

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

PRE-TRIAL CHAMBER

CASE NO. 002/19-09-2007-ECCC/OCIJ (PTC 14)
CASE NO. 002/19-09-2007-ECCC/OCIJ (PTC 15)

KHIEU SAMPHAN

FRIDAY, 3 APRIL 2009
856H
APPEAL HEARING

Before the Judges:

PRAK Kimsan, Presiding
Rowan DOWNING
HUOT Vuthy
NEY Thol
Katinka LAHUIS
PEN Pichsaly (Reserve)

For the Pre-Trial Chamber:

SAR Chanrath
CHUON Sokreasey
Anne-Marie BURNS

For the Office of the Co-Prosecutors:

YET Chakriya
Vincent DE WILDE D'ESTMAEL

For the Charged Person KHIEU SAMPHAN

SA Sovan
Jacques VERGÈS

For the Civil Parties

HONG Kimsuon
LOR Chunthy
NY Chandy
Silke STUDZINSKY
MOCH Sovannary
KIM Mengkhy
KONG Pisey

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. DE WILDE d'ESTMAEL	French
JUDGE DOWNING	English
JUDGE HUOT VUTHY	Khmer
JUDGE LAHUIS	English
MR. SA SOVAN	Khmer
MS. STUDZINSKY	English
THE CHARGED PERSON	Khmer
THE PRESIDENT (PRAK KIMSAN, Presiding)	Khmer
MR. VERGÈS	French
MR. YET CHAKRIYA	Khmer

1

1 P R O C E E D I N G S

2 (Judges enter the courtroom)

3 MR. PRESIDENT:

4 I now invite the media representatives to leave the courtroom.

5 In the name of the Cambodian people and the United Nations,

6 today, the Pre-Trial Chamber of the Extraordinary Chambers in the

7 Courts of Cambodia declares open the hearing of the two criminal

8 cases N° 002/19-09-2007-ECCC/OCIJ (PTC14), dated 28 October 2008

9 and N° 002/19-09-2007-ECCC/OCIJ (PTC15) dated 18 November 2008 in
10 which :

11 The charged person Khieu Samphan, alias Hem, Cambodian

12 nationality, male, born on 27 July 1931, in Rom Chek commune, Rom

13 Duol district, Svay Rieng province, Cambodia. Pre-arrest

14 address, Konkhlong village, O Tavao Quarter, Pailin district,

15 Pailin town, Cambodia; father's name Khieu Long, deceased,

16 mother's name Por Kong, deceased; is charged with crimes against

17 humanity and grave breaches of the Geneva Conventions of 12

18 August 1949, being crimes set out and punishable under articles

19 5, 6, 29(new) and 39(new) of the Law on the Establishment of the

20 Extraordinary Chambers in the Courts of Cambodia dated 27 October

21 2004.

22 Defence co-lawyers: Mr. Sa Sovan, Mr. Jacques Verges. Lawyers

23 for the civil parties: Mr. Hong Kimsuon, Mr. Lor Chunthy, Mr. Ny

24 Chandy, Mr. Kong Pisey, Mr. Yong Panith, Mr. Kim Mengkhy, Miss

25 Moch Sovannary, Ms. Silke Studzinsky, Ms. Martine Jacquin, Mr.

2

1 Philippe Cannone, Mr. Pierre-Olivier Sur, Ms. Elizabeth
2 Rabesandratana, Mr. Olivier Bahougne, Mr. David Blackman
3 The greffiers, are all the participants present at the hearing?
4 THE GREFFIER:
5 All the participants present except eight civil party lawyers are
6 absent, only 6 of them are present today. Thank you.
7 MR. PRESIDENT:
8 The composition of today's hearing includes one Mr. Prak Kimsan
9 President, Mr. Rowan Downing, Judge, Mr. Ney Thol, Judge, Mrs.
10 Katinka Lahuis, Judge, Mr. Huot Vuthy, Judge, Mr. Pen Pichsaly,
11 Reserve Judge. Greffiers include Miss. Sar Chanrath and Anne
12 Marie Burns. Co-Prosecutors: - Co-Prosecutors: Mr. Yet Chakriya,
13 Deputy Co-Prosecutor, Mr. Vincent de Wilde d'Estmael, deputy
14 Co-Prosecutors.
15 [9.04.00]
16 The charged person Mr. Kieu Samphan please stand up. What is
17 your name?
18 THE CHARGED PERSON:
19 (inaudible)
20 MR. PRESIDENT:
21 Have you got any alias name?
22 THE CHARGED PERSON:
23 I am also called Hem
24 MR. PRESIDENT:
25 How old are you?

3

1 THE CHARGED PERSON:

2 (inaudible).

3 MR. PRESIDENT:

4 What is your nationality?

5 THE INTERPRETER:

6 The interpreter regrets that Khieu Samphan's mic is not actively
7 activated).

8 MR. PRESIDENT:

9 What is your occupation?

10 KHIEU SAMPHAN:

11 I have no job.

12 MR. PRESIDENT:

13 What was your occupation before you were arrested?

14 THE CHARGED PERSON:

15 Before I was arrested I did not have any job, I lived on farming.

16 MR. PRESIDENT:

17 Where did you live before you were arrested?

18 THE CHARGED PERSON:

19 I lived in Konkhlong, O Tavao.

20 MR. PRESIDENT:

21 What is your father's name?

22 THE CHARGED PERSON:

23 (inaudible)

24 MR. PRESIDENT:

25 What is your mother's name?

4

1 THE CHARGED PERSON:
2 (inaudible)
3 MR. PRESIDENT:
4 What is your wife's name?
5 THE CHARGED PERSON:
6 (inaudible)
7 MR. PRESIDENT:
8 How many children have you got?
9 THE CHARGED PERSON:
10 Four children.
11 MR. PRESIDENT:
12 Have you chosen lawyers to defend your case?
13 THE CHARGED PERSON:
14 Yes, I have chosen both national and international lawyers to
15 help me.
16 MR. PRESIDENT:
17 Pursuant to Rule 21(1)(d) of the Internal Rules, you are presumed
18 innocent as long as your guilt has not been established. You
19 have the right to be informed of any charges brought against you.
20 You have the right to be defended by a lawyer of your choice, and
21 you have the right to remain silent. And now Case N°
22 002/19-09-2007-ECCC/OCIJ appeal against the Co-Investigating
23 Judges' order refusing the request for release. Mr. Huot Vuthy,
24 you read the report out.
25 [09.07.10]

5

1 JUDGE HUOT VUTHY:
2 Pre-Trial Chamber criminal case file N° 002/19-09-2007-ECCC
3 (PTC-14). Report of examination. Proceedings number two
4 examination of the case by the co-rapporteurs.
5 One, The Proceedings. A, Introduction: Pursuant to Rule 77(10)
6 of the Internal Rules of the Extraordinary Chambers in the Courts
7 of Cambodia, the President of the Pre-Trial Chamber has assigned
8 Judges Huot Vuthy and Rowan Downing to set out the details of the
9 Order Refusing Request for Release issued on 28 October 2008,
10 against which the present appeal is lodged, and of the relevant
11 facts. The president of the Pre-Trial Chamber has assigned both
12 Judges to work on the relevant facts of the Case File No.
13 002/19-09-2007-ECCC-OCIJ (PTC 14).
14 Identification of the Charged Person: Khieu Samphan, alias Hem,
15 male, born the 27th of July 1931, at Rom Chek commune, Rom Duol
16 District, Svay Rieng Province, Cambodia. Pre-arrest address
17 village of Konkhlong Sangkat O Tavao, Khan Pailin City; father's
18 name Khieu Long, deceased, mother's name Por Kong, deceased,
19 spouse's name So Socheat, with four children. Khieu Samphan is
20 represented by Co-Lawyers Mr. Sa Sovan and Mr. Jacques Vergès.
21 Charges: Khieu Samphan is under investigation for crimes against
22 humanity, murder, extermination, imprisonment, persecution and
23 other inhuman acts, and grave breaches of the Geneva Conventions
24 of 12 August 1949, wilful killing, wilfully causing great
25 suffering or serious injury to body or health, wilful deprivation

6

1 of rights to a fair trial of a prisoner of war or civilian,
2 unlawful deportation or transfer or unlawful confinement of a
3 civilian, being crimes set out and punishable under articles 5,
4 6, 29(new) and 39(new) of the Law on the Establishment of the
5 Extraordinary Chambers in the Courts of Cambodia dated 27th of
6 October 2004.

7 Purpose of this report. This report of the co-rapporteurs sets
8 out the details of the decision appealed against and the facts at
9 issue before this Court. It is to assist those who are not
10 parties to the proceedings understand the matters before the
11 Court.

12 B. Co-Investigating Judges' Order Refusing Request for Release.

13 On 28 October 2008, the Co-Investigating Judges dismissed the
14 application for release filed by Khieu Samphan's co-lawyers.

15 Recalling their provisional detention order of 19 November 2007,
16 the Co-Investigating Judges held that there continue to exist
17 well-founded reasons to believe that Khieu Samphan "instigated
18 the commission of crimes charged against him", or aided and
19 abetted in the perpetration of these crimes, thus concluding that
20 the criterion of Internal Rule 63(3)(a) is met.

21 The Co-Investigating Judges also held that four of the grounds
22 for provisional detention set out in Rule 63(3)(b) continue to be
23 satisfied. They held that continued detention was necessary to
24 prevent pressure on witnesses and victims as well as to preserve
25 evidence as "the passage of time since the provisional detention

7

1 of the charged person has not eliminated the risk" which is even
2 more acute. In addition, the Co-Investigating Judges held that
3 Khieu Samphan's continued detention was necessary to preserve
4 public order as "it is not excessive, considering the gravity of
5 the crimes charged against the charged person, to conclude that a
6 decision to grant release within the fragile context of today's
7 Cambodia could provoke protests of indignation which could lead
8 to violence". The Co-Investigating Judges also noted risk to the
9 security of the charged person considering "the gravity of the
10 crimes and the threat to public order if the charged person was
11 released."

12 [09.13.24]

13 The Co-Investigating Judges further rejected the co-lawyers'
14 request for bail as an alternate measure to provisional
15 detention. They found that since a majority of the conditions of
16 Internal Rule 63(3)(b) continue to be met, there is a "strong
17 indication that no other form of detention can outweigh the
18 necessity for continued provisional detention."

19 They also considered that detention for nearly twelve months is
20 not "excessive in the view of the scope of the investigations,
21 the complexity and gravity of the crimes of which the
22 Co-Investigating Judges are seized." They "have collected a
23 large body of evidence, notably regarding Khieu Samphan's
24 potential role."

25 Finally, the Co-Investigating Judges held that the age and state

8

1 of health of the charged person were not a bar to his continued
2 detention. In particular, they noted that "age in itself is not
3 an obstacle to detention" and that "as of now, having examined
4 all the elements, Khieu Samphan's state of health is compatible
5 with his continued detention."

6 C. Khieu Samphan's Appeal: On 27 November 2008, Khieu Samphan's
7 lawyers filed an appeal, in which they requested that the
8 Pre-Trial Chamber: 1, vacate the Co-Investigating Judges' Order
9 refusing release; and 2, order the release of Khieu Samphan. They
10 do so on the main ground that the order is not justified having
11 regard to the overall circumstances of the case and the fact that
12 it is based only on the gravity of the crimes charged.

13 D. Co-Prosecutors' Response: On 28 January 2009, the
14 Co-Prosecutors filed their response, requesting the Pre-Trial
15 Chamber to dismiss the Appeal on the primary ground that the
16 co-lawyers have not established a change in circumstance since
17 the initial provisional detention and that the criteria contained
18 in Rule 63(3) continue to be met.

19 E. Response of the Civil Parties: The co-lawyers of the Civil
20 Parties did not file any responses.

21 Two, examination by the co-rapporteurs:

22 [09.16.51]

23 A. Failure to Consider the Overall Circumstances of the Case:

24 First, the co-lawyers for the charged person argue that the Order
25 Refusing Release is not justified because it failed to take into

9

1 account the overall circumstances of the case. Specifically, the
2 co-lawyers point out that the Co-Investigating Judges did not
3 take note of "procedural defects and serious violations of the
4 rights of the Defence", including a long delay connected with the
5 hearing on the appeal against provisional detention and the lack
6 of translation of the case file. The co-lawyers contend that the
7 translation issue in particular "raises very serious concerns
8 about the lawfulness and legitimacy of the proceedings against
9 Khieu Samphan."

10 Second, the co-lawyers argue that the Co-Investigating Judges
11 committed an error of law in relying on the gravity of the crimes
12 charged to be in itself a relevant factor in refusing to grant
13 the release of Khieu Samphan or considering alternatives to
14 provisional detention such as bail. They submit that "insofar as
15 the Charged Person is actually presumed to be innocent, the
16 Judges must undertake an in concreto assessment of the 'real'
17 risks involved in granting release in order to satisfy the legal
18 requirements."

19 The Co-Prosecutors respond that the Order is "sufficiently and
20 adequately reasoned" as the Co-Investigating Judges are only
21 required "to set out the legal grounds and facts taken into
22 account before coming to a decision", and "are not obliged to
23 indicate a view on all the factors but only the relevant ones".
24 They contend that "the issue of translation rights and
25 obligations pending before the Pre-Trial Chamber is not directly

10

1 linked to the legality of provisional detention."
2 [09.19.44]
3 The Co-Prosecutors further submit that the Co-Investigating
4 Judges acted in accordance with international jurisprudence by
5 considering "the nature of the crimes charged as a criterion in
6 the test for determining the reasonableness of provisional
7 detention." They assert that the co-lawyers "have erroneously
8 claimed that the Co-Investigating Judges failed to consider
9 alternative measures to provisional detention solely on the basis
10 of the gravity of the charges."
11 B. Well-founded reasons to believe that the charged person may
12 have committed the crime or crimes specified in the introductory
13 submission (Internal Rule 63(3)(a))
14 The co-lawyers point out that "it was impermissible for the
15 Co-Investigating Judges to rely on well-founded reasons to
16 believe that the charged person committed the alleged crimes in
17 denying release" because "the defence cannot mount a proper
18 defence" to refute this finding. They recall that the
19 international co-lawyer is unable to examine the case file in a
20 language which he understands.
21 In response, the Co-Prosecutors submit that the co-lawyers "do
22 not seriously challenge the existence of a well-founded reason to
23 believe that the charged person may have committed the crimes
24 specified in the introductory submission." They add that the
25 "case file today contains evidence capable of satisfying an

11

1 objective observer, at this stage of the investigation, that the
2 charged person may have committed the crimes for which he is
3 currently under investigation."

4 C. Consideration of the grounds making provisional detention a
5 necessary measure, Internal Rule 63(3)(b).

6 [09.22.31]

7 The co-lawyers also submit that the criteria contained in
8 Internal Rule 63(3)(b) has not been met. They argue that "the
9 Co-Investigating Judges have not established any of the
10 conditions to justify Khieu Samphan's detention, and their
11 decision is based solely on the gravity of the alleged crimes."
12 First, they assert that the Co-Investigating Judges have failed
13 to show evidence of past actions or behaviour by Khieu Samphan
14 that demonstrates a concrete risk that he might exert pressure on
15 witnesses and victims.

16 Second, the co-lawyers submit that "there is no factual evidence
17 of a risk to public order as to show that release would actually
18 disrupt public order or, for that matter, that public order
19 effectively remains threatened at the present time." Finally,
20 the co-lawyers denied the risk to Khieu Samphan's safety if
21 released. They submit that "the risk referred to by the
22 Co-Investigating Judges is neither real nor current; it is simply
23 presumed and purely hypothetical."

24 Therefore, the co-lawyers conclude that the release of Khieu
25 Samphan is currently the only appropriate measure as his

12

1 detention is arbitrary owing to fundamentally flawed proceedings
2 and unjustified due to "the lack of diligence in the conduct of
3 proceedings".

4 [09.25.00]

5 In addition, the co-lawyers argue that detention aggravates the
6 charged person's "state of health and that could ultimately be
7 found to be an offence against his dignity."

8 The Co-Prosecutors respond that the co-lawyers have not
9 "identified any material evidence or change of circumstances to
10 justify the provisional release of the charged person, or even a
11 change in the conditions of detention." With regard to exerting
12 pressure on witnesses and victims, the Co-Prosecutors point to
13 past threats of retaliation on the part of the charged person as
14 demonstrating a "concrete risk of interference arising from both
15 the charged person's past actions and his present influence."

16 The Co-Prosecutors also argue that the co-lawyers have
17 misrepresented "the current stage of affairs in Cambodia" and
18 that "the release of a person alleged to be amongst the senior
19 leaders of the [Democratic Kampuchea] regime would be likely to
20 cause negative reactions among the population". Finally, the
21 Co-Prosecutors submit that "recent statements and behaviour of
22 some victims or civil parties show that any release of the five
23 charged persons may degenerate into violence directed against the
24 former Khmer Rouge leaders, including Khieu Samphan."

25 In addition, the Co-Prosecutors submit that arguments made by the

13

1 co-lawyers contending lack of diligence are "unsubstantiated and
2 irrelevant" and that "no bail order would be rigorous enough to
3 satisfy the needs to protect the charged person's personal
4 safety, to preserve public order, and to prevent the charged
5 person from exerting pressure on witnesses and victims." Phnom
6 Penh, February 2009, Co-Rapporteurs, Judge Huot Vuthy and Judge
7 Rowan Downing.

8 [09.28.06]

9 MR. PRESIDENT:

10 Mr. Khieu Samphan, would you like to make a statement related to
11 your appeal, or if you would like your co-lawyers to speak on
12 your behalf?

13 THE CHARGED PERSON:

14 I would like to give the rights to my lawyer to speak on my
15 behalf.

16 MR. PRESIDENT:

17 Please sit down. The civil party lawyers, I note you were about
18 to make any comment.

19 MS. STUDZINSKY:

20 Good Morning, Mr. President, good morning Your Honours, good
21 morning to everybody. I would to like to make at this stage of
22 the hearing, some (recording malfunction) -- and if you allow to
23 do so, on behalf of the civil parties to make these remarks to
24 present brief oral observations, in this appeal hearing.

25 The co-lawyers of the civil parties did not file a written

14

1 submission to the Appeals of the defence within the deadline, nor
2 did submit a written pleading. Due to limited resources the
3 co-lawyers are not in the position to address all appeals of the
4 defendants.

5 [09.29.51]

6 However, the Pre-Trial Chamber ruled in their recent decision on
7 the relation between the Internal Rules and the Cambodian
8 Criminal Procedure Code, that, I quote: "Civil parties are thus
9 allowed to raise the issue of applicability of the Internal Rules
10 whenever they deem it necessary to do so". This is the case.
11 Today, the matter of provisional detention will be discussed, and
12 civil parties' rights like the right to reparations and - - is
13 this okay with the technical? Are there any problems?

14 JUDGE LAHUIS:

15 No, there is no problem with the technical; I was just wondering
16 how I should see the oral submissions in relation to this appeal?

17 MS. STUDZINSKY:

18 How you see the oral submission? I would like to, as you stated
19 in the decision of 25 February, civil parties may raise the
20 applicability of Internal Rules whenever they deem it, as I said,
21 necessary to do so.

22 JUDGE LAHUIS:

23 But of course within the existing regulations.

24 MS. STUDZINSKY:

25 But I add "new arguments" and therefore I would like to make this

15

1 short statement and referring also, we have a new case and you
2 ruled that you will decide every case upon its merits, and the
3 situation is different here because civil parties' rights are
4 directly concerned. And this is a difference maybe to the
5 situation in December. Could I -

6 JUDGE LAHUIS:

7 Yes, but within the existing regulations. The Pre-Trial Chamber
8 directed that if any new circumstances occur, which makes it
9 necessary for the civil parties to review that position, in this
10 sense that's prior to the hearing that you have developed a view
11 that you want to raise oral submissions, that you could announce
12 that to the other parties.

13 [09.32.46]

14 MS. STUDZINSKY:

15 But however there are new arguments and therefore I would like to
16 make this - - its really a brief remark and would like to
17 continue because first we have civil parties' rights concerned
18 and secondly, the reasons lie different, or in part different.

19 JUDGE LAHUIS:

20 Would you allow the Bench to talk this over?

21 (Deliberation between Judges)

22 [09.34.56]

23 JUDGE DOWNING:

24 Mrs. Studzinsky, could you inform the Court or the Chamber what
25 notice you have given to the prosecution and the co-lawyers of

16

1 your application at the moment?

2 MS. STUDZINSKY:

3 We did not give any notice to the parties about this application,
4 or let's say preliminary remark in this hearing. But, however,
5 maybe you could ask the parties and give them the right to be
6 heard and to give their opinion if they object these preliminary
7 remarks.

8 (Deliberation between Judges)

9 [09.36.37]

10 JUDGE DOWNING:

11 Ms. Studzinsky, we have in the past made it clear that there is
12 to be an orderly procedure here and people are not to be taken by
13 surprise. You come to the Court today without having given notice
14 to the other parties concerning that which you wish to say.
15 What you appear to be raising may be fundamental and should have
16 been the subject of notice, so that the other parties could have
17 been prepared to deal with these issues that you now raise. We
18 not prepared to hear you on the matter in these circumstances.

19 MS. STUDZINSKY:

20 Am I right that this is a decision that the Pre-Trial Chamber has
21 taken on this request to make preliminary remarks?

22 JUDGE DOWNING:

23 Yes, that is correct. We do not wish to hear from the other
24 parties. We have made it clear in the past what the views of
25 this Chamber are concerning applications without notice. Other

17

1 parties, have to, as a matter of fairness, know what is going to
2 be presented and what they have to answer in this Court.

3 MS. STUDZINSKY:

4 But I suggested to ask the parties if they object and if they
5 agree, there is nothing really new, and very new that nobody can,
6 or has any idea about what I'm saying, I'm not talking about
7 something very strange, what have never been discussed or raised.

8 JUDGE DOWNING:

9 The parties have not come prepared; and we are not prepared to
10 proceed on the basis of surprise. We have already indicated that
11 notice must be given. You have not given that notice. There were
12 weeks - - months, in which notice could have been given and you
13 come to Court today and mention this matter, by way of surprise
14 for all. So that is the ruling of this Court and we will not be
15 proceeding to hear you on the matter.

16 MR. PRESIDENT:

17 I would like now to invite the defence counsel to make your oral
18 submission. You have one hour for the both of you. Now you take
19 the floor.

20 [09.40.00]

21 SA SOVAN:

22 Mr. President, Your Honours. Good morning Mr. Co-Prosecutor,
23 good morning to civil party lawyers, and my respects to the
24 victims and the public in the public gallery.

25 Before I respond to the allegations - as in the report of the

18

1 Co-Rapporteurs. In today's hearing I would like the Pre-Trial
2 Chamber to include -- to combine both appeals, there is an appeal
3 on the release for the provisional detention and another appeal
4 on the extension of provisional detention of Mr. Khieu Samphan
5 for another year.

6 If the PTC permits, I would like to respond to both appeals and
7 take the observations from the Co-Prosecutors.

8 MR. PRESIDENT:

9 The Co-Prosecutors, do you have any comments to make regarding
10 the request by the defence counsel?

11 MR. YET CHAKRIYA:

12 Your Honour, in today's scheduling of the hearing here are two
13 parts; one is regarding an appeal against the release on bail and
14 another appeal on the extension of provisional detention of the
15 charged person. Therefore the prosecution has prepared according
16 to this scheduling and it should not be changed. It means we have
17 to deal with appeal by appeal, in that order. Thank you.

18 [09.42.50]

19 (Deliberation between Judges)

20 [09.45.45]

21 MR. PRESIDENT:

22 The Pre-Trial Chamber considers that in the proceeding, and you
23 know that the proceeding today is divided into two parts and you
24 did not object to the proceedings. Therefore, the Pre-Trial
25 Chamber will maintain the same proceeding which is divided into

19

1 two parts. However, in the afternoon, you can raise what you have
2 said in the morning again if you wish. Thank you.

3 MR. SA SOVAN:

4 I do not want to cause any difficulties but actually want to save
5 time, that's why I requested and it's also based on the Pre-Trial
6 Chamber's decision as I have it in my hands in the French
7 language, it's the last part before the decision.

8 MR. SA SOVAN (Speaking in French):

9 " ... for release, and that this question raised matters that are
10 closely linked to the order." That is the appeal against the
11 order extending detention. The Chamber will hear the two appeals
12 jointly.

13 MR. SA SOVAN (Speaking in Khmer):

14 However, I would accept the decision of the Pre-Trial Chamber and
15 if I have the right to respond to the Co-Rapporteurs I would do
16 so. With Your Honour's permission I would like my client to sit
17 next to me, because the other parties want to make their comments
18 heard as well.

19 MR. PRESIDENT:

20 The charged person may sit next to the lawyers.

21 [9.48.50]

22 MR. SA SOVAN:

23 Thank you Your Honours, Thank you, Mr. President for allowing my
24 client to sit next to me. I would like to respond to the report
25 that the national Co-Prosecutor just answered. I would like to

20

1 request the release of my client. For the following grounds: In
2 principle detention is the loss of his right - freedom. And
3 according to the judicial practice it is only necessary to detain
4 a person, however, there are also other measures not to detain in
5 order to preserve the evidence, to protect the safety.
6 But my client has been in detention for one year now and I would
7 like this matter to be considered, because this detention is
8 based on the reasons that if Mr. Khieu Samphan is released on
9 bail he, can exert pressures on the victims or witnesses not to
10 appear before the Chamber and if he was released on bail, Mr.
11 Khieu Samphan might (indistinct). In addition, if he were to be
12 released there could be public disorder in the current situation.
13 These are the reasons raised by the Co-Investigating Judges based
14 on their introductory submission. I would like to respond to
15 these reasons for his detention.

16 [09.51.13]

17 Up to today he has lived for 10 years in Pailin and until this
18 hour, I have not seen the Co-Investigating Judges prove any
19 evidence that Mr. Khieu Samphan write any letter to anybody to
20 threaten somebody else. And if he were to release on bail, he
21 could intimidate other witnesses so that they dare not to speak?
22 And not only that, but the Co-Investigating Judges also observed
23 that although 30 years since those crimes, the anger of the
24 victims and those who are represented by their lawyers, it is a
25 force to be recognized so that Mr. Khieu Samphan should not be

21

1 released on bail.

2 In my view this is a pre-meditated view on their part because one
3 sees it differently. One sees it as a metal from one side and I
4 see it as a wood from my aspect. And I believed that Your Honours
5 as well as the Co-Prosecutors to have justice, to seek justice,
6 and if Mr. Khieu Samphan is released on bail and if he were to
7 exert such pressures, I would like to see such evidence. If such
8 evidence cannot be shown, please don't use this pretext.

9 Secondly, they said, if Khieu Samphan is released on bail, he may
10 threaten and disturb public order, to cause social instability
11 and the Co-Prosecutors also showed the evidence of the 4th
12 December evidence of the victims' reactions. So, if he were to be
13 released on bail it could cause social disorder, it could
14 threaten the public order. To that point I would like to respond.
15 Currently everybody, including Your Honour, there is no such
16 event as happened previously. There was a misunderstanding at
17 that time and I know that the victims' lawyers as well as the
18 victims including myself I am not discredited to my parents, a
19 lot of my siblings and family members died.

20 [09.54.44]

21 And why should I defend him? I would respect to the souls of
22 those that died, including my father. I only want to seek the
23 truth. Nobody is going to put a charge to anybody until we find
24 the truth. We have to consider the facts.

25 But at the moment, even the Royal Government of Cambodia might

22

1 say about the social, economical disorder with a bit of
2 robberies, or that sort of mishaps happen. This is not the
3 factors that could cause to the release of my client.
4 Now the point I would like to raise is that if he is to be
5 released on bail, he would have his own safety risk. That is, he
6 might be threatened because of anger. But during the 10 years in
7 Pailin, nobody -- nobody ever go and scold him or to strike
8 against him like the strikes or the demonstrations like against
9 the land issue at this moment. The international Co-Prosecutor
10 also went to the Pailin area, to visit the area to ask the people
11 to complain against my client, Mr. Khieu Samphan. But they did
12 not receive much, the situation is calm, is stable, but I do
13 respect and respect the anger, but do not turn their anger into
14 revenge. Because everybody acknowledged there was a killing
15 during that era.
16 And he himself is not afraid of death, of being killed. And don't
17 take the events in '91 as a pretext because there was a political
18 motivation. And he has gone through a lot of such events even
19 during the Lon Nol regime. He was imprisoned once during that
20 era, and I would like Your Honours to consider, if you think you
21 like him and if he is to release on bail he would have his own
22 safety risk, I can tell you that he is not going to flee. The
23 reason that he is released on bail so that he could grow
24 vegetables or do a bit of gardening for his own use.
25 [09.57.42]

23

1 And another point I would like to raise regarding his detention.
2 I would like to modify the detention to "release under judicial
3 supervision" instead. As in the report read by the Judge there
4 is no evidence showing the risk or lack of it. Because I have
5 shown evidence that I have but you do not consider it, you are
6 the one who detained him, then you have to show me the evidence,
7 if there is any risk involved if he is released on bail. Because
8 during the ten years he lived he has never threatened anybody or
9 he has never been threatened by anyone.

10 Now I don't know what to tell you, but I would like you all to
11 consider it; because detention is a serious form and he cannot
12 gain back his honour by being detained. Even if in exchange for
13 money, he has lost his freedom, he lost his honour and once again
14 with Your Honours' leave I would like the Chamber to consider to
15 have my client Khieu Samphan released on bail under judicial
16 supervision and I would like to hear the observations by the
17 Co-Prosecutors if, until to date, there is no change in
18 circumstance, as I said, from 2001 to 2009. In that (indistinct)
19 even he was beaten and my teachers, my students told me "oh,
20 students went to beat Khieu Samphan but they did not even know
21 the face of Khieu Samphan", but that was the past, now here is
22 new, the situation is different.

23 Like I said for those who corrupt, who did bad things, they still
24 receive impunity but I want to counter that, I want to find
25 justice, to seek justice. And I have shown the histories from '91

24

1 until 2009 here. There is no risk on him. And if he is to go
2 out, and he is to be slashed to death, then nobody wants to go
3 out. But this is not existent, so from my point I can say its
4 wood and from the other perspective, they say it's metal.

5 [10.00.57]

6 So I would like to hear the observations by both the national and
7 international Co-Prosecutor, if the material changed in
8 circumstance really exist, and if he is to release on bail under
9 judicial supervision he can make a report on a regular basis to
10 the police.

11 This is my submission Your Honour. Thank you.

12 MR. PRESIDENT:

13 The international defence counsel may make your submission.

14 MR. VERGÈS:

15 My friend Mr. Sovan has spoken on behalf of the defence. The
16 defence has a joint position. So Mr. Sovan has said what I think
17 and I do not feel that there is any need to repeat what he has
18 already said.

19 MR. PRESIDENT:

20 The Co-Prosecutors please, the floor is yours.

21 MR. YET CHAKRIYA:

22 Your Honours, in the name of the ECCC prosecution, I submit to
23 uphold the response of the Co-Prosecutors, against the appeal by
24 the defence lawyers of Khieu Samphan, and I would like to make
25 additional observations as follows. The Co-Prosecutors submitted

25

1 the introductory submission on 18 July 2007, in which it set out
2 the facts and the names of the charged person Khieu Samphan and
3 the other four charged persons to be responsible for crimes
4 committed under the jurisdiction of the ECCC.

5 The charged person was provisionally detained on 19 November 2007
6 by the order of the CIJ for a period not exceeding one year, and
7 was charged with crimes against humanity and grave breaches of
8 the Geneva Convention as defined in Article 5, 6, 29(new) and
9 39(new) of the ECCC law.

10 Request for release on bail was initially made by the defence
11 lawyers on 13 June 2008 which was subsequently rejected by an
12 order of the CIJ dated 23 June 2008.

13 Notification of an appeal was submitted by the defence lawyers on
14 30 June 2008. However, the appeal was subsequently rejected.

15 The defence lawyers made an appeal before the PTC on 22 July 2008
16 against an order on the right and obligation of parties
17 concerning translation. A public hearing was held on 4 December
18 2008. Subsequently on 21 February 2009 the Pre-Trial Chamber
19 issued an order dismissing that appeal. On 8 October 2008, the
20 defence lawyers withdrew the appeal against the order for
21 provisional detention and made an urgent request for release to
22 the Co-Investigating Judges. On 28 October 2008 the
23 Co-Investigating Judges rejected the defence lawyers request for
24 release.

25 For this reason, an appeal was submitted by the defence lawyers

26

1 to the Pre-Trial Chamber on 27 November 2008. The Pre-Trial
2 Chamber set a date for the hearing on 27 February 2009 in respect
3 to that appeal against the order refusing release of the charged
4 person Khieu Samphan. However, one day before the hearing, that
5 is 26 February 2009, the defence lawyers notified that they
6 requested an hour delay in the hearing due to the delay of the
7 international co-defence lawyer. Subsequently, on the hearing day
8 the national co-defence lawyer requested an adjournment of the
9 hearing due to the international co-defence lawyer's absence.
10 Hence, the Pre-Trial Chamber set a new date for hearing, which is
11 today.
12 In their appeal, the co-defence lawyers submit that their client
13 shall be released on the following grounds: this Co-Investigating
14 Judges decision contains an error of law in omitting to take into
15 account the overall circumstances of the case, for their
16 justification and their decision relies on the gravity of the
17 alleged crimes.
18 The Co-Investigating Judges decision involves an error of fact as
19 it does not present any evidence to support their assertion that
20 risk can occur. Exerting pressures on victims and witnesses, on
21 public order and on personal security. Releasing the charged
22 person is the only appropriate measure. The charged person has
23 been detained for more than one year and due diligence is not
24 shown in the context of the proceedings, in this matter the
25 prosecution submits that in their request for release on bail.

27

1 The charged person has the burden to provide evidence showing all
2 factors justifying conditions for provisional detention are not
3 longer satisfied. Within the context of their appeal, the defence
4 lawyers need to establish material evidence for justification of
5 the charged person's release.

6 [10.09.04]

7 Guidance principles may be sought from the international criminal
8 law, especially in the case file of the SCSL dated 23 February
9 2004, which states that in most of the jurisprudence, in the ICTY
10 and the ICTR, in the process of evaluation the arguments of the
11 two parties, the burden in providing evidence still falls on the
12 defence lawyers and not the prosecution. In the practice of the
13 international criminal law, once a subject has been provisionally
14 detained, the defence lawyers bear the burden in finding evidence
15 to satisfy the court's condition justifying release on bail.

16 The defence lawyers neither indicate evidence nor material
17 changes in circumstance to justify the charged persons release on
18 bail. Nor, any change in the conditions for detention. Therefore
19 on 28 October 2008, the Co-Investigating Judges refused the
20 charged persons bail application, indicating that conditions for
21 detention as stated in Rule 63(3) are still satisfied and the
22 duration of the charged person's detention is excessive.

23 In the Co-Investigating Judges order refusing release, it
24 indicates there are at least 12 witness statements confirming the
25 facts and are consistent on the knowledge and participation of

28

1 the charged person in the alleged crimes. In the name of the
2 President of the State Presidium, as leader in the Politburo of
3 the Central Party, Office 870, and full rights member of the
4 Central Committee of the Communist Party of Kampuchea, therefore
5 the co-defence lawyer's submission in this matter is untenable.
6 On the submission that the order refusing release contains
7 insufficient reasons, the prosecution submits that the order
8 refusing release contains sufficient and appropriate reasons, as
9 the Co-Investigating Judges outlined the legal and factual
10 arguments before issuing the extension order for provisional
11 detention.
12 They are not obligated to express their view on any or all other
13 factors. Referencing recognized international jurisprudence, the
14 Pre-Trial Chamber finds that all Court decisions, including those
15 of the Co-Investigating Judges, must provide reasons in
16 compliance with international standards. The Pre-Trial Chamber
17 specifies that an obligation to provide reasons is required for
18 the Co-Investigating Judges to indicate the facts and the law
19 that they consider before issuing decisions.
20 The Co-Investigating Judges discharged this obligation by making
21 reference to the case file in general circumstances and in other
22 circumstances as they are not obligated to provide a view on all
23 other factors.
24 As in paragraphs 64 to 66 of the order on the appeal, against
25 provisional detention of the charged person Ieng Sary, the

29

1 Pre-Trial Chamber indicates that the Co-Investigating Judges are
2 not obligated to provide their views on all other factors.
3 The Co-Investigating Judges have discharged their obligation in
4 providing the facts and the law that they considered before
5 issuing the decision. The grounds stated in their numerous briefs
6 for various measures which violates the rights of the charged
7 persons for expeditious trial. Moreover, extension of provisional
8 detention is appropriate for the following reasons: the gravity
9 of the alleged crimes, the complexity of the case file to the
10 extent of on going investigation being carried out by the
11 Co-Investigating Judges, the charged person is faced with several
12 charges in relations to the mode of liability of the Joint
13 Criminal Enterprise, of its extended and systematic character
14 and, such provisional detention is warranted under the Internal
15 Rules.
16 Therefore, the submission that the decision contains insufficient
17 reasons cannot be accepted. Regarding the issue of due
18 diligence: the duration of provisional detention is not without
19 any reason, and due diligence is shown in the conduct of the
20 proceedings by the Co-Investigating Judges. In general, specific
21 investigation conditions within the ECCC jurisdiction shall be
22 thoroughly examined. The charged person is charged with crimes
23 against humanity and grave breaches of the Geneva Convention. The
24 charged person is being investigated for planning, instigating,
25 ordering, committing, aiding and abetting and superior

30

1 responsibility for several crimes against humanity. In addition
2 as stated in the introductory submission and in subsequent
3 documents, on the charge of commissioning, indicating the charged
4 person's participation in the Joint Criminal Enterprise as a
5 co-perpetrator for the crimes committed throughout Cambodia, and
6 within the temporal jurisdiction of this Chamber.
7 These crimes are the most serious and complicated and if
8 convicted the charged person could face life imprisonment. By
9 reviewing the case file it clearly shows the progress of
10 investigation and the additional evidence collected indicating
11 the charged persons responsibility for the alleged crimes.
12 In the order refusing release the Co-Investigating Judges
13 considered that the passage of time shall be a factor to
14 determine whether grounds for provisional detention are still
15 being satisfied. Other international tribunals consider this
16 time period as a relevant factor in determining the legality for
17 detention. The defence lawyers fail to show that their client's
18 detention for the past period of one year has any impact on fair
19 trial.
20 The ICTR has yet to find provisional detention inappropriate. The
21 ICTY considers a longer period of detention is appropriate due to
22 the serious nature of the alleged crimes. Moreover, the ECCC
23 Internal Rules safeguard a measure for provisional detention as
24 it can only be extended for a maximum of three years. In the
25 current case file there are well-founded reasons to believe that

31

1 the charged person may have committed crimes which are being
2 investigated. The Co-Investigating Judges also note that since
3 the arrest of the charged person the investigation has progressed
4 and a number of documentary evidence has been collected and the
5 passage of time has already been considered. Therefore
6 well-founded reasons to believe that have strengthened from one
7 year to another as the inculpatory evidence against the charged
8 person has increased both in volume and gravity.

9 [10.20.07]

10 In addition the Co-Investigating Judges have issued several
11 rogatory letters for case file 002. The Co-Investigating Judges
12 themselves as well their investigators have interviewed more than
13 200 witnesses in connection to the charged person and the alleged
14 crimes. Moreover documents in case file 001 which relate to the
15 charged person Khieu Samphan have already been transferred to
16 case file 002. At the same the Office of the Co-Prosecutors makes
17 contribution to the investigation by placing documents since the
18 submission of the introductory submission and after the arrest of
19 the charged person. The evidence collected by the
20 Co-Investigating Judges as well as the evidence placed in the
21 case file at the request of the Co-Prosecutors covers all the
22 forms and modes of the charged persons participation in the
23 alleged crimes against humanity, including crime based evidence
24 -- evidence which links the locations to the leadership
25 structure, in which the charged person exercised his authority in

32

1 ordering evidence to support his participation in the Joint
2 Criminal Enterprise, evidence to support jurisdictional elements.
3 Including wide spread and systematic attack against civilian
4 population.
5 Therefore the Co-Investigating Judges discharged their duties
6 with due diligence in conducting their investigations. Your
7 Honours, the issue raised by the defence counsel that their
8 client lived happily for 10 years at the border in the Pailin
9 area, this is contradictory to what happened at that time.
10 In 1991 Mr. Khieu Samphan entered Phnom Penh and was surrounded
11 by massive number of population so it was very hard to predict at
12 the time. A huge number of population surrounded him, throwing
13 rock at him and only with the intervention of the government did
14 Khieu Samphan could be escaped. And recently everybody knows
15 that Khieu Samphan is being detained at the ECCC and if he is to
16 be released on bail, the victims - - the families of the victims,
17 in massive number would show their anger towards Khieu Samphan
18 and would have an impact on his personal security.
19 In the name of the prosecution, I would submit, I would provide
20 the floor to my colleague to continue our submission. Thank you.
21 MR. PRESIDENT:
22 The Chamber will adjourn for 15 minutes break.
23 THE GREFFIER:
24 All rise.
25 (Court recesses from 1024H to 1040H)

33

1 [10.40.30]

2 MR. PRESIDENT:

3 I would like to invite the international Co-Prosecutor to make
4 your oral submission, the floor is yours.

5 MR. DE WILDE D'ESTMAEL:

6 Mr President, Your Honours, my learned friends of the defence and
7 civil parties, I would like to say something brief regarding the
8 consequences of your decision on 20 February 2009 regarding
9 translation rights, because these have implications for the two
10 hearings that will be held today. It is like a house of cards
11 falling down in the wind. The two appeals were primarily based,
12 especially the second; on the translation of every single page of
13 the case file in French so that the international lawyer could
14 understand it. With your decision of 20 February, most of the
15 arguments presented by the defence in the two appeals have become
16 irrelevant because the defence was basing its arguments on the
17 possibility that the Chamber would grant them their application
18 on translation rights.

19 That said, I should now like to turn to the appeal against the
20 order, denying release issued by the Co-Investigating Judges and
21 I will start with the discretionary power of the Investigating
22 Judges. The Co-Investigating Judges have discretion to refuse a
23 request for release and such power takes account of the material
24 in the case file and the property value of the evidence and the
25 prior conducts of the charged person the interests of witnesses

34

1 and victims and more generally the interests of justice. It seems
2 to us, that the Co-Investigating Judges correctly exercised their
3 discretion in their order and the defence has failed to show that
4 the Co-Investigating Judges committed any error.

5 The conditions governing such an error are fairly restrictive
6 because as it is said in the Judgement of 16 April 2007 of the
7 ICTR Appeals Chamber in the Sredoje Lukic case at paragraph 5 and
8 I will quote it in English because there is no French version
9 available.

10 MR. DE WILDE D'ESTMAEL (Speaking in English):

11 "The Appeal's Chamber will only overturn a Trial Chamber's
12 decision on provisional release where it is found to be (1) based
13 on an incorrect interpretation of governing law, (2) based on a
14 patently incorrect conclusion of fact or (3) so unfair or
15 unreasonable as to constitute an abuse of the Trial Chamber's
16 discretion".

17 MR. DE WILDE D'ESTMAEL (Speaking in French):

18 This is not what obtains (sic) here.

19 [10.44.18]

20 Furthermore, the appeal does not mention a significant change in
21 circumstances which could justify ordering the provisional
22 release of the appellant. In fact, on 28 October 2008, before the
23 Co-Investigating Judges took into account all the arguments
24 submitted by the defence and reviewed the investigation file at
25 the time, they also rejected the request for release on the

35

1 grounds that the conditions set forth in Rule 63(3) were still
2 valid and that the duration of the provisional detention was not
3 excessive.

4 Now turning to Rule 63(3), it provides two conditions that must
5 be fulfilled so that a person can be placed in provisional
6 detention. The defence relies on the well founded reasons that
7 the appellant may have committed the crimes charged. We consider
8 that this condition is still being fulfilled, that the
9 Co-Investigating Judges briefly but brilliantly reasoned this in
10 paragraphs 7 to 11 of their order.

11 We shall return to this in further detail in our hearing this
12 afternoon.

13 Moving on to Rule 63(3)(b). As we said in our reply and other
14 written briefs, the provisional detention of the charged person,
15 is necessary within the meaning of Rule 63(3)(b) and applies to
16 at least four of the five separate conditions. I shall not dwell
17 on these five conditions but, three of them have been challenged
18 by the defence.

19 The defence considers that the Co-Investigating Judges refusal to
20 grant provisional release is based mainly, or only on the
21 seriousness of the crimes charged. We agree that the seriousness
22 of the crimes charged alone cannot justify a refusal to grant
23 release.

24 But that is not what the Co-Investigating Judges say in their
25 order. What they say that this is a factor to take into

36

1 consideration in examining the five separate criteria to decide
2 to continue the provisional detention. This is consistent with
3 international law. Combined with other factors, the seriousness
4 of the crimes charged can be considered as being relevant to deny
5 provisional release. I refer in this respect to the Gotovina
6 Judgement of 17 January 2008, at paragraph 15.

7 It is vital for the credibility of the ECCC that proceedings
8 concerning charged persons comply with or follow the rights and
9 interests of all parties. For justice to be done, it must be
10 ensured that the charged persons or accused, participate at all
11 stages of the proceedings. Next, witnesses should be present and
12 should cooperate. The security of documentary evidence should be
13 guaranteed and the chambers should in serenity (sic). In view of
14 the importance of these proceedings for Cambodia and the
15 international community, any risk to these conditions must be
16 analysed carefully because no error can be permitted. It is like
17 walking on a tightrope without a safety net.

18 [10.48.18]

19 With the regard to the risk of pressure on witnesses and victims
20 and I refer here to Rule 63(3)(b), your Chamber has already
21 noted before that the vast majority of witnesses and potential
22 witnesses are ordinary people who may be intimidated by the
23 process of justice.

24 These are people who have suffered trauma, these are people who
25 are used to being quiet because of the impunity that has reigned,

37

1 and these are people who may be afraid to give testimony for fear
2 of reprisals.

3 And here we have a former Head of State who has held high office
4 all his life, both before 1975 and after 1979 and of course I
5 shall not dwell on the Khmer Rouge period in this regard. Many of
6 the witnesses have heard what the charged person has said and he
7 still has influence today with former Khmer Rouge members in
8 Pailin or elsewhere.

9 In short this is a person with influence, who in 2002 issued
10 threats of reprisals in the press in case he was arrested, the
11 key witnesses of which there only a few in this case, should be
12 able to tell their story without fear of intimidation or revenge.
13 This is even more so in the case of former subordinates.

14 But there is an aspect of Cambodian culture which is that, the
15 authorities are respected and feared even when they are no longer
16 in power. There is a concrete risk that when the liberation of
17 the charged person would fuel the fears of the victims and
18 witnesses to such an extent that it would prevent them from
19 participating in the proceedings. We must also take into account
20 that in Cambodia the judicial system is still being established.
21 Witness protection is a fledging concept. Violence is a fact of
22 life and access to weapons is easy.

23 In the Haradinaj case, in the ICTY Trial Chamber on 20 July 2007,
24 it was said that if a Chamber does not measures to guarantee the
25 appearance of witnesses in before the Judges it would compromise

38

1 the proper administration of justice and the Chamber noted that
2 there was a risk that it could not perform its prime duty which
3 was to ascertain the truth.

4 We must also take into account the access of the charged person
5 to the case file, and therefore to the names of potential
6 witnesses, of whom many have not yet been interviewed. He also
7 has access to the names of civil parties.

8 The Co-Investigating Judges lastly considered, rightly that in
9 this case that because of the media coverage of the charged
10 person since his arrest, the time that has passed has only
11 increased the risk of interference and pressure on witnesses in
12 case of release. There is every reason to disregard the defence
13 arguments in this regard.

14 With regard to protecting the security of the charged person, and
15 preserving public order. I shall not dwell on what has already
16 been submitted in writing, I will just highlight some new
17 information that could emphasize the threat to the charged
18 person's safety and the risk to public order.

19 We should bear in mind that evaluating such risks necessarily
20 includes anticipation. My colleague has already mentioned the
21 event of 1991, when an angry crowd threw stones at the charged
22 person.

23 The defence in its submissions forgot one thing, with regard to
24 the charged person's residence in Pailin. The fact that he lived
25 there without any major incidents should not lead the court to

39

1 think that the charged person would not encounter problems if he
2 was released. In fact, Pailin is a stronghold of the former Khmer
3 Rouge and the charged person and Nuon Chea lived there. I do not
4 think that they lived in peace but I think they were well
5 protected when they were there.

6 At the time, it was not possible for numerous incidents to occur.
7 Now, the charged person has been arrested and things have changed
8 completely.

9 I should like to mention the conclusions or the findings by the
10 University of Berkeley entitled "So we will never forget." Of
11 January 2009. The university made a presentation on this to the
12 ECCC and very recently the Co-Investigating Judges concluded that
13 it was not necessary to include it formally in the record of the
14 case. At the beginning of page 3, of the summary, it is apparent
15 that 90% of persons interviewed considered that the Khmer Rouge
16 should be tried for the crimes they committed. Also, the majority
17 of the interviewed persons said they felt hate towards the Khmer
18 Rouge who were responsible for acts of violence, and 61% of the
19 persons interviewed said they wanted the Khmer Rouge to suffer as
20 they had suffered.

21 [10.55.17]

22 Lastly, nearly 40% said they would take revenge if they were
23 offered the opportunity. So in our view this study only confirms
24 what we knew: many people and some people say its 30% of
25 Cambodians suffer from post-traumatic stress disorder, especially

40

1 among survivors of the Democratic Kampuchea regime. These people
2 have not in general received the appropriate care and therefore
3 their reactions in the face of the resurgence of the anxieties
4 occasioned by these proceedings is not foreseeable. So this deep
5 rooted hate and violence are not rhetorical, they well may occur
6 and who today would like to take such a risk? Who will like to
7 play puppet masters in such a situation?

8 In addition we have some concrete information to corroborate the
9 risk we have raised. In the New York Times of 17 June 2008, two
10 victims said, and you will forgive me for quoting such hateful
11 words that they "wanted to chop Nuon Chea into little bits, and
12 pour salt on his wounds, to give him a drumming (sic), to torture
13 him, and to shock him with electricity so he could talk" another
14 said "they wanted to see the charged person to suffer as they had
15 suffered because it is only by the charged person being killed
16 that they would find peace".

17 Similar threats were repeated during the press conference which
18 followed the lively hearing of 4 December 2008 on the issue of
19 translation. As you saw in the video footage of this conference
20 which was filed in the record of the case, the first victim said
21 bitter words and had violent gestures when responding to the
22 defence council and another threatened to use a terrorist group
23 and said that she or he would "twist his neck and eat him".

24 Let us be clear, we deplore, we regret these incidents and
25 statements and the fact that these people are attacking the

41

1 lawyers of Khieu Samphan. But we should not take lightly or
2 minimise these incidents because they strengthen the real risk of
3 violence the charged persons, his lawyers or the ECCC as an
4 institution if the charged person were to be released.
5 In its appeal the defence stated that at the very most the
6 Co-Investigating Judges were able to establish that there was
7 continued suffering amongst the victims of the regime but that
8 the judges had failed to establish that the release would disrupt
9 public order, in fact these two issues are not mutually
10 exclusive.
11 We shall refer briefly to a report by the Institute for Economy
12 and Peace dated 2008 which we mention in our response to the
13 appeal, with says that in regard to Cambodia, that there is a
14 high probability of acts of violence, a high probability of
15 violent crime and there is possibility - - and that it is easy to
16 procure small arms. This is at odds with the defence argument
17 that Cambodia is no longer a fragile state.
18 Lastly, I would ask you to consider closely the jurisprudence of
19 ICTY which is referred to by the defence especially in footnote
20 62, pertaining to the purported provisional release of charged
21 persons in post conflict contexts, because this jurisprudence
22 actually wholly contradicts the argument it is supposed buttress.
23 Neither Lukic or Galic or Boskoski or Gotovina were granted
24 provisional release in the quoted decisions. The appeal is full
25 of such errors when we study the jurisprudence that is quoted.

42

1 With regard to the Haradinaj case we have mentioned this in our
2 response and I do not think that they are relevant to this
3 proceeding. Furthermore, in the regard to the five non-cumulative
4 conditions of Rule 63(3)(b), I shall refer to the arguments which
5 were developed in this regard in the response to this appeal and
6 also in our response to the order closing the investigation, as
7 well as our response to the defences initial appeal against the
8 provisional detention which the defence abandoned in due course.

9 [11.01.26]

10 To conclude on this point I would ask you to note, that the
11 defence arguments have no basis and cannot challenge the
12 continued existence or indeed the existence of the five
13 conditions set forth in Rule 63(3)(b).

14 I would like to conclude with a comment regarding the
15 possibilities for release on bail, under whatever conditions. We
16 concur with the Co-Investigating Judges who believed that since
17 provisional detention is deemed necessary for a number of
18 reasons, there is no alternative to detention be it stringent
19 that would be capable of fully meeting the requirements served
20 by provisional detention and its maintenance. In the event of
21 release, provisional release, there is no bail condition such as
22 the obligation to report daily to the police station, applying
23 curfew, the obligation to not leave Pailin or Phnom Penh or of
24 handing over passports et cetera. None of these measures would be
25 compatible with the fact that one or several of the conditions of

43

1 Rule 63(3)(b) are met. If this chamber believes that the charged
2 person might indeed influence witnesses, might indeed be attacked
3 in his security, or that his presence in society at large might
4 disturb public order.

5 It would not be normal, it would not be consistent to allow this
6 person to move about freely, even under a whole array of
7 conditionalities. Such a measure would be inconsistent
8 incompatible with the fact that such risk as being real and
9 concrete has been found to exist, furthermore I would like to
10 point out that right now, the public is increasingly aware of
11 what is happening at ECCC, the public is now very much aware of
12 the past of the charged person and this is connected with the
13 fact that more than 3,000 complaints have been filed in case file
14 002.

15 In this respect I would like to conclude my intervention by
16 asking for a full denial of all the requests by the defence.

17 Thank you.

18 [11.04.26]

19 MR. PRESIDENT:

20 The defence counsel you can now respond.

21 MR. SA SOVAN:

22 (inaudible)

23 MR. PRESIDENT:

24 Please press the button to activate the mike before you can
25 speak.

44

1 MR. SA SOVAN:
2 Thank you Your Honour I would like to state again, I think I will
3 be brief, I am wondering regarding the recollection of events
4 from 1991, I can see that there has been development and good
5 progress because the government states clearly that we would like
6 to have stability in the society.
7 I already stated that there might be some crimes like robbery and
8 theft but the situation has improved and this has been rejected
9 by the Co-Prosecutors, they said that when Khieu Samphan was
10 released he would have been beaten again. And doubt has been cast
11 on me, what language are we using here if I say it is wood and
12 then you said it is a metal things like that - - object?
13 My second doubt, for example if Khieu Samphan were to be release
14 that he would exert pressure on witnesses by the Co-Prosecutors,
15 1.7 million people died including my family members - -people in
16 my family who died, and then you said that if he were released
17 that he would be threatened or mistreated. I think it does not
18 exist. If you know you have any proof to support your arguments,
19 you can have to present it right here, because he himself is
20 afraid of dying. Of his risk, of his security and the prosecutor
21 said that you went to Pailin but Mr. Robert Petit also went to
22 Pailin and no one caused any harm to them but I think if we talk
23 about the truth, I also talked to Mr. Khieu Samphan, he doesn't
24 need to even thank me, what I am here doing is to help seek for
25 the truth, and when you said that Cambodian people were violent,

45

1 I think - - on 4 December I can recall, a senior lady approached
2 me, and pulled me, I was not very angry with her. In the future
3 when I see her again I will apologise to her.

4 [11.08.07]

5 If I did something wrong but now they came here with a kind of
6 T-shirts with logos of the boat races and we provoked them
7 actually, they were provoked to start the violence and I am
8 suspicious why this kind of thing happened. And now, after all,
9 why should we really detain him further?

10 I would like to move back to the Pre-Trial Chamber Judges, I
11 would like you to consider the matter as for example the
12 Co-Investigating Judges agreed that he would not escape. And he
13 is here, and I believe that he will never flee. But I would like
14 to wrap up, just to save our time.

15 I am very suspicious now; I would like to end by maybe giving
16 five to ten minutes to my colleague to make a comment, because he
17 will talk on my behalf also. I just filed an application to the
18 Investigating Judges to investigate the matter of alleged
19 corruption because it is widespread now and rampant. So I would
20 like my colleague now to add further on top of my comments.

21 [11.09.45]

22 MR. PRESIDENT:

23 The co-defence lawyer you can now take the floor.

24 MR. VERGÈS:

25 We have asked of the Co-Investigating Judges to give us

46

1 information regarding the proceedings that are underway in the
2 field of corruption, and on this subject perhaps I could provide
3 some explanations.

4 JUDGE DOWNING:

5 Counsel, you appear to be raising new issues, and not by way of
6 response to what has been provided or asserted by the --

7 MR. VERGÈS:

8 (Not interpreted)

9 JUDGE DOWNING:

10 I'm sorry, let me finish. You are given an opportunity to
11 respond to the remarks of the prosecutors, not to open new
12 matters at this point. If you wish to raise these issues, which
13 I think you are now wishing to raise, it should have been done
14 when you first addressed us. Not by way of response. It may be
15 that you can raise these matters in this afternoon's case, but
16 you are at the moment given the opportunity to respond to the
17 submissions by the prosecutors, not to raise new issues. You are
18 now, it seems to me, to be raising new issues.

19 MR. VERGÈS:

20 So, with your leave, I shall not raise a new issue, I shall
21 follow your guidance, but I would like to explain why I am not
22 insisting, in line with what happened with the civil parties this
23 morning. I shall be very brief. First of all, I shall remain
24 silent because I need not be more careful about your honour than
25 you are yourselves. If you believe that we should not talk about

47

1 corruption here I shall not impose such a debate upon you.
2 I shall keep silent because I understand your caution in this
3 respect, and I believe that the presumption of innocence that you
4 sometimes question in respect of our accused might be beneficial
5 to you. And I shall also remain silent because the head of state,
6 of this state, has publicly stated that he wants this Chamber to
7 be brought to a conclusion. In this sense, you are mere
8 squatters. A member of the government that accommodates you here
9 says that you're obsessed only by money, thus corroborating the
10 accusations, be they grounded or not, regarding corruption that
11 might possibly be plaguing this tribunal.
12 And once again, still being brief, I shall stay silent because
13 it's not good to be shooting on ambulances and victims and the
14 wounded, it is not good to be shooting on houses and dying people
15 or institutions.
16 MR. PRESIDENT:
17 The charged person, Mr. Khieu Samphan, would you like to make any
18 final statement. You can take the floor now if you wish to do
19 so.
20 [11.13.33]
21 THE CHARGED PERSON:
22 (inaudible)
23 MR. PRESIDENT:
24 I beg your pardon?
25 THE CHARGED PERSON:

48

1 Because I did not put my headset, I could not hear you.

2 MR. PRESIDENT:

3 Would you make any final statement?

4 THE CHARGED PERSON:

5 I would like my defence counsel to continue speaking on my
6 behalf.

7 MR. SA SOVAN:

8 I would like to respond to the submission made by the
9 Co-Prosecutors, I thank you Your Honour for giving me the last
10 minutes. I am very suspicious with the international
11 Co-Prosecutor. And I don't want to be long, I think he may not
12 know Pailin very well because he said that Khieu Samphan was in
13 Pailin and then I am suspicious, however Jacques Vergés, my
14 colleague, already stated clearly that the government has been
15 aware of the matter, so my suspicion has been already stated by
16 my colleague that we would like the Pre-Trial Chamber to take
17 this seriously.

18 Because Khieu Samphan he, himself, loves himself so much, because
19 he really does not want to die and as I told you earlier when we
20 met with the victims, the senior lady, told me and she cursed me
21 and I was so disappointed to hear her message, because she cursed
22 me to die in a plane crash for example. And I follow the
23 proceedings and I am seeking for the truth, and I think we can
24 discuss this matter in another trial. I thank you very much Your
25 Honours, that is my comment.

1 [11.16.29]

2 MR. PRESIDENT:

3 The Pre-Trial Chamber will proceed to the second criminal case
4 file, I would like the reporting judge to read the report of
5 examination.

6 JUDGE VUTHY:

7 The Pre-Trial Chamber Criminal Case file number 002/19/09/2007.

8 A, Introduction. Pursuant to Rule 77(10) of the Internal Rules
9 of the Extraordinary Chambers in the Courts of Cambodia, the
10 President of the Pre-Trial Chamber has assigned Judges Huot Vuthy
11 and Rowan Downing to set out the details of the Order on
12 Extension of Provisional Detention issued on 18 November 2008 by
13 the Co-Investigating Judges, against which the present Appeal is
14 lodged, and the relevant facts of Case File No.
15 002/19-09-2007-ECCC-OCIJ (PTC 15).

16 Identification of the Charged Person. Khieu Samphan, alias Hem,
17 male, born 27 July 1931, at Commune of Rom Chek, District of Rom
18 Duol, Province of Svay Rieng, Cambodia, Khmer nationality,
19 pre-arrest address village of KonKhlong Sangkat Otavao, Khan
20 Pailin, Pailin City, father's name Khieu Long, deceased, mother's
21 name Por Kong, deceased, spouse's name So Socheat, with four
22 children.

23 Khieu Samphan is represented by co-lawyers Mr. Sa Sovan and Mr.
24 Jacques Vergès.

25 Charges. Khieu Samphan is under investigation for crimes against

50

1 humanity, murder, extermination, imprisonment, persecution and
2 other inhuman acts, and grave breaches of the Geneva Conventions
3 of 12 August 1949, wilful killing, wilfully causing great
4 suffering or serious injury to body or health, wilful deprivation
5 of rights to a fair trial of a prisoner of war or civilian,
6 unlawful deportation or transfer or unlawful confinement of a
7 civilian, being crimes set out and punishable under articles 5,
8 6, 29(new) and 39(new) of the Law on the Establishment of the
9 Extraordinary Chambers in the Courts of Cambodia dated 27 October
10 2004.

11 Purpose of this report. This report of the co-rapporteurs sets
12 out the details of the decision appealed against and the facts at
13 issue before this Court. It is to assist those who are not
14 parties to the proceedings understand the matters before the
15 Court.

16 B, Co-Investigating Judges' Order on Extension of Provisional
17 Detention. On 18 November 2008, the Co-Investigating Judges of
18 the ECCC issued an Order extending provisional detention of the
19 Charged Person, who has been detained since 19 November 2007, for
20 another term not exceeding one year. The Co-Investigating
21 Judges dismissed the co-lawyers' arguments that Khieu Samphan's
22 international co-lawyer's inability to "examine the investigation
23 file in a language he understands" has rendered the detention
24 arbitrary and that they must have stayed their decision on
25 extension of provisional detention pending the Pre-Trial

51

1 Chamber's decision on their appeal relating to translation rights
2 and obligations. The Co-Investigating Judges held that "the Order
3 extending the provisional detention of Khieu Samphan is not
4 contingent upon the outcome of the appeal against the Order on
5 Translation Rights and Obligations of the Parties." They
6 considered that they must instead look to the requirements laid
7 out in Internal Rule 63 to determine whether an extension of
8 provisional detention is warranted.

9 The Co-Investigating Judges found that the co-lawyers' contention
10 that they lack impartiality equates to an application for
11 disqualification per Internal Rule 34(5) for which they have no
12 jurisdiction. The Co-Investigating Judges also concluded that
13 they were not obliged to recuse themselves under Internal Rule
14 34(1) as neither the fact that they are charged with ordering
15 provisional detention while at the same time conducting the
16 judicial investigation nor their previous order on translation
17 affect their impartiality with regard to provisional detention.
18 Further, the Co-Investigating Judges held that there had been no
19 change in circumstances since they issued their Order Refusing
20 Request for Release on 28 October 2008, in which they found that
21 provisional detention was still justified and necessary.

22 C, Khieu Samphan's Appeal. On 4 December 2008, the co-lawyers
23 filed their Appeal Brief Against the Order on Extension of
24 Provisional Detention, in which they request that the Pre-Trial
25 Chamber, 1) note that Khieu Samphan is being held on a basis of a

52

1 null and void measure, 2) order his immediate release, and 3)
2 award him compensation for being detained arbitrarily and without
3 legal authority. They do so on the ground that the
4 Co-Investigating Judges had to defer their decision, that they
5 issued an unnecessary decision extending an arbitrary detention
6 and that the charged person is being held without legal
7 authority.

8 D, Co-Prosecutors' Response. On 9 January 2009, the
9 Co-Prosecutors filed their Response to the Appeal , requesting
10 the Pre-Trial Chamber to dismiss the Appeal on the main grounds
11 that the Co-Investigating Judges "had no obligation to defer
12 their decision" and that the charged person "has failed to
13 demonstrate any material change in circumstances since he was
14 originally detained" .

15 E. Civil Parties' Response. The Co-Lawyers of the Civil Parties
16 did not file any responses.

17 Two, Examination by the Co-Rapporteurs.

18 A) Obligation of the Co-Investigating Judges to Defer their
19 Decision. The co-lawyers submit that the Co-Investigating Judges
20 were under an obligation to defer the decision relating to the
21 extension of provisional detention for two reasons. First, they
22 argue that the proceedings were fundamentally flawed and delayed
23 primarily as a result of the Co-Investigating Judges' refusal "to
24 order translation of all the materials in the Khieu Samphan Case
25 File" which "severely impair Khieu Samphan's rights" . The

53

1 co-lawyers point out that they have appealed the Co-Investigating
2 Judges' refusal to order the translation of the case file before
3 the Pre-Trial Chamber and that proceedings concerning extension
4 of detention should have been stayed pending the outcome of this
5 appeal. Moreover, in their view, the delay in those proceedings
6 should have obliged the Co-Investigating Judges to defer their
7 decision with regard to extension of detention.

8 Second, the Co-Lawyers argue that "the Co-Investigating Judges
9 could not decide impartially, in view of their position on the
10 translation issue and the exceptional circumstances surrounding
11 the proceedings." Further, they contend that the
12 Co-Investigating Judges lack impartiality owing to the fact that
13 they are "charged with conducting the judicial investigation"
14 thereby making them unable to "take into account the defence's
15 views" on the issue of well-founded reasons that the charged
16 person may have committed the crimes mentioned in the
17 Introductory Submission.

18 In response, the Co-Prosecutors submit that the Co-Investigating
19 Judges "had no obligation to defer their decision; on the
20 contrary, they had to make a decision on the extension of
21 provisional detention before its expiry." In addition, they
22 argue that "this is not the proper forum to hear contentions
23 regarding the impartiality of the Co-Investigating Judges which
24 are in any event baseless."

25 B, Arbitrariness of the Order. The co-lawyers raise the argument

54

1 that the order made by the Co-Investigating Judges extending
2 Khieu Samphan's detention is arbitrary because the
3 Co-Investigating Judges were under no obligation to decide on the
4 extension of detention as, in principle, provisional detention is
5 for a one-year term only. The co-lawyers also submit that "the
6 Order dated 28 October 2008 does not demonstrate the need for
7 detention" and that expiry of provisional detention in itself
8 constitutes a change which should be considered by the
9 Co-Investigating Judges.

10 Further, they state that: "The co-lawyers for the defence clearly
11 demonstrated that in releasing Khieu Samphan, there was no risk
12 of pressure being exerted on any witnesses or victims or
13 prejudice to public order or, for that matter, putting his
14 personal security at risk. Therefore the Co-Investigating Judges
15 could have deemed an alternative to detention to be an
16 appropriate measure. They declined to do so, and have no reason
17 for their refusal."

18 In response, the Co-Prosecutors argue that the Co-Investigating
19 Judges, who "are mandated, by virtue of the Rules, to decide on
20 the placement in, as well as, the maintenance and extension of,
21 provisional detention" had "the positive obligation to re-assess
22 the conditions for continued detention and decide whether to
23 extend the provisional detention order or not."

24 The Co-Prosecutors assert that the "defence do not challenge the
25 existence of a well-founded reason to believe that the charged

55

1 person may have committed the crimes specified in the
2 Introductory Submission" nor "identify any material change of
3 circumstance to show that the conditions necessitating his
4 detention under Rule 63(3)(b) are no longer met."
5 C, Legal Authority Underpinning Provisional Detention. The
6 co-lawyers for the charged person consider that the initial Order
7 on Provisional Detention issued by the Co-Investigating Judges
8 "is null and void" , as the lack of translation of the case file
9 had led to a "nullity of the proceedings" . As a result, they
10 submit that the subsequent Order on Extension of Provisional
11 Detention "should be considered to be non-existent" in that
12 "there is no legal authority underpinning Khieu Samphan's
13 detention." Further, the co-lawyers add that the Pre-Trial
14 Chamber's delay in issuing a decision concerning detention
15 obliged the Co-Investigating Judges to release the charged person
16 from detention per Article 278 of the Cambodian Code of Criminal
17 Procedure.
18 The Co-Prosecutors respond that "[t]his argument is without merit
19 for two reasons: (1) the defence voluntarily withdrew their
20 appeal against the Provisional Detention Order, and thus failed
21 to submit any alleged violation of the charged person's rights to
22 the Pre-Trial Chamber; (2) article 278 of Cambodian Code of
23 Criminal Procedure, which is the lynchpin of the defence's
24 argument, is inapplicable before the ECCC." Phnom Penh, 26
25 February 2009, Co-Rapporteurs, Judge Huot Vuthy, Judge Rowan

56

1 Downing.

2 [11.34.01]

3 MR. PRESIDENT:

4 Mr. Khieu Samphan, please stand up. In the second case, you are
5 entitled the same rights as I mentioned earlier, according to
6 Rule 21(1)(d) of the Internal Rules, so the rights are still
7 maintained, and in this case, this appeal, would you like to talk
8 or to make any statement related to this appeal? Or if you would
9 like your lawyers to speak on your behalf?

10 THE CHARGED PERSON:

11 I would like to give the rights to my defence counsel to speak on
12 my behalf. Thank you.

13 MR. PRESIDENT:

14 So I would like the lawyer of the charged person to make his oral
15 submission.

16 MR. SA SOVAN:

17 Mr. President, Your Honours, as I informed Your Honours I would
18 like to combine the two appeals together so I will not repeat
19 what I said on the detention.

20 Regarding his initial detention, there was a controversial issue
21 on the translation issues, into the French language, because the
22 international co-defence lawyer is French, and he requested for
23 the French translation. Therefore I would like to make an
24 observation only, on the issue of the deferring of the decision
25 on the appeal against the initial detention.

57

1 Because when a person is detained for one year there should be a
2 possibility of a person to make an appeal and an appeal was made
3 and the decision on that appeal is deferred because on 4 December
4 2008, the Pre-Trial Chamber made a public hearing, but did not
5 announce the decision. I also, as the defence counsel for the
6 charged person, think that deferring such a decision is a
7 violation on his rights. At least the decision on that appeal
8 shall be reached first, so that the Co-Investigating Judges can
9 consider their decision on the extension of the provisional
10 detention.

11 However, as I understand, since Mr. Khieu Samphan's arrest on 17
12 November 2007 until 19 November 2008, when there is no decision
13 on the extension of provisional detention he shall be released on
14 bail. Therefore the Co-Investigating Judges continued the
15 detention of Mr. Khieu Samphan on 18 November 2008 and we, the
16 defence counsel for Mr. Khieu Samphan made an appeal to the
17 Pre-Trial Chamber regarding that extension of provisional
18 detention. Without waiting for the decision of the Pre-Trial
19 Chamber. This is the point I would like to make. And this is
20 contradictory the principle of law.

21 So It means they have a presumption that my client is guilty and
22 this is a violation of his right and freedom.

23 I do not want to return to the issues on the grounds for his
24 detention. I would like Your Honour, the Pre-Trial Chamber to
25 consider on this issue and I would like to remind Your Honours

58

1 that, we, the defence counsel for Mr. Khieu Samphan as well as
2 other lawyers for the charged persons. We are not consulted for
3 the internal rules or its amendments. Usually in the past, in
4 practice, when a client is not satisfied with the lawyers, they
5 could appeal or they could lodge an appeal to the appeals court
6 but within this particular court such appeal is not possible, for
7 either Mr. Khieu Samphan or other charged persons.

8 Let me know return to the issue of the translation. When there is
9 an issue on the translation, the Co-Investigating Judges issue an
10 order regarding the right and obligations on the translation
11 issue. So, they are themselves, the law and they are also the
12 Judge. I would like to remind your honours that, I have to defend
13 Mr. Khieu Samphan. He is being detained by this court. What I
14 remind Your Honour is on the equality of arms and I would like
15 all the Chambers, all these Extraordinary Chambers in the Courts
16 of Cambodia to seek justice. I myself I love justice. So certain
17 points I am not satisfied but I have to accept it, I thank you
18 very much Your Honours, and the President.

19 [11.41.04]

20 MR. PRESIDENT:

21 The international co-defence lawyer may make your response.

22 MR. VERGÈS:

23 Mr. Sa Sovan has said what I thought.

24 MR. PRESIDENT:

25 May the Co-Prosecutors make your oral submission.

59

1 YET CHAKRIYA:

2 Thank you, Mr. President, Your Honours. In the name of the ECCC
3 prosecution, I submit to uphold the response of the
4 Co-Prosecutors against the appeals by the defence lawyers of
5 Khieu Samphan, and I would like to make additional observations,
6 as follows:

7 On 18 July 2007 the Co-Prosecutor submitted the introductory
8 submission, and also on the extension of the detention not
9 exceeding one year. And on 4 December 2008 the defence lawyers
10 lodged and appeal to the Pre-Trial Chamber and the Pre-Trial
11 Chamber set a date for 27 February 2009 regarding that appeal.
12 However, the hearing was adjourned due to the absence of the
13 international co-defence lawyer. The defence lawyers submit
14 that, the charged person shall be released because the
15 Co-Investigating Judges have an obligation to defer their
16 decision, the Co-Investigating Judges are not partial thus cannot
17 render an extension order for provisional detention. The
18 Co-Investigating Judges issued an unnecessary decision on an
19 extension on provisional detention within inappropriate reasons,
20 and the extension order for the provisional detention was based
21 on a non-existent measure.

22 In this matter, the prosecution submits that, the
23 Co-Investigating Judges have no obligation to defer their
24 decision, but they have an obligation to decide on the issue of
25 extending provisional detention. There is no provision or article

60

1 in the internal rules of the Code of Criminal Procedure
2 authorizing the Co-Investigating Judges to defer their decision
3 making or waiting until such time the Pre-Trial Chamber makes its
4 decision in a separate procedure. An appeal to the Pre-Trial
5 Chamber does not have any effect to interrupt any proceedings.
6 Rule 63 (4) and (7) do not specify any effect for suspending a
7 charged persons appeal against a Co-Investigating Judges order.
8 The Co-Investigating Judges do not have an obligation to defer
9 any proceedings; it is insufficient to base an irregular process
10 of the proceedings before the Pre-Trial Chamber to prevent the
11 Co-Investigating Judges from taking measure necessary for the
12 investigating process. Specifically their decision to extend
13 provisional detention.

14 [11.45.13]

15 A violation of the charged person rights as submitted in respect
16 of the translation issue for documentary evidence and which has
17 been mentioned in every submission made by the defence lawyers
18 since April 2008 is weak, unclear and mostly based on an
19 assumption.

20 Arguments raised by the defence lawyers in their submissions
21 intend to define a delay in taking measures as being equal to
22 procedural infringement, moreover as a consequence delaying in
23 making extension decisions of provisional detention can impact
24 the investigation as it can lead to a release of the charged
25 person although the Co-Investigating Judges have found that het

61

1 release will lead to eventual risks on victims and witnesses, on
2 preserving evidence, on the security of the charged person and
3 public order, and these actions can lead to violations of Rule
4 63(3) (a) and (b).

5 The defence lawyers for the charged person cannot submit to
6 issues of Co-Investigating Judges impartiality in their appeal.
7 The charged person accused that the Co-Investigating Judges are
8 not impartial, thus any extension decision on provisional
9 detention is illegal.

10 In the name of the prosecution we submit that this allegation is
11 improper. The principle criteria for making an appeal against
12 extension order on provisional detention are whether the
13 conditions specified in Rule 63(3) are still being satisfied.

14 In addition the internal rules allow the charged person to appeal
15 any lacking of impartiality of any Chamber of the ECCC by request
16 for disqualification as set out in Rule 64 - - 34.

17 [11.48.00]

18 It is submitted that arguments in the appeal of the defence
19 lawyers in respect in lacking impartiality or bias shall not be
20 considered by the Pre-Trial Chamber as the issue is beyond the
21 scope of the appeal against the extension order of provisional
22 detention.

23 If the defence lawyers are confident they have satisfactory legal
24 ground fro making disqualification request against any of the
25 ECCC Judge the charged person shall make such request for

62

1 disqualification in compliance with Rule 34 of the Internal
2 Rules. In any case the arguments that the Co-Investigating
3 Judges are not impartial are untenable it is necessary for the
4 defence lawyers not to base entirely on previous decisions of the
5 Co-Investigating Judges on the translation issue of documentary
6 evidence in making there submission that the extension order for
7 provisional detention is not impartial.

8 It should be recalled that the Co-Investigating Judges fulfilled
9 their duties independently and impartially while other parties
10 may or may not play an active role during their investigation.
11 The extension order for provisional detention was based on legal
12 and factual arguments as stipulated in Rule 63(3). It is
13 unreasonable to argue that the extension order for provisional
14 detention issued by the Co-Investigating Judges is as a result of
15 a separate decision on the translation right.

16 The decision on the translation of documentary evidence is
17 irrelevant to the legality of provisional detention. Therefore
18 the arguments made by the co-lawyers for the charged person in
19 respect to the Co-Investigating Judges impartiality are
20 untenable.

21 Your Honour I would like my international colleagues to continue
22 our submission.

23 [11.50.40]

24 MR. PRESIDENT:

25 The international Co-Prosecutor, you now take the floor.

63

1 MR. DE WILDE D'ESTMAEL:

2 In view of the time, I would like to be sure that I will not be
3 cut short in the middle of my presentation. Shall I develop the
4 arguments now? I shall take about 20 minutes or do you think the
5 lunch break will cut into my presentation?

6 MR. PRESIDENT:

7 As requested by the Co-Prosecutor we will adjourn for our lunch
8 break and the Chamber will resume at 1:30 this afternoon.

9 THE GREFFIER:

10 All rise.

11 (Court recesses from 1151H to 1329H)

12 MR. PRESIDENT:

13 The Chamber is now back in session. I would like to invite the
14 Co-Prosecutor to continue your submission.

15 MR. DE WILDE D'ESTMAEL:

16 The length, Mr. President, Your Honours, of the proceedings
17 before your Chamber -- in regard to the defence initial appeal
18 against the provisional detention in 2007, it is worth noting, as
19 the Co-Investigating Judges said, that the defence voluntarily
20 withdrew its appeal before it was decided upon by the Chamber.
21 Secondly, the Pre-Trial Chamber has already had occasion to
22 repeat, at least on two occasions, first during the hearing of
23 the 23rd of April 2008, and in its instructions on the 2nd of
24 October 2008, that the delays in the proceedings were due to the
25 defence, which from April 2008 placed itself in a position where

64

1 it could not offer an effective defence for its client by
2 choosing not to cooperate with the ECCC.
3 Furthermore, you heard the international co-lawyers, in a few
4 sentences, explicitly and fundamentally challenge the existence
5 of the ECCC, its legitimacy, the length of its duration and made
6 particular reference in so doing to the Pre-Trial Chamber. This
7 is a strategy of disruption on the part of the defence, which for
8 one year has only submitted one argument, that is the argument on
9 translation, and which has refused to cooperate with the ECCC, in
10 particular with the administrative organs or services of the
11 Court.
12 This strategy on which this international lawyer has based all
13 his career consists in wilfully disrupting and delaying
14 proceedings so that no trial worthy of the name can be concluded
15 within a reasonable time frame. Can this Chamber afford to
16 continue to tolerate such a strategy before the ECCC? Can it be
17 tolerated further when impunity is coming to an end, when charged
18 persons are aging, when victims have been waiting so long for
19 justice to be done, and efficiently, in compliance with
20 international standards? Does this strategy -- does it have any
21 relevance before a Court such as ours, when decolonisation and
22 the Cold War are now well behind us?
23 The rules apply to people appearing before the ECCC apply to all
24 parties. The prosecution, the defence and civil parties. They
25 are identical to the rules that apply before other international

65

1 courts, or hybrid courts. When one agrees to represent a charged
2 person before the ECCC, one does so knowingly. Each defence team
3 is required to cooperate with the administrative services of this
4 Court. Each defence team must act as a team by using all the
5 skills, means and resources, both linguistic and intellectual, to
6 provide effective and efficient representation of a client.
7 To return to the absence of cooperation on the part of the
8 defence, and the systematic challenge of the authority of this
9 Chamber and the ECCC in general, this defence strategy, one
10 wonders, or one might think, it might be a sign of a lack of
11 availability and commitment of the defence in respect of this
12 team. But every lawyer must be diligent in defending his or her
13 client before this Court, and the lawyer has the duty to study
14 the case file to afford the charged person due process.
15 A fair trial is in the interest of all parties, and therefore of
16 the prosecution as well, and this is not only because the
17 prosecution wishes to ensure that the trials have credibility, it
18 is not in the interests of the Co-Prosecutor for the charged
19 person not to have effective representation, because this could
20 be a ground for appeal at a later stage in the proceedings.
21 The defence has never asked for investigative action, it has
22 never asked to place exculpatory documents in the case file. The
23 underlying question is linked to what the Chamber raised during
24 the hearing on the 23rd of April 2008, which is, in the main,
25 finding out whether defence lawyers are now ready, effectively,

66

1 to defend the rights of the client and to do so diligently. This
2 would, in particular, require acceptance of your decision of the
3 20th of February 2009 and to apply the Co-Investigating Judges'
4 order in respect of the rights and obligations for translation.
5 [1.37.45]
6 In our view, this application should not be granted, so the
7 Chamber can draw all the necessary inferences in order to
8 preserve the fundamental rights of the charged person. And now,
9 I shall move on to the appeal against the order on the extension
10 of provisional detention.
11 Rule 63(6) and (7) provide for review of the detention. This
12 review is carried out after having heard the defence alone. The
13 prosecution and the civil parties are not authorised to submit
14 their viewpoints, at least at that stage. In case of extension
15 of provisional detention, the charged person may appeal against a
16 decision, a reasoned decision, which he has done. It is now for
17 the appellant to provide sufficient material to support the fact
18 that the reasoning set forth by the Co-Investigating Judges in
19 their extension order is in error, or is no longer justified. It
20 is for the defence to identify a material change in the
21 circumstances, or a change in the conditions of detention.
22 This is not the case in the extension order, or the appeal
23 against the order, because it relies solely on the violation of
24 the defence's rights in respect of appeal, which you found not to
25 exist on the 20th of February. The defence considers that the

67

1 expiry of the detention is a change to take into consideration.
2 It is not a change in circumstance, because the purpose of the
3 periodic review of the Investigating Judges is to ensure that the
4 conditions for detention are being met. Furthermore, due to the
5 extension of the order, provisional detention remains legal.
6 As we have said before, in their order the Co-Investigating
7 Judges also took into account the duration of the detention in
8 order to come to their decision. They found this to be
9 reasonable, because of the complexity of the file, the
10 seriousness of the crimes and the scope of the investigations.
11 The defence also failed to show how detention for a year could
12 have been prejudicial to the charged person and prevented a fair
13 trial.

14 [1.41.10]

15 As to the well-founded reasons to believe that the charged person
16 committed the crimes, and here I make reference to Rule 63(3)(a),
17 which I did not develop this morning, and which I wish to refer
18 to now, the investigation record still contains facts and
19 information to convince an objective observer that the person
20 concerned may have been responsible for the crimes mentioned in
21 the introductory submission or may have committed them. The
22 Co-Investigating Judges showed why in their order of the 18th of
23 November 2008 which itself refers to the order of 20th October.
24 Although none of the two appeals of the defence contain arguments
25 concerning the well-founded reasons to believe, or an analysis of

68

1 the evidence in the investigation file, because the defence
2 considered that it did not have access to the case record in a
3 language it understood, it still made vague references,
4 particularly in paragraphs 7, 44 and 85 of the appeal that was
5 discussed this morning, and paragraphs 8 and 49 of the second
6 appeal which we are discussing this afternoon. The defence
7 advanced the alleged lack of diligence on the part of the
8 Co-Investigating Judges in conducting their investigations.
9 We consider, first of all, that the evidence that was submitted
10 in support of the introductory submission is sufficient to
11 satisfy the test of well-founded reasons to believe, even a year
12 later. This material is well-founded, it is abundant, it is
13 supported, and has never been seriously challenged. More
14 material which has been submitted for more than a year now can
15 also be advanced. It shows the diligence of the Co-Investigating
16 Judges.
17 First, since the issuance of the first detention order have
18 issued about 20 rogatory letters in case number 2, of which at
19 least 10 concern interviews of witnesses for crimes that the
20 Co-Prosecutors submitted to the Co-Investigating Judges. More
21 than 200, in fact closer to 300 interviews have been conducted
22 concerning the crimes of which the five charged persons are
23 suspected in case number 2. This objective fact is contrary to
24 the defence statements regarding the alleged lack of diligence on
25 behalf of the Co-Investigating Judges.

1 [1.44.40]
2 Of the statements requested by the Co-Investigating Judges
3 between October 2007 and November 2008, at least 13 were
4 mentioned, in their order, as being directly relevant to the
5 individual responsibility of the charged person. You will find
6 this in paragraphs 9 and 16 on the order denying release to which
7 the order on the extension of detention refers. The
8 Co-Investigating Judges provide particularly concrete and
9 detailed information in regard to the functions of the charged
10 person and his participation in the crimes.
11 The evidence mentioned by the Co-Investigating Judges
12 corroborates the evidence submitted in support of the
13 introductory submission, and this evidence was not challenged by
14 the defence in its appeal. Furthermore, since this order of
15 November 2008, at least 167 new statements have been filed in the
16 new record of the case on the rogatory letter dated 26th of May
17 2008 that is document D.125, as well as other documents which
18 were filed subsequently.
19 Some of this testimony concerns the role that the charged person
20 played in the regime. As my colleague has already said, the
21 relevant evidence in case number 1 was transferred into case
22 number 2 by the Co-Investigating Judges on the 30th of May and
23 the 20th of October 2008. The abundant evidence pertaining to
24 S-21 and its director Duch, including his interrogation by the
25 Co-Investigating Judges, are key elements which concern the

70

1 charged person directly, whose subordinates were detained,
2 tortured and executed in S-21.
3 Material in the record of the case shed light on the role of the
4 charged person in the arrest of his subordinates and mentioned
5 their transmission to the charged person of the confessions
6 obtained under torture in S-21. This is not confidential
7 information. Thirdly, the Co-Prosecutors also contributed to the
8 investigation by filing a lot of evidence from the introductory
9 submission and the arrest of the charged person, including nearly
10 500 press articles concerning the regime and the role of the
11 charged persons, chronological tables detailing the actions of
12 this charged person and other charged persons before, during and
13 after the Democratic Kampuchea period, and which shows the
14 continuity and the extent of the commitment or involvement of the
15 charged person in the Khmer Rouge.
16 The Co-Prosecutors have also filed compiled lists of S-21
17 detainees, among other pieces of evidence. It is obvious that
18 the supplementary elements filed in the record of the case are
19 abundant and relevant, and that every day new evidence is filed
20 in the record of the case. So it cannot on any account be said
21 that there is any lack of diligence on the part of the
22 Co-Investigating Judges when investigation continued all through
23 2008 and 2009 as the record of the case shows.
24 [1.49.15]
25 Just regarding the five non-cumulative or disjunctive conditions

71

1 under 63(3)(b), I would like to refer very briefly to the
2 procedure and to what was mentioned this morning, and to conclude
3 I would like you to reject the argumentation submitted by the
4 defence in its appeals brief, and to confirm the order by the
5 Co-Investigating Judges for the extension of provisional
6 detention of the charged person for another maximum period of one
7 year.

8 MR. PRESIDENT:

9 I would like to invite the defence counsel to respond.

10 MR. SA SOVAN:

11 Thank you, Mr. President, Your Honours. I will be brief again,
12 as I told you already this morning. Now the Prosecutors say that
13 the defence counsel is having mistake because by doing so we only
14 want to prolong the detention of our client, and that by doing so
15 we have not properly defend our client. I don't understand their
16 view. However, I think regarding the view, I don't even think
17 they don't even need to refer to articles that put people to
18 sleep at the Court. I think if Khieu Samphan was not happy with
19 me he would have fired me, and I never intended to extend any
20 proceedings, regardless of the proceedings before the Pre-Trial
21 Chamber or the ECCC itself.

22 [1.51.50]

23 I really abide by the proceedings, although I'm not very happy.
24 However, if I did not do so then I will not be able to properly
25 defend my client. Only a stupid or crazy defence lawyer who

72

1 would file applications to delay the extension of their client,
2 but on the contrary we would like him to be released. I only
3 need to submit and state again that the laws regulate two lawyers
4 for a charged person, a national and an international one. As a
5 Cambodian lawyer, I am fine to assist him, or to represent him,
6 and in Cambodia even the municipal court in Phnom Penh or other
7 national courts, whenever there's a case related to a foreigner
8 then we need a translator to translate.

9 Then I think prosecutors may be in the position to, you know,
10 argue whatever they want, but as a lawyer I'm not that stupid to
11 want to further detain my client, and I just want to seek
12 justice. I want justice to be done. That's it. And I don't
13 want to be long; I know that my opinion is different from that of
14 the Co-Prosecutors, because when I see an object as a wooden
15 object, then the Co-Prosecutors saw it as a metal object. I
16 think we so divided. But I would like to make sure that justice
17 is served here. I believe in the Court. We have experience -- we
18 learned from the experience from the international Judges and
19 lawyers and we learned from the victims also -- we should use the
20 language of legal officers, we don't really want to use the
21 vengeance, the language which seeks retaliation in the Court.

22 So that does not benefit my client at all to further detain him,
23 because he is old, and I know the Prime Minister of Cambodia
24 recently just stated this position also, so once again I am very
25 grateful, and I would like to also address the victims that I

73

1 never want to object you to make any voice heard, but I think
2 according to the proceedings you are not allowed.

3 [1.55.15]

4 MR. PRESIDENT:

5 The defence counsel, Mr. Jacques Vergès, would you like to make
6 any comment?

7 MR. VERGÈS:

8 The deputy prosecutor has most elegantly challenged me, and I
9 shall respond with a Latin motto: de minimis non curat praetor.
10 I hope he understands Latin.

11 MR. PRESIDENT:

12 Mr Khieu Samphan, would you like to make any final statement
13 concerning this appeal?

14 THE CHARGED PERSON:

15 I do not have any further comments to add. My lawyer asked me
16 whether the Court wants me to fire them, and I just would like to
17 confirm that I would never want to fire them, because I need them
18 to make sure that the legal principles are preserved here.

19 JUDGE DOWNING:

20 Just to clarify, the Court has never asked, or suggested that you
21 should fire your lawyers. I do not wish you to have this
22 understanding. You are free to choose your own lawyers, and you
23 need to understand that. The Court does not have any say in
24 this. This is your decision.

25 MR. VERGÈS:

74

1 (Recording malfunction) written in a decision of the Court, and
2 this may, as usual, have been an error of the greffier.

3 MR. PRESIDENT:

4 The hearing starting in the morning is now coming to an end, so
5 the decision will be pronounced later, but parties will be
6 notified three days in advance before the pronouncement of the
7 judgement. The Court is now adjourned. The security guard
8 please take the charged person back to the detention facility.

9 (Court adjourns at 1358H)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25