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

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

អង្គជំនុំជម្រះតុលាការកំពូល
Supreme Court Chamber
Chambre de la Cour suprême

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សំណុំរឿងលេខ: ០០២/១៩-កញ្ញា-២០០៧-អ.វ.ត.ក-អ.ជ.ស.ដ/អ.ជ.ត.ក(២៧)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(27)

Before: **Judge KONG Srim, President**
Judge Chandra Nihal JAYASINGHE
Judge Agnieszka KLONOWIECKA-MILART
Judge MONG Monichariya
Judge Florence Ndepele Mwachande MUMBA
Judge SOM Sereyvuth
Judge YA Narin

Date: **22 August 2013**
Language(s): **Khmer/English**
Classification: **PUBLIC**

DECISION ON IMMEDIATE APPEAL AGAINST THE TRIAL CHAMBER'S DECISION ON KHIEU SAMPHÂN'S APPLICATION FOR IMMEDIATE RELEASE

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1. **THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea between 17 April 1975 and 6 January 1979 ("Supreme Court Chamber" and "ECCC", respectively) is seized of the *"Appel de la décision relative à la demande de mise en liberté immédiate avec placement sous contrôle judiciaire présentée par M. KHIEU Samphân"* filed by the Defence for KHIEU Samphân ("Defence") on 16 May 2013 ("Appeal").[1]

I. INTRODUCTION

2. The Appeal concerns a decision of the Trial Chamber issued on 26 April 2013 rejecting an application filed by the Defence on 29 March 2013 for KHIEU Samphân's immediate release on bail ("Impugned Decision" and "Application", respectively).[2]

a. Background

3. KHIEU Samphân was placed in provisional detention on 19 November 2007 by order of the Co-Investigating Judges.[3] On 15 September 2010, the Co-Investigating Judges issued the Closing Order in Case No. 002/19-09-2007/ECCC ("Case 002"), in which they indicted KHIEU Samphân for genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, and violations of the Cambodian Penal Code of 1956.[4] The Co-Investigating Judges further ordered that KHIEU Samphân remain in provisional detention until brought before the Trial Chamber.[5] The Pre-Trial Chamber thereafter confirmed the continued provisional detention of KHIEU Samphân.[6]

4. On 16 February 2011, the Trial Chamber rejected an application for the immediate release of KHIEU Samphân.[7] On appeal, the Supreme Court Chamber found that the Trial Chamber had failed to provide sufficient reasoning to find KHIEU Samphân to be a flight risk and order

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[1] E275/2/1.
[2] Decision on KHIEU Samphan's Application for Immediate Release, 26 April 2013, E275/1; *Demande de mise en liberté immédiate avec placement sous contrôle judiciaire de M. KHIEU Samphân*, 29 March 2013, E275.
[3] *See* Provisional Detention Order, 19 November 2007, C26. *See also* Order refusing the request for release, 23 June 2008, C36/III; Order on Extension of Provisional Detention, 23 December 2008, C26/4; Decision on KHIEU Samphan's Supplemental Application for Release, 24 December 2008, C26/5/5; Decision on KHIEU Samphan's Appeals against Order Refusing Request for Release and Extension of Provisional Detention, 3 July 2009, C26/5/26; Order on Extension of Provisional Detention, 18 November 2009, C26/8; Decision on KHIEU Samphan's Appeal against Order on Provisional Detention, 30 April 2010, C26/7/12.
[4] Closing Order, 15 September 2010, D427 ("Closing Order").
[5] Closing Order, paras. 1622-1624.
[6] Decision on KHIEU Samphan's Appeal against the Closing Order, 21 January 2011, D427/4/15.
[7] Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Shamphan and IENG Thirith, 16 February 2011, E50 ("First TC Decision on Immediate Release").

continued detention pursuant to Rule 63(3)(b)(iii) of the Internal Rules.[8] However, the Supreme Court Chamber considered that the legal basis for the detention of KHIEU Samphân under Rule 63(3)(b)(iii) of the Internal Rules remained valid in light of facts demonstrating the risk that he might be rendered unavailable for trial.[9]

5. On 29 March 2013, the Defence filed the Application, submitting that KHIEU Samphân has never attempted to go into hiding although he knew that he faced prosecution and that, upon arrest, he willingly handed himself over.[10] The Defence further submitted that KHIEU Samphân is unable to flee because of his age, indigence, a lack of travel documents, and an unwillingness to leave his family.[11] The Defence requested the Trial Chamber to find that bail, accompanied by appropriate judicial supervision measures, including a guarantee by KHIEU Samphân to reside at a particular address, to submit his identity card to the ECCC, to submit to regular checks by the competent authorities, and to appear at trial, is sufficient to mitigate the risk of flight.[12]

6. On 29 March 2013, the Trial Chamber issued an oral decision, with written reasons issued on 26 April 2013, in which it re-severed Case 002 into discrete trials ("Second Severance of Case 002") and confined the scope of the first trial to a limited number of charges ("Case 002/01")[13] following the Supreme Court Chamber's annulment of a previous severance decision by the Trial Chamber ("First Severance of Case 002" and "First SCC Severance Decision", respectively).[14]

7. On 10 April 2013, the Defence requested that the Trial Chamber, pursuant to Rule 87(4) of the Internal Rules, admit into evidence certain extracts of a book authored by former ECCC Co-Investigating Judge Marcel LEMONDE, and take them into consideration when deciding on the Application ("Request").[15] On 11 April 2013, the Trial Chamber informed the parties that, due to lack of time to properly consider the Request, the matter would not be considered before deciding upon the Application and that the Request would be adjudicated following standard procedure, thereby affording the parties the opportunity to comment thereupon.[16] The Greffier of the Trial Chamber thereafter informed the parties that the Trial Chamber decided to hear the

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[8] Decision on Immediate Appeal by KHIEU Samphan on Application for Release, 6 June 2011, E50/3/1/4 ("First SCC Decision on Immediate Release").
[9] First SCC Decision on Immediate Release, para. 54.
[10] Application, para. 28.
[11] Application, para. 29.
[12] Application, paras. 46-62.
[13] T. (EN), 29 March 2013, E1/176.1, pp. 1-4; Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, E284, 26 April 2013 ("Second Severance Decision").
[14] Decision on the Co-Prosecutors' Immediate Appeal of the Trial Chamber's Decision Concerning the Scope of Case 002/01, E163/5/1/13, 8 February 2013.
[15] *Première demande visant à faire verser aux débats des extraits du livre de M. Marcel LEMONDE*, 10 April 2013, E280.
[16] T. (EN), 11 April 2013, E1/180.1, p. 78-80.

request for immediate release without considering the new evidence proposed by the Defence, and therefore found the Request moot.[17] On 8 May 2013, the Defence filed a second request to place extracts of the book authored by Judge LEMONDE before the Trial Chamber ("Further Request").[18]

8. On 26 April 2013, the Trial Chamber issued the Impugned Decision rejecting the Application and ordering the continued detention of KHIEU Samphân.

b. The Appeal

9. On 14 May 2013, the Defence filed the Appeal, submitting that the Trial Chamber committed numerous errors warranting the invalidation of the Impugned Decision.[19] The Defence contends that the Trial Chamber attached undue significance to the flight risk and organizational challenges and did not afford sufficient weight to the assurances provided or take into account the proposed bail conditions.[20] The Defence therefore requests the Supreme Court Chamber to annul the Impugned Decision, order KHIEU Samphân's immediate release, and issue any necessary bail orders.[21]

10. On 6 June 2013, the Co-Prosecutors responded that the Appeal is not admissible because it was not filed within the applicable time limit.[22] The Co-Prosecutors further submit that the Defence failed to demonstrate that the Trial Chamber's errors merit the relief sought.[23] The Co-Prosecutors thus request the Supreme Court Chamber to dismiss the Appeal in full.[24]

c. Oral Arguments

11. The Defence requests the Supreme Court Chamber to hold a public hearing on the Appeal.[25] Rule 109(1) of the Internal Rules provides that immediate appeals may be decided on the basis of written submissions only. Having considered the ample written submissions made by the parties, the Supreme Court Chamber does not deem it necessary to hold a public hearing on the Appeal in this case, and hereby renders its decision.

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[17] Electronic mail from Roger PHILLIPS, Legal Officer and Greffier of the Trial Chamber, entitled "Re: Forms of Response to KHIEU Shamphan's Rule 87(4) Application", sent on 19 April 2013 at 3:15PM, E280/1.
[18] *Deuxième demande visant à faire verser aux débats des extraits du livre de M. Marcel LEMONDE*, 8 May 2013, E280/2.
[19] Appeal, para. 12.
[20] Appeal, para. 14.
[21] Appeal, para. 79.
[22] Co-Prosecutors' Response to KHIEU Shamphan's Appeal against the Decision on the Application for Immediate Release on Bail, 6 June 2013, E275/2/2 ("Response"), paras. 12-14.
[23] Response, paras. 26-47.
[24] Response, para. 48.
[25] Appeal, para. 79.

d. Applicable Time Period

12. The present decision is issued within the time period prescribed under the Internal Rules and the Practice Direction on Filing Documents.[26] Pursuant to Rule 108(4*bis*)(a) of the Internal Rules, immediate appeals against decisions on detention and bail must be rendered within three months "after receipt of [the case file together with certified copies of the decision and each immediate appeal]".[27]

13. The Appeal was filed and notified in French only on 16 May 2013, and the Khmer translation of the Appeal was thereafter filed and notified on 22 May 2013.[28] Article 7.1 of the Practice Direction on Filing Documents requires that "[a]ll documents shall be filed in Khmer as well as in English or French". The purpose of this requirement is to allow both national and international components of the relevant organs of the ECCC to properly examine and address filings. The Supreme Court Chamber's "receipt" of the Appeal pursuant to Rules 108(2) and 108(4*bis*)(a) of the Internal Rules accordingly took place on 22 May 2013. The three-month applicable time limit for the issuance of the present decision is therefore 22 August 2013.

[26] Internal Rules of the ECCC, Revision 8, 3 August 2011 ("Internal Rules"); Practice Direction on the Filing of Documents before the ECCC, Revision 8, 7 March 2012 ("Practice Direction on Filing Documents").
[27] *See also* Rule 108(2) of the Internal Rules.
[28] The Defence had previously requested and was granted the appropriate authorisation pursuant to Article 7.2 of the Practice Direction on Filing Documents to file the Appeal first in French only with the Khmer translation to follow at the earliest opportunity. *See infra*, para. 17.

II. STANDARDS OF APPELLATE REVIEW

14. Pursuant to Rule 104(4) of the Internal Rules, only the following decisions of the Trial Chamber are subject to immediate appeal: (a) decisions which have the effect of terminating the proceedings; (b) decisions on detention and bail under Rule 82 of the Internal Rules; (c) decisions on protective measures under Rule 29(4)(c) of the Internal Rules; and, (d) decisions on interference with the administration of justice under Rule 35(6) of the Internal Rules. Other decisions may only be appealed at the same time as an appeal against the judgment on the merits.

15. Pursuant to Rules 104(1) and 105(4) of the Internal Rules, the Supreme Court Chamber shall decide immediate appeals on the following grounds: (a) an error on a question of law invalidating the decision; (b) an error of fact which has occasioned a miscarriage of justice; or, (c) a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

III. ADMISSIBILITY

a. Timeliness

16. The Co-Prosecutors submit that the Khmer version of the Appeal was filed five days past the filing deadline.[29] They contend that "where the Appeal was not timely filed and where the Defence neither requested special measures nor brought their delay to the attention of this Chamber or the other parties along with sufficient justification, the Appeal should be deemed to be untimely and therefore rejected".[30]

17. On 8 May 2013, the Defence requested authorisation pursuant to Article 7.2 of the Practice Direction on Filing Documents to file the Appeal in French in the first instance with a Khmer translation to follow at the first opportunity.[31] The Supreme Court Chamber considered that the Defence had duly shown the exceptional circumstances warranting authorisation, and accordingly granted the request on the same day.[32] The Supreme Court Chamber notes, however, that the request and authorisation – made in the form of electronic mail – were not brought to the attention of the parties. Future similar requests and decisions shall ensure to include all interested parties in copy so as to avoid any future similar confusion.

b. Rule 104(4)(b) of the Internal Rules

18. There is no dispute that the Appeal is admissible under Rule 104(4)(b) of the Internal Rules, which provides that "decisions [of the Trial Chamber] on detention and bail under Rule 82 [are subject to immediate appeal]".[33]

19. Rule 82 of the Internal Rules governs the procedure as regards the provisional detention of an accused and bail at the ECCC. Rule 82(5) of the Internal Rules states that "[a]ll decisions of the [Trial] Chamber concerning provisional detention are open to appeal by the Accused or the Co-Prosecutors, as appropriate". The Impugned Decision was rendered under Rule 82 of the Internal Rules.[34]

20. The Appeal is therefore admissible under Rule 104(4)(b) of the Internal Rules.

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[29] Response, para. 12.
[30] Response, paras. 12-13.
[31] Electronic mail from Marie CAPOTORTO, Legal Consultant for the Defence, entitled "*demande d'autorisation de dépôt dans un premier temps en français*", sent on 8 May 2013 at 9:32AM.
[32] Electronic mail from Sheila PAYLAN, Legal Officer and Greffier of the Supreme Court Chamber, entitled "Re: *demande d'autorisation de dépôt dans un premier temps en français*", sent on 8 May 2013 at 9:43AM.
[33] *See* Response, para. 11.
[34] *See* Impugned Decision, paras. 14, 23. The Impugned Decision was also rendered under Rule 63 of the Internal Rules, which also governs procedure related to provisional detention. *See* Impugned Decision, para. 13.

IV. MERITS

21. The Defence submits that the Trial Chamber: (a) failed to demonstrate the necessity for continued detention; (b) failed to handle the case against KHIEU Samphân with diligence and recognize the disproportionate length of his detention; and, (c) erred in taking into consideration whether there was a change in circumstances since his last application for release.[35]

22. The Supreme Court Chamber will address these in turn.

a. Alleged Failure to Demonstrate Necessity of Continued Detention

23. In rejecting the Application for his immediate release on bail and ordering the continued provisional detention of KHIEU Samphân, the Trial Chamber reasoned as follows:

> The Chamber's primary consideration is the risk of the Accused's flight. The Accused undertakes to be present during his trial and to respect any conditions that may be imposed should he be granted provisional release. His family states that it will provide him with lodgings, transport and assist him in fulfilling any release conditions, including appearing for trial. The Chamber notes that Case 002/01 is entering its final stages and that non-appearance of the Accused (whether intentionally or otherwise) risks delay to the expeditious completion of Case 002/01 and further trials of what is in its totality '[...] an enormous organizational and logistical undertaking involving four [now two] Accused, most of whom have health problems, and numerous Civil Parties and multi-person legal teams.' The Chamber does not consider the assurances of the Accused and his family members sufficient to outweigh these concerns, or the risk that the Accused may abscond at this late stage of the trial. The Chamber notes also that at this advanced stage of the trial, the Accused may consider flight to be a real option when faced with the prospect of a lengthy sentence of imprisonment, should he be convicted. The Chamber therefore considers all these considerations remain valid as reasons to continue the provisional detention of the Accused.[36]

24. The Defence submits that the Trial Chamber failed to provide sufficient reasons for its decision, attached undue significance to a hypothetical flight risk and organizational challenges, omitted to take into account KHIEU Samphân's personal circumstances and proposed bail conditions, and placed insufficient weight on the assurances he gave.[37]

25. The Co-Prosecutors respond that the Defence fails to substantiate any error in the Trial Chamber's decision that KHIEU Samphân's continued detention remains necessary.[38]

26. The Supreme Court Chamber recalls that, consistent with international standards, the law controlling detention before the ECCC is based on the presumption in favour of liberty, the

[35] Appeal, paras. 13-14, 52-55, 73, 75-78.
[36] Impugned Decision, para. 21 (internal citations omitted and emphasis added).
[37] Appeal, paras. 13-45.
[38] Response, paras. 27-34.

requirement of legality, and the prohibition of arbitrariness.[39] Accordingly, in considering the question of continued detention, the judicial organs of the ECCC must ensure that detention has a statutory basis at all times.[40] A person detained based on criminal charges shall be tried within a reasonable time or shall be released, and it shall not be a general rule that persons awaiting trial shall be detained in custody.[41] As such, judicial authorities must examine all facts in support of or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty and the presumption in favour of release, with due regard for the principle of the presumption of innocence.[42] Judicial authorities must, moreover, set out these facts in their decisions on applications for release.[43]

27. Rule 63(3) of the Internal Rules states that detention may only be ordered when two conditions are met. The first condition is contained in Rule 63(3)(a) of the Internal Rules, which requires a well-founded reason to believe that the person who is to be detained may have committed the crime or crimes specified. The second condition is found in Rule 63(3)(b) of the Internal Rules, which requires that provisional detention be considered necessary in order to satisfy at least one of five grounds listed therein: (i) prevent the person who is to be detained from exerting pressure on any witnesses or victims, or prevent any collusion between him or her and accomplices of crimes falling within the jurisdiction of the ECCC; (ii) preserve evidence or prevent the destruction of any evidence; (iii) ensure the presence of the person who is to be detained during the proceedings; (iv) protect the security of the person who is to be detained; or, (v) preserve public order.

28. Rule 82(1) of the Internal Rules provides that "[w]here 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, subject to sub-rule 2". Rule 82(2) of the Internal Rules states that "[t]he Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these [Internal Rules]". The Supreme Court Chamber recalls, however, that Rule 82(1) of the Internal Rules only goes so far as to establish a rebuttable presumption that conditions for detention, as previously ordered by the Co-Investigating Judges, in an adversarial procedure and with the option for appellate review

[39] *See* First SCC Decision on Immediate Release, para. 46, *and references cited therein.*
[40] *See* First SCC Decision on Immediate Release, para. 46, *citing* Article 9(1) of the International Covenant on Civil and Political Rights ("ICCPR") ("Deprivation of liberty shall not be allowed except on such grounds and in accordance with procedure as established by law") *and* para. 47 ("The presumption of liberty requires that the detention of an accused must at all times have a basis in a judicial decision, issued in accordance with the statutorily determined procedure and pursuant to statutorily defined conditions").
[41] First SCC Decision on Immediate Release, para. 46, *citing* Article 9(3) of the ICCPR.
[42] *See* First SCC Decision on Immediate Release, para. 46, *and references cited therein.*
[43] First SCC Decision on Immediate Release, para. 46.

by the Pre-Trial Chamber, continue to apply when the case reaches trial.[44] Whereas the onus is on an accused to challenge the persistence of these grounds in a request for release,[45] the Trial Chamber is nevertheless obligated to carry out a "meaningful" review thereof when re-examining the conditions for detention.[46]

29. Neither the well-founded suspicion that the person arrested has committed an offence nor the specific conditions for detention are intrinsically stable elements. In order to comply with the presumption in favour of liberty, these elements should therefore be subject to critical assessment at each instance of review. This considered, judicial Chambers at the ECCC may not ignore facts which arise in the course of proceedings, regardless of whether they are specifically raised by the applicant, and which have the potential to affect the persistence of conditions for detention. In the present case, two such factors are the passage of time and the advanced stage of trial proceedings. After two years of trial and litigation, the Trial Chamber's exclusive reliance on findings made at the junction of the investigation and trial, without evaluation of their actuality,[47] risks arbitrariness. Another related factor is the Trial Chamber's decision to sever Case 002, which it had confirmed at the time of the issuance of the Impugned Decision, and which requires that the conditions for detention be evaluated in relation to each of the severed cases individually.

30. The right to a reasoned decision is universally recognized in human rights jurisprudence and well established in the case law of international criminal tribunals.[48] The extent of the duty to provide reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case. While courts are not obliged to give a detailed answer to every argument raised it must be clear from the decision that the essential issues of the case have been addressed.[49] Irrespective of how the duty to give reasons is governed by the procedural law in question, and regardless of whether there exist specific, *de facto* reasons justifying detention, it is

[44] First SCC Decision on Immediate Release, para. 47.
[45] First SCC Decision on Immediate Release, para. 48.
[46] First SCC Decision on Immediate Release, para. 49. Reliance upon a presumption of detention throughout a whole trial phase, whether authorised by the law on criminal procedure or resulting from an established practice, goes against the prohibition of arbitrariness.
[47] *See* Impugned Decision, para. 16.
[48] The right to a reasoned judicial decision is well established before the European Court of Human Rights ("ECtHR"), the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, the United Nations Human Rights Committee ("HRC"), the International Criminal Court ("ICC"), the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda, and the ECCC. *See*, *generally*, ICC, Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I of 13 July 2012 entitled "Decision on the 'Requête de la Défense demandant la mise en liberté provisoire du président Gbagbo'", 26 October 2012, ICC-02/11-01/11-278-Red, Dissenting Opinion of Judge Anita Ušacka, paras. 8-14 *and references cited therein*.
[49] S*ee*, *e.g.*, ECtHR, *Hadjianastassiou v. Greece*, Judgment, 16 December 1992, application no. 12945/87, para. 33; *Ruiz Torija v. Spain*, Judgment, 9 December 1994, application no. 18390/91, para. 29; *Van de Hurk v. the Netherlands*, Judgment, 19 April 1994, application no. 16034/90, para. 61; *Taxquet v. Belgium*, Judgment, 16 November 2010, application no. 926/05, paras. 90-91.

nevertheless incompatible with the principle of protection from arbitrariness if the competent judicial authorities, in deciding to authorise prolonged detention, fail to provide any grounds in support thereof,[50] provide only reasoning marked by "sketchiness", which fails to provide details of the relevant factual considerations,[51] or rely exclusively on presumption.[52]

31. In the First TC Decision on Immediate Release, the Trial Chamber ordered the continued detention of KHIEU Samphân on the sole basis that "the potentially severe penalty [he] face[s] [...] if convicted creates an incentive to abscond".[53] The Trial Chamber rejected all other possible conditions upon which continued detention could be held.[54] The Supreme Court Chamber determined that such rejection was unreasonable,[55] and that "the expectation of a lengthy sentence cannot be held against an accused *in abstracto* as the sole factor determining the outcome of an application for release, because all the accused persons before the ECCC, if convicted, are likely to face heavy sentences".[56] The Supreme Court Chamber accordingly found that the Trial Chamber erred in having placed undue weight on the potential severity of KHIEU Samphân's sentence in justifying his continued detention at that time,[57] and in thereby failing to provide sufficient reasoning to order his continued detention pursuant to Rule 63(3)(b)(iii) of the Internal Rules.[58]

32. The Defence submits that the Trial Chamber commits the same error again by listing KHIEU Samphân's hypothetical risk of flight as its primary consideration in ordering his continued detention, and by failing to provide sufficient reasons for this decision.[59] The Supreme Court Chamber notes that, in the Impugned Decision, the Trial Chamber repeated the consideration that, "at this advanced stage of the trial, [KHIEU Samphân] may consider flight to be a real option when faced with the prospect of a lengthy sentence of imprisonment, should he be convicted",[60] and similarly rejected all other conditions listed under Rule 63(3)(b) of the

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[50] *See* ECtHR, *Khudoyorov v. Russia*, Judgment, 8 November 2005, application no. 6847/02, para. 136; *Stasaitis v. Lithuania*, Judgment, 21 March 2002, application no. 47679/99, para. 67 *and references cited therein*.
[51] ECtHR, *I.A v. France*, Judgment, 23 September 1998, application no. 28213/95, para. 105.
[52] *See*, *inter alia*, ECtHR, *Belchev v. Bulgaria*, Judgment, 8 April 2004, application no. 39270/98, paras. 76-79; *Ilijkov v. Bulgaria*, Judgment, 26 July 2001, application no. 33977/96, para. 87; *Jecius v. Lithuania*, Judgment, 31 July 2000, application no. 34578/97, paras. 93-94.
[53] First TC Decision on Immediate Release, para. 40.
[54] First TC Decision on Immediate Release, para. 40.
[55] First SCC Decision on Immediate Release, para. 41.
[56] First SCC Decision on Immediate Release, para. 40.
[57] First SCC Decision on Immediate Release, para. 41. *See also* First SCC Decision on Immediate Release, para. 50.
[58] First SCC Decision on Immediate Release, para. 54.
[59] Impugned Decision, paras. 14-19.
[60] Impugned Decision, para. 21.

Internal Rules upon which his continued detention could be justified.[61] A sole additional element now invoked is that "Case 002/01 is entering its final stages".[62]

33. The risk of flight is commonly one amongst several legitimate grounds upon which the refusal of release on bail may be justified.[63] Under the ECCC legal framework, Rule 63(3)(b)(iii) of the Internal Rules is broadly constructed to include not only the risk of flight, but also the risk of becoming unavailable for trial.[64] "Trial" in this context is to be understood as the entirety of proceedings until the final conclusion of the case.[65] However, to adduce a general risk of flight, absconding from, or obstructing, the proceedings does not suffice unless it is grounded upon the specific circumstances of the case at hand, which bar release even if subject to bail conditions.[66] The general test justifying the refusal of release on bail on this ground is that "there must be a whole set of circumstances [...] which give reason to suppose that the consequences and hazards of flight will seem to [the accused] to be a lesser evil than continued imprisonment".[67] Of these circumstances, the prospect of a lengthy sentence of imprisonment can be regarded as one of the factors in evaluating whether an accused will appear for trial, if released; it cannot, however, be held *in abstracto* as the sole factor negating release but must be taken into account in addition to other relevant factors that indicate a concrete risk of absconding.[68] It must also be considered that the risk of flight may decrease as time passes because of, for example, the public nature of the

[61] Impugned Decision, paras. 20, 22.
[62] Impugned Decision, para. 21.
[63] *See* First SCC Decision on Immediate Release, para. 40, *and references cited therein.*
[64] Rule 63(3)(b)(iii) of the Internal Rules provides that provisional detention may be ordered where there is a need to "ensure the presence of [the person who is to be detained] during the proceedings".
[65] *See* Article 305 of the Code of Criminal Procedure of the Kingdom of Cambodia.
[66] *See* ECtHR, *Boicenco v Moldova*, Judgment, 11 July 2006, application no. 41088/05, para. 143 ("In the present case, the Court notes that both the first-instance court and the Court of Appeal, when ordering the applicant's detention and the prolongation thereof, have cited the relevant law, without showing the reasons why they considered to be well-founded the allegations that the applicant could obstruct the proceedings, abscond or re-offend. Nor have they attempted to refute the arguments made by the applicant's defence. Thus, the circumstances of this case are similar to those [...] in which this Court found violations of Article 5 § 3 of the Convention on account of insufficient reasons given by the courts for the applicants' detention [...] [T]he Court considers that the same approach should be adopted in the present case" (emphasis added)). *See also* HRC, *Smantser v. Belarus*, Views, 23 October 2008, communication no. 1178/2003, para. 10.3; *Hill v. Spain*, Views, 2 April 1997, communication no. 526/1993, para. 12.3.
[67] ECtHR, *Stogmuller v. Austria*, Judgment, 10 November 1969, application no. 1602/62, para. 15. *See also*, *e.g.*, *Smirnova v. Russia*, Judgment, 24 July 2003, application nos. 46133/99 and 48183/99, para 60.
[68] *See* First SCC Decision on Immediate Release, para. 40, *and references cited therein. See also*, *inter alia*, ECtHR, *Kononovich v. Russia*, Judgment, 9 July 2009, application no. 41169/02, paras. 55-56 ("the domestic courts essentially referred to the gravity of the charges against the applicant[,] [...] mentioned his previous conviction as a reason for refusal of his release [...] [and] consistently ruled that the defendants' release 'might impede a thorough, complete and objective examination of the case' [...] [n]or did the trial court elucidate in what way the applicant's release "might impede a thorough, complete and objective examination of the case"); *Idalov v. Russia*, Judgment, 22 May 2012, application no. 5826/03, paras. 139, 145-146; *Grishin v. Russia*, Judgment, application no. 14807/08, paras. 139, 143-144, 146-149, 154-155; *Piruzyan v. Armenia*, Judgment, 26 June 2012, application no. 33376/07, paras. 95-97, 99-100; *Valeriy Kovalenko v. Russia*, Judgment, 29 May 2012, application no. 41716/08, paras. 44-48; *Malkhasyan v. Armenia*, Judgment, 26 June 2012, application no. 6729/07, paras. 74-76; *Kalashnikov v. Russia*, Judgment, 15 July 2002, application no. 47095/99, paras. 114-118.

indictment, the possibility that trial may increase the hazards of flight, that defence tactics might crystallize as the trial progresses, or because the significance of the length of the sentence faced is reduced as the period of pre-trial detention will be treated as a part of the sentence.[69] In this light, the Trial Chamber's finding to the contrary required a reasoned explanation thereto. In the Supreme Court Chamber's view, the Trial Chamber failed to provide sufficient reasoning for KHIEU Samphân's continued detention.

34. In reviewing the conditions for KHIEU Samphân's detention at this stage of proceedings, the Trial Chamber should have taken into account the import of the two preceding years of trial and litigation. In accordance with the foregoing standards, the Trial Chamber must terminate the detention if developments in the trial demonstrate that the evidence which constituted a well-founded reason to believe that the person who is to be detained may have committed the crime or crimes specified has been challenged, depreciated, or rendered irrelevant such that the need for detention no longer exists. This change of circumstances may result from any element of novelty in the evidence, such as newly discovered facts, new means of evidence, or any newly introduced element that reasonably entails the re-evaluation of the evidence gathered thus far. Likewise, after a certain lapse of time, the court must establish whether the other grounds cited continue to justify the deprivation of liberty.[70]

35. Moreover, there must persist not only a link between the person deprived of his or her liberty and the events supposed to constitute an offence but also a sufficient basis for concluding that those events fall within the scope of the alleged offence. The Supreme Court Chamber accepts that, in practical terms, it might be difficult for a trial court to perform such an evaluation before the completion of evidentiary proceedings.[71] A change of circumstances affecting the need for continued detention would need to be manifest,[72] significant enough to compensate for the

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[69] *See, e.g.,* ECtHR, *Neumeister v. Austria*, Judgment, 27 June 1968, application no. 1936/63, para 10 ("The danger of flight cannot, however, be evaluated solely on the basis of [the gravity of the charges]. Other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial. It should also be borne in mind that the danger of flight necessarily decreases as the time spent in detention passes by for the probability that the length of detention on remand will be deducted from the period of imprisonment which the person concerned may expect if convicted, is likely to make the prospect seem less awesome to him and reduce his temptation to flee" (emphasis added)). *See also I.A. v. France*, Judgment, 23 September 1998, application no. 28213/95, para. 105.

[70] *See* ECtHR, *Letellier v. France*, Judgment, 26 June 1991, application no. 12369/86, para. 35.

[71] The probability of conviction may vary dependent of each piece of evidence presented; as a result, the level of proof at trial can graphically be represented as a sine wave with crests and troughs.

[72] In other words, the new element must be highly persuasive so as to allow such adjudication even before final deliberations.

gravity of incriminating evidence, and stable.[73] The Supreme Court Chamber assumes that the Trial Chamber recorded no change of such magnitude.

36. The Supreme Court Chamber accepts that, in the circumstances of Case 002, the incentive for KHIEU Samphân to abscond may be greater now than beforehand. Until recently, absent firm determination of the scope of individual segments of Case 002, the proceedings did not offer a clear prospect of arriving at a judgment. The proceedings were, moreover, ridden with delays due to the health problems of the co-Accused,[74] marked with allegations of political interference,[75] and reported as chronically precarious due to the lack of funding.[76] Altogether, these conditions may have given KHIEU Samphân the impression of a genuine possibility that either no judgment would be delivered in Case 002 or that it would not be rendered within his lifespan.

37. The Second Severance of Case 002, which better determined the scope of Case 002/01, and the impending closure of the hearings, creates a more concrete prospect of a verdict. In light of KHIEU Samphân's advanced age and given the gravity of the charges against him, any possible conviction and sentence of imprisonment may practically equate to a life sentence. As such, crediting the time spent in detention by KHIEU Samphân against a hypothetical sentence affords him much less relief. The alternative between *de facto* life imprisonment and the hazards of evasion may not greatly differ as regards the level and duration of distress caused thereto. The Supreme Court Chamber considers, moreover, that the imminent threat of further proceedings elevates the risk of absconding.[77] Even though Case 002/02 has not yet commenced, the charges against KHIEU Samphân remain pending and the Supreme Court Chamber has urged for its expeditious hearing and expects concrete results.[78]

38. The Defence submits that KHIEU Samphân has always been prepared to answer any accusations against him in a court of law, and that his demeanour, as exemplified by his public statements, interviews, the book he authored, and his regular presence at trial hearings despite his

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[73] In other words, it must imply that evidence yet to be obtained can *a priori* be considered irrelevant or insignificant for the overall outcome of the proceedings.
[74] *See*, *e.g.*, First SCC Severance Decision, para. 49.
[75] *See*, *e.g.*, Decision on NUON Chea's Appeal against the Trial Chamber's Decision on Rule 35 Applications for Summary Action, 14 September 2012, E176/2/1/4, paras. 6-7.
[76] *See*, *e.g.*, Decision on NUON Chea's "Appeal against Constructive Dismissal of Application for Immediate Action Pursuant to Rule 35", 26 November 2012, E189/2/3, para. 5, fn. 13.
[77] *See*, *e.g.,* European Commission of Human Rights ("EComHR"), *X. v. Switzerland*, Decision, 12 March 1980, application no. 8788/79, para. 2 ("the Swiss authorities have the right to take into account, as a practical factor in assessing the risk of absconding, the threat of further charges which might he brought against the applicant").
[78] Decision on Immediate Appeals against Trial Chamber's Second Decision on Severance of Case 002 – Summary of Reasons, 23 July 2013, E284/4/7 ("Second SCC Severance Decision"). Full reasons for this decision shall be delivered as soon as possible.

advanced age, shows that he respects justice and the rule of law.[79] The Defence contends that these facts should support the belief that he does not pose a risk of flight.[80] The Supreme Court Chamber notes, however, that KHIEU Samphân has made statements which indicate that he is not willing to participate in the proceedings and that he, in fact, challenges their legitimacy.[81] The Supreme Court Chamber further notes that, at the close of the evidentiary hearings, KHIEU Samphân refused to take the stand or answer any questions, declaring that he has "no faith in this Court" on account of the violation of his fair trial rights.[82] In the Supreme Court Chamber's view, this clear rejection of the ECCC does not elicit confidence that KHIEU Samphân would willingly comply with a summons to return to court if he were to be released.

39. The Supreme Court Chamber therefore remains of the opinion that the legal basis for KHIEU Samphân's continued detention under Rule 63(3)(b)(iii) of the Internal Rules is still valid, and that the reasons have less to do with the general risk of his absconding in the face of the severity of potential penalty, and more with the risk of his becoming unavailable for trial.[83] The Supreme Court Chamber is not persuaded by the Defence's argument that KHIEU Samphân's advanced age, financial status, or lack of passport precludes him from hiding or ignoring a summons should he so wish. In relation to the proposed bail and assurances given by KHIEU Samphân,[84] the Supreme Court Chamber agrees with the Trial Chamber that they do not suffice to ensure his presence.[85] A guarantee must be assessed "principally by reference to [the accused], his assets and his relationship with the persons who are to provide the security".[86] The guarantees offered consist mainly of personal undertakings by KHIEU Samphân and members of his family, with whom he likely shares a common interest. KHIEU Samphân offered no financial or other assets that could guarantee "a sufficient deterrent to dispel any wish on his part to abscond".[87]

40. The abovementioned considerations and conclusions are only valid, however, provided that the need to guarantee KHIEU Samphân's presence at trial persists in order to ensure the expeditious conduct of proceedings. Accordingly, the foregoing considerations and conclusions principally pertain to Case 002/01 in which closing submissions are currently being prepared and

[79] Appeal, paras. 27-28.
[80] Appeal, para. 28.
[81] T. (EN), 11 April 2013, E1/180.1, pp. 115-117, *and references cited therein*.
[82] T. (EN), 9 July 2013, E1/220.1, p. 41. *See also* Letter to the Editor, Phnom Penh Post, 18 July 2013, available at < http://www.phnompenhpost.com/analysis-and-op-ed/khieu-samphan-forced-remain-silent>
[83] *See* First SCC Decision on Immediate Release, para. 54.
[84] Appeal, paras. 30-40; Application, paras. 50-62.
[85] Impugned Decision, para. 21.
[86] ECtHR, *Neumeister v. Austria*, Judgment, 27 June 1968, application no. 1936/63, para 14.
[87] ECtHR, *Neumeister v. Austria*, Judgment, 27 June 1968, application no. 1936/63, para 14. *See also* EComHR, *Bonnechaux v Switzerland*, application no. 8224/78, Report of the Commission (Strasbourg: 1980), para. 73.

are at present scheduled to be heard from 16 to 31 October 2013.[88] The need to ensure KHIEU Samphân's presence at trial may therefore diminish, if not extinguish, should there be no court activity, such as during the drafting of the judgment in Case 002/01, and this, coupled with an unjustified delay in the commencement of proceedings in Case 002/02, could constitute grounds for replacing detention with less stringent measures such as judicial supervision.

41. At the present time, however, the Supreme Court Chamber considers that KHIEU Samphân's immediate release on bail is not warranted. For the foregoing reasons, the Supreme Court Chamber finds that the Defence does not demonstrate that the Trial Chamber's error in providing insufficient reasoning for the continued detention of KHIEU Samphân invalidates its decision. These arguments are accordingly dismissed.

b. Alleged Excess in Length of Provisional Detention

42. In rejecting the Application for his immediate release on bail and ordering the continued provisional detention of KHIEU Samphân, the Trial Chamber further reasoned:

> Nor does the Chamber consider that KHIEU Samph[â]n's continued detention is disproportionate in all the circumstances of the case. In cases of comparable complexity to Case 002, provisional detention of five years or more has been viewed as justified in all the circumstances. When all the relevant circumstances are considered, including the finding that it is 'an enormous organizational and logistical undertaking', the trial in Case 002 has proceeded as quickly as possible. In any event, as Case 002/01 approaches its concluding phases, the Chamber does not accept the [...] Defence submission that [KHIEU Samphân] cannot predict or be certain of the likely duration of this trial. Nor does the Chamber consider that [KHIEU Samphân]'s advanced age renders his detention inappropriate. The factors that justify his continued detention outweigh these personal issues when the Chamber takes into account the standard of care provided to [KHIEU Samphân] and the respect for his rights afforded by the ECCC Detention Facility.[89]

43. The Defence submits that the Trial Chamber erred in failing to take into account the judicial investigative period in its analysis of whether the length of KHIEU Samphân's provisional detention was justified.[90] The Defence further avers that the Trial Chamber erred by comparing KHIEU Samphân's case to cases before international criminal tribunals, where the common law adversarial proceedings necessarily last much longer than those that are preceded by judicial investigations, such as at the ECCC.[91] In addition, the Defence contends that, despite Case 002/01 drawing to a close, there remains a lack of judicial predictability and certainty about

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[88] Memorandum from Judge NIL Nonn, President of the Trial Chamber, entitled "Adjusted Schedule for Closing Submissions (E295/1, E295/1/2, E295/1/3, E295/2 and E295/3)", E295/4, 22 August 2013.
[89] Impugned Decision, para. 23 (internal citations omitted).
[90] Appeal, paras. 49-55.
[91] Appeal, paras. 56-57.

the duration of the trial in Case 002 as a whole.[92] The Defence argues that, rather than considering KHIEU Samphân's advanced age alone in examining the propriety of his continued detention, the Trial Chamber should have considered it along with all the other relevant factors, namely delays and judicial unpredictability and uncertainty, which, taken together, lead to the only reasonable conclusion that the length of his provisional detention is excessive.[93]

44. The Co-Prosecutors respond that the Trial Chamber duly considered both the investigative and trial detention periods in its analysis,[94] appropriately compared Case 002 to cases of similar complexity before international criminal tribunals,[95] and correctly considered his advanced age cumulatively with all other relevant factors justifying his continued detention.[96] They further contend that the Defence fails to substantiate its contention that judicial predictability and certainty are factors of relevance and that, in any event, the foreseeability of trial completion and judgment in Case 002/01 can no longer be seriously disputed.[97]

45. Contrary to the Defence's claim that the period of judicial investigation was ignored in the Trial Chamber's analysis, the Supreme Court Chamber notes that the Trial Chamber duly defined the pre-trial detention period as running "from the moment when an individual is remanded in custody until a first-instance court's judgment is adopted",[98] and correctly calculated it as beginning from the day that he was detained by order of the Co-Investigating Judges.[99] The Trial Chamber's determination that it would not consider extracts from Judge LEMONDE's book in its analysis does not detract from the reasonableness of the Trial Chamber's decision. Human rights bodies, in determining whether there has been a violation of the right to be tried within a reasonable time, and in ascertaining whether the competent national authorities have demonstrated "special diligence" in the conduct of the proceedings,[100] take into consideration – in addition to the overall duration of detention – whether there were protracted

[92] Appeal, paras. 58-70.
[93] Appeal, paras. 71-74.
[94] Response, paras. 35, 37-38. *See also* Response, para. 39.
[95] Response, para. 36.
[96] Response, para. 41.
[97] Response, para. 40.
[98] Impugned Decision, fn. 47.
[99] Impugned Decision, para. 2.
[100] ECtHR, *Letellier v. France*, Judgment, 26 June 1991, application no. 12369/86, para. 35; *Idalov v. Russia*, Judgment, 22 May 2012, application no. 5826/03, para. 140 ("The existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings" (emphasis added)). *See also*, *inter alia*, *Bykov v. Russia*, Judgment, 10 March 2009, application no. 4378/02, para. 64; *McKay v. United Kingdom*, Judgment, 3 October 2006, application no. 543/03, para. 44; *Kudla v. Poland*, Judgment, 26 October 2000, application 30210/96, para. 111; *Labita v. Italy*, Judgment, 6 April 2000, application no. 26772/95, para. 153.

periods of "inactivity" or "inaction" by the authorities.[101] The Defence does not submit that there were periods of inactivity or inaction in Case 002; rather, the Defence contends that Case 001 was given "priority" by the Co-Investigating Judges.[102] Even if Case 001 were to have been prioritized at some stage, this is not to say that the investigation in Case 002 was inactive. The Supreme Court Chamber considers, in any event, that the extracts of Judge LEMONDE's book are insufficient to substantiate the claim of the lack of diligence. The Defence therefore fails to demonstrate that the Trial Chamber ignored the judicial investigative period in its analysis of the proportionality of the length of KHIEU Samphân's provisional detention.

46. The Supreme Court Chamber, moreover, considers the Defence's contention that the Trial Chamber erred in comparing KHIEU Samphân's period of provisional detention of over five years to similar cases at the international level to be without merit. The Defence fails to provide any support for its assertion that proceedings preceded by a period of judicial investigation are necessarily shorter than those that are not, nor does the Defence explain how such a difference in proceedings might affect the period of provisional detention at the ECCC. The fact of the matter is that KHIEU Samphân forms part of a multiple-accused case involving, *inter alia*, charges of genocide and crimes against humanity spanning a time period of nearly four years: such cases are of a nature and complexity rarely seen at the domestic level. The Trial Chamber's decision to conduct a comparative analysis of provisional detention periods in similar criminal cases at the international level was therefore entirely reasonable.[103] This conclusion is supported, moreover, by the Defence's own reliance on the jurisprudence of the *ad hoc* international criminal tribunals to support other arguments in the Appeal, which allege errors in the Trial Chamber's assessment

[101] *See* ECtHR, *Assenov and others v. Bulgaria*, Judgment, 28 October 1998, application no. 24760/94, paras. 157-158 ("The Government have submitted that it took two years for the case to come to trial because it was particularly complex, requiring a lengthy investigation. However, it would appear from the information available to the Court that during one of those years […] virtually no action was taken in connection with the investigation: no new evidence was collected and Mr Assenov was questioned only once […] Against this background, the Court finds that Mr Assenov was denied a "trial within a reasonable time", in violation of Article 5 § 3" (emphasis added)). *See also* *Punzelt v. the Czech Republic*, Judgment, 25 April 2000, application no. 31315/96, paras. 78-82; *Barfuss v. the Czech Republic*, Judgment, 31 July 2000, application no. 35848/97, paras. 71-74.

[102] Further Request to Admit into Evidence, para. 20.

[103] The ICC, the *ad hoc* international criminal tribunals, the ECtHR, and the HRC all refer to one another's jurisprudence in relation to matters of principle such as reasonableness of the length of detention. All conclude that "whether a time limit is appropriate can be evaluated only in light of all the circumstances of a given case". *See* ICTY, *Prosecutor v. Darko Mrda*, Case No. IT-02-59-PT, Decision on Darko Mrda's Request for Provisional Release, 15 April 2002. *See also* Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary,* (2nd ed., N.P. Engel: 2005), p. 177; Karim Khan, "Article 60 Initial proceedings before the Court" in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, (2nd ed., Beck: 2008), p. 1167, fn. 53; David Harris, Michael O'Boyle, Edward Bates and Carla Buckley (eds.), *Harris, O'Boyle & Warbrick: Law of the European Convention on Human* Rights, (2nd ed., OUP: 2009), p. 175.

of KHIEU Samphân's provisional detention period.[104] The Defence therefore fails to demonstrate any error in this regard.

47. The Supreme Court Chamber similarly rejects the Defence's assertion that the Trial Chamber considered KHIEU Samphân's advanced age in isolation rather than cumulatively with other relevant factors. The Trial Chamber specifically stated that "[t]he factors that justify [KHIEU Samphân's] continued detention outweigh these personal issues", referring to, among other things, his advanced age.[105]

48. As to the argument relating to the judicial predictability and certainty of the proceedings in Case 002, the Supreme Court Chamber considers that the Defence makes a valid point. At the outset, the Supreme Court Chamber stresses that the continued detention of any accused person must relate to specific charges subject to criminal proceedings. In declaring the invalidity of the First Severance of Case 002, the Supreme Court Chamber specified that the First SCC Severance Decision was without prejudice to the Trial Chamber's reassessment of severing Case 002, but that renewed severance must entail, *inter alia*, a tangible plan for the adjudication of the entirety of the charges in the Closing Order.[106] In severing Case 002 anew, the Trial Chamber declined to follow the Supreme Court Chamber's instructions, declaring that it "doubts that projections for future trials can meaningfully constitute a plan",[107] and abstained from resolving the issue as to how any subsequent trials might be conducted, and particularly when a potential second trial in Case 002 ("Case 002/02") could commence.[108] Instead, the Trial Chamber proposed to "hold[] a Trial Management Meeting later in the year, when the issue can be revisited anew in the light of circumstances then prevailing."[109]

49. For reasons which are developed more fully in a separate decision,[110] the Supreme Court Chamber has found that the Second Severance Decision results in a *de facto* stay of proceedings in relation to all charges placed outside the scope of Case 002/01, and that such a stay does not carry a sufficiently tangible promise of resumption as to permit arriving at a judgment on the

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[104] *See* Appeal, paras. 20-21, 34.
[105] Impugned Decision, para. 23. Other "personal" factors referred to by the Trial Chamber include the Defence's submission that KHIEU Samphân "has never sought to flee and has always attended proceedings, when required", that "it is also unlikely that [he] will be prevented from attending hearings due to his ill-health", that "there is no or negligible risk to public order should [KHIEU Samphân] be provisionally released", and that "at no stage during the course of proceedings has he encountered any threat to his safety". *See* Impugned Decision, para. 8, *referring to* Application, paras. 12, 26, 28, 32-35, 40.
[106] First SCC Severance Decision, para. 50.
[107] Second Severance Decision, para. 153.
[108] Second Severance Decision, paras. 154-155.
[109] Second Severance Decision, para. 155.
[110] Second SCC Severance Decision.

merits. In the Supreme Court Chamber's view, the persistence of such a situation renders KHIEU Samphân's continued detention in relation to those charges increasingly unjustified.

50. According to the jurisprudence of the ECtHR, the complexity of the case, *inter alia*, may be taken into consideration by the judicial authorities in justifying the continued detention of an accused.[111] However, such factors may continue to justify the prolongation of the deprivation of liberty only where the competent authorities have demonstrated "special diligence" in the conduct of proceedings.[112] Factors to be taken into account when making an assessment as to the lawfulness of proceedings in complex cases include the way in which the judicial system is organised[113] and whether domestic authorities have allocated additional resources or established a special unit thereto.[114] The ECtHR further considers that a heavy workload cannot justify unduly protracted proceedings.[115] The Supreme Court Chamber must therefore recommend measures in order to ensure that the conduct of the remainder of Case 002 is carried out diligently.

51. The Supreme Court Chamber has accordingly ordered that "the evidentiary hearings in Case 002/02 shall commence as soon as possible after closing submissions in Case 002/01, and that Case 002/02 shall comprise at minimum the charges related to S-21, a worksite, a

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[111] *See*, *inter alia*, ECtHR, *Kudla v. Poland*, Judgment, 26 October 2000, application no. 30210/96, para. 124 ("The Court will assess the reasonableness of the length of the proceedings in the light of the particular circumstances of the case and having regard to the criteria laid down in its case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities" (emphasis added)).

[112] *See supra*, fn. 100.

[113] *See* ECtHR, *Parizov v. The Former Yugoslav Republic of Macedonia*, Judgment, 7 February 2008, application no. 14258/03, para. 59 ("it is for the Contracting States to organise their legal systems in such a way that their courts can guarantee everyone's right to obtain a final decision on disputes [...] within a reasonable time"). *See also Kostovska v. The Former Yugoslav Republic of Macedonia*, Judgment, 15 June 2006, application no. 44353/02, para. 41.

[114] *See* Monica Macovei, *The Right to Liberty and Security of the Person. A Guide to the Implementation of Article 5 of the European Convention on Human Rights* (Directorate General of Human Rights, Council of Europe: 2002), pp. 35-36 ("In the complex cases [...] it can be particularly significant that a special unit has been created to deal with the case or that additional resources have been provided for existing ones expected to handle a case of an exceptional character; but above all it will be essential to demonstrate that the overall length of proceedings had been kept under review and that all possible efforts to expedite them had been taken"). *See also* ECtHR, *W. v. Switzerland*, Judgment, 26 January 1993, application no. 14379/88, paras. 41-42 ("The Government for their part stressed that the case was the most difficult case of economic crime so far dealt with in the Canton of Berne. It exceeded by far all other cases of the same type, both in extent and in complexity [...] The authorities had neglected nothing in order to complete the case-file and had even established a unit consisting of two investigating judges who were themselves assisted by persons assigned exclusively to that unit [...] [the Court] finds no period during which the investigators did not carry out their inquiries with the necessary promptness, nor was there any delay caused by possible shortage of personnel or equipment. Consequently, it appears that the length of the detention in issue was essentially attributable to the exceptional complexity of the case and the conduct of the applicant" (emphasis added)).

[115] *See* ECtHR, *Markoski v. The Former Yugoslav Republic of Macedonia*, Judgment, 2 November 2006, application no. 22928/03, para. 39 ("a chronic overload cannot justify an excessive length of proceedings"); *Dumanovski v. The Former Yugoslav Republic of Macedonia*, Judgment, 8 December 2005, application no. 13898/02, para. 45 ("As the Court has consistently held in its case-law [...], the workload in the national courts cannot be considered as a factor that can excuse the protracted length of the proceedings" (emphasis added)).

cooperative, and genocide".[116] The Supreme Court Chamber has also stated that, in order to achieve this, the creation of a second panel of national and international judges within the Trial Chamber to hear and adjudicate Case 002/02 has now become imperative, and has accordingly instructed the Office of the Administration of the ECCC to immediately explore the establishment thereof.[117] The matter of KHIEU Samphân's detention in relation to Case 002/02 and subsequent trials, if any, will therefore require new and separate justification and scrutiny by the assigned primary triers of fact.

52. As such, at the time of the filing of the Application and Appeal, the Defence made a valid point that there lacked judicial predictability and certainty in relation to Case 002 as a whole. However, since the time of these filings, Case 002 has been severed anew, and such severance has been upheld on appeal. The Supreme Court Chamber considers that the predictability and certainty of the end of the proceedings and judgment in Case 002/01 is presently restored, and the Defence's arguments in opposition thereto must therefore fail.

53. For the foregoing reasons, the Defence has failed to demonstrate that the length of KHIEU Samphân's provisional detention is disproportionate or excessive. These allegations are accordingly dismissed.

c. Alleged Error in Considering Change of Circumstances

54. In rejecting the Application for his immediate release on bail and ordering the continued provisional detention of KHIEU Samphân, the Trial Chamber further reasoned:

> Rule 82(4) [of the Internal Rules] allows an [a]ccused to file a further application for release where his circumstances have changed since his last application was finally rejected. The SCC upheld the Trial Chamber's decision refusing to release KHIEU Samph[â]n in February 2011. The Chamber has not found any change in [his] circumstances since that date that would allow it to grant his [A]pplication now.[118]

55. The Defence submits that the Trial Chamber erred in law in relying upon Rule 82(4) of the Internal Rules and in considering whether there has been a change in the circumstances since KHIEU Samphân's last application for release, despite the fact that it had previously decided that this requirement would not apply in a further similar application.[119]

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[116] Second SCC Severance Decision, para. 13.
[117] Second SCC Severance Decision, para. 11. *See also* Order Regarding the Establishment of a Second Trial Panel, 23 July 2013, E284/4/7/1.
[118] Impugned Decision, para. 23.
[119] Appeal, paras. 75-78.

56. The Co-Prosecutors agree that the Trial Chamber erred in examining the requirement under Rule 82(4) of the Internal Rules, but argue that the Defence has failed to show any resulting prejudice that would invalidate the Impugned Decision.[120]

57. The Supreme Court Chamber notes that, in the First TC Decision on Immediate Release, the Trial Chamber indicated that "[i]n view of the lack of advance notice afforded to the parties to adequately prepare their submissions in relation to Rule 63(3) [of the Internal Rules], the Defence shall not be required to establish a change in circumstances under Rule 82(4) [of the Internal Rules] should a fresh application for release be subsequently made before the Chamber".[121] The appropriateness of the Trial Chamber's remedy was upheld on appeal.[122] The fact that the Trial Chamber nevertheless applied the requirement at Rule 82(4) of the Internal Rules despite its previous indication is not in dispute. The fact that the Trial Chamber found no change in circumstance since KHIEU Samphân's last application for immediate release, without having heard the Defence on the matter first, is also manifest. The Supreme Court Chamber therefore finds that the Trial Chamber committed an error of law in this respect.

58. Contrary to Rule 105(2) of the Internal Rules, however, the Defence makes no demonstration that the Trial Chamber's error invalidates the Impugned Decision.[123] Even if the Trial Chamber had not taken Rule 82(4) of the Internal Rules into account, in light of the considerations above, the Supreme Court Chamber finds that the Trial Chamber's decision that KHIEU Samphân's detention continues to be warranted is not so unreasonable as to warrant appellate intervention. The Defence's arguments in this respect are accordingly dismissed.

[120] Response, paras. 42-47.
[121] First TC Decision on Immediate Release, para. 42.
[122] First SCC Decision on Immediate Release, para. 51.
[123] Rule 105(2) of the Internal Rules provides that "[a] party wishing to appeal a decision of the Trial Chamber where immediate appeal is available under Rule 104(4) shall file an immediate appeal setting out the grounds of appeal and arguments in support thereof. In respect of each ground of appeal it shall: a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; or b) specify a discernible error in the exercise of the Trial Chamber's discretion which results in prejudice to the appellant; or c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice".

V. DISPOSITION

59. For the foregoing reasons, the Supreme Court Chamber:

ADMITS the Appeal under Rule 104(4)(b) of the Internal Rules; and,

DENIES the Appeal in its entirety.

Phnom Penh, 22 August 2013
President of the Supreme Court Chamber

KONG Srim