

**BEFORE THE SUPREME COURT CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPEAL AGAINST
THE DECISION ON THE APPLICATION FOR IMMEDIATE RELEASE ON BAIL**

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I. INTRODUCTION

1. The Co-Prosecutors make these submissions (“Response”) in response to the appeal (“Appeal”)¹ by the Defence for Khieu Samphan (the “Defence”) against the Trial Chamber’s decision on the Defence’s application for the immediate release of the Accused (“Impugned Decision”)².
2. As explained further below, the Co-Prosecutors submit that the Appeal should be dismissed as untimely or, in the alternative, for failing to demonstrate error meriting relief. In particular response to the grounds of appeal lodged by the Defence, the Co-Prosecutors submit that: (1) the Defence did not substantiate error meriting relief in regards to the factors the Trial Chamber considered in determining that the risk to the Khieu Samphan’s (“Accused”) attendance at trial merited continued detention, or the weight it ascribed to those factors; (2) the Defence did not substantiate error meriting relief in regards to the Trial Chamber’s analysis that the detention period was proportionate considering all of the factors; and (3) while the Trial Chamber appears to have erred in considering whether there was a change of circumstances since the Accused’s last application for release pursuant to Rule 82(4), any error was harmless because the Chamber conducted a fresh review of all facts and circumstances relevant to the issue of the Accused’s detention.

II. PROCEDURAL HISTORY

3. On 19 November 2007, Khieu Samphan was detained by order of the Co-Investigating Judges (“CIJ”) and transferred to the ECCC detention facility.³ The CIJ periodically renewed the Accused’s detention orders, which were subsequently upheld by the Pre-Trial Chamber.⁴
4. On 15 September 2010, the CIJ issued their Closing Order in Case 002 and ordered the continued provisional detention of the Accused until he was brought before the Trial

¹ E275/2/1 Appeal Against the Decision on Mr Khieu Samphan’s Application for Immediate Release on Bail, 14 May 2013 (“Khieu Samphan Appeal”).

² E275/1 Decision on Khieu Samphan’s Application for Immediate Release, 26 April 2013 at para. 23 (“Impugned Decision”).

³ C27 Detention Order of Khieu Samphan, 19 November 2007.

⁴ See e.g. C26/5/26 Decision on Khieu Samphan’s Appeals Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009 at paras. 53, 58, 63; C26/9/12 Decision on Khieu Samphan’s Appeal Against Order on Extension of Provisional Detention, 30 April 2010 at paras .34, 35, 38, 39.

Chamber, stating that the conditions in Internal Rule 63(3) justifying detention were satisfied.⁵

5. On 13 January 2011, the Pre-Trial Chamber filed its decision on the Accused's appeal of the Closing Order, declaring the Accused's appeal inadmissible and ordering continuation of the Accused's provisional detention until he was brought before the Trial Chamber.⁶ On 21 January 2011, the Pre-Trial Chamber issued reasons for the detention portion of that ruling.⁷
6. The Trial Chamber was seised of Case 002 on 13 January 2011. On 18 January 2011 the Defence filed an application for the immediate release of the Accused.⁸ The Co-Prosecutors made oral submissions in response on 31 January 2011.⁹ On 16 February 2011, the Trial Chamber rejected the application and ordered the continuation of the Accused's detention pursuant to Internal Rule 63(3)(b)(iii) on the basis of the need to ensure his presence during trial proceedings.¹⁰ It also allowed, as a remedy for not providing advance warning that the oral hearings would concern the Rule 63(3) factors, that "the Defence shall not be required to establish a change in circumstances under Rule 82(4) should a fresh application for release be subsequently made before the Chamber."¹¹
7. On 3 March 2011, the Defence appealed the Trial Chamber's decision of 16 February 2011.¹² The Co-Prosecutors responded on 28 March 2011,¹³ and the Accused replied on 11 April 2011.¹⁴ In its 6 June 2011 decision rejecting the Defence's appeal, the Supreme Court Chamber held, in relevant part, that: the Accused's detention was valid under Internal Rule 63(3)(b)(iii) on the basis of the risk of the Accused becoming unavailable for trial; the Trial Chamber did not commit error in not explicitly considering release on bail because the Defence had not substantiated the "factual circumstances and conditions attaching to bail;" and the Trial Chamber's remedy of not requiring a change of

⁵ **D427 Closing Order**, 15 September 2010 at para. 1622("Part Six: Maintenance in Detention").

⁶ **D427/4/14** Decision on KHIEU Samphan's Appeal against the Closing Order , 13 January 2011; see also **D427/4/15** Decision on KHIEU Samphan's Appeals against the Closing Order, 21 January 2011.

⁷ **D427/4/15** Decision on KHIEU Samphan's Appeals against the Closing Order, 21 January 2011.

⁸ **E18** Application for Release Pursuant to Rule 82(3) of the internal Rules , 18 January 2011.

⁹ **E1/1.1** T. 31 January 2011.

¹⁰ **E50** Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011.

¹¹ **E50** Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, at para. 42.

¹² **E50/3** Appeal Against the Decision on Application for Immediate Release Khiev Samphan, 3 March 2011.

¹³ **E50/3/1/1**, Co-Prosecutors' Response to Khieu Samphan's Appeal Against the Decision on the Application for Immediate Release, 28 March 2011.

¹⁴ **E50/3/1/3** Reply, 11 April 2011.

circumstances on a subsequent application was a sufficient remedy for any procedural defect in the Trial Chamber not providing advance notice that the Rule 63(3) factors would be discussed at the oral hearings.¹⁵

8. On 29 March 2013, the Defence filed a new application for the immediate release of the Accused.¹⁶ The Defence argued: that there was no longer any justification for the Accused's detention; that continued detention violated the Accused's rights because there was "no prospect of a judgment in the foreseeable and not too distant future" and because of the Accused's age; and that release under proffered bail conditions was sufficient to address any risks.¹⁷ While the Co-Prosecutors were not permitted to file a written response, at the hearing on this application, they responded that: the conditions under Rule 63(3)(b) continued to exist justifying detention¹⁸; noted that the Defence had misconstrued their cited authorities on their claim regarding a lack of legal certainty¹⁹; that the ECHR cases relied on by the Defence were of limited relevance²⁰; and that the Defence's allegations regarding lack of certainty and delay of proceedings did not withstand scrutiny²¹.
9. On 26 April 2013, the Trial Chamber issued the Impugned Decision rejecting the Defence's application and ordered the continuation of the Accused's detention pursuant to Internal Rule 63(3)(b)(iii) on the basis of the need to ensure his presence during trial proceedings.²² The Trial Chamber held that given the advanced stage and complexity of the trial, either intentional or non-intentional non-appearance of the Accused would risk delaying the trial's expeditious completion. The Trial Chamber was also concerned that the risk of the Accused absconding was increased by the late stage of trial. The Trial Chamber held that these concerns were not sufficiently outweighed by the assurances advanced by the Accused and his family.²³ The Trial Chamber rejected the Defence's

¹⁵ E50/3/1/4 Decision on Immediate Appeal by Khieu Samphan's on Application for Release, 6 June 2011, paras. 54, 55, 58.

¹⁶ E275 Application for Mr Khieu Samphan's Immediate Release on Bail , 29 March 2013.

¹⁷ E275 Application for Mr Khieu Samphan's Immediate Release on Bail , 29 March 2013; E1/180.1 T. 11 April 2013.

¹⁸ E1/180.1 T. 11 April 2013, at pp. 98, 106-117.

¹⁹ E1/180.1 T. 11 April 2013, p. 99.

²⁰ E1/180.1 T. 11 April 2013, pp. 100-101.

²¹ E1/180.1 T. 11 April 2013, pp. 102-106.

²² E275/1 Impugned Decision, at para. 23.

²³ E275/1 Impugned Decision, at para. 21.

contention that a judgment is unforeseeable and found the length of the Accused's provisional detention to be justified in the totality of the circumstances.²⁴

10. In the Appeal, the Defence asserts that the Trial Chamber erred: in failing to provide sufficient reasons for its decision; in the factors it considered in ordering continued detention, and the weight it ascribed to them; in improperly calculating the length of provisional detention and denying the admission of purported evidence of delays during the investigatory stage; in finding that there was not a sufficient lack of predictability and certainty regarding the issuance of a judgment; and in relying upon Internal Rule 82(4) in rejecting the Accused's new application for immediate release. Further, the Defence alleges that, together, circumstances of delays and judicial unpredictability and uncertainty, as well as the Accused's age, make the length of the Accused's provisional detention excessive.²⁵

III. ADMISSIBILITY

11. The Supreme Court Chamber has jurisdiction over the Appeal pursuant to Internal Rule 104(4)(b), which allows for immediate appeals of Trial Chamber "decisions on detention and bail under Rule 82".²⁶ The Defence make allegations that the Trial Chamber erred as to fact, law, and/or discretion pursuant to Rule 105(2).

IV. TIMELINESS

12. The Co-Prosecutors submit that the Appeal was not timely as it was not perfected within the applicable time limits, and therefore that it should be dismissed. The Impugned Decision was notified to the parties on 26 April 2013. Pursuant to Rule 107(2), the Defence had until 16 May 2013 to file their appeal.²⁷ Pursuant to Practice Direction Article 7.1, documents must be filed in Khmer and either French or English. While the French version of the Appeal was filed on 16 May 2013, the Khmer version was not filed until 22 May 2013, five days past the filing deadline. The Co-Prosecutors are not aware of any request from the Defence for permission to file in one language only pursuant to Practice Direction 7.2, or to have the Appeal deemed timely retrospectively pursuant to Rule 39(4)(b).
13. Pursuant to Rule 39(1), failure of a party to respect the applicable time limits "shall lead to the invalidity of the action in question." The Co-Prosecutors submit that in the instant

²⁴ E275/1 Impugned Decision, at para. 23.

²⁵ E275/2/1 Khieu Samphan Appeal.

²⁶ Internal Rule 82; E50/3/1/4 Decision on Immediate Appeal at para. 21.

²⁷ This includes allowances for public holidays on 13, 14, and 15 May 2013.

case, 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. Additionally, it stands to reason that any *post hoc* requests that may be forthcoming from the Defence for special dispensation now that their error has been noted should not be seriously countenanced, as that would incentivize making late filings *sub rosa*.

14. This Response is timely as it is filed within ten days of the Co-Prosecutors being notified of the Defence's perfected appeal on 27 May 2013.²⁸

V. APPLICABLE LAW

A. Scope of appellate review and corrective jurisdiction

i. Appellate review

15. Internal Rule 104 provides that the Supreme Court Chamber shall decide appeals that are based on one or more of the following grounds: an error on a question of law invalidating the decision; an error of fact which has occasioned a miscarriage of justice; or a discernible error in the exercise of the Trial Chamber's discretion, which resulted in prejudice to the appellant. These grounds are disjunctive.²⁹ Thus, for any error, harm or prejudice must flow to the appellant in order to warrant relief under any grounds for appeal.
16. The scope of the Supreme Court Chamber's review of the Impugned Decision is limited to the grounds put forth in the appeal.³⁰ However, for issues within the scope of the appeal, the Supreme Court Chamber may consider afresh the factual underpinnings of an impugned decision and substitute its own reasoning for the reasoning of a first instance decision.³¹

ii. Corrective jurisdiction

17. Moreover, "[t]he burden rests upon the party challenging a provisional release decision to demonstrate that the Trial Chamber has committed a 'discernible error'."³²

²⁸ Practice Direction ECCC/01/2007/Rev.8, Filing of Documents Before the ECCC, Article 8.3.

²⁹ E50/3/1/4 Decision on Immediate Appeal, at para. 20.

³⁰ E50/3/1/4 Decision on Immediate Appeal, at para. 52.

³¹ E50/3/1/4 Decision on Immediate Appeal, at para. 52. Subrule 104(1) gives the Supreme Court Chamber the discretion to "examine evidence and call new evidence," while Subrule 104(2) empowers it to amend decisions being appealed in whole or in part.

³² **Prosecutor v. Zdravko Tolimir et al.**, Decision on Interlocutory Appeal Against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, para. 4.

B. Evaluating provisional detention

i. Two-step test

18. As conditions precedent to an order of provisional detention, Internal Rule 63(3) requires first, that there is a “well-founded suspicion that the person who is to be detained has committed a crime charged,”³³ and, if so, that at least one of the five grounds listed in Internal Rule 63(3)(b) be present.³⁴ In regards to this Appeal, the permissible ground for detention found by the Trial Chamber was in order to “ensure the presence of the [Accused] during the proceedings”.³⁵
19. This Chamber has held that in evaluating whether provisional detention is a necessary measure to ensure the presence of the Accused
- [i]t is reasonable for a Trial Chamber to take into account the gravity of the offences charged in order to determine whether facing the possibility of a lengthy sentence would constitute an incentive for an accused to flee. It is evident that the more severe the possible sentence which an accused is facing, the greater is his incentive to flee.³⁶
20. The Chamber noted, however, that the seriousness of the crimes charged was only one factor to be considered, and that the expectation of a lengthy sentence cannot be the “sole factor determining the outcome of an application for release”.³⁷
21. The scope of considerations related to ensuring the Accused’s presence is broader than merely the risk that he or she will abscond. It encompasses other considerations that might cause the Accused to be unavailable for trial, such as the risks that the Accused may go into hiding, disregard summons, or even be temporarily and unintentionally prevented from attending a hearing, such as by public disturbances or attacks on his person.³⁸ The risk to expeditious conduct of proceedings posed by these possibilities renders them valid considerations in determining whether continued detention is justified. As the Supreme Court Chamber noted in its June 2011 decision, “[e]ven a single instance of an accused failing to appear before the court might undermine the prospect of arriving at the judgment within a reasonable time” and frustrate the goal of expeditious proceedings.³⁹

³³ E50/3/1/4 Decision on Immediate Appeal, at para. 39.

³⁴ E50/3/1/4 Decision on Immediate Appeal, at para. 39.

³⁵ Internal Rule 63(3)(b); E275/1 Impugned Decision at para. 21.

³⁶ E50/3/1/4 Decision on Immediate Appeal, para. 40, quoting Case No. IT-03-73-AR65.1, *Prosecutor v. Ivan Cermak and Mladen Markac*, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Denying Provisional Release, 2 December 2004, para. 25.

³⁷ E50/3/1/4 Decision on Immediate Appeal, at para. 40.

³⁸ E50/3/1/4 Decision on Immediate Appeal, at para. 54.

³⁹ E50/3/1/4 Decision on Immediate Appeal, at para. 54.

22. Furthermore, “a Trial Chamber has considerable discretion when determining what factors will be relevant to its assessment of whether the requirements of [provision release] have been met, and ... a Trial Chamber also has considerable discretion when determining the weight to accord these factors in light of the specific circumstances of the individual case.”⁴⁰
- ii. Presumption of continued grounds for detention and applications for release*
23. Pursuant to Rule 82(1), when an 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,” unless a release order is issued under Rule 82(2). This provision creates a rebuttable factual presumption that the grounds deemed by the Co-Investigating Judges to justify provisional detention persist until judgment is rendered.⁴¹ Therefore, “from the initial appearance until the Trial Chamber’s judgment is handed down, the onus is on an accused to challenge the persistence of the grounds of his or her detention in a request to the Trial Chamber.”⁴² Moreover, the burden of substantiating the factual conditions and circumstances making bail an appropriate remedy for any risk of flight rests with the Defence; only after these conditions are substantiated is an assessment of the adequacy of release on bail required.⁴³
24. When detention continues at trial, it must remain proportionate to the circumstances of the case and be balanced against the risk of unreasonably long or indefinite deprivation of liberty.⁴⁴ The basic right to personal liberty must be weighed against the reasons warranting detention.⁴⁵
25. Internal Rule 82(4) requires a change in the Accused’s circumstances for a new application for release to be made after previous applications have been rejected. However, for the instant application, the Defence has been granted a dispensation from this requirement as a remedy for lack of adequate notice to prepare submissions on

⁴⁰ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.1 Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolić’s Motion for Provisional Release, 24 January 2006, p. 5.

⁴¹ E50/3/1/4 Decision on Immediate Appeal, at para. 48.

⁴² E50/3/1/4 Decision on Immediate Appeal, at para. 48.

⁴³ E50/3/1/4 Decision on Immediate Appeal, at para. 57.

⁴⁴ E50/3/1/4 Decision on Immediate Appeal, at para. 56.

⁴⁵ E50/3/1/4 Decision on Immediate Appeal, at para. 56, citing *McKay v. United Kingdom*, Grand Chamber Judgment, App. No. 543/03, 3 October 2006, para. 42.

Internal Rule 63(3) for hearings before the Trial Chamber during its previous application.⁴⁶ This remedy was upheld by this Chamber.⁴⁷

VI. ARGUMENT

26. Just as the Defence failed to carry their burden in the Trial Chamber to demonstrate that detention was no longer necessary, the Defence have failed to demonstrate in this Appeal any error meriting relief. The grant or denial of provisional release is a discretionary decision afforded wide latitude, and the Trial Chamber properly exercised that discretion in determining that, in light of all relevant circumstances, the risk to the Accused's availability for trial outweighed assurances put forth by the Defence.

A. The Defence Fail to Substantiate Error in the Trial Chamber's Discretionary Decision

27. In considering all of the circumstances, the Trial Chamber held that the concern for ensuring the Accused's presence during trial was not outweighed by assurances proffered by the Defence. The Defence allege that the Trial Chamber erred in the weight it ascribed to factors relevant to provisional detention, particularly its concern for the risk of the Accused's flight.⁴⁸ The Defence also allege that the Trial Chamber "did not provide sufficient reasons for its decision."⁴⁹

28. This Chamber itself has previously found that "the risk of the Accused becoming unavailable for trial"⁵⁰ justified the Accused's provisional detention. The Defence's arguments do not demonstrate that either the Trial Chamber or this Chamber were erroneous in that conclusion. Nevertheless, should this Chamber be persuaded that the Trial Chamber committed error in its exegesis of the justification for provisional detention, where "the legal basis for the Accused's detention under Internal Rule 63(3)(b)(iii) is still valid"⁵¹ this Chamber "may substitute its own reasoning for the flawed reasoning of a first instance decision"⁵².

29. As factors supporting the conclusion that concern for the Accused's presence at trial justified his continued detention, the Trial Chamber considered as its "primary consideration" the risk of the Accused's flight. In addition, however, it also considered

⁴⁶ E50 Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, at para. 42.

⁴⁷ E50/3/1/4 Decision on Immediate Appeal, at para. 51.

⁴⁸ E275/2/1 Appeal, at para. 14.

⁴⁹ E275/2/1 Appeal, at para. 14.

⁵⁰ E50/3/1/4 Decision on Immediate Appeal, at para. 52.

⁵¹ E50/3/1/4 Decision on Immediate Appeal, at para. 54.

⁵² E50/3/1/4 Decision on Immediate Appeal, at para. 52.

the impact on the trial that the non-appearance of the Accused would have, the late stage of the trial, the complexity of the trial, and potential circumstances of unintentional absence.⁵³

30. The Defence seek to substantiate error by referencing this Chamber's instruction that the potential for a lengthy sentence could not be the "sole factor determining the outcome of an application for release".⁵⁴ It is clear, however, that the Accused's potential lengthy sentence was only one factor indicating a risk of flight, the other being the advanced stage of trial. Furthermore, risk of flight was only one of the factors that the Trial Chamber considered militated against provisional release. This Chamber itself noted the detrimental impact of the Accused's absence if "goes into hiding, decides to disregard summons or even temporarily is prevented from attending a hearing."⁵⁵ Although it was "reasonable for a Trial Chamber to take into account the gravity of offences charged,"⁵⁶ the Trial Chamber did not regard "the possible severity of the sentence as determinative,"⁵⁷ Nor does the Defence substantiate a claim that the Trial Chamber placed undue weight on the Accused's risk of flight. This Chamber has confirmed that the possibility of a lengthy sentence is a relevant factor as to risk of flight, and the Trial Chamber is given wide discretion in considering the weight to be afforded to various factors regarding whether to continue provisional detention. The Impugned Decision therefore does not violate this Chamber's guidance in this regard.
31. In attempting to demonstrate error, the Defence also allege that: the Trial Chamber did not "take account of the fact that Mr Khieu Samphan does not have what it takes to abscond;"⁵⁸ the Trial Chamber's finding that the assurances provided by the Accused and his family members were insufficient in the circumstances "is totally mistaken;"⁵⁹ and the Trial Chamber "ignore[d] the truthfulness and sincerity of the assurances given."⁶⁰
32. As a factual matter, the Defence's assertions regarding "what it takes abscond" are unconvincing. This Chamber has observed that "[e]ven a single instance of an accused

⁵³ E275/1 Impugned Decision, para. 21.

⁵⁴ E50/3/1/4 Decision on Immediate Appeal, at para. 40.

⁵⁵ E50/3/1/4 Decision on Immediate Appeal, at para. 54.

⁵⁶ E50/3/1/4 Decision on Immediate Appeal, at para. 40.

⁵⁷ *Prosecutor v. Čermak and Markač*, Case No. IT-03-73-AR65.1 Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, 2 December 2004, para 27 (cited by the Supreme Court Chamber at E50/3/1/4 Decision on Immediate Appeal, at para 41).

⁵⁸ E275/2/1 Appeal, at para. 23.

⁵⁹ E275/2/1 Appeal, at para. 31.

⁶⁰ E275/2/1 Appeal, at para. 35.

failing to appear before the court might undermine the prospect of arriving at the judgment within a reasonable time,”⁶¹ and it is self-evident that it is not necessary to have a passport, personal financial means, nor ample physical ability⁶² in order to abscond, even if only for a short period.

33. But the Trial Chamber was not only concerned with the intentional absences that could disrupt trial, but also unintentional absences.⁶³ In light of these concerns, it rejected the “assurances of the Accused and his family members,” logically read to include the proffered bail conditions,⁶⁴ as insufficient to outweigh its concerns regarding the prospect of his unavailability.⁶⁵ This finding was entirely within the Trial Chamber’s discretion and is reasonable considering the circumstances of the case. To the extent the Trial Chamber did have misgivings about the proffered assurances, it is clearly “for the Trial Chamber to consider the credibility of all evidence presented. ... [a trial chamber is] entitled to reach a conclusion contrary to that urged by the [moving party] after having taken into account the information which had been presented to it.”⁶⁶

34. As for the Defence’s general complaint that the decision was insufficiently reasoned, the Co-Prosecutors submit that the Trial Chamber’s explanation of the various factors it found supported its conclusion, and many of those it did not, was adequate reasoning. The Co-Prosecutors note that, “[t]he Trial Chamber is ‘not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial. It is sufficient for the Trial Chamber to indicate all the relevant factors that it has taken into account in reaching its decision. In other words, the Trial Chamber must render a reasoned opinion.’”⁶⁷ This Chamber has previously dismissed the argument of the Defence, which they repeat again in the Appeal⁶⁸, that a Trial Chamber decision on provisional detention should be annulled as insufficiently reasoned based on decisions by the French *Cour de Cassation* because they

⁶¹ E50/3/1/4 Decision on Immediate Appeal, at para. 54.

⁶² See E275/2/1 Appeal, at para. 24.

⁶³ E275/1 Impugned Decision, at para. 21.

⁶⁴ See E275/1 Impugned Decision, at fn. 42, 43.

⁶⁵ E275/1 Impugned Decision, at para. 21; see also *Prosecutor v. Zdravko Tolimir et al.*, Decision on Interlocutory Appeal Against Trial Chamber’s Decisions Granting Provisional Release, 19 October 2005, para. 29 (general references “may be understood to incorporate” specific facts related to provisional release).

⁶⁶ *Prosecutor v. Zdravko Tolimir et al.*, Decision on Interlocutory Appeal Against Trial Chamber’s Decisions Granting Provisional Release, 19 October 2005, para. 15.

⁶⁷ *Prosecutor v. Jovica Stanisic*, Case No. IT-03-69-PT Decision on Provisional Release, 28 July 2004, para. 10 (internal quotations omitted).

⁶⁸ E275/2/1 Appeal, at para. 39.

are “not relevant in light of Internal Rule 82(1).”⁶⁹ Even if the Supreme Court Chamber should desire further evidence substantiating the necessity of the continued provisional detention of the Accused, it will find it in the Co-Prosecutors’ submissions on record⁷⁰ to the Trial Chamber regarding all of the Rule 63(3)(b) factors.⁷¹ That evidence includes: a) the risk to the Accused’s security arising from his exposure in traveling to and from the Court for scheduled hearings; b) evidence of public surveys indicating that large numbers of victims harbour feelings of revenge towards the Accused; c) prior attacks on the Accused and his own insistence on guarantees of security; d) the extensive exposure of the Accused’s role in the Communist Party of Kampuchea and the Democratic Kampuchea regime, which has been heard in open court; e) the Accused’s past statements questioning the legitimacy of ECCC proceedings and opposing the prospect of his trial.⁷²

B. The Defence Fail to Substantiate Error in the Trial Chamber’s Conclusion that the Accused’s Detention was not Disproportionate under the Circumstances

35. The Defence argue that the Trial Chamber committed an error of law because it did not include the judicial investigation phase in calculating the length of provisional detention, and therefore did not include it as “among the relevant circumstances.”⁷³ The Defence also argue that the Trial Chamber “omitted to take account of the Defence’s submissions or to give any reasons for its decision thereupon.”⁷⁴
36. Contrary to the Defence’s claim, the Trial Chamber did “provide reasons for its decision”⁷⁵ rejecting this argument by the Defence, explaining that international jurisprudence, the complexity of the case, and the speed with which it has progressed,

⁶⁹ E50/3/1/4 Decision on Immediate Appeal, at fn. 84.

⁷⁰ E1/180.1 T. 11 April 2013, at pp. 112-117.

⁷¹ E50/3/1/4 Decision on Immediate Appeal, at para. 54; E1/180.1 T. 11 April 2013, p. 114 (“[W]e agree with the Supreme Court Chamber. In our submission, all of these factors go towards establishing both an unacceptable risk to Mr. Khieu Samphan’s own safety and, by extension, under Rule 63.3(b)(iii), which relates to ensuring his presence, they create an unacceptable risk that his presence cannot be or may not be secured if he is released.”).

⁷² E1/180.1 T. 11 April 2013, at pp. 112-117. The Co-Prosecutors also submit for the Supreme Court Chamber’s consideration recent public surveys which tend to confirm the existence of risk to the Accused (These documents were sent to the Trial Chamber and the Defence prior to the hearings on the application for release. They were not filed as the Trial Chamber directed the Co-Prosecutors not to file a written response to the application for release): Human Rights Centre, University of California, Berkeley, *After the First Trial - A Population-Based Survey On Knowledge And Perception Of Justice And The Extraordinary Chambers In The Courts Of Cambodia*, June 2011 (see p.5 bullet point 3); Berlin Centre for the Treatment of Torture Victims, *The Survivors’ Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation*, December 2010 (see graphs 2 and 3 on pp.30-31).

⁷³ E275/2/1 Appeal, at para. 51 (internal quotations and italics omitted).

⁷⁴ E275/2/1 Appeal, at para. 52.

⁷⁵ E275/2/1 Appeal, at para. 52.

amongst “all the relevant circumstances” all supported its conclusion.⁷⁶ As part of that analysis, the Trial Chamber compared the detention period in this case to those in cases tried before the *ad hoc* tribunals. The Defence claim that this was an error because “adversarial proceedings before the ICTY, and ICTR and the ICC necessarily last much longer than proceedings which are preceded by judicial investigations,”⁷⁷ and accuse the Trial Chamber of “just plain bad faith”⁷⁸ in doing so. This submission is without merit. First, as noted above, the Trial Chamber was considering both the Accused’s pre-trial and trial detention periods, thus obviating the alleged difference between the courts. Second, as the Co-Prosecutors noted to the Trial Chamber, cases before the *ad hoc* tribunals are, in fact, far more similar to the instant one than the European Court of Human Rights cases that the Defence cited before the Trial Chamber⁷⁹ (but have not relied on in the instant Appeal) because the international tribunals deal “with cases of mass crime, and not domestic cases dealing with a charge of single murder, or robbery, or fraud.”⁸⁰ In that regard, the Co-Prosecutors noted that in more than 50 cases at the ICTY Accused were detained for five years or longer, while at the ICTR Accused have been detained for five years or longer in more than 31 cases.⁸¹

37. The Trial Chamber clearly countenanced the pre-trial period in its calculation of the provisional detention period. The Trial Chamber explicitly noted that “[p]ursuant to the ECtHR case-law, pre-trial detention runs from the moment when an individual is remanded in custody.”⁸² Additionally, the Trial Chamber sought guidance from “cases of comparable complexity” which entailed “provisional detention of five years or more.”⁸³ The Trial Chamber noted that, including the pre-trial detention period, the Accused had been detained for five years and five months at the time of the Impugned Decision, thus clearly indicating it was including the pre-trial detention period in its calculations.
38. Furthermore, the Defence’s assertion that the Trial Chamber did not take account its submissions on alleged delays and lack of diligence during the investigative phase is without merit. As a general matter, the fact that the Trial Chamber does not explicitly mention all arguments raised by a party “does not necessarily mean that it did not take

⁷⁶ E275/1 Impugned Decision, at para. 23.

⁷⁷ E275/2/1 Appeal, at para. 57.

⁷⁸ E275/2/1 Appeal, at para. 57.

⁷⁹ E275 Application for Mr Khieu Samphan’s Immediate Release on Bail, 29 March 2013, fn. 21, 22.

⁸⁰ E1/180.1 T. 11 April 2013, p. 103.

⁸¹ E1/180.1 T. 11 April 2013, p. 103.

⁸² E275/1 Impugned Decision, at para. 23, fn. 47.

⁸³ E275/1 Impugned Decision, at para. 23.

[them] into account.”⁸⁴ Indeed, the Supreme Court Chamber has held that “[t]he Trial Chamber is not required to articulate every step of its reasoning for each finding it makes.”⁸⁵ Nevertheless in the “applicable law” section of its decision, the Trial Chamber makes clear its awareness that it “must also consider whether the relevant judicial organs have displayed diligence in the conduct of the proceedings.”⁸⁶ Further, in noting the Defence’s submission alleging breach of the Accused’s right to an expeditious trial and the Co-Prosecutors’ response to undue delay allegations,⁸⁷ it is evident that the Trial Chamber was cognisant of considerations that go to the “assessment of possible delays to the proceedings”⁸⁸ in finding that “the trial in Case 002 has proceeded as quickly as possible.”⁸⁹

39. Moreover, a substantial portion of the Defence’s argument in relation to delays during the investigatory stage is spent attempting to reargue the admissibility of evidence it proffered to the Trial Chamber but that the Trial Chamber did not admit⁹⁰, despite the fact that Trial Chamber decisions regarding the admissibility of evidence are not subject to immediate appeal,⁹¹ either individually or pendant to another matter. The Defence seeks to challenge the Trial Chamber’s decision to reject the Defence’s Internal Rule 87(4) request to put before the Trial Chamber extracts of Marcel Lemonde’s book entitled *Un Juge Face Aux Khmer Rouge*.⁹² “[D]ecisions outside the scope of Internal Rule 104(4) can only be appealed following the final judgment”, and “[o]ther [Supreme Court Chamber] decisions have similarly dismissed appeals as inadmissible because they do not fall within the scope of Internal Rule 104(4).”⁹³ The Trial Chamber’s decision on the admissibility of evidence is therefore not open to immediate appeal and the Defence’s challenge should be dismissed. In any event, the decision is entirely reasonable given the

⁸⁴ **E163/5/1/13** Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 36

⁸⁵ **E163/5/1/13** Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, 8 February 2013, para. 36

⁸⁶ **E275/1** Impugned Decision, para. 15; see also E1/180.1 T. 11 April 2013, p. 101.

⁸⁷ **E275/1** Impugned Decision, paras. 8, 10.

⁸⁸ **E275/2/1** Appeal, at para. 51.

⁸⁹ **E275/2/1** Appeal, at para. 49.

⁹⁰ **E275/2/1** Appeal, at paras. 52-54.

⁹¹ Rule 104(4).

⁹² **E280/1** Email from Roger Phillips Re: Form of Response to Khieu Samphan’s Rule 87(4) Application, 19 April 2013.

⁹³ **E154/1/1/4** Decision on Ieng Sary’s Appeal Against the Trial Chamber’s Decision on its Senior Legal Officer’s Ex Parte Communications, 25 April 2012, para. 12.

lateness of the application to admit this new evidence in the context of the bail application.⁹⁴

40. The Defence further argue that the Trial Chamber committed error in regards to its finding “that the Accused cannot predict or be certain of the likely duration of this trial.”⁹⁵ At the outset the Co-Prosecutors reiterate that the cases cited by the Defence to the Trial Chamber to support this principle are not relevant for present purposes because they concern the issue of legal certainty of legislation, an issue litigated in cases before the European Court of Human Rights cited by the Defence in its application for release.⁹⁶ In the instant Appeal, the Defence have not provided *any* jurisprudence to support the relevance of this principle. Furthermore, the relative foreseeability of judgement in Case 002/01 cannot be seriously disputed as the Trial Chamber has indicated on numerous occasions that it tends to conclude the trial in the near future. This was most recently affirmed in the Trial Chamber’s memorandum on the final evidentiary hearing in Case 002/01,⁹⁷ which outlines the concluding phase to Case 002/01.⁹⁸
41. Finally, the Defence appear to argue that the Trial Chamber committed an error because, in rejecting the Defence’s argument that the Accused’s age should support his provisional release, the Trial Chamber considered this factor by itself rather than cumulatively with other factors.⁹⁹ This argument is similarly meritless. In providing a reasoned decision, the Trial Chamber addressed many factors individually, but considered age cumulatively with the other relevant factors in making its decision, and determined that “factors that justify his continued detention outweigh these personal issues.”¹⁰⁰

C. The Trial Chamber’s Error in Noting that there had been no Change in Circumstances was Harmless

42. The Trial Chamber’s consideration of Internal Rule 82(4)’s requirement that the Accused demonstrate a change in circumstances from his last application was, as the Defence submits, erroneous. Although Internal Rule 82(4) is normally applicable, the Defence has

⁹⁴ See the Co-Prosecutors’ submissions on this issue: **E1/180.1** T. 11 April 2013, at pp.70, 72-75.

⁹⁵ **E275/1** Impugned Decision, at para. 23; **E275/2/1** Appeal, at paras. 58-70.

⁹⁶ **E1/180.1** T. 11 April 2013, at p. 99.

⁹⁷ **E288** Trial Chamber memorandum: Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013, 31 May 2013.

⁹⁸ See **E288** Trial Chamber memorandum: Announcement of remaining hearings prior to the close of evidentiary proceedings in Case 002/01 and scheduling of final Trial Management Meeting for 13 June 2013, 31 May 2013, paras. 8-10.

⁹⁹ **E275/2/1** Appeal, at paras. 71-74.

¹⁰⁰ **E275/1** Impugned Decision, at para. 23.

been granted a dispensation from this requirement as a remedy for lack of adequate notice to prepare submissions on Internal Rule 63(3) for hearings before the Trial Chamber during the previous application.¹⁰¹

43. Nevertheless, this error did not result in harm or prejudice to the Accused, and so does not invalidate the decision. The Trial Chamber's reasoning demonstrates that it has undertaken a *de novo* review of all circumstances militating in favour and against the Accused's continued detention. Therefore, even if the Chamber had explicitly not required the Defence to demonstrate a change in the circumstances, the outcome of the Impugned Decision would have been the same. The error therefore does not invalidate the decision.
44. Internal Rule 104(1)(a) provides that the Chamber shall have appellate jurisdiction over "an error on a question of law invalidating the judgment or decision." Internal Rule 105(2), which sets out the requirements for admissibility of an appeal and, by implication, the applicable standard of review, states that the Defence shall "specify [the] alleged error on a question of law and demonstrate how it invalidates the decision." These two requirements are cumulative. In order to satisfy this standard, the appellant must not only identify the alleged error but also show that the error in question invalidates the Impugned Decision. This Chamber has recognized that some proof of harm or prejudice to the rights of the Accused is required for an error of law to invalidate a decision of the Trial Chamber and merit relief.¹⁰²
45. Jurisprudence from the *ad hoc* Tribunals also supports the principle that decisions are not invalidated by harmless errors. The ICTY Appeals Chamber has consistently declared that without proof of prejudice, even a patent error of law will not be held to invalidate an impugned decision.¹⁰³
46. In this instance, the Defence fails to prove—or even identify—any harm or prejudice resulting from the erroneous citation to Internal Rule 82(4) that would cause the decision to be invalid.¹⁰⁴ The Impugned Decision's rejection of the Accused's application did not

¹⁰¹ See **E50/3/1/4** Immediate Appeal, at para. 51.

¹⁰² See **E176/2/1/4** Decision on NUON Chea's Appeal against the Trial Chamber's Decision on Rule 35 Application for Summary Action, 14 September 2012, at para. 29.

¹⁰³ See *Prosecutor v. Galic*, Case No. IT-98-29-A, Judgment (ICTY Appeals Chamber), 30 November 2006 at para. 21; *see also Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment (ICTY Appeals Chamber), 29 July 2004 at para. 299; *Prosecutor v. Haradinaj*, Case No. IT-04-84-A, Judgment (ICTY Appeals Chamber), 19 July 2010 at para. 17.

¹⁰⁴ **E275/2/1** Appeal, at paras. 75-78.



rest on its erroneous application of Internal Rule 82(4). Indeed, Internal Rule 82(4) appears barely to have weighed on the Trial Chamber's reasoning. Neither the rule nor its requirements are so much as referenced until the final sentences of the decision, and then only briefly.¹⁰⁵

47. Therefore, while the Trial Chamber committed legal error in citing Internal Rule 82(4), the error does not invalidate the decision. It caused no harm or prejudice to the rights of the Accused, and so does not meet the standard for meriting relief.

VII. CONCLUSION

48. For the reasons stated above, the Co-Prosecutors respectfully request this Chamber to **DISMISS** the Appeal in full.

Respectfully submitted,

Date	Name	Place	Signature
6 June 2013	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

¹⁰⁵ E275/1 Impugned Decision, at para. 23.