



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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

អង្គជំនុំជម្រះសាលាដំបូង

Trial Chamber
Chambre de première instance

**ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ**

Kingdom of Cambodia
Nation Religion King
Royaume du Cambodge
Nation Religion Roi

ឯកសារដើម
ORIGINAL/ORIGINAL
ថ្ងៃ ខែ ឆ្នាំ (Date): 05-May-2011, 15:20
CMS/CFO: Sann Rada

TRANSCRIPT OF HEARING - PURSUANT TO RULE 68(3)

IENG SARY

PUBLIC

Case File N° 002/19-09-2007-ECCC/TC

4 May 2011, 0859H

Before the Judges: NIL Nonn, Presiding
Silvia CARTWRIGHT
YA Sokhan
Jean-Marc LAVERGNE
THOU Mony
YOU Ottara (Reserve)
Claudia FENZ (Reserve)

The Accused: IENG Sary

For the Accused: ANG Udom
Michael KARNAVAS

Trial Chamber Greffiers/Legal Officers:

SE Kolvuthy
DUCH Phary
LIM Suy Hong
Franziska ECKELMANS
Natacha WEXELS-RISER

For Court Management Section:
UCH Arun

For the Office of the Co-Prosecutors:

VENG HUOT
Dale LYSAK

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
Mr. ANG UDOM	Khmer
JUDGE CARTWRIGHT	English
MR. HENG VUOT	Khmer
JUDGE LAVERGNE	French
MR. LYSAK	English
THE PRESIDENT (Nil Nonn, Presiding)	Khmer

1

1 (Judges enter courtroom)

2 MR. PRESIDENT:

3 Please be seated.

4 Today is Wednesday 4th of May 2011. The Trial Chamber of the
5 Extraordinary Chambers in the Courts of Cambodia, with the
6 following composition of the Judges, first myself, the President
7 to the Trial Chamber, Judge Silvia Cartwright, Judge Ya Sokhan,
8 Judge Jean-Marc Lavergne, Judge Thou Mony, and with two reserve
9 Judges, Judge You Ottara and Judge Claudia Fenz, is holding a
10 public hearing pursuant to Rule 68(3) of the Internal Rules in
11 relation to Ieng Sary in the case 002.

12 [9.01.35]

13 Greffier, Mrs. Se Kolvuthy, could you report on the presence and
14 absence of the parties attending the meeting?

15 THE GREFFIER:

16 Thank you, Mr. President. All the parties are the following.
17 Mr. Ieng Sary is present, Mr. Ang Udom, the national defence
18 counsel, and Mr. Karnavas are present. The Prosecution is
19 present.

20 MR. PRESIDENT:

21 Thank you, Mrs. Greffier. The presence and absence of the parties
22 must be recorded in the record of the proceedings.

23 We would like to put questions to the co-lawyers for the accused
24 Ieng Sary, if they have any application to make before the
25 Chamber.

2

1 [9.03.10]

2 MR. ANG UDOM:

3 Good morning, Mr. President, Your Honours. We have applications
4 to make before Your Honours. I am not sure whether this is the
5 appropriate time for me to make my oral submission. If the
6 hearing is going to be long, I would like to seek your permission
7 for my client, Mr. Ieng Sary, to relieve himself when he is
8 needed, and the proceeding may go ahead during his absence. This
9 is also the information to other parties and the request to Your
10 Honours.

11 MR. PRESIDENT:

12 The Chamber would like to inform the counsel for the accused that
13 the public hearing this morning has its objectives as we put in
14 our notification. The presence of Mr. Ieng Sary before the
15 Chamber is pursuant to Rule 68(3) of the Internal Rules.

16 [9.04.50]

17 However, the Chamber forms the view that if the defence counsel
18 or any party in the application of the Internal Rule 68(3) the
19 Chamber would seek from the defence team if you have any
20 application to make. Otherwise, we will proceed, and then we
21 will conclude the proceeding pursuant to Internal Rule 68(3),
22 because this is a brief hearing, and if there is no application
23 by any party in relation to the provisional detention of the
24 accused, then it shall be brief.

25 MR. ANG UDOM:

3

1 Good morning again, Mr. President, Your Honours. Also good
2 morning people in the main courtroom, and in the hall. This is
3 the first day that my client, Mr. Ieng Sary, appears before the
4 Trial Chamber. I would like to make my oral submission as the
5 following.

6 [9.06.45]

7 As Mr. Ieng Sary's co-lawyers, Michael Karnavas and I are
8 honoured and privileged to represent Mr. Ieng Sary. Assisting us
9 today are our case manager, So Mosseny, and our consultants,
10 Tanya Pettay, Neville Sorab and Joshua Kern.

11 We have three submissions to put before you today. The first is
12 that the provisional detention of Mr. Ieng Sary is ultra vires.
13 The second is the violation of Rule 68(2) of the Internal Rules.
14 The third is the available remedies to the Trial Chamber.

15 [9.08.05]

16 For the last three years, Mr. Ieng Sary was detained in
17 provisional detention. The OCIJ and Pre-Trial Chamber erred in
18 detaining Mr. Ieng Sary in provisional detention during this
19 period of time, as their reasons were unsubstantiated.
20 Alternative measures were possible, such as house arrest. These
21 were not implemented. Leaving this aside, Mr. Ieng Sary has been
22 illegally detained in provisional detention. Article 38 of the
23 Constitution of Cambodia states that the prosecution, arrest or
24 detention of any person shall not be done except in accordance
25 with the law.

4

1 On the point of ultra vires, Rule 63 governs provisional
2 detention, and Rule 63(6) states provisional detention may be
3 ordered as follows: a), for genocide, war crimes and crimes
4 against humanity for a period not exceeding one year. However,
5 the Co-Investigating Judges may extend the provisional detention
6 for further one year periods.

7 [9.10.00]

8 Rule 63(7) states no more than two such extensions may be
9 ordered. Likewise, Article 210 of the Cambodian code of criminal
10 procedure states: in case of crimes against humanity, genocide or
11 war crimes, provisional detention shall not exceed one year for
12 each of these offences. However, when this time period ends, the
13 Investigating Judges may extend a provisional detention for
14 another year by an order with a proper and expressed statement of
15 reasons. The extension can only be made twice.

16 [9.11.00]

17 Mr. Ieng Sary was arrested and has been in provisional detention
18 since 12 November 2007. Two further extensions, as permitted by
19 Rule 63(7) would permit Mr. Ieng Sary's detention until 11
20 November 2010. Rule 68(1) states the issuance of a Closing Order
21 puts an end to provisional detention and bail orders once any
22 time limit for appeals against the Closing Order have expired.
23 However, where the Co-Investigating Judges consider that the
24 conditions for ordering provisional detention or bail under Rules
25 63 and 65 are still met, they may, in a specific reasoned

5

1 decision included in the Closing Order, decide to maintain the
2 accused in provisional detention, or maintain the bail conditions
3 of the accused until he or she is brought before the Trial
4 Chamber.

5 [9.12.45]

6 (indistinct) Rule 68(1) permits the Co-Investigating Judges to
7 maintain Mr. Ieng Sary in provisional detention until he is
8 brought before the Trial Chamber. However, nothing in Rule 68(1)
9 permits Mr. Ieng Sary's provisional detention until he is brought
10 before the Trial Chamber beyond three years.

11 Today, he has been brought before the Trial Chamber. Mr. Ieng
12 Sary has been held in provisional detention ultra vires from 11
13 November 2010 to 4 May 2011, totalling 173 days, on the violation
14 of Rule 68(2). To assist the Trial Chamber, permit me to set out
15 a brief chronology.

16 [9.14.15]

17 A, on 15 September 2010 the Closing Order was filed. B, on 22
18 October 2010 our appeal against the Closing Order's extension of
19 Ieng Sary's provisional detention was filed. C, on 25 October
20 2010, our appeal against the Closing Order was filed. D, on 13
21 January 2011, the Pre-Trial Chamber issued its decision on our
22 appeal against the Closing Order's extension of Ieng Sary's
23 provisional detention without reasons. E, on 13 January 2011,
24 the Pre-Trial Chamber issued its decision on our appeal of the
25 Closing Order without reasons.

6

1 F, on 21 January 2011, the Pre-Trial Chamber issued its decision
2 on our appeal against the Closing Order's extension of Ieng
3 Sary's provisional detention with reasons. G, on 11 April 2011,
4 the Pre-Trial Chamber issued its decision on our appeal of the
5 Closing Order with reasons.

6 [9.16.35]

7 Rule 68(2) states where an appeal is lodged against the
8 indictment, the fact of the detention or bail order of the
9 Co-Investigating Judges shall continue until there is a decision
10 from the Pre-Trial Chamber. The Pre-Trial Chamber shall decide
11 within four months. Rule 77(14) states all decisions under this
12 rule, which concerns procedural for pre-trial appeals, not to do
13 with procedural defects, including any dissenting opinions, shall
14 be reasoned and signed by their authors.

15 The Trial Chamber has previously agreed that reasoning is a key
16 feature of decisions under both Cambodian law and the Internal
17 Rules. Please refer to the decision on the urgent application
18 for immediate release of Nuon Chea, Khieu Samphan, and Ieng
19 Thirith dated 16 February 2011, document E50, paragraph 24.

20 [9.18.40]

21 In considering the applications for release of Nuon Chea, Khieu
22 Samphan and Ieng Thirith, the Trial Chamber found that the
23 Pre-Trial Chamber's deferral of reasons on its decisions on the
24 Closing Order constitutes a procedural defect. Please read the
25 decision on the urgent application for immediate release of Nuon

7

1 Chea, Khieu Samphan and Ieng Thirith dated 16 February 2011,
2 document E50, paragraph 29.

3 Rule 68(2) states that the Pre-Trial Chamber shall decide within
4 four months. As our appeal was against the indictment, that is
5 the Closing Order, the Pre-Trial Chamber's decision on our appeal
6 of the Closing Order with reasons, namely 11 April 2011, is when
7 the Pre-Trial Chamber decided, according to Rule 68(2). However,
8 it is not clear from Rule 68(2) when the four months commence.

9 The four months may either commence from the filing of the
10 Closing Order, that is 15 September 2010, or the filing of our
11 appeal against the Closing Order dated 25 October 2010.

12 [9.20.55]

13 If the four months commenced from the filing of the Closing
14 Order, Mr. Ieng Sary has been detained beyond the four month
15 decision deadline by 87 days. If the four months commenced from
16 the filing of our appeal against the Closing Order --

17 MR. PRESIDENT:

18 I think there is a technical glitch, as the voice cannot be
19 heard. Court Officer, can you rectify the issue, and try to
20 resolve it. In the public gallery there is no sound output.

21 [9.21.55]

22 (Pause for technical rectifications)

23 [9.26.35]

24 MR. PRESIDENT:

25 I have been informed that the AV system is now connected.

8

1 Counsel Ang Udom, you may proceed.

2 MR. ANG UDOM:

3 Thank you, Mr. President. I have no idea where I left off, or
4 where my part of the speech was not heard. I may have to go back
5 a little bit further to cover what has been missing.

6 MR. PRESIDENT:

7 You may proceed from where you feel appropriate.

8 [9.27.30]

9 MR. ANG UDOM:

10 Thank you, Mr. President. If the four months commenced from the
11 filing of the Closing Order, Mr. Ieng Sary has been detained
12 beyond the four month decision deadline by 87 days. And if the
13 four months commenced from the filing of our appeal against the
14 Closing Order, then Mr. Ieng Sary has been detained beyond the
15 four month decision deadline by 45 days. In either case, Mr.
16 Ieng Sary has been detained beyond the four month decision
17 deadline.

18 [9.28.40]

19 Remedies. The Rules do not provide a remedy for the ultra vires
20 detention of Mr. Ieng Sary. However, logic dictates that if
21 there is no valid order or decision detaining Mr. Ieng Sary, he
22 should have been released. Nonetheless, he was not. The most
23 suitable remedy is to release Mr. Ieng Sary on bail immediately.
24 Such practice is in accordance with the Cambodian criminal
25 procedure code. Article 249 of the Cambodian criminal procedure

1 code provides that when a charged person's provisional detention
2 ceased to be effective, the charged person shall be released
3 immediately.

4 When requested by the other defence teams to release their
5 clients due to a lack of reasoning by the Pre-Trial Chamber in
6 its decision on its appeal of the Closing Order, the Trial
7 Chamber found that automatic nullity does not follow from a
8 failure to give reasons. Decision on the urgent application for
9 immediate release of Nuon Chea, Khieu Samphan and Ieng Thirith of
10 16 February 2011, E50, paragraph 33.

11 [9.31.15]

12 In supporting this finding, the Trial Chamber relied upon two
13 cases from the European Court of Human Rights. Although helpful
14 in guidance, these cases are not binding at the ECCC, and where
15 possible, the rules of the Cambodian code of criminal procedure
16 should be used.

17 The Trial Chamber found that a lack of reasoning by the Pre-Trial
18 Chamber led to a procedural defect which initially impacted on
19 the accused's fundamental fair trial guarantees of legal
20 certainty and clarity. Decision on the urgent application for
21 immediate release of Nuon Chea, Khieu Samphan and Ieng Thirith of
22 16 February 2011, E50, paragraph 29.

23 [9.32.55]

24 The lack of reasoning caused the Pre-Trial Chamber to violate
25 Rule 68(2), thereby causing a procedural defect. The remedy for

10

1 a procedural defect is set out in Rule 48, which states
2 investigative or judicial action may be annulled for procedural
3 defect only where the defect infringes the rights of the party
4 making the application. The judicial action resulting from the
5 procedural defect was the continued provisional detention of Mr.
6 Ieng Sary.

7 As such, this judicial action, the provisional detention, should
8 be annulled. The most suitable remedy is to release Mr. Ieng
9 Sary on bail immediately.

10 [9.34.20]

11 Contrary to the Trial Chamber's findings, immediate release is
12 not an extreme remedy. Decision on the urgent application for
13 immediate release of Nuon Chea, Khieu Samphan and Ieng Thirith of
14 16 February 2011, E50, paragraph 35. Mr. Ieng Sary has the
15 presumption of innocence, and has not been convicted of any
16 crime. He has a presumption of bail.

17 Adequate bail conditions or house arrest are by no means an
18 extreme remedy as such, and in light of the arguments above, Mr.
19 Ieng Sary should be released on bail immediately.

20 [9.35.45]

21 The defence further submits that even if the Trial Chamber found
22 that the provisional detention of Mr. Ieng Sary is not ultra
23 vires, or that there was not a violation of Rule 68(2), Mr. Ieng
24 Sary does not meet the rule 63(3) test for detention. This
25 concludes my oral submissions. Thank you for your courtesy and

11

1 attention, and I would like to share the floor with my
2 co-colleague Mr. Michael Karnavas, should he wish to do so, and I
3 would like to also add additional comments if needed, Your
4 Honours. I'm very grateful.

5 MR. PRESIDENT:

6 Counsel Karnavas, you may now proceed.

7 MR. KARNAVAS:

8 Good morning, Mr. President. Good morning, Your Honours. Good
9 morning to everyone in and around the courtroom. I have nothing
10 further to supplement, I believe Mr. Ang Udom said everything
11 that we needed to say.

12 I just wish to point out to everyone and for the record that
13 there is no civil party representation. I assume it's because,
14 based on the Rules, they are not necessarily entitled to speak at
15 these hearings, but nonetheless I wish to go on the record to say
16 that they are absent.

17 But I should also note that on past occasions where provisional
18 release matters have been handled, civil parties have been
19 invited, and were provided the opportunity to speak. Thank you.

20 [9.37.55]

21 MR. PRESIDENT:

22 Counsel Ang Udom, would you wish to add any further comments or
23 oral submissions, because you already preserved your rights to
24 make further comments. The floor is yours.

25 MR. ANG UDOM:

12

1 Thank you, Mr. President, Your Honours. I would like to be brief
2 today and to draw the Court's attention to my points. According
3 to the rules and criminal code of procedure, the accused can only
4 be detained for a period of three years, and during this period
5 of time the accused shall be brought before the Court, the Trial
6 Chamber. Even though the criminal code of Cambodia does not set
7 forth any provision concerning the Pre-Trial Chamber operated
8 under this Court, as I already indicated, the detention of Mr.
9 Ieng Sary has been beyond the limit by the rule.
10 And according to the Rules the continued detention shall be
11 rendered for another period of four months, but that time has
12 also lapsed. Now I would like to draw Your Honours' attention
13 to the few following points.

14 [9.39.40]

15 The Pre-Trial Chamber issued an indictment, continued the
16 provisional detention of Ieng Sary for four months. That order
17 issued on 13 January 2011, and that my client shall be detained
18 for a period of three months 27 days, if I'm not mistaken, after
19 that order is issued. And the question is that whether such
20 order is a valid one.

21 According to Rule 77(4) of the Internal Rules, which states that
22 any decision under this Rule, including the rebuttal or
23 dissenting opinions, shall be reasoned. But the order has been
24 rendered without reasoning, so it is not really a valid one yet,
25 according to the law. That's an error.

13

1 [9.41.00]

2 And I would like to also draw Your Honours' attention to another
3 decision by the Pre-Trial Chamber of 11 April 2011. This
4 decision is reasoned, however the decision has been rendered
5 beyond the four month period prescribed by the law. So the
6 previous decision was rendered in due course but without any
7 reasoning, although the law stated that such a decision must be
8 reasoned. It is therefore regarded as a non-decision, because it
9 was not reasoned.

10 And another new decision on 11 April 2011, it was reasoned but it
11 was issued beyond the limit time.

12 [9.42.10]

13 The question remains on this particular issue why the Court
14 issued two decisions on the same case. The final decision should
15 not be considered as the order, it should have been the order on
16 reasoning. Since there are two decisions already on the same
17 case, the question still remains, which one of the order is
18 considered as the valid one?

19 The second decision by the Pre-Trial Chamber is valid because it
20 is pursuant to Rule 77(14). However, it is in contravention to
21 other rules, which state that in any case, where there is an
22 appeal is lodged, the Pre-Trial Chamber shall render a decision
23 within four month period.

24 [9.43.40]

25 So I can conclude that any of the decisions, if taken, really

14

1 affects the fundamental and fair rights of my client which has
2 been protected by the law, in particular with reference to our
3 Constitution, Article 38(3). As I already indicated to Your
4 Honours, any decision on the provisional detention shall be done
5 in accordance with the law.

6 And as for the detention of our client, rather it's started to
7 count from our appeal until the decision is rendered, the time,
8 the legal limit time for such detention has already elapsed, so
9 we would like to seek what kind of appropriate remedy that really
10 commensurate with such error. According to the procedures, and
11 the provisions, there is no condition at all, and my client shall
12 be released immediately.

13 [9.45.25]

14 However, counsels for Ieng Sary -- another step forward to
15 release -- but to pave the way for the Trial Chamber to consider
16 our request, and that request is not the immediate release of our
17 client according to the provisions, but we would like to request
18 that our client is released on bail. And we even requested that
19 our client be released under house arrest, which is part of the
20 release on bail. And it is very appropriate remedy already for
21 my client and if the Court fails to consider our request then the
22 constitution and the code of criminal procedure of Cambodia
23 including the ECCC laws could have been violated.
24 And they have been violated by the ECCC itself. I am very
25 grateful, Your Honours, and I really would like to maintain our

15

1 request as they are.

2 [9.47.05]

3 MR. PRESIDENT:

4 Thank you, counsel for Ieng Sary. We would like to proceed now
5 to the prosecution, whether they would wish to make any response
6 to defence counsel. The floor is theirs.

7 [9.47.35]

8 MR. VENG HUOT:

9 On behalf of the prosecution, I would like to make some
10 observations, as follows. As already set out in the order for
11 the hearing today, and this hearing is conducted in accordance
12 with Rule 68(3) of the Internal Rules to bring before the Court
13 Ieng Sary, the former Minister of the Foreign Affairs of the
14 Democratic Kampuchea regime, and this is his first appearance
15 before the Trial Chamber.
16 During this first appearance, it is appropriate and it is in due
17 course of a provisional detention is rendered until the Trial
18 Chamber render on the decision on merits, and this provisional
19 detention is done in accordance with Internal Rules 82(1) and
20 82(2).

21 [9.49.15]

22 The arguments that the provisional detention of Ieng Sary is
23 illegal is not appropriate. Any request for the release on bail
24 is also not accepted. I would like to summarise on this that the
25 arguments by the defence counsel is similar to the motions by the

16

1 defence teams of the other three accused persons, Khieu Samphan,
2 Ieng Thirith and Nuon Chea.

3 When it comes to the arguments by the defence counsel regarding
4 the decision by the Pre-Trial Chamber that they say lacked
5 reasoning, actually the decision has already been rendered, and
6 that the accused is continued to be provisionally detained under
7 the order E50 of 16 February 2011. And the defence counsel
8 failed to raise any changes of circumstance according to the
9 Internal Rule concerning the provisional detention and the
10 conditions of the detention.

11 [9.51.10]

12 The Office of Co-Prosecutors responded in detail regarding the
13 appeal by Ieng Sary against the extension of the provisional
14 detention as referred to in document C22/9/2. The prosecutors
15 therefore submit that the provisional detention of Ieng Sary is
16 still a necessary measure, and the prosecution would like to
17 maintain our position that Ieng Sary remain detained.

18 All the decisions concerning the provisional detention has been
19 well reasoned in accordance with Rule 63 concerning the magnitude
20 of the crimes that the accused person have been charged with.

21 Also, I would like to also quote the statement by Mr. Ban
22 Ki-moon, who expressed his emotion concerning the sufferings
23 Cambodian people have had suffered during the brutal regime. He
24 indicated that he observed the facial expression of the Cambodian
25 people with their tears, and that we recognise their suffering,

17

1 and we note that it is really difficult to really recollect this
2 very bad chapter of history, but we would like to make sure that
3 your bravery is a very powerful message to the world that
4 impunity shall not be left unpunished.

5 [9.54.15]

6 Mrs. Hillary Clinton, during her visit in Cambodia, also
7 witnessed the sufferings of Cambodian people and she stated that
8 the work of the Court is very painstaking, but it is really vital
9 to secure long term peace and to bring justice to the victims.
10 That is why the Court has brought to justice the accused persons
11 to heal these wounds. And I would like to conclude my oral
12 submission now, I would like to share the floor with my
13 colleague, Mr. Dale Lysak.

14 MR. PRESIDENT:

15 Thank you, Mr. Prosecutor. Now the international Co-Prosecutor,
16 you may proceed.

17 MR. LYSAK:

18 Good morning. Thank you, Your Honours. First, procedurally,
19 Your Honours, I would like to respond to the manner in which this
20 application has been raised before the Trial Chamber. As you
21 know, a notice was issued by the Trial Chamber inviting --
22 notifying the parties of the Trial Chamber's intention to hold a
23 hearing pursuant to Rule 68(3) and asking the parties whether
24 they intended to ask for release or bail. We did not receive
25 notice that the accused intended to make such an application. We

18

1 are prepared, as we are doing, and will do here, to respond, but
2 I think the record should reflect that this is the first time
3 that this accused has notified the Trial Chamber that he
4 considers himself to be unlawfully detained, and the first time
5 that he has asked this Trial Chamber for release.

6 [9.56.25]

7 Now, while our perspective would have been that it would have
8 been preferable for this to be done by written motion, the Rules
9 do allow the accused to do this by way of an oral application.
10 And I'm referring there to Rule 82(3), which allows the accused
11 or his lawyers to request the Chamber to release him orally
12 during a hearing.

13 However, I think it is important that the accused be advised that
14 the Rules allow him to do this once, and only once, and after
15 that, in order to make any additional applications under 82(4),
16 further applications may only be filed where the circumstances
17 have changed. So while the accused does have the right today to
18 make an oral application for his release, this application should
19 be considered as his one application under Rule 82, and from this
20 point forward it is the position of the Co-Prosecutors that the
21 accused will need to demonstrate changed circumstances to make
22 any further applications.

23 [9.57.40]

24 With that said, I'll proceed to respond to the arguments we've
25 heard from counsel today. Counsel has argued that his detention

19

1 is unlawful, ultra vires, citing first to what he claims is a
2 three-year maximum detention period that is established by Rule
3 63(7). This is a matter that has been briefed before Your
4 Honours, and before other parts of this Court before. Our
5 position on this is that Rule 63 deals with --

6 [9.58.25]

7 MR. PRESIDENT:

8 Defence counsel, you may proceed.

9 MR. ANG UDOM:

10 Thank you, Mr. President. I would seek your permission for my
11 client, Mr. Ieng Sary, to wait in the waiting room, as he can no
12 longer sit, and the proceeding can go ahead without his presence.

13 MR. PRESIDENT:

14 Yes, we allow Mr. Ieng Sary to rest in the waiting room
15 downstairs. Security guards, you are instructed to bring Mr.
16 Ieng Sary to the waiting room downstairs. The international
17 Co-Prosecutor you may now resume your oral submission.

18 MR. LYSAK:

19 Thank you, Your Honours. I was addressing the argument that
20 there is a three-year maximum of detention under Rule 63. As has
21 previously been briefed, Rule 63 merely deals with the detention
22 during the initial phase of proceedings before this Court, and
23 that is up until the point that a Closing Order is issued.

24 [9.59.55]

25 So the three-year period involving an initial one-year period of

20

1 detention and two extensions simply establishes a limit on the
2 amount of detention prior to the issuance of a Closing Order.
3 The next argument made involves an asserted violation of Rule
4 68(2), and again counsel is relying on an interpretation of this
5 Rule that has been rejected by the Trial Chamber, rejected by the
6 Pre-Trial Chamber, and every Court officer that has so far
7 entertained this. The argument focuses exclusively on Rule
8 68(2), which merely provides that where an appeal is lodged
9 against the indictment, the Pre-Trial Chamber shall decide within
10 four months.

11 Counsel argues as to whether this four months starts from the
12 Closing Order or from the filing of the appeal. We would submit
13 it is fairly clear that it must be from the date of the appeal,
14 since it states the Pre-Trial Chamber shall decide within four
15 months, obviously they are deciding. They only have something to
16 decide once an appeal is filed.

17 [10.01.30]

18 But the real response to counsel's arguments is that they have
19 ignored Rule 68(3). Rule 68(2) merely deals with the first part
20 of the process, which is that the Pre-Trial Chamber has four
21 months to decide, and the provisional detention ordered by the
22 Co-Investigating Judges can only be valid for four months. Once
23 the Pre-Trial Chamber has issued a decision, it is clear under
24 rule 68(3) that an additional four month period starts from the
25 date of the decision of the Pre-Trial Chamber.

21

1 Rule 68(3) provides, in any case, the decision of the
2 Co-Investigating Judges or the Pre-Trial Chamber to continue to
3 hold the accused in provisional detention or to maintain bail
4 conditions shall cease to have any effect after four months
5 unless the accused is brought before the Trial Chamber within
6 that time. So Rule 68(3), as has previously been briefed and
7 argued to Your Honours, provides an additional four month period
8 running from the Pre-Trial Chamber's decision, and allows the
9 accused to be maintained in detention for that period, and for
10 detention to continue after that provided the accused is brought
11 before this Court within that four month period.

12 [10.03.00]

13 And that is indeed the reason that we are standing before Your
14 Honours here today, is because the four month period from the
15 Pre-Trial Chamber's decision would run in the middle of this
16 month, approximately. Hence the Trial Chamber has done what is
17 required under Rule 68(3), which is to bring the accused before
18 it, and on that basis, the accused's detention may now be
19 maintained through trial.

20 That is our response to the procedural arguments that have been
21 made by the accused and that are the basis for his application
22 today. I'm prepared also to address the merits of provisional
23 detention under the Rule 66(3) (sic) factors. Counsel have not
24 made any argument in that regard, so I would seek guidance from
25 the Court as to whether they want to hear from us in relation to

22

1 the Rule 63 factors, or whether they're satisfied with our
2 response to the procedural issues that have been raised.

3 [10.04.25]

4 (Deliberation between Judges)

5 [10.06.40]

6 MR. PRESIDENT:

7 The Chamber notes the arguments raised by both parties. In
8 particular, the intention to respond in details by the
9 international Co-Prosecutor, which is rather more details than
10 the Chamber anticipated. And the Chamber would like to give the
11 opportunity to the defence team to provide any further concrete
12 grounds for their application at this time. Before the Chamber
13 decides to give the floor to the prosecution, in particular the
14 international Co-Prosecutor to provide details in relation to the
15 facts.

16 So the floor is open for the defence team if you have any
17 concrete facts or arguments to be raised.

18 [10.07.55]

19 MR. KARNAVAS:

20 Mr. President, Your Honours, in the past we have provided
21 concrete arguments -- not before this particular Chamber but
22 before the Pre-Trial Chamber -- as to why we submitted that house
23 arrest, or house detention, would be an appropriate measure to
24 ensure both the safety of others and Mr. Ieng Sary as well as his
25 availability to be here. We maintain that that is, and remains

23

1 an option, and that this Trial Chamber should consider that. So
2 that's as far as additional details on that particular matter --
3 if you have any further inquiries, I would be more than happy to
4 address them.

5 I did want to take this opportunity to note that we did provide
6 notice to the senior legal officer with respect to an inquiry
7 made as far as whether we would be making any submissions. I do
8 not know whether the Office of Co-Prosecutor was informed, but I
9 do want to go on record that we did provide notice, as we were
10 requested, because the prosecutor does tend to leave the
11 impression that somehow the defence was acting inappropriately
12 today.

13 [10.09.25]

14 And lastly, I do want to point out that we do find it troubling
15 that the prosecution would be invoking the Secretary-General Ban
16 Ki-moon's statements, for two reasons. One, this tribunal is
17 financed by the UN, and it may give the impression that somehow
18 this is not an independent institution, but rather under -- is
19 taking directions from the UN, but more importantly, of the UN's
20 history with respect to Cambodia and the Khmer Rouge period, or
21 after the Khmer Rouge period -- and I don't think the UN is in
22 any position to be lecturing.

23 The same goes with Hillary Clinton on behalf of the United
24 States. I don't think these are appropriate comments to be made
25 as far as whether somebody should or should not be provisionally

24

1 released. I think we should keep the politicians out, and stick
2 to the law. But if they're intending and invoking personalities
3 such as Ban Ki-moon and Hillary Clinton, then I do believe that
4 we should be entitled to talk about the carpet bombing, by the
5 United States, of Cambodia. We should be able to talk about the
6 UN's involvement after 1979. If we are not -- because that was
7 the temporal jurisdiction -- it's beyond the temporal
8 jurisdiction that was purposely chosen by the UN and by certain
9 members of the UN to ensure that those issues were not properly
10 vented out, then if that is the case, we should not be going into
11 those areas through the backdoor. Thank you.

12 [10.11.10]

13 MR. PRESIDENT:

14 In order to clarify the matter further, if any Judges of the
15 Bench would like to put queries to any party, you may proceed in
16 regards to the arguments or the response by the prosecution.

17 Judge Cartwright, you may proceed.

18 [10.11.50]

19 JUDGE CARTWRIGHT:

20 Thank you, President. First, Mr. Karnavas is correct when he
21 says that the defence informed the senior legal adviser that it
22 would be making some application. It was a little unclear what
23 that application would be, but the Trial Chamber inferred from
24 the message that it was likely to be a bail application.
25 Moving more specifically to the question of bail or house

25

1 detention, this Chamber does not have before it immediately the
2 submissions that were made before other chambers on this issue.
3 I would like a brief summary of the proposals that the defence
4 has, if it is serious in seeking house detention, either as a
5 remedy or as, effectively, a bail application. These sorts of
6 details are practical matters. Where? What are the proposals
7 for security? What arrangements would be made for the accused to
8 get to Court? These are basic pieces of information that the
9 Chamber is entitled to have if it is to consider this application
10 seriously.

11 [10.13.30]

12 Are you able to give a brief oral summary now?

13 MR. KARNAVAS:

14 Thank you, Your Honour. Well, in the past, we have argued that
15 if, indeed, it is house arrest, house detention, it is the
16 Government's responsibility to provide security. In other words,
17 they would be posting -- the Government -- would be posting the
18 necessary individuals, police, to protect the house. And since
19 it is house arrest, it would be, then, either the Government or
20 the Court that would be providing the transportation.

21 [10.14.20]

22 By way of an example, at least with respect to how it's handled
23 at the ICTY, if someone is provisionally released to their
24 national jurisdiction, to their homes, the Government does give a
25 guarantee the individual is at home, and outside the house there

26

1 is posted a police officer.

2 And if that individual were permitted to leave the house, as may
3 be the case, on occasion, that individual is shadowed by the
4 police. So at all times they are within at least sight of the
5 police. Inside the house, of course, there's nobody there to
6 monitor, but they cannot leave the house, and the house is
7 protected by the police to make sure that, one, the individual
8 doesn't flee, and nothing comes to -- no harm comes to any
9 witnesses or any other individuals, or to the individual
10 themselves.

11 [10.15.25]

12 So that would be our proposal. Of course, to iron out all of
13 these details, first and foremost it would be that the Trial
14 Chamber would at least entertain whether that would be a
15 possibility, and then for the necessary mechanisms to be checked
16 out. Whether the Government would, indeed, be prepared to
17 provide security. When Mr. Ieng Sary leaves the detention unit
18 here and goes to the hospital, for instance, there is someone
19 posted. And in fact I cannot even visit Mr. Ieng Sary. They
20 wouldn't let me come into his room because somebody is posted.
21 So there are mechanisms.

22 Of course, it would take a court order. I don't think the Court
23 can necessarily order the Government to take measures, but at
24 least the Court can look into it, whether the Government would be
25 willing to take the necessary measures.

27

1 [10.16.20]

2 Now there is the question of health. And of course that's
3 something that can easily be remedied as well. Just as he has
4 his daily check-up, he can have his daily check-up at his house.
5 So that would be our proposal, Your Honour, to ensure that, one,
6 he is here, he's readily available, and of course as far as
7 transportation was concerned, also I've indicated that that
8 should be provided, since it's arrest, and he's not out on bail
9 on his own, those sort of services would have to be provided.
10 We do understand that it complicates matters, but that's where
11 the Trial Chamber comes in. The Trial Chamber may, using its own
12 discretion, consider that weighing the two: weighing his health,
13 weighing the logistics, that it may be inappropriate or perhaps
14 not logistically feasible at this stage of the proceedings, but
15 we leave that to your discretion.

16 I hope I have satisfied Your Honour's question.

17 [10.17.45]

18 MR. PRESIDENT:

19 Thank you counsel for your response. I would like now to give
20 the floor to Judge Lavergne.

21 JUDGE LAVERGNE:

22 Thank you, Mr. President. I would like to have more concrete
23 details on this proposal. I do not need precise details, but I
24 would like to know more about his ability, for instance, where do
25 you expect your client to reside in Cambodia?

28

1 MR. KARNAVAS:

2 Well, thank you, Your Honour. Well, in his home. I mean, he has
3 a house, here in Phnom Penh. This is where he was. It was no
4 great secret that this institution was being created, was being
5 funded, was actually in existence and that Mr. Ieng Sary was
6 being investigated. Mr. Ieng Sary never fled the country. Never
7 went anywhere. He was there in plain sight, in Phnom Penh, and
8 so he would be at his house.

9 [10.19.00]

10 And of course, as would be the case, it would be necessary to
11 check the house for security purposes, but we are under the
12 understanding that the house is secure enough that it would not
13 take more than one or two persons to guard the house. It's
14 gated. Does that -- are there any more questions, Your Honour?
15 Thank you.

16 MR. PRESIDENT:

17 Any Judges of the Bench would like to put any more questions to
18 the parties?

19 (Deliberation between Judges)

20 [10.20.50]

21 MR. PRESIDENT:

22 Defence counsel, do you have something to say?

23 MR. KARNAVAS:

24 (microphone not activated) mention that we did make contact, back
25 in 2008, we've made contact with the Government, with the

29

1 appropriate authorities, I believe it was the Department of
2 Interior, or the Ministry of Interior, and we were informed that
3 they would be waiting to hear back from the Chambers. So in
4 other words, we made an initial contact to see whether they would
5 be amenable to that.

6 [10.21.25]

7 While they didn't say absolutely yes, they did say that they
8 wanted to hear from the Trial Chamber, or the Chambers, at the
9 time, and so I don't -- I think this is something that may
10 require the Chamber to consult, but we can provide the Trial
11 Chamber with a copy of the communication that we received. I had
12 just forgotten about it. Thank you.

13 MR. PRESIDENT:

14 Thank you for your additional comments, defence counsel.
15 The Chamber would like now to give the opportunity to the
16 international Co-Prosecutor to respond to the comments made by
17 the defence team.

18 [10.22.30]

19 MR. LYSAK:

20 Thank you, Your Honours. First, certainly, accept the word that
21 notice was provided to the Trial Chamber. I can say on behalf of
22 the representatives here that we did not receive notice, but I
23 think that's somewhat beside the point. My larger point here is
24 that we are hearing these arguments for the first time here in
25 this Court, and as Your Honours have pointed out, there is simply

30

1 no adequate basis that has been presented by the accused that
2 would justify him now being submitted into some sort of house
3 arrest with the lack of details that have been presently
4 provided.

5 [10.23.25]

6 My other point, in making that observation, was that the accused
7 are submitting that their client has been unlawfully detained
8 since November of last year. This Trial Chamber has been seized
9 of this case since January, yet here we are in May and for the
10 first time the accused is coming and saying to this Court that I
11 have been unlawfully detained since November, please release me.
12 It seems to me, particularly given that the other three accused
13 filed motions and that this accused was silent, that there is a
14 lack of timeliness in this response, in this motion, on their
15 part.

16 That said, I do not think that the accused have in any ways met
17 the burden of establishing that house arrest is appropriate here.
18 If the Court wishes to hear us on the general conditions for
19 provisional detention under Rule 63(3), specifically that there
20 is well-founded reason to believe the accused may have committed
21 crimes, and the factors supporting provisional detention, such as
22 the flight risk, I would be happy to provide, to respond to those
23 issues with the Court. And we would also be happy to submit
24 something in writing if the Court would prefer that.

25 [10.25.00]

31

1 But if the Court wishes to hear from us, right now, I am prepared
2 to address the factors supporting provisional detention under
3 Rule 63(3).

4 MR. PRESIDENT:

5 It is appropriate for the prosecution to respond to the comments
6 and applications by the defence team. This is the opportunity
7 for you to make an oral submission or comments regarding what has
8 been requested or argued by the defence. So this is your last
9 chance to bring any arguments regarding this matter.

10 [10.26.00]

11 MR. LYSAK:

12 Thank you, Your Honour. As the Trial Chamber has already ruled
13 in the case of the other three accused, the Co-Prosecutors
14 believe that there is ample basis to support the continued
15 provisional detention of Mr. Ieng Sary under Rule 63(3). On each
16 of the eight prior occasions on which the Co-Investigating Judges
17 or Pre-Trial Chamber have reviewed the accused's provisional
18 detention, in each instance they have concluded that there was
19 well-founded reason to believe that Ieng Sary may have committed
20 crimes that had been set forth in the Co-Prosecutors'
21 Introductory Submission.

22 At this point in the proceedings, an over 700-page indictment has
23 now been issued against the accused, which provides more than a
24 sufficient basis to confirm that this condition of provisional
25 detention is satisfied, and I would refer the Court specifically

32

1 to paragraphs 994 through 1125 of the Closing Order, which
2 relates specifically to the accused.

3 [10.27.25]

4 And at this time I would simply wish to note two of the key
5 factual bases that provide such well-founded reason to believe
6 that Mr. Ieng Sary may have committed crimes. First, the accused
7 was one of the founding members of the Communist Party of
8 Kampuchea, and one of only five full rights members of the
9 Party's Standing Committee, along with Pol Pot, Nuon Chea, Ta Mok
10 and Sao Phim.

11 The Standing Committee was the highest ranking body in the
12 Communist Party of Kampuchea, responsible for the policies and
13 decisions that resulted in the horrific crimes experienced in
14 this country between 17 April 1975 and January 1979.

15 [10.28.25]

16 In September 1960, the accused was one of 20 representatives who
17 met, in secret, in the quarters of a worker at the Phnom Penh
18 railway station, and established the founding party lines and
19 policies, including a decision to use violence to eliminate
20 enemies of the party. At this first Party Congress, Ieng Sary
21 was elected a member of the Central Committee, and an alternate
22 member of the Standing Committee. He became a full rights member
23 of the Standing Committee at the second Party Congress in
24 February 1963, ranking third in the Party, behind only the
25 Secretary, Pol Pot, and Deputy Secretary, Nuon Chea. And he

1 held that position from that time forward, through the end of the
2 Democratic Kampuchea regime.

3 [10.29.25]

4 The accused has admitted that he was a member of the Standing
5 Committee, and the minutes of Standing Committee meetings confirm
6 his role, presence and participation. In this capacity, Your
7 Honours, Ieng Sary directly participated in the establishment of
8 the criminal policies and plans that were implemented by the
9 Communist Party of Kampuchea during the period they controlled
10 this country, including the enslavement of the population in
11 rural cooperatives, and the use of security or re-education
12 offices, at which any person suspected of being an enemy was
13 subject to detention, interrogation, torture and execution.

14 The second general area that establishes a well-founded reason to
15 believe the accused may have committed crimes relates to his role
16 as the head of the Ministry of Foreign Affairs. As has been
17 explained by the Chief of S-21, Duch, the head of every
18 organisational unit in Democratic Kampuchea, including the
19 leaders of each ministry, zone, sector and military division,
20 played an essential role in the process by which the purported
21 enemies of the Party were identified, arrested, and sent to S-21.

22 [10.30.55]

23 In short, when interrogation teams at S-21 obtained confessions
24 that implicated other cadres of the Party, Duch would forward
25 those documents to either Son Sen or Nuon Chea, who would them

34

1 on-forward them to the head of the organisation of the implicated
2 persons, and work with that organisation head to determine which
3 cadres would be arrested.

4 [10.30.20]

5 MR. KARNAVAS:

6 Your Honour, if I may lodge an objection at this point in time
7 here -- either we're having an opening --

8 (Technical malfunction)

9 MR. KARNAVAS:

10 I didn't object earlier when he went into the history about what
11 was happening in 1960. I assume we'll be able to get into that
12 during the trial. We'll talk about what was happening in 1960,
13 we'll talk about what the then King, who had abdicated, what he
14 was doing, what was happening here. We'll talk about what the
15 French were doing. If that's what -- this is the intention of
16 this particular tribunal.

17 But for this period, for this hearing, what happened in 1960 is
18 irrelevant, and if counsel is going to testify about what he
19 believes Duch was doing, then I think we should have -- we'll
20 schedule a hearing for that. But this is for whether Mr. Ieng
21 Sary should be detained at this period. And so the comments
22 should be limited, for the purposes of this particular hearing.

23 [10.32.30]

24 MR. LYSAK:

25 Your Honours, first of all, I'm not testifying, I'm reciting to

35

1 the information that's in the case file and Closing Order. And
2 second, the first condition of provisional detention is whether
3 there is a well-founded reason to believe that the accused has
4 committed crimes. I understand that counsel may not enjoy
5 hearing this, but it is certainly relevant and it's an essential
6 part of the test for provisional detention.

7 MR. KARNAVAS:

8 It's -- a Closing Order is very much like an indictment. That's
9 what we're talking about. So we have the Closing Order. We
10 don't need -- so if those are the grounds, that we have a Closing
11 Order now, we accept that. But to go in about what was happening
12 in 1960 and then onwards, I find that objectionable. That's the
13 whole purpose.

14 MR. LYSAK:

15 If counsel is -- that his client --

16 [10.33.30]

17 MR. PRESIDENT:

18 We have been notified that the DVD needs to be replaced with a
19 new one, because the first one has already been full. And it is
20 also an appropriate time for morning adjournment. We should take
21 the adjournment for 20 minutes. We will resume at ten to 11.

22 The court officials are now instructed to draw the curtain
23 closed, and then have it opened after the Judges have seated.

24 (Judges exit courtroom)

25 (Court adjourns from 1035H to 1056H)

36

1 (Judges enter courtroom)

2 MR. PRESIDENT:

3 Please be seated.

4 The Chamber is now back in session. Before the adjournment the
5 Chamber heard the response from the international Co-Prosecutor
6 and there was an objection from the international defence team.

7 The Chamber noted the appropriate objection raised by the
8 international defence counsel.

9 The Chamber therefore would like to inform the international
10 Co-Prosecutor that it is not necessary to raise those arguments
11 stated in the Closing Order as the Chamber is familiar with the
12 facts set out in that Closing Order already. The Chamber now
13 gives the opportunity for the prosecution, as this is the last
14 opportunity for them to make any submission regarding the
15 conditions for detention pursuant to Rule 63 if they have any.
16 The floor is now open for the prosecution.

17 [13.59.15]

18 MR. LYSAK:

19 Your Honours, I will proceed, then, on the understanding that you
20 did not require to hear from us further with regard to the first
21 condition of provisional detention, the well-founded reasons, but
22 that we may proceed on the second group of factors that must be
23 satisfied.

24 In relation to the other conditions for provisional detention
25 that are set forth in Rule 63(3)(b), the prior detention orders

1 of the Co-Investigating Judges and Pre-Trial Chamber have relied
2 on three of those factors. One, the need to assure the presence
3 of the accused at trial. Second, the protection of the security
4 of the accused, and third, preservation of public order.
5 As the arguments relating to the latter two factors are the same
6 for this accused as have been made for the other three accused,
7 and as the Trial Chamber has focused on the first factor in its
8 provisional detention decision in this case, I will use my time
9 this morning to address the facts that we believe support a
10 conclusion that provisional detention is necessary here to ensure
11 the presence of Ieng Sary at trial.
12 [11.00.45]
13 As this Chamber noted in its prior decision, the accused has been
14 charged with the most serious crimes imaginable: genocide and
15 crimes against humanity resulting in the deaths of an estimated
16 1.7 million people. He faces severe penalties should he be
17 convicted. With trial now imminent, he has a compelling motive
18 to flee and not return, where he to be now released.
19 In addition to this motive, as has been repeatedly concluded by
20 the Co-Investigating Judges and Pre-Trial Chamber, this accused
21 has the ability and the means to leave the country and escape the
22 jurisdiction of this Court. I refer the Court first to paragraph
23 18 of the OCIJ detention order of 14 November 2007, which
24 references numerous voyages outside Cambodia, the material means
25 necessary to facilitate his flight to another country, and public

1 statements by the accused indicating his refusal to appear or
2 cooperate with the ECCC.

3 [11.02.15]

4 And I would refer to paragraph 104 of the 17 October 2008
5 decision of the Pre-Trial Chamber, which also noted his frequent
6 travel abroad, his connections with influential persons in the
7 Cambodia/Thailand border region who would be able to facilitate
8 his travel and escape, the fact he has had a passport since his
9 defection, since 1996, and also the report that he owns a Chinese
10 passport under a false name.

11 These references are supported by evidence from the case file
12 that I will now cite for Your Honours, which show the evidence of
13 the accused's frequent travel outside Cambodia, the evidence that
14 he has available resources to facilitate travel or flight from
15 this country, and his past relationships and high-level contacts.

16 [11.03.25]

17 And I would first refer to a rogatory report that is in the case
18 file as D78/5 which describes various evidence that was seized
19 upon the arrest of Ieng Sary and his wife, and included in the
20 list of materials were both current and old passports, which are
21 described as including numerous tourist visa stamps from
22 Thailand, again, establishing the frequent travel of this accused
23 outside the country.

24 Document number D366/7.1.412 is the Chinese passport that was
25 referenced in the Pre-Trial Chamber in a decision, a passport

1 that has Ieng Sary's photo, that was issued on January 27 1979,
2 in the name of a Su Hao, S-U H-A-O, who purportedly was born on
3 January 1 1930 in Beijing. In fact, as the record reflects in
4 this case, Ieng Sary was born as Kim Tran on 24 October 1925 in
5 Tra Vinh province, in Vietnam. So there is evidence in the case
6 file that this accused has had a passport with a false name and
7 identify.

8 [11.05.20]

9 Document D56/432 is an August 1996 article by Nayan Chanda
10 entitled *Fall of the High-Flyer*, which discusses reports that
11 Ieng Sary had 'siphoned off "ten million dollars from Chinese aid
12 money to purchase large cars and mansions and to send his
13 children to study abroad".' He was also accused of buying
14 \$400,000 worth of jewels, gold and diamonds for his wife. The
15 reference here was to Ieng Sary's role in the post-'79 period, he
16 has sometimes been described as a 'bagman' during that period.
17 As that is a term that probably does not translate well, for
18 those who do not know, 'bagman' refers to a person who is
19 responsible to collect the money to fund an operation, and Ieng
20 Sary's role, post-'79, was to raise money from the Chinese
21 government.

22 Subsequent to his defection from the Khmer Rouge, Ieng Sary
23 became the head of what was known as the Democratic National
24 United Movement, which was given control over a large part of
25 northwestern Cambodia, Pailin. And there are numerous reports in

40

1 the case file referencing potential wealth accumulated by the
2 accused during that period, including document D56, document 475.

3 [11.07.20]

4 Document D29, attachment 22 is a February 5 1999, report entitles
5 Ieng Sary Warns of New Unrest over Khmer Rouge Trial. This
6 report evidences not only what the Pre-Trial Chamber referred to
7 in terms of past statements by the accused indicating a hostility
8 towards the Court -- in fact the article starts by stating that
9 former Khmer Rouge leader Ieng Sary warned against attempting to
10 bring leaders of the movement to trial, implying that his
11 followers would re-ignite the civil war if rebel defectors were
12 threatened with arrest. The report also notes that Ieng Sary now
13 controls the autonomous zone of Pailin in the north west.

14 A similar report was issued six months later, on August 16 1999,
15 that is in the case file as D29, attachment 23. On 15 November
16 2001 Reuters reported on Mr. Ieng Sary travelling to Thailand for
17 medical treatment. That report is in the case file as D29,
18 attachment 57. That report notes that Ieng Sary passed through
19 the Thai passport control in the channel reserved for diplomats.

20 [11.09.10]

21 A number of additional articles that I will just identify by name
22 establish the potential wealth and resources of the accused,
23 including his palatial home, as it is described in these reports.
24 The first one is D56, document 494, which is an October 2002
25 report from the Cambodia Daily entitled Old Age Finds Ieng Sary

41

1 Fully Divested Of His Once Revolutionary Distain Of Wealth.
2 D29, attachment 52, is a December 2002 report entitled How
3 Brother Number Three, Architect of the Killing Fields, Lives A
4 Life of Luxury in the New Cambodia. And document D29, attachment
5 13, is a February 2006 article from The Sunday Times that
6 contains similar information, including information on a gold
7 stupor that had been built by the accused.

8 [11.10.35]

9 And finally, I would refer the Court to D29, attachment 15, which
10 is an article dated February 2007 from the Cambodia Daily,
11 entitled Former Communists Embrace the Market Economy in Malai
12 District. This is an article by Thet Sambath and Erika Kinetz,
13 and it discusses the DNUM organisation that Ieng Sary was the
14 head of, and in particular information as to where the money and
15 resources that had been accumulated by DNUM were now located.
16 And as of 2007, the Secretary-General of the Malay Market and
17 Trade Office is quoted as indicating that the largest shareholder
18 in the Malay trading company was Ieng Sary, and that the shares
19 that were held in that company were an extraordinarily good
20 investment, yielding 24 to 40 per cent a year.

21 [11.11.55]

22 I list this evidence, Your Honours, so that the Court has full
23 access to the information that's in the case file that supports
24 the prior conclusions that because of the available resources
25 that the accused has, because of his past relationships and

42

1 travel, he does pose a flight risk. And given how close we are
2 to trial here, it would be the position of the Co-Prosecutors
3 that release or bail is not warranted at this time, and we would
4 ask the Court to reject the application.

5 [11.12.40]

6 MR. PRESIDENT:

7 Thank you, international Co-Prosecutor. The Chamber received a
8 request from Mr. Ieng Sary to return to the detention facility,
9 and the Chamber granted his request. And the security guards
10 were instructed to bring Mr. Ieng Sary back to the detention
11 facility. Also the AV unit is instructed to link the audio and
12 visual components to the detention facility so that the accused
13 Ieng Sary can follow the proceedings taking place here in the
14 courtroom.

15 The defence team is invited to make a brief response to what has
16 been raised by the international Co-Prosecutor, if you wish to do
17 so.

18 [11.14.00]

19 MR. KARNAVAS:

20 Thank you, Mr. President. Thank you, Your Honours. Just very
21 briefly: first and foremost, we will concede that the documents
22 cited are in the case file, so I think there's no news to that.
23 However, when looking at everything that was cited, for instance,
24 they go back to a passport of 1979 with respect to China, a
25 permanent member of the Security Council, who also has agreed to

43

1 the establishment of this institution, to suggest that somehow
2 Mr. Ieng Sary has the availability, at least from the Chinese
3 government, the current Chinese government, to get another
4 passport. That's what I read into this.

5 So let's face it: it was a 1979 passport. When he was arrested
6 they did not find a current passport from a foreign country.

7 Then they rely on a great deal of secondary, hearsay information
8 that is in the press, and I think we need to be somewhat
9 circumspect when considering that particular sort of information,
10 and I'm sure we will hear a lot of that during the trial.

11 [11.15.20]

12 It is no secret that Mr. Ieng Sary would go, on occasion, to
13 Thailand because of health reasons. That's where he would seek
14 his medical treatment. That is no longer the case now because
15 this institution is providing excellent medical assistance and
16 treatment to Mr. Ieng Sary and there's no reason why that
17 treatment cannot be continued if he's under house arrest.

18 Whether he was given diplomatic status as he was going through
19 the Customs in Thailand, or not, I don't think that's an issue,
20 that was in 2001. Nothing to suggest that that was the case in
21 2007 or 8.

22 The fact that Mr. Ieng Sary may or may not have wealth.

23 Concerning these reports, let's consider that for a second. If
24 Mr. Ieng Sary was fully aware that this institution was being
25 created for the purposes of trying him, and it was widely

44

1 publicised, and this information would have been readily
2 available to him, and they do quote a 1999 article, why then did
3 Mr. Ieng Sary not leave the country when he had the chance? He
4 could have.

5 And he could have gone to a place like, for instance, China, if
6 he wished to, if he wished to avoid being arrested and
7 prosecuted. The point is, it's a double-edged sword. What we're
8 proposing, Your Honours, is that -- not that he is out and about
9 on his own without supervision, without any conditions, but
10 rather that he be placed under house arrest, as opposed to being
11 in his cell.

12 [11.17.25]

13 So essentially he's going from one detention facility to another
14 one. One being over here, the other one being his house. As we
15 have indicated, we will be providing the Trial Chamber with some
16 correspondence that would seem to indicate that the Government of
17 Cambodia is willing to entertain any request from the ECCC
18 concerning provisional release or house detention. Whether
19 ultimately they will agree to any conditions such as the ones
20 that I have suggested, which are having police outside the house
21 on a 24 hour basis, seven days a week, that's another story, but
22 in any event, what we have presented are adequate measures that
23 would allow the Trial Chamber to come to the conclusion that
24 house arrest will ensure his presence for the trial, would ensure
25 that he doesn't flee the country, and would also ensure that no

45

1 harm comes to him or to others.

2 [11.18.40]

3 And we want to thank the Trial Chamber for giving us this
4 opportunity to be heard on this matter -- and it was by
5 invitation, we were asked whether we wanted to make submissions,
6 and we took that opportunity, and we are very grateful for having
7 had this opportunity. Thank you.

8 MR. PRESIDENT:

9 Thank you counsel Karnavas. Having noted the arguments and
10 responses, also the request by the parties to the proceeding and
11 to the counsel, in particular, for Ieng Sary, regarding the
12 release on bail or under house arrest. The Chamber has noted
13 these arguments and applications and this concludes today's
14 hearing.

15 And the Chamber notes that Mr. Ieng Sary has been brought before
16 the Trial Chamber in accordance with the Internal Rule 68(3).

17 The Chamber's decision will be rendered in due course.

18 The hearing is adjourned.

19 (Judges exit courtroom)

20 (Court adjourns at 1120H)

21

22

23

24

25