

**Khieu Samphan To Remain in Detention Even
Found Not Guilty in Case 002/01**

July 5, 2013

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Khieu Samphan is one of the four Accused in Case 002 which was charged with Crimes Against Humanity, Genocide and Grave breaches of the 1949 Geneva Conventions. The charges were for the serious crimes in the international criminal cases.

On 19 November 2007 Khieu Samphan was arrested and placed in provisional detention at the Extraordinary Chambers in the Courts of Cambodia (ECCC) for a period of maximum one year by a provisional detention order issued by the Co-Investigating Judges. On 18 November 2008, the Co-Investigating Judges issued the first Order on Extension of Provisional Detention, extending the provisional detention of Khieu Samphan for a maximum of one year to continue its investigation. On 18 November 2009, because the investigation was still in the process, the Co-investigating Judges issued the second Order on Extension of Provisional Detention, extending the provisional detention for one more year. The provisional detentions of Khieu Samphan in the investigation stage totaled three years.

On 15 September 2010, the Co-investigating Judges issued a closing order in Case 002, ordering that the Accused remain in Provisional Detention until they are brought before the Trial Chamber.¹ Therefore, Khieu Samphan remained in the provisional detention at the ECCC prison until he was tried by the Trial Chamber.

In the Trial Chamber stage, Khieu Samphan was still detained in the prison by the Chamber pursuant to Rule 82(1) of the Internal Rules, which provided that: "*Where the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber's judgment is handed down*".² The Trial Chamber, however, has discretion to order the release of an Accused or where necessary release on bail, or detain an Accused after hearing the Accused and his or her lawyer.

¹ Closing Order, 15 September 2010, D427, ¶1624.

² ECCC Internal Rules, Rule 82(1).

Ahead of the substantive hearing the Trial Chamber issued an order, on 22 September 2011,³ to separate the proceedings in Case 002 into parts which enable the Chamber to select some of the charges or factual allegations in the closing order to try in the first trial. The first trial was called Case 002/01. In Case 002/01, the Trial Chamber tried all the crimes that occurred during the population movement phases 1 and 2 and the execution of Khmer Republic soldiers at Toul Po Chrey execution site immediately after the Khmer Rouge takeover in 1975.⁴ These acts were only charged as Crimes Against Humanity (excepting persecution on religious grounds). No co-operatives, worksites, security centres, execution sites or facts relevant to the third phase of population movements will be examined during the first trial. Whereas the allegations of, inter alia, Genocide and Grave Breaches of the Geneva Conventions of 1949 have been deferred to later phases of the proceedings in Case 002.

During the trial hearings in the Case 002/01, Khieu Samphan disputed all the charges against him and said that he did not know about the crimes were committed during the Democratic Kampuchea regime and he also did not have any power to decide even he was the Head of State.⁵

If the Trial Chamber's decision in Case 002/01, which is planned to be issued in the first quarter in 2014,⁶ found that Khieu Samphan is found guilty, the Chamber shall sentence him in according with the Agreement, the ECCC Law and the Internal Rules.⁷ In contrast, if the Chamber considers that the acts set out in the Indictment have not been proved, or that Khieu Samphan is not guilty of those acts, he shall be acquitted.⁸

Even if in Case 002/01 Khieu Samphan is found not guilty, he shall remain in detention.

There are two reasons that Khieu Samphan would not be released. First, the Co-prosecutors can appeal against the Trial Chamber's Judgment. Second, due to Khieu Samphan is in detention for other charges.

For the first reason, the Trial Chamber's decision will be appealed by the Co-prosecutors if the Accused Khieu Samphan is found not guilty. Khieu Samphan, therefore, will remain in

³ "Severance Order Pursuant To Internal Rule 89 TER", E124, 22 September 2011. Notably, the decision was annulled by the Supreme Court Chamber on 8 February 2013. On 26 April 2013, the Trial Chamber issued a new decision on severance of case 002/01 following Supreme Court Chamber Decision.

⁴ Trial Chamber memorandum entitled "Notification of decision on Co-Prosecutions' request to include additional crime sites within the scope of Trial in Case 002/01, (E163), 8 October 2012.

⁵ Transcript of Trial Proceedings, E1/15.1, 23 November 2011. See also, Transcript of Trial Proceedings, 27, 29, 30 May and 4 June 2013. "E1/197.1", "E1/198.1", "E1/199.1", "E1/200.1".

⁶ "Decision on Severance of Case 002/01 following Supreme Court Chamber Decision of 8 February 2013", Trial Chamber, 26 April 2013, at 71, footnote 270, E284. [hereinafter SCC's Decision]. See also, "Appeal against the Decision on Mr. KHIEU Samphan's Application for Immediate Release on Bail", 14 May 2013, ¶ 66, E275/2/1.

⁷ ECCC Internal Rules, Rule 98(5).

⁸ *Id.*, at Rule 98(6).

detention until the Supreme Court Chamber's Judgment is handed down. According to the Trial Chamber's expectation, the Case 002/01 final Judgment might be issued at the end of 2015.⁹ Pursuant to Rule 111(4) of the Internal Rules, in case of acquittal on appeal, Khieu Samphan shall be immediately released.¹⁰ This rule, however, also added that the Accused shall remain in detention if he or she is in detention in relation to other charges¹¹. This is the second reason to keep Khieu Samphan in detention even if he is not guilty of the acts determined in Case 002/01 regarding to the Crimes Against Humanity. As indicated, Khieu Samphan was charged with three international crimes as such Crimes Against Humanity, Genocide and Grave Breaches of the 1949 Geneva Conventions. Because Case 002 has been severed into a series of separate trials, each addressing a different section of the indictment, the Accused Khieu Samphan is still charged with two other crimes. Pursuant to Rule 111(4), Khieu Samphan will likely remain in detention pending trial in Case 002/02 or Case 002/03 on other charges.

The period of Khieu Samphan's provisional detention since 2007 until now is five years and seven months; the provisional detention might be extended until the end of the Case 002. Khieu Samphan has right to request the Chamber to release him on bail¹² and he did so. While in provisional detention Khieu Samphan filed requests for provisional release five times, but all were rejected. The reason for rejection was the risk of Khieu Samphan's flight.¹³

For this reason, it seems likely that Khieu Samphan shall remain in detention until the Chambers' Judgment in Case 002/01 is handed down and pending the trials of the other charges. Khieu Samphan is now 82 years old compared to the timeframe of the Chamber's expectation to issue the final Judgment in Case 002/01 along with Case 002/02 or Case 002/03 (if possible), the possibility of releasing Khieu Samphan is almost zero.

However, the continuation of lengthy provisional detention of the Accused without a tangible plan for the adjudication of the entirety of the charges in the Indictment is not a better choice for the Trial Chamber because it could compromise bringing the subsequent proceedings to a conclusion within a reasonable time. Thus, the Trial Chamber should provide a clearer idea as to how much longer the trial will last in order to avoid disputation from the Defence counsel.

⁹ SCC's Decision, *supra note 6*.

¹⁰ ECCC Internal Rule 111(4) provides: "In case of acquittal on appeal, the Accused shall be immediately released, unless he or she is in detention in relation to other charges."

¹¹ *Id.*

¹² ECCC Internal Rules, Rule 82(3).

¹³ Decision on KHIEU Samphan's Application for Immediate Release, Trial Chamber, 26 April 2013, E275/1, ¶ 21.