consisting of the fact that no accused before the ECCC can be held in provisional detention for more than three years in total.

⁶⁹ The Defence acknowledged that "The Co-Investigating Judges therefore have broad powers to grant KHIEU Samphan's release. They must interpret the facts in light of the overall circumstances of the case", Defence Urgent Application for Release, C40, paragraph 22.

⁷⁰ *Prosecutor v. Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, paragraph 4, ERN 00153946-54 (ENG) (C40/5/1, Authority 5).

⁷¹ *Case of KAING Guek Eav alias "DUCH"*, Decision on Appeal Against Provisional Detention Order of Kaing Guek Eav alias "Duch", 3 December 2007, Case No. 001/18-07-2007-ECCC-OCIJ (PTC01), C5/45, ERN 00154284-302 (ENG), para. 27. [*hereinafter* DUCH Detention Appeal Decision]

- (i) prevent the defendant from exerting pressure on any witness or victim, or prevent any collusion between him and his accomplices;
- (ii) preserve evidence or prevent its destruction;
- (iii) ensure the presence of the defendant during the proceedings;
- (iv) protect the security of the defendant; or
- (v) preserve public order.

22. The five grounds of detention under Rule 63 (3) (b) are disjunctive.⁷² There is no requirement that the CIJs find that every ground is satisfied before they consider that detention is a necessary measure or that its extension is warranted. On the contrary, should they consider that any one of these five grounds exist, the test for detention is met. This approach is also followed by other criminal tribunals dealing with similarly serious international crimes.⁷³

V. FACTS AND ARGUMENT

A. The Appeal does not Identify Material Change of Circumstances to Justify the Provisional Release of the Charged Person.

23. The Appellant has not identified any material evidence or change of circumstances to justify the provisional release of the Appellant, or even a change in the conditions of detention. Rather, the Defence relies upon semantic arguments submitting that the decision to refuse the request for release of the Charged Person was reached arbitrarily and that such a decision was not necessary. The Appeal offers no facts in support of these assertions. The CIJs refused to provisionally release the Charged Person on 28 October 2008, because the conditions of Rule 63(3) were still met and the length of the Charged Person's detention was not excessive.⁷⁴ The Defence has not submitted any evidence since the initial Provisional Detention Order in November 2007 that would demonstrate a change in circumstances justifying a reconsideration of the Ruling issued by the CIJ.

⁷² IENG Sary Detention Appeal Decision, **C22/I/74**, para. 121.

⁷³ *Prosecutor v Sainovic and Odjanic*, Decision Refusing Ojdanic Leave to Appeal, Case No. IT-99-37-AR65.2, ICTY Appeals Chamber, 27 June 2003, ERN 00149692-95, at 00149694 (**D29**, Authority 16) and has been adopted by the ECCC PTC: DUCH Detention Appeal Decision, **C5/45**, para. 59.

⁷⁴ Order Refusing Release, **C40/4**, paras. 5-22 and 26-30.

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

24. The Case File today contains evidence capable of satisfying an objective observer, at this stage of the investigation, that the Appellant may have committed the crimes for which he is currently under investigation. This is the test articulated by the PTC⁷⁵ and applied by the CIJs.⁷⁶
25. Although they did so in a previous appeal,⁷⁷ the Defence do not currently submit any relevant arguments based on Rule 63(3) (a). Indeed the Defence do not seriously challenge the existence of a well-founded reason to believe that the Charged Person may have committed the crimes specified in the Introductory Submission. Therefore, the Co-Prosecutors deem it necessary only to mention some new elements under Rule 63 (3) (a), that have intervened since the arrest of the Appellant. As for the evidence supporting the Introductory Submission, which in itself is still sufficient for justifying the criteria of “well-founded reason to believe”, the Co-Prosecutors incorporate by reference the submissions contained at paragraphs 24-26 and 33-52 of their “Response to KHIEU Samphan’s Appeal against Provisional Detention Order of 19 November 2007”.⁷⁸ They also refer to the new evidence detailed in the CIJs’ Order Refusing Release dated 28 October 2008, paragraphs 7-11.⁷⁹
26. In their impugned Order, the CIJs noted that well founded reasons continued to exist to believe that the Appellant may have committed the crimes specified in the Introductory Submission. The CIJs also noted that the judicial investigation has progressed since the arrest of the Charged Person as additional evidentiary materials have been collected and that the passage of time had been taken into consideration.⁸⁰

⁷⁵ NUON Chea Detention Appeal Decision, **C11/54**, para. 46; PTC Decision on Appeal against Provisional Detention Order of IENG Thirith, 9 July 2008, **C22/I/27**, ERN 00201633-49 (ENG), para. 21 [*hereinafter* IENG Thirith Detention Appeal Decision]; IENG Sary Detention Appeal Decision, **C2/I/73**, para. 71.

⁷⁶ Order Refusing Release, **C40/4**, para. 7.

⁷⁷ Appeal Brief against the Provisional Detention Order of 19 November 2007, 21 December 2007, **C26/I/3**, ERN 00158303-14 (ENG).

⁷⁸ *Case of KHIEU Samphan*, Co-Prosecutors’ Response to KHIEU Samphan’s Appeal against Provisional Detention Order of 19 November 2007, 6 February 2008, **C26/I/9**, ERN 00160767-95 (ENG).

⁷⁹ Order Refusing Release, **C40/4**.

⁸⁰ Extension Order, **C26/4**, paras. 25-25 referring to paras. 7-11 of CIJs’ Order Refusing Release, **C40/4**.

27. The Co-Prosecutors submit that the PTC should confirm its previous findings of the existence of a well-founded reason to believe that the Charged Person may have committed the crimes alleged.⁸¹ It is clear from a review of the Case File that the basis of this belief is now even stronger than one year ago, as the evidence incriminating the Appellant has increased both in volume and gravity in recent months. The CIJs have issued at least thirteen Rogatory Letters in Case File No. 002 (Document Nos. D25, D40, D43, D78, D82, D91, D92, D93, D94, D104, D107, D115, D123)⁸² and they, or their investigators, have interviewed more than a hundred witnesses in relation to the crimes that the five persons charged in that Case File, including the Appellant, may have committed. In addition, the substantive content of the Case File No. 001, largely relevant to the Appellant's case, has been transferred to the Case File No. 002 by a note of the CIJs dated 28 October 2008;⁸³ the 28 written records of interview of KAING Guek Eav alias DUCH conducted in the context of Case File No. 001 had already been integrated by the CIJs in Case File No.002 on 30 May 2008.⁸⁴ Moreover, [REDACTED]^{85 86}

28. The Co-Prosecutors have also contributed to the investigation by filing a large number of evidentiary materials since the Introductory Submission and the Appellant's arrest.⁸⁷ It must be noted that the evidence placed in the Case File by the CIJs at the request of the Co-Prosecutors (Introductory Submission and subsequent filings) as well as the evidence collected by the CIJs in the last year, covers all the modes and types of the Appellant's

⁸¹ In its decision on appeal against provisional detention order of IENG Sary, the PTC noted that the term "have committed" should be interpreted to mean "incur individual responsibility for" which includes planning, instigating, ordering, aiding and abetting, or committing and superior criminal responsibility: IENG Sary Detention Appeal Decision, **C22/I/74**, para. 71.

⁸² Among those Rogatory Letters, eight relate to witness interviews: **D25** (36 witness interviews), **D40** (25 witness interviews), **D91** (24 witness interviews), **D92** (8 witness interviews), **D94** (16 witness interviews), **D107** (at least one witness interview), **D115** [REDACTED] and **D123** (3 witness interviews) for a total of at least 118 witness interviews placed on the Case File. According to the CIJ however, numerous rogatory letters are in the course of being executed. It is not surprising as the parties are usually informed of the existence of such Rogatory Letters only at the time they are completed. It is likely that many more witness statements have been collected by the OCIJ since the 118 witness interviews were placed on the Case File.

⁸³ *Case of NUON Chea et al.*, Note by the Co-Investigating Judges, 28 October 2008, **D108**, ERN 00236076-77 (ENG), and its annex **D108/1**.

⁸⁴ *Case of NUON Chea et al.*, Note by the Co-Investigating Judges, 30 May 2008, **D86**, ERN 00194661-67 (ENG).

⁸⁵ [REDACTED]

⁸⁶ [REDACTED]

⁸⁷ [REDACTED]

contribution to the crimes against humanity and war crimes he is charged with. This includes crime base evidence, evidence linking crime base to leadership structures within which the Appellant exercised command authority, evidence supporting his participation in the JCE and evidence supporting jurisdictional elements such as the widespread and systematic attack against a civilian population.

29. As detailed by the CIJs in the Order Refusing Release, at paragraph 9, at least 12 witness statements made before the OCIJ investigators between October 2007 and March 2008 which are supported by other evidence, corroborate the Charged Person's knowledge of and participation in the crimes charged against him, in his capacities as Head of State (Chairman of the State Presidium), leader within the Centre political Office (Office 870) and as a full-rights member of the Central Committee of the Communist Party of Kampuchea.⁸⁸

30. [REDACTED]^{89 90 91}

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

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

32. The Appellant does challenge the persistence of four alternative conditions set in Rule 63 (3) (b) (i) (ii) (iv) and (v). The Defence also allege that the CIJs' decision to refuse the Charged Person's Request for Release was made solely on the basis of the gravity of the charges against KHIEU Samphan.⁹²

⁸⁸ Order Refusing Request for Release, C40/4. [REDACTED]

⁸⁹ [REDACTED]

⁹⁰ [REDACTED]

⁹¹ [REDACTED]

⁹² Appeal, C40/5/1, paras. 3/23.

33. The CIJs have acknowledged that “the gravity of the crimes for which the Charged Person is under investigation is not in itself an obstacle to release. Nonetheless, this factor is relevant in assessing the criteria for deciding continued detention and its legitimacy”. This statement is in accordance with international criminal jurisprudence which includes the nature of crimes charged as a criterion in the test for determining the reasonableness of provisional detention.⁹³ The Defence simply disagree with the conclusions of the CIJs and seek to ignore the due consideration given by the CIJs to the circumstances of the case and replace its own opinion for that of the CIJs. Moreover, the Defence have erroneously claimed that the CIJs failed to consider alternative measures to provisional detention solely on the basis of the gravity of the charges. In fact, the CIJs have determined that no other measure would be appropriate in light of the fact that the majority of the conditions of 63 (3) (b) are satisfied.⁹⁴ In such circumstances, where the conditions for provisional detention are satisfied, international criminal jurisprudence does permit consideration of the gravity of the crimes charged in determining whether provisional detention is necessary.⁹⁵
34. Regarding the alternative conditions of Rule 63(3) (b), the Co-Prosecutors incorporate by reference the submissions contained at paragraphs 53 to 73 of their “Response to KHIEU Samphan’s Appeal against Provisional Detention Order⁹⁶ and paragraphs 15-25 of their Response to the Co-Investigating Judges Forwarding Order Regarding Khieu Samphan’s Urgent Application for Release dated 24 October 2008.⁹⁷ They also refer to the CIJs Order Refusing the Request for Release dated 28 October 2008, paragraphs 15-21.⁹⁸

⁹³ *Prosecutor v. Tihomir Blaskic*, Order Denying a Motion for Provisional Release, Case No. IT-94-14, ICTY Trial Chamber, 20 December 1996 (C20/3, Authority 3). *Prosecutor v. Mrdja*, Decision on Darko Mrdja’s Request for Provisional Release, Case No. IT-02-59-PT, ICTY Trial Chamber II, 15 April 2002 (C11/11, Authority C19).

⁹⁴ Order Refusing Release, C40/4, para. 25.

⁹⁵ *Prosecutor v. Sesay et al.*, Decision on the Motion by Morris Kallon for Bail, Case No. SCSL-04-15-PT, Special Court for Sierra Leone Trial Chamber, 23 February 2004, para. 34 (C11/11, Authority C42): “Applications for bail require a close review and careful consideration of the requirements of Rule 65... in doing so one should bear in mind that, in the specific nature of international tribunals, the crimes over which such tribunals have jurisdiction can be categorized as the most serious crimes under international law. Therefore, it can be said that the approach to bail that prevails in national courts of law may be different than that for an international tribunal, such as the Special Court”.

⁹⁶ Co-Prosecutors’ Response to Khieu Samphan’s Appeal against Provisional Detention Order of 19 November 2007, 6 February 2008, C26/I/9, ERN 00160767-95 (ENG).

⁹⁷ Co-Prosecutors’ Response to the Co-Investigating Judges Forwarding Order Regarding Khieu Samphan’s Urgent Application for Release, 24 October 2008, C40/3, ERN 00234631-45 (ENG).

⁹⁸ Order Refusing Release, C40/4.

35. In addition, the Co-Prosecutors submit some new elements contradicting the arguments upheld by the Defence in the Appeal.

Rule 63(3) (b) (i) – Exerting Pressure on the Witnesses and Victims

36. The Defence contend that the CIJs have failed to show evidence of the Charged Person's past actions or behavior that demonstrates a concrete risk that he might use that influence to exert pressure on witnesses and victims.⁹⁹ The Defence Co-Lawyers dismiss the evidence adduced by the CIJs to support their conclusion on this point.¹⁰⁰ The ICTY has stated that if a Trial Chamber does not take all necessary measures to ensure that witnesses testify before the Tribunal, it jeopardizes the integrity of the Trial and that a reduction in the numbers of witnesses willing to testify in any given case undermines the most important function of the Trial Chamber, namely establishing the truth.¹⁰¹

37. The circumstances of the present case are the following: (a) small number of key witnesses surviving thirty years after the end of the DK period; (b) widespread feelings of fear of testifying before the ECCC based on concerns of revenge and intimidation¹⁰²; (c) absence of current witness protection measures. In light of those circumstances, the threats of retaliation issued by the Charged Person to those concerned with bringing the leaders of the KR regime to justice should be viewed as evidence of the Accused Person's tendency toward thwarting the course of justice.¹⁰³ These threats should be given added weight as a result of the support the Charged Person continues to enjoy in certain parts of the country¹⁰⁴ and the attitude of

⁹⁹ Appeal, C40/5/1, para. 52.

¹⁰⁰ Order Refusing Release, C40/4, paragraph 16, footnote 20: "Khmer Rouge Heads Want Truth Commission Instead of Trial", *Agence France Presse*, 1 December 2002 (D29, Annex A, Attachment 74).

¹⁰¹ *Prosecutor v. Haradinaj*, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, IT-04-84-T, Trial Chamber I, ICTY, 20-July-2007 (C20/I/7, Authority B27).

¹⁰² Geerteke Jansen, *Voices of Takeo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia*, Documentation Centre of Cambodia, October 2006 (D29, Annex A, Attachment 80).

¹⁰³ "Khmer Rouge Heads Want Truth Commission Instead of a Trial", *Agence France Presse*, 1 December 2002 (D29, Annex A, Attachment 74).

¹⁰⁴ See "Analysis – Comrades seen protecting K. Rouge leaders", David Brunnstrom, Reuters News, 4 January 1999 (D29, Annex A, Attachment 69); "Former Khmer Rouge stronghold becoming safe haven for leaders", Don Pathan, Associated Press Newswires, 9 January 1999 (D29, Annex A, Attachment 70); "Khmer Rouge leaders in northern Cambodia: Thai source, resistance chief", *Agence France-Presse*, 13 June 1998 (D29, Annex A, Attachment 71); "Khmer Rouge leaders off to Phnom Penh for talks, Reuters News, 28 December 1998 (D29, Annex A, Attachment 73); "Khmer Rouge leaders defiant over calls for trial", *Agence France-Presse*, 1 January 1999 (D29, Annex A, Attachment 73).

some of his supporters towards the proceedings at the ECCC.¹⁰⁵ The Defence have clearly downplayed these considerations and obscured the gravity of the Charged Person's remarks, erroneously dismissing the CIJs findings regarding the concrete risk of interference with victims and witnesses arising from both the Charged Person's past actions and his present influence.

38. For these reasons the Co-Prosecutors concur with the CIJs that (1) the passage of time since the Charged Person's provisional detention has not diminished or eliminated the risk, but has instead made it more acute; (2) that KHIEU Samphan has access to the Case File, and that it contains "written records of interviews with witnesses, as well as complaints and civil party applications"; (3) that there is a "real risk that witnesses might refuse to participate in the proceedings in the future"; and (4) that "there are reasons to believe that these witnesses could be subjected to pressure, either because they were the Charged Person's subordinates or, in a broader sense, because of the senior positions the Charged Person held".¹⁰⁶

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

39. As regards the threats posed to personal security - 63 (3) (b) (iv) - the recent statements and behaviour of some victims or civil parties show that any release of the five Charged Persons may degenerate into violence directed against the former Khmer Rouge leaders, including the Appellant, the defence teams or the ECCC. In an article published in the New York Times on 17 June 2008¹⁰⁷ two victims said that they wanted respectively to "slice (Nuon Chea) into ribbons and pour salt into his wounds (...), beat him up and torture him and give him electric shocks to make him talk" and to have [the Charged Persons] "suffer the way I suffered" as "only killing them will make me feel calm". Three persons reiterated those statements / threats (against Khieu Samphan and his Defence team but also against the court) at a press conference held after the PTC hearing on 4 December 2008.¹⁰⁸ These emotional reactions are

¹⁰⁵ See 20 Years on Khmer Rouge Still Threaten War, *Agence France-Presse*, January 7 1999, in which governor of Pailin, Y Chhean, is reported to have stated that any attempt to bring Khieu Samphan or Nuon Chea would result in civil war (D29, Annex A, Attachment 75);

¹⁰⁶ Order Refusing Release, C40/4, paras. 15-16.

¹⁰⁷ "In Khmer Rouge Trial, Victims Will Not Stand Idly by", *The New York Times*, Seth Mydans, 17 June 2008. <http://www.nytimes.com/2008/06/17/world/asia/17cambodiahtml?scp=1&sq=Seth%20Mydans%20in%20Khmer%20Rouge%20Trial%20Victims&st=cse>, accessed on 9 January 2009, (C20/5/7.7).

¹⁰⁸ As the ECCC video of the press conference dated 4 December 2008 indicates (disclosed as C20/5/7.8R in Co-Prosecutors' response to IENG Thirith's Appeal against the Order on extension of Provisional Detention, 9 Response to Khieu Samphan's Appeal on Order Refusing Release (Public Redacted Version) Page 21 of 24

symptomatic of the post-traumatic stress disorder still persisting among the victims as the ECCC proceedings led to the resurfacing of anxieties.¹⁰⁹ Therefore, the potential threat to the personal security of the Charged Person is not illusory, but vivid and concrete.

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

40. Furthermore, while the Defence allege that the CIJs have failed to show facts that the release of the Appellant would actually disrupt public order, they nonetheless accept that any determination of the question of a risk to public order necessarily entails a measure of prediction.¹¹⁰
41. The Defence contend that the CIJs have only succeeded in establishing persistent distress amongst the victims of the Khmer Rouge as opposed to facts that release could actually disrupt public order. The Defence simply reject the evidence adduced by the CIJs establishing these facts and replace their own opinion on this evidence for that of the CIJs.¹¹¹ The expert evidence dismissed by the Defence has consistently been relied upon by the CIJs and the PTC.¹¹² It states that 30% of Cambodians still suffer from Post Traumatic Stress Disorder arising from the widespread and systematic crimes of the DK period. Accordingly,

January, ERN 00270535), A first female KR victim (reported as Suth Ny) shouted and pointed the finger at the national Defence Co-lawyer during the press conference. Ly Monysar, a victim now security guard threatened the court with a terrorist act against the KR leaders “if the court continues to be a comedy” during the Victims’ Press Conference and a female civil party (applicant), Sok Chear, repeated that if she could catch Khieu Samphan she would “tear and eat him”; See “Tribunal Khmer Rouge: l’exaspération des victimes intensifiée par un clash avec la défense”, 5 December 2008, Ka-Set (site d’information sur le Cambodge), Stéphanie Gée, accessible at the following web address : http://ka-set.info/index2.php?option=com_content&task=view&id=783&pop=1&page=0&Itemid=46 (C20/5/7.9); “Farce Meets Justice in Khmer Rouge Trial”, *The Nation (New York, USA)*, Barbara Crossette, 17 December 2008, 4th paragraph (C20/5/7.10) “Khmer Rouge Court Holds Hearing of Khieu Samphan’s Appeal against decision on Translation of Case File”, 5 December 2008, English translation, *Rasmei Kampuchea*, vol.16 #4760 (C20/5/7.11); “Disorder in the court as hearing ends in disarray”, 5 December 2008, *The Phnom Penh Post*, by Georgia Wilkins (C20/5/7.12); “Le Cirque Vergès”, 11-17 December 2008, *Cambodge Soir*, by Adrien Le Gal (C20/5/7.13); These four press clippings are accessible on the ECCC G:Drive at their respective dates of publication (G:\Public Affairs\Daily Clippings International\12. Dec); “Khmer Rouge Genocide Tribunal Stumbles as French Defense Lawyer Demands New Translation”, *Law.com:International News*, by Claire Duffett, 10 December 2008 (Enclosed, Annex B, Attachment B1).

¹⁰⁹ Rob Savage states that the commencement of judicial activities before the ECCC “may pose a fresh risk to the Cambodian society” which could “lead to the resurfacing of anxieties and a rise in the negative social consequences that may accompany them”. Rob Savage, “Post Traumatic Stress Disorder: A Legacy of Pain and Violence”, *Monthly South Eastern Globe*, July 2007, pp. 24-27, ERN 00153657-61 (ENG) (C11/11 Attachment A).

¹¹⁰ Appeal, C40/5/1, para. 60.

¹¹¹ Appeal, C40/5/1, para. 64.

¹¹² DUCH Detention Appeal Decision, C5/45, footnotes 10 and 22; IENG Thirith Detention Appeal Decision, C22/I/27, footnotes 36 and 44.

given that the proceedings before the ECCC are the first time that suspects are being tried for the crimes committed during the DK regime, it seems imprudent of the Defence to argue that the issues of distress and public order are mutually exclusive. 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 (see above paragraph 39).

42. The Defence submit that the CIJs have failed to establish the fragility of Cambodian society. The Defence have arrived at this conclusion on the basis of abstract and unsubstantiated passages from reports that are not concerned with the issue of societal fragility and violence in Cambodia.¹¹³ The Defence's contention misrepresents the current state of affairs in Cambodia, as the Institute for Economics and Peace in 2008 determined that there is a high likelihood of violent demonstrations, high levels of violent crime and ready availability of small arms in Cambodia.¹¹⁴ 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.
43. The Defence rely on the case of *Prosecutor v. Haradinaj* to assert that other tribunals have permitted the provisional release of Accused Persons notwithstanding a potential impact on

¹¹³ "The Cambodia Human Development Report 2007: Expanding Choice for the Rural People (NHDR)" cited in the Appeal (C40/5/1) at para. 69 concerns natural resources and rural livelihoods in Cambodia. The "Sharing Growth, Equity and Development in Cambodia", report also cited in the Appeal at para. 69 is concerned with economic development in Cambodia. These documents do not provide empirical evidence as the stability or fragility of Cambodian society.

¹¹⁴ The Institute for Economics and Peace ranks Cambodia as the 91st most peaceful of 140, The Institute for Economics and Peace Global Peace Initiative 2008 available at <http://www.visionofhumanity.org/gpi/results/cambodia/2008> (Enclosed - Annex B, Attachment B2). These findings are consistent with the information on the Case File concerning the potential for public disorder that could follow the release of a Charged Person: "Weapons burned to help banish deadly legacy of Cambodia's Khmer Rouge", *Associated Press*, March 30, 2005, describing the ceremonial burning of 3,500 guns, rocket launchers and other munitions as part of an attempt to decommission surplus arms left over from Cambodia's conflicts (D29, Annex A, Attachment 76); Japan Assistance Team for Small Arms Management in Cambodia, "Weapons Collection Record 2005-2007" (JSAC, 2007) (D29, Annex A, Attachment 77); Christine Wille, "How Many Weapons are There in Cambodia?", Small Arms Survey Working Paper (Geneva: Small Arms Survey, 2005) (D29, Annex A, Attachment 78); "Summary of the Speech of Mr. Thor Saron, Cambodian Judge", in the National Workshop Report on Awareness Raising in Arms Law, July 16-18, 2006, pp. 15-16 (Working Group on Weapons Reduction, 2006) (D29, Annex A, Attachment 79).

public order.¹¹⁵ The Defence fail to state that a subsequent motion for provisional release by Haradinaj after the expiration of his initial period of provisional release was denied, notwithstanding his exemplary behavior during his release, due to the prevailing atmosphere of intimidation in Kosovan society towards witnesses at the ICTY.¹¹⁶

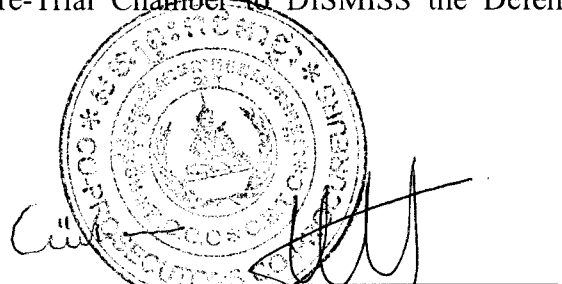
44. The Co-Prosecutors therefore, request the Pre-Trial Chamber to hold that the Defence failed to support their provisional release application by establishing that the conditions for provisional detention under Rule 63 (3) (b) (i), (ii), (iv) and (v) are no longer satisfied.

C. - No Bail Order

45. No bail order would be rigorous enough to satisfy the needs to protect the Charged Person's personal safety, to preserve public order, and to prevent the Charged Person from exerting pressure on witnesses and victims and therefore, destroying evidence.

VI. CONCLUSION

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



YET Chakriya William Smith
Deputy Co-Prosecutor Deputy Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this 28th day of January, 2009.

¹¹⁵ Appeal, **C40/5/1**, para. 70.

¹¹⁶ *Prosecutor v. Haradinaj*, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, IT-04-84-T, Trial Chamber I, ICTY, 20-July-2007 (C20/I/7, Authority B27). Haradinaj has been acquitted by Trial Chamber I of the ICTY but the issue remains a contentious one as two witnesses in the case, Sadri Selca and Avni Krasniqi, have since been indicted for contempt of court for failing to appear before the Trial Chamber without just cause and refusing to testify respectively; see ICTY Press Release, 13 November 2007, "A second witness in Haradinaj et al. arrested for contempt of court", available at <http://secnet069.un.org/sid/8825> (**Enclosed, Annex A, Attachment No. A1**). The Prosecution has since filed a Notice of Appeal citing the prevailing atmosphere of fear in Kosovo as having thwarted their efforts to obtain witness testimony.