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BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA ("ECCC")

Case No: 002/14-08-2006

Case Name: KANG GUEK EAV

Filed Before: The Pre-Trial Chamber

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THE PRE-TRIAL CHAMBER OF THE ECCC
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AMICUS CURIAE BRIEF RELATING TO THE APPEAL CHALLENGING THE ORDER OF PROVISIONAL DETENTION OF 31 JULY 2007

TABLE OF CONTENTS

Preliminary Observations

Introduction

Opinion

I. The Appellant's Prior Detention violated his rights and must be acknowledged by the ECCC.

II. A review of the key cases and the evidence suggests the Appellant's Prior Detention did not preclude or restrain the OCIJ from making the Detention Order.

a) The OCIJ was entitled to order provisional detention, absent concerted action between the ECCC and the Military Court of Phnom Penh.

b) The OCIJ should only decline to exercise its power to order provisional detention if the Prior Detention involved torture or serious mistreatment

c) The Prior Detention by the Military Court of Phnom Penh should be taken into consideration for the purposes of sentencing.

III. A review of the key cases suggests that the standard of judicial review required to overturn the OCIJ's Detention Order and grant bail is not easily met.

a) Ordering provisional detention or bail is a discretionary decision that is for the OCIJ alone to make and, if necessary, revisit.

b) Any factual omissions in the reasoning behind the OCIJ's Detention Order are not appealable errors.

c) The Appellant bears the burden of proving why a bail order should replace the OCIJ's Detention Order.

d) The Appellant's trial is imminent.

Conclusion

Preliminary Observations

1. We refer to the public notice made by the Office of the Pre-Trial Chamber on 4 September 2007 (the "Public Notice") inviting *amicus curiae* briefs from organizations and members of public in relation to the notice of appeal filed by Mr. Kaing Guek Eav, alias Duch, (the "Appeal") against the Order of Provisional Detention of the Office of the Co-investigating Judges dated 31 July 2007 (the "Detention Order").

2. These written submissions constitute the joint *amicus curiae* brief of:

   a) The Center for Social Development, an indigenous non-government organization dedicated, *inter alia*, to the observance of human rights, justice and national reconciliation in Cambodia; and

   b) The Asian International Justice Initiative, a collaborative project between the War Crimes Studies Center at the University of California (Berkeley) and the East-West Center at the University of Hawaii, established to foster justice initiatives and capacity-building programs throughout the Asia-Pacific region.

3. Notwithstanding the fact that the Public Notice called for *amicus curiae* briefs to be submitted by 3 October 2007 in response and "*relating to any matter of the ...appeal*", the Appellant's Appeal Brief dated 5 September 2007 (the "Appeal Brief") was only made available to the public on 26 September 2007, leaving us with **only 4 clear days** to address the matters therein! We ask that, in the future, organizations and the public be given an adequate opportunity to respond through *amicus curiae* briefs and we reserve the right to amend and/or supplement portions of this brief if the need arises.

4. We emphasize that this brief, being an *amicus curiae* submission, is a neutral and independent legal opinion on points of law raised in the Detention Order and the Appeal Brief. For the avoidance of doubt, its scope is limited to assisting this

Honourable Chamber determine these points alone and is without prejudice to the Appellant's innocence or guilt in respect of any crimes for which he stands accused before the ECCC. We have limited our review to matters pertaining to international law and do not make any comment on the legal or procedural issues relating to provisional detention that arise under Cambodian law. Our review will rely on, *inter alia*, the jurisprudence and practice of the international[1] and hybrid criminal tribunals as well as the International Criminal Court ("ICC").

5. We recognize that in addition to applying Cambodian law, the Law on the Establishment of the ECCC (including amendments) dated 27 October 2004 (the "ECCC Law") and the Internal Rules of the ECCC dated 22 June 2007 (the "Internal Rules"), the ECCC shall exercise its jurisdiction "*in accordance with the international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights ("ICCPR")*" under Article 12 of the Agreement Between the United Nations and the Royal Government of Cambodia dated 6 June 2003.

INTRODUCTION

6. The ECCC takes cognizance of only the most heinous and abhorrent crimes known to mankind – namely, genocide, crimes against humanity and the most serious of war crimes. In this early stage of development, the ECCC, and indeed all other international and hybrid criminal courts with jurisdiction to try persons accused of such crimes, must address and balance certain competing considerations when determining whether or not to order the provisional pre-trial detention of or grant bail to accused persons.

7. The Appeals Chamber of another hybrid criminal court (the Special Court for Sierra Leone) summarized these competing considerations as follows in ***Fofana*** :

[1] Namely, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"").

> "Given the practical difficulties facing international criminal justice at this time, courts must demonstrate a resolve to ensure that those suspects who have been arrested do in due course face trial, and are not given bail in circumstances where there is a real risk that they would flee or intimidate prosecution witnesses or resume the conduct for which they have been indicted. To do so would mock the victims of the heinous crimes they are accused of perpetrating...
>
> That said, international human rights law, upon which international criminal law is premised in part, gives full force to the principle... that any person deprived of liberty should have the right both to contest the legality of that detention and additionally, in the event the detention is lawful, to apply for provisional liberty pending the conclusion of that trial.
>
> This latter right is not, in international human rights law, a "right to bail" in the sense that the defendant is entitled to be freed unless the prosecuting authorities can prove particular allegations against him; it's a right to apply for bail, to a court which is open to persuasion that the pre-trial detention of the defendant is not necessary to secure the efficacy of the trial or for any other public reason"[2].

8. These considerations underlie every decision of the Office of the Co-investigating Judges (the "OCIJ"") to order provisional detention, provisional release or bail under Rules 63-65 of the Internal Rules. Although the Internal Rules do not expressly make liberty the rule and detention the exception for accused persons awaiting trial, it is significant that they do not require that an accused person prove that exceptional circumstances exist before he may be released, unlike the procedural rules of the ICTR[3]. The OCIJ can only order provisional detention if, *inter alia*, it considers that to be a necessary measure. Even if an accused person is detained, the OCIJ may order his bail at any time if it thinks fit. Put simply, "*the focus must be on the particular*

[2] *The Prosecutor v. Fofana*, SCSL-04-14-AR65, Appeal against Decision refusing bail, 11 March 2005, paras 31-32.
[3] Rule 65(B) of the ICTR Rules of Procedure and Evidence states that "provisional release may be ordered by a Trial Chamber only in exceptional circumstances, after hearing the host country and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person".

circumstances of each individual case without considering that the eventual outcome is either the rule or the exception" [4].

9. As a general rule, "*a decision to release an accused should then be based on an assessment of whether public interest elements, demonstrated by the Prosecution, outweigh the need to ensure respect for an accused's right to liberty*"[5]. In other words, when determining whether or not to order provisional detention, release or bail, it is for the OCIJ to exercise its discretion and strike a balance between public interest requirements, on one hand, and the accused person's right to liberty, on the other.

10. As these are discretionary decisions, they should only be overturned by this Honourable Chamber on appeal if they are based on an incorrect interpretation of the governing law; based on a patently incorrect conclusion of fact; or are so unfair or unreasonable as to constitute an abuse of the OCIJ's discretion[6].

11. These guiding principles that we have set out above apply with equal force to the present case.

12. Our opinion addresses three separate legal issues, which we hope to offer some guidance to the Honourable Chamber for its determinations. First, having surveyed the relevant case law on the matter, we wish to comment on the discretion afforded the OCIJ in making its determination and whether that discretion was, as a matter of law, properly exercised. It seems clear that the decision of the OCIJ to provisionally detain the Appellant in the public interest was within the exercise of its discretion. Furthermore, given the stringent standards for review that have been imposed at the other international tribunals, it is at least questionable whether the OCIJ's decision

[4] *The Prosecutor v. Sesay*, SCSL-04-15-PT-069, Decision on Application for Provisional Release, paragraph 39. See also *The Prosecutor v Miodrag Jokic* and *The Prosecutor v Rahim Ademi*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, Trial Chamber, 20 February 2002.
[5] *The Prosecutor v. Sesay*, SCSL-04-15-PT-069, Decision on Application for Provisional Release, para 39.
[6] See *Slobodan Milosovic v The Prosecutor*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, ICTY, Case No. IT –02-54-AR7.3.7, 1 November 2004, para 10.

could be made the subject of an appeal, taking into account all the circumstances and operational realities in Cambodia briefly described in paragraphs 22 and 23 of the Detention Order.

13. Second, and as a related point, we wish to comment on the OCIJ's determination regarding its jurisdiction over the Appellant's prior detention. After characterizing the Appellant's prior detention without trial by the Military Court of Phnom Penh (the "Military Court") since 10 May 1999 until he was brought before the ECCC on 30 July 2007 (the "Prior Detention") as "*problematic*" as a matter of human rights law, the OCIJ proceeded to conclude that it "*do(es) not have jurisdiction to determine the legality of DUCH's prior detention*" under the law.[7] With respect, that conclusion sidesteps the significance of the Appellant's Prior Detention and, as we shall explain, limits its own discretion. It seems clear from the relevant jurisprudence that the OCIJ, and indeed this Honourable Chamber, should exercise rather than evade its discretion to acknowledge that the Prior Detention constitutes a violation of the Appellant's right to be tried without undue delay in accordance with, *inter alia*, Article 14(3)(c) of the ICCPR.

14. Third, we ask, given that the Prior Detention is a violation of the Appellant's rights, what is the appropriate remedy? While a violation of rights does require some remedy, the ICTY Appeals Chamber has reiterated that when considering the appropriate remedy for an alleged violation of the rights of the accused, a "*balance must ... be maintained between the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law*"[8]. The Appellant insists that an immediate release is the only recourse against such a violation. In coming to this conclusion, however, the Appellant has not addressed the issue of whether the violation he suffered is directly attributable to the ECCC and therefore

[7] Detention Order, paras 2 and 20.
[8] Prosecutor v Nikolic, IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003, para. 30. Prosecutor v Brdjanin, IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, 3 October 2003, para. 61 apply the same principles to other alleged violations of rights.

capable of restricting the OCIJ's discretion under the law and at this stage of the proceedings. In the alternative, the Appellant seeks his remedy in the ambit of sentencing (if convicted) or compensation (if acquitted), not release, at paragraphs 127 to 133 of his Appeal Brief. Based on our survey of the relevant case law and our understanding of the intent of the Internal Rules, we suggest that this alternative may accord with international precedent on the matter.

15. In summary, three issues arise for the Honourable Chamber's consideration on appeal, namely:

   a) whether the Prior Detention by the Military Court was a violation of the Appellant's rights and, if so, if it ought to have been declared as such by this Honourable Chamber;

   b) whether such a violation precluded or restricted the jurisdiction of the OCIJ to make the Detention Order; and

   c) if the OCIJ was entitled to exercise its discretion in this respect, whether that exercise ought to be reviewed.

OPINION

I. The Appellant's Prior Detention by the Military Court violated his rights and must be acknowledged by the ECCC.

16. A critical distinction must be drawn between the OCIJ's jurisdiction to *examine, determine and declare* the legality of the Appellant's Prior Detention by the Military Court on one hand and the OCIJ's jurisdiction to *order* the Appellant's provisional detention or bail on the other.

17. The abuse of process doctrine (which we shall consider below) and the connected question of whether any abuse of process relating to the Appellant's Prior Detention

is attributable to the ECCC is relevant to the OCIJ's exercise of the latter form of its jurisdiction, not the former.

18. The OCIJ appeared to conflate these two separate forms of jurisdiction at paragraph 20 of its Detention Order (set out and discussed above). The prior and pertinent question that the OCIJ ought to have asked is – can we determine the legality of the Appellant's Prior Detention, even though the ECCC only became operational on 22 June 2007 and was not therefore directly responsible for occasioning that detention?

19. The ICTR's Appeals Chamber has answered this question in the affirmative in its decision in ***Barayagwiza*** , where it held that a violation of an accused person's rights under the law must be acknowledged by an international criminal tribunal before which he seeks relief, even if that violation cannot be attributed to that tribunal *per se*:

> "In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him.
>
> **At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated**"[9].
>
> (Emphasis added)

[9] *The Prosecutor v. Barayagwiza*, ICTR, Appeals Chamber Decision of 3 November 1999, paragraph 85.

20. It follows that the OCIJ had the jurisdiction to determine and declare whether or not the Prior Detention of more than 8 years amounted to a violation of the Appellant's rights.

21. The case law suggests that there is no golden rule to determining if a particular period of detention qualifies as undue pre-trial delay in violation of, *inter alia*, 14(3)(c) of the ICCPR. None of the decisions of the Human Rights Committee or European Court of Human Rights ("ECHR") cited by the Appellant in paragraphs 32 – 81 of his Appeal Brief adopt a mechanical approach to pre-trial detention or set out an arbitrary or fixed limit that can be applied to all cases where there has been a delay, rather each considers the facts of the case on their individual merits. In fact, the ECHR has eschewed fixed limits and approached cases concerning detention on remand by considering a range of factors in the circumstances of the particular case[10]. Similarly, the fact that the Human Rights Committee has found a certain period of detention to be unreasonable under one set of circumstances does not mean that detention for a similar period in other circumstances would *ipso facto* be considered unreasonable.

22. Notwithstanding this, and although we do have not had the benefit of reading the Prosecution's submissions or the Military Court's case file relating to the Appellant's on this point, we are inclined to believe that the Appellant's Prior Detention constitutes a *prima facie* violation of his right to a trial within a reasonable time or to release enshrined in international law. We agree with the authorities cited in paragraphs 38-55 of the Appellant's Appeal Brief to the extent that they support this (and only this) proposition.

23. Having acknowledged that the Appellant's Prior Detention was "*problematic*" in view of the applicable law at paragraph 2 of its Detention Order, the OCIJ should

[10] See the "Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)" (1CC-01/04-01/06-356 and annexes, 28 August 2006." Such factors include, inter alia, the complexity of the case, the severity of the offence and the penalty to be expected in the case of a conviction, the range of evidence and difficulties in the investigation, and the conduct of the judicial authorities".

have proceeded to further acknowledge that it was a violation of his rights under the law. Instead, the OCIJ circumvented this issue by saying that it had no jurisdiction whatsoever to inquire into the matter. We therefore urge this Honourable Chamber to examine, determine and declare the legality of the Appellant's Prior Detention in its decision.

II. A survey of the key cases suggests the Appellant's Prior Detention did not preclude or restrain the OCIJ from making the Detention Order.

24. Assuming that the Prior Detention is a violation of his rights, what effect does it have (if any) on the issue of whether or not he should be provisionally detained further pending an ECCC trial?

25. The Appellant insists that the only consequence of and remedy for that violation is his immediate release[11].

26. The Appellant relies on the ***Barayagwiza*** case as precedent for suggesting that the violation of his rights under Prior Detention impinges on the OCIJ's discretion to grant or refuse his provisional release. However, it must be remembered that in that case, the ICTR Appeals Chamber was making its determinations in the context of judgment and sentencing. In other words, the timing of the determination must be taken into account: it is important to note that the Chamber limited its observations and determinations to that "juncture" or stage of inquiry alone (see excerpt above at paragraph 19). This is especially significant, given that attributability, or the need to establish a nexus between a violation or abuse of process and the ECCC, becomes, as we shall explain, a decisive consideration when determining if the OCIJ is entitled to order provisional detention.

27. The Appellant has not addressed a recent and seminal decision in the ***Lubanga*** case where the ICC Appeals Chamber considered the very issue that this Honourable Chamber now faces – i.e. whether there are the circumstances under which a pre-

[11] Appeal brief, para 84.

existing human rights violation can preclude or restrain the exercise of an international criminal tribunal's jurisdiction to order provisional detention. [12]

28. The facts of the ***Lubanga*** case are analogous to the Appellant's case. In that case, Lubanga was arrested and detained in relation to proceedings before the Military Courts of the Democratic Republic of Congo ("DRC") until he was transferred to the ICC as part of its own judicial proceedings and pursuant to the ICC's co-operation request dated 14 March 2006. One issue before the ICC Appeals Chamber was whether any violations of Lubanga's internationally recognized human rights in relation to his arrest and detention by the DRC prior to 14 March 2006 impinged on the jurisdiction of the ICC to order provisional detention.

29. After a thorough review of the relevant jurisprudence and practice of other international and hybrid criminal tribunals, the ICC Appeals Chamber laid down, *inter alia*, the following principles:

    a. Any violations of an accused person's rights in relation to his prior arrest and detention by external authorities will only become the criminal tribunal's responsibility if it has first been established that there has been concerted action between the criminal tribunal and those authorities in respect of those violations[13];

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[12] *The Prosecutor. v. Lubanga*, Case ICC-01/04-01/06, 14 Dec.06, paragraphs 42-43.

[13] See Stocké v Germany before the European Court of Human Rights, 11755/85 [1991] ECHR 25 (19 March 1991), para 51-54; ECHR, Klaus Altmann vs. France, Decision of 4 July 1984 on the admissibility of the application, application No. 10689, 1984, p. 234. Moreover, the ICTR has repeatedly stated that the Tribunal is not responsible for the illegal arrest and detention of the accused in the custodial State if the arrest and detention was not carried out at the behest of the Tribunal. See in particular the Semanza Case Appeals Chamber, 31 May 2000,CaseNo. ICTR-97-20-A ,para.79, where a distinction is made between the time Semanza was held at the request of the Rwandan authorities and the time he was held at the request of the ICTR. See also the Rwamakuba Case, Trial Chamber II, 12 December 2000, "Decision on the Defence Motion Concerning the Illegal Arrest and Illegal Detention of the Accused", Case No.ICTR-98-44-T, para.30 stating that, "[t]he Trial Chamber does therefore not consider that, from 2 August 1995 until 22 December 1995,when the Prosecutor notified the Namibian authorities of their knowledge that the accused was in their custody, the Tribunal was responsible for the accused's detention. The Tribunal having no jurisdiction over the conditions of that period of detention, any challenges in this respect are to be brought before the Namibian jurisdiction".

b. Even if there is no concerted action between the criminal tribunal and these external authorities, the abuse of process doctrine constitutes an additional guarantee of the rights of the accused[14];

c. Notwithstanding this, the application of abuse of process doctrine (which would require that the criminal tribunal decline to exercise its jurisdiction in a particular case)[15] is confined to instances of torture or serious mistreatment by the external authorities or related to the process of arrest and transfer of the person to the criminal tribunal[16].

30. As there was no evidence indicating that Lubanga's arrest and detention prior to 14 March 2006 was the result of any concerted action between the ICC and the DRC authorities or that he had been tortured or seriously mistreated at any time, the ICC Appeals Chamber concluded that it was entitled to provisionally detain Lubanga and proceeded to do so.

a) The OCIJ was entitled to make order provisional detention, absent concerted action between the ECCC and the Military Court of Phnom Penh.

31. The Appellant does not appear to establish there was concerted action between the ECCC and the Military Court.

32. The Appellant:

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[14] See Prosecutor v. Dragan Nikolic Case, "Decision on Interlocutory Appeal Concerning Legality of Arrest", 5 June 2003, Case No. IT-94-2-AR73, para. 30. See also Juvenal Kajelijeli vs. The Prosecutor, Case No. ICTR-98-44A-A, para. 206; and Prosecutor.vs. Slavko Dokmanovic, "Decision on the Motion for Release by the Accused", 22 October 1997, Case No IT-95-13a-PT, paras. 70-75.

[15] See Jean Bosco Barayagwisa vs. TheProsecutor, Appeals Chamber, 3 November 1999, Case No. ICTR-97-19-AR72, paras. 74- 77. See also Juvenal Kajelijeli vs. The Prosecutor, 23 May2005, Case No. ICTR-98-44A- A para206

[16] See Prosecutor vs. Dragan Nikolic Case, "Decision on Interlocutory Appeal Concerning Legality of Arrest", 5 June 2003, Case No. IT-94-2-AR73, para. 30. See also Juvenal Kajelijeli vs. The Prosecutor, Case No. ICTR-98-44A-A, para. 206; and Prosecutor vs. Slavko Dokmanovic, "Decision on the Motion for Release by the Accused", 22October 1997, Case No IT-95-13a-PT, paras. 70-75.

i. points to references in previous detention orders made by the Military Court to the ECCC law,

ii. states that the Military Court gave no explanation for detaining the Appellant;

iii. speculates as to what the Military Court motive may have been to prolong the Appellant's pre-trial detention; and

iv. states that the Prior Detention can be imputed to the Cambodian judicial authorities (including the ECCC),

in order to assert that the ECCC bears responsibility for the Prior Detention.

33. However, the fact that the ECCC is part of the Cambodian judicial system should not necessarily lead one to the conclusion that this special internationalized tribunal acted in concert with a separate judicial authority, the Military Court, which is not responsible for the Appellant's case before the ECCC. We do not dispute that the Military Court's Prior Detention amounts to a *prima facie* violation of the Appellant's rights, but since it cannot be clearly attributed to the ECCC, the Appellant's quarrel is with the Military Court, not the ECCC. The Appellant is entitled to seek a remedy for such a violation before the ECCC (see below), but international precedent would tend to suggest that the Appellant cannot raise this as a shield against an exercise of the ECCC's discretion to order provisional detention.

34. From the facts at hand, it seems clear there is a link between the nature and scope of the charges that the Appellant faced before the Military Court and those that the ECCC has now brought against him. But this does not prove concerted action or collusion of any sort between these separate judical bodies and none appears to have been explicitly suggested by the Appellant. Had there been evidence of such collusion

or concerted action, the Prior Detention would have most certainly have to have been taken into account at this stage.[17] It would therefore seem, from a survey of the relevant jurisprudence, that sentencing is the most appropriate stage to remedy this harm (we elaborate further at paragraphs 36 and 37 herein). As was noted by the ICTR Trial Chamber in the ***Kajelijeli*** case, a defendant should be entitled to credit for the total period during which he had spent in custody, including the period under which he was detained solely under a warrant of arrest for the warrant of a State, if the warrant was '*based on the same allegations that formed the subject of the trial.*'[18]

b) The OCIJ should only decline to exercise its power to order provisional detention if the Prior Detention involved torture or serious mistreatment.

35. The Appellant has not proffered evidence that he suffered any form of torture or serious mistreatment at the hands of the Military Court or its enforcement authorities during the period of his Prior Detention. Absent such evidence, the international precedent in ***Lubanga*** suggests that, in the circumstances, the abuse of process doctrine may not apply. Put differently, the Prior Detention, albeit a violation of the Appellant's rights, may not amount to an abuse of process of the ECCC that is capable of requiring that the OCIJ decline to exercise its jurisdiction in this case. It would seem this recent precedent is particularly persuasive, in light of the fact that it comes from the ICC, whose Rome Statute has now been ratified by 105 countries worldwide (including Cambodia).

[17] Case No. ICTR-98-44A-T, *Juvenal Kajelijeli v The Prosecutor*, Judgement and Sentence, 1 December 2003, at paras 208 – 233. In that case, several other of the accused's rights were also violated, including his rights as a suspect and (once an accused) to a timely initial appearance, which arguably do not apply here.

[18] Case No. ICTR-98-44A-T, *Juvenal Kajelijeli v The Prosecutor*, Judgement and Sentence, 1 December 2003, at para. 967. At trial, the defendant was granted credit for time served for five years, five months and twenty-five days. On Appeal, the time during which the defendant had spent awaiting his transfer from Benin to the ICTR in Arusha was added to this original credit, hence reducing the defendant's sentence by an additional 306 days. The Appeals Chamber also considered that the Trial Chamber had erred in its interlocutory decision dismissing the fact that his rights were violated during the period of his arrest and detention in Benin, and found in favour of the accused on appeal (namely, that the Trial Chamber should have determined his rights had been violated). However, the fact situation of the accused's arrest can be distinguished from the one faced by the Appellant at the ECCC: in that case, the Appellant was arrested without a warrant and was not informed by the Prosecution at the ICTR of the grounds of his arrest and the authorities in Benin had to a large extent acted under the authority of the ICTR.

c) The Prior Detention by the Military Court of Phnom Penh should be taken into consideration for the purposes of sentencing.

36. We do not wish to suggest the Appellant should we be left without any remedy against his Prior Detention that amounts to a *prima facie* violation of his right a trial within a reasonable time or to release. As the ICTR Appeals Chamber noted in ***Kajelijeli***:

> "Where a suspect or an accused's rights have been violated during the period of his unlawful detention pending transfer and trial, Article 2(3)(a) of the ICCPR stipulates that '[a]ny person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'"[19]

37. In this regard, we would urge this Honourable Chamber to consider as authority the decisions of the ICTR Appeals Chamber in ***Barayagwisa*** (which the Appellant relies on) and ***Kajelijeli*** when making any determinations regarding the Appellant's third and final ground of appeal, but only to the extent that it relates to the alternative remedies of sentencing and financial compensation.

III. A review of the key cases suggests that the standard of judicial review required to overturn the OCIJ's Detention Order and grant bail is not easily met.

a) The OCIJ is vested with the discretion to order provisional detention or bail and, if necessary, revisit its decision(s).

38. As we have mentioned, any decision by the OCIJ to order provisional detention or bail is a purely discretionary one. That is significant. Appellate chambers in other international and hybrid criminal tribunals have established that the standard of

[19] Case No. ICTR-98-44A-A, *Juvenal Kajelijeli v The Prosecutor*, Judgement, 23 May 2005, at paragraph 322

review of interlocutory motions on appeal is high: they have not interfered with the discretion of a first-instance chamber, save in exceptional circumstances. As the ICTY Appeals Chamber observed in the ***Milosevic*** case, a decision must be "*so unreasonable as to show that the Trial Chamber failed to exercise its discretion judiciously*" before it can be overturned.[20] The Appeals Chamber at the Special Court for Sierra Leone has adopted the same standard for judicial review of bail determinations. In the ***Fofana*** case, that Chamber held that "*where the Judge or Trial Chamber has exercised his or their discretion to grant or refuse bail, the Appeals Chamber will not substitute its own discretion for that of the Judge or Trial Chamber*"[21]. It went on to add that a decision to deny bail would only be quashed if it was "*logically perverse and evidentially unsustainable*".[22]

39. The OCIJ's decision, while regrettably containing certain factual omissions (as discussed below), does not appear to meet this high threshold of unreasonableness. The Appeals Chambers of both the ICTY and the ICTR and the Special Court for Sierra Leone have made it clear that an Appeals Chamber can only review facts determined by a Trial Chamber where a reasonable trier of fact could not come to the same conclusion or if the decision itself is wholly erroneous. As was noted by the ICTR Appeals Chamber in ***Semanza***:

> 'The Appeals Chamber emphasizes the fact that, on appeal, party cannot merely repeat arguments that did not succeed at trial in the hope that the Appeals Chamber will consider them afresh.
>
> The appeals process is not a trial *de novo* and the Appeals Chamber is not a second trier of fact.'[23]

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[20]Although the OCIJ is not a Chamber of the ECCC, the determinations it has made with regards to the Appellant's detention are analogous to those of a Trial Chamber at an International Tribunal in this instance. Case No.IT-02-54-AR73.7, *Prosecutor v Slobodan Milosevic* 'Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel', 1 November 2004, at paragraph 10.

[21] *The Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa* (SCSL-04-14-T) 'Fofana – Appeal Against Decision Refusing Bail', 11 March 2005, at paragraph 20

[22]Ibid, at para 20.

[23]*The Prosecutor v Semanza*, ICTR-97-20-A, Judgement, 20 May 2005, para. 8. See also *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Bobor Kanu* 'Decision on Brima-Kamara Defence Appeal Motion Against Trial Chamber II Majority Decision for the Reappointment of Kevin Metzger and Wilbert Harris as Lead Counsel for Alex Tamba Brima and Brima Bazzy Kamara', at para. 112.

40. The same could be said of appeals made at the pre-trial stage to this Honourable Chamber. The OCIJ has clearly outlined the factors that have been taken into account in coming to their conclusion in paragraphs 22 and 23 of the order. Even if this Honourable Chamber disagrees with the OCIJ's determination, such disagreement is not grounds to quash the decision. Case law on the matter would tend to suggest that the Honourable Chamber should not, with respect, consider arguments *de novo* or substitute its own discretion for that of the OCIJ to order provisional detention. If the Pre-Trial Chamber does quash the OCIJ's decision, we would urge the Chamber to explain the distinction between its standards of review and that of the other international and hybrid criminal tribunals, the practice and jurisprudence of which are a persuasive source of law for this Honourable Chamber.

41. In the event that the Honourable Chamber determines that threshold for reviewing the OCIJ's determination had been met, another significant factor must be taken into consideration: i.e. that that the OCIJ can revisit the Detention Order at a future date on its own motion[24].

42. The Honourable Chamber should take note of the unique periodic review procedures established by the Internal Rules, which can be distinguished from the rules governing provisional detention and release in other international criminal tribunals.[25] Unlike the rules of the ICTY, ICTR and the Special Court for Sierra Leone, Rule 64 and 65 of the Internal Rules provide that a pre-trial detention order is only provisional in nature and gives the OCIJ the further discretion to revisit its order and call for the Appellant's release at a later stage. Alternatively, the Appellant can file applications for release to the OCIJ at any moment during the period of provisional detention, falling which, he can appeal the OCIJ's decision or make further applications in

[24] Rule 64, Internal Rules.

[25] See in particular, Rules 64 and 65 of the Rules of Procedure and Evidence for both the International Criminal Tribunal for the former Yugoslavia ('ICTY') (Rules of Procedure and Evidence, IT/32/Rev.40, 12 July 2007) and the International Criminal Tribunal for Rwanda ('ICTR')(Rules of Procedure and Evidence, as amended 10 November 2006) and Rule 64 of the SCSL.

three-monthly intervals seeking reconsideration of the OCIJ's order, if he can show that there has been a change in his circumstances.

43. The fact that the ECCC has a periodic review and monitoring procedure in place to ensure that any prolonged detention is necessary should be taken into account when considering the strength of the Appellant's arguments in support of his immediate release.[26] In particular, it must be remembered that the Detention Order does not deprive the Appellant of seeking a further remedy at a later stage of his detention, should his provisional detention clearly prove to be unnecessary – in that event, the Appellant is perfectly entitled to seek his release.

b) The factual omissions in the OCIJ's reasoning behind its Detention Order, albeit regrettable, are not appealable errors.

44. Despite considering the legal grounds for its decision at length in its 10-page Detention Order, we note that the OCIJ has provided limited discussion of the factual basis supporting that decision, allocating no more than the 2 final paragraphs for this purpose.

45. We understand that a discretionary decision such as the Detention Order does not have to be accompanied by an exhaustive list of reasons as long as concrete dangers are identified[27], but it bears mentioning that the OCIJ has done very little to elaborate on the facts behind these concrete dangers. For example, the OCIJ has cited no evidence to substantiate its claim that, "*in the fragile context of today's Cambodian society*", the Appellant's alleged crimes are so egregious that his release could

[26]According to the decision in ***Ademi***, the length of pre-trial detention was all the more relevant in the international tribunal context 'since in the system of the Tribunal, unlike generally that in national jurisdictions, there is no formal procedure in place providing for periodic review of the necessity for the continued pre-trial detention. Consequently, if in a particular case detention is prolonged, it could be that … *this factor may need to be given more weight* in considering whether the accused in question should be provisionally released.' [Emphasis added] Case No. IT-01-46-PT (ICTY) *The Prosecutor v Rahim Ademi* 'Order on Motion for Provisional Release', 20 February 2002, at para. 26. By parity of reasoning, the converse would be true in this case.

[27] See '*The Prosecutor v Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petrovic, Valentin Coric, and Berislav Pusij,* " Order on Provisional Release of Jadranko Prlic', 30 July 2004, IT-01-46-PT.

provoke "*protests of indignation* which *could lead to violence*" among the population that could "*imperil the very safety*" of the Appellant[28].

46. The jurisprudence suggests that these factual omissions are, however, not appealable errors (defined above). In other words, the OCIJ's statement paraphrased above as well as others contained paragraph 22 and 23 of the Detention Order are not so unreasonable as to be logically perverse or to lack judiciousness. In fact, although not specifically cited in the Detention Order, these statements are not entirely without support in view of the preponderance of research and writings of local and international civil society organisations and eminent scholars in respect of contemporary public sentiment about the pre-trial detention of the Appellant and the trials before the ECCC in general.

47. In the circumstances, we urge the Honourable Chamber to provide, in its decision, clear guidance to the OCIJ on how it can fulfil its requirement to set out the factual basis for detention in every case in accordance with Rule 63(2)(a) and (3) of the Internal Rules.

c) The Appellant bears the burden of proving why a bail order should replace the OCIJ's Detention Order.

48. The burden of proof is on the Appellant to satisfy the Pre-Trial Chamber that a bail order should replace the OCIJ's Detention Order.[29] The Appellant has raised several grounds to show that, if released, he would not evade justice.[30] He also notes in the Appeal Brief that similar applications by persons accused of crimes as heinous as the ones the Appellant is accused of have been allowed by the ICTY.[31]

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[28] Detention Order, para 22.
[29] Case No.IT-04-84-PT, *The Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* 'Decision on Ramush Haradinaj's Motion for Provisional Release', 6 June 2005, at paragraph 21.
[30] Appeal Brief, para. 120-122.
[31] Appeal Brief, para. 85.

49. A review of these ICTY cases on which the Appellant relies reveals that all or most of the following conditions should be present in an application seeking to persuade an international criminal tribunal that the applicant is entitled to provisional release or bail:

(i) Public statements made by the accused person to the effect that he will not resist the tribunal in question or that he honours the judicial process;

(ii) Character references regarding the personal integrity of the accused person, including declarations from the relevant government or from offices of the United Nations to this effect;

(iii) Written guarantees provided by the accused person that he will fully comply with the terms of his provisional release; and

(iv) Written guarantees from the relevant government that they have the means and capability to apprehend the accused, should he attempt to flee.[32]

50. The Appellant has stated publicly that he would not resist the ECCC. The Appeal Brief also includes details of the Appellant's co-operation with the tribunal. The Appellant's lawyer has even agreed to offer personal surety that the Appellant will be present in court.

51. These factors clearly are in the Appellant's favour.

52. However, there are two obstacles in the way of the Appellant being granted bail or provisional release.

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[32]See Case No.IT-04-84-PT, *The Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* 'Decision on Ramush Haradinaj's Motion for Provisional Release', 6 June 2005; Case No.IT-04-74-PT *The Prosecutor v Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petrovic, Valentin Coric, and Berislav Pusij* 'Order on Provisional Release of Jadranko Prlic', 30 July 2004, para. 21; IT-01-46-PT; and *The Prosecutor v Rahim Ademi* 'Order on Motion for Provisional Release', 20 February 2002, paragraphs 29 -30.

53. First, although the Appellant (or his counsel) has expressed gestures of good will and is prepared to make guarantees to ensure his appearance at trial, a "*guarantee is only a guarantee if the applicant can establish it, at least to the court's satisfaction*"[33].

54. There is no right to be granted bail *per se* in the sense that an accused person is entitled to be freed unless the prosecuting authorities can prove particular allegations against him; it's a right to apply for bail, to a court which is open to persuasion that the pre-trial detention of the defendant is not necessary to secure the efficacy of the trial or for any other public reason. [34]

55. As Judge David Hunt observed in ***Sainovic***:

> "The more serious the matter asserted or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant tribunal that what is asserted is more probably true than not. That is only common sense"[35].

56. The Honourable Chamber must be convinced that the Appellant, if granted bail, will, *inter alia* appear for trial. In making this determination, it must take cognisance of the severity and notoriety of the crimes that the Appellant has been charged with in relation to Security Prison S-21 as well as the potential impact the Appellant's provisional release would have on the Cambodian public and their confidence in the rule of law in Cambodia. The Honourable Chamber must also consider the possibility that the Appellant may wish to flee legal action to avoid a sentence of life imprisonment. Although the Appellant claims in his Appeal Brief that he has no financial means to do so, the Chamber should rely on further proof of his indigence:

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[33] *The Prosecutor v. Fofana*, SCSL-04-14-AR65, Appeal against Decision refusing bail, 11 March 2005, para 39.

[34] See *The Prosecutor v. Fofana*, SCSL-04-14-AR65, Appeal against Decision refusing bail, 11 March 2005, paragraphs 31-32.

[35] *The Prosecutor v Nikola Sainovic & Dragoljub Ojdanic*, ICTY Appeals Chamber, Dissenting Opinion of Judge David Hunt on Provisional Release, 30 October 2002, para 29.

proof which may have already been furnished in order to appoint him counsel, but which has not been included as part of the Appeal Brief.

57. Second, category (iv) set out in paragraph 49 above is missing from the Appellant's bail application. This would appear a significant omission. Although the operational realities in Cambodia are different from those concerning the ICTY, one would expect, at the very least, certain assurances from relevant ministries of the Royal Government of Cambodia stating that they have the capacity to ensure the Appellant would not be able to flee the country were he to be released. No such guarantees have been made at the present time.

d) The Appellant's trial is imminent

58. Furthermore, the ICTY has been mindful, when ordering provisional release, of the length of time the accused will have to wait to face trial. For example, in the ***Ademi*** case, on which the Appellant relies, the Trial Chamber took into account the fact that it '*did not appear likely that the trial of the accused will start soon*'.[36] The length of time that the Appellant is likely to spend in further detention should be taken into account when determining whether or not to allow his provisional release, as well as what is required to ensure the Appellant remains at the disposition of justice. A further detention of six months, subject to the ongoing review of the OCIJ, makes the terms of the Appellant's provisional detention distinguishable from that of the case law on which he relies.

CONCLUSION

59. We hope that our opinion will assist the Honourable Chamber in arriving at a reasoned decision on whether the Appellant's Prior Detention of more than eight years constitutes a violation of his rights. If the Honourable Chamber agrees with us

[36] Case No. IT-01-46-PT (ICTY) *The Prosecutor v Rahim Ademi* 'Order on Motion for Provisional Release', 20 February 2002, at paragraph 38.

that it is a violation, we humbly ask that the Honourable Chamber declare this and consider if an appropriate remedy for the Appellant may lie at the sentencing stage. In, addition we have presented a survey of the relevant jurisprudence and practice of other international and hybrid criminal tribunals in order to assist the Honourable Chamber decide if the OCIJ was entitled to exercise its discretion to order the Appellant's provisional detention and whether that exercise ought to be reviewed. The cases suggest that a balance must be struck between public interest elements, on one hand, and the need to ensure respect for the Appellant's right to liberty, on the other. Ultimately, it is for the Pre-Trial Chamber to decide whether the OCIJ's discretionary decision, which tipped the scales in favour of the former, was manifestly unreasonable in the circumstances.

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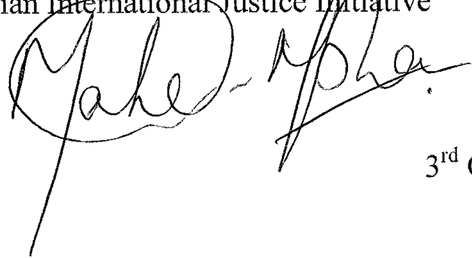

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