

**BEFORE THE PRE-TRIAL CHAMBER
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

Criminal Case File N°: 002/19-09-2007-ECCC-OCIU (PTC15)

Case Name: KHIEU SAMPHAN

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EXTREMELY URGENT SUPPLEMENTAL APPLICATION FOR RELEASE

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MAY IT PLEASE THE PRE-TRIAL CHAMBER

I. INTRODUCTION

1. The Defence has filed the present extremely urgent application pursuant to Article 283 of the Code of Criminal Procedure (CCP). The application has been filed as a matter of utmost urgency and is supplemental and correlated to the appeal brief filed by the Defence, on 4 October 2008, against the Order on Extension of Provisional Detention.

II. RELEVANT LEGAL PROVISIONS

A) Threatened constitutional rights

- “Every Khmer shall have the right to (...) personal freedom (...)”¹ and “the prosecution, arrest or detention shall not be done except in accordance with the law.”²
- “Any case of doubt shall be resolved in favor of the accused.
- The accused shall be considered innocent until the court has judged finally on the case.
- Every citizen shall enjoy the right to defence through judicial recourse.”³

B) Legality of the proceedings called into question

- Article 278 of the CCP provides: “in case of provisional detention, the decision shall be issued within 15 days of the receipt of the file by the Investigation Chamber. At the expiry of the fifteen-day period, the charged person shall be released except if further investigation action has been ordered or if there are unforeseeable or insurmountable circumstances obstructing the pronouncement of the decision within this period.”
- Article 9.4 of the International Covenant on Civil and Political Rights (ICCPR) – which applies directly at the ECCC – provides: “Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”⁴

¹ Article 32 of the Constitution.

² Article 38 of the Constitution.

³ *Ibid.*

⁴ This provision is echoed in Article 5.4 of the European Convention on Human Rights, which, though not directly applicable, could provide guidance on the decision: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court

C) Crucial statutory powers

Powers of the President of the Chamber

2. Pursuant to Article 283 of the Code of Criminal Procedure of the Kingdom of Cambodia, “The President of the Investigation Chamber shall (...) verify the conditions for implementing provisions concerning provisional detention, court orders (...). The president of the Investigation Chamber shall supervise that there be no undue delay in the implementation of proceedings.”

Powers of the Pre-Trial Chamber on appeal

3. Pursuant to Article 109 of the Cambodian Constitution, “The judicial power shall be an independent power. The judiciary shall guarantee and uphold impartiality and protect the rights and freedoms of the citizens”. “ (...) The authority of the Judiciary shall be granted to the Supreme Court and to the lower courts of all sectors and levels”. According to Article 110 of the Constitution, “a judge shall fulfil his duty with strict respect for the laws, wholeheartedly, and conscientiously.”
4. Pursuant to Article 261 of the Code of Criminal Procedure of the Kingdom of Cambodia, “Every time it is seised, the Investigating Chamber shall examine the regularity and assure itself of the proper conduct of the proceedings.”
5. Under international law, and pursuant to a long line of precedents, a tribunal also “possess[es] the power to make all those judicial determinations that are necessary for the exercise of its primary jurisdiction”⁵ regardless of whether such power is stipulated in the statutes, provided that it is essential to guaranteeing a fair trial.⁶

and his release ordered if the detention is not lawful.”

⁵ *Prosecutor v. Tihomir Blaskic*, IT-95-14-AR108bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 33.

⁶ *Ibid.* para. 25.

III. REASONS FOR THE APPLICATION

6. The Defence considers that KHIEU Samphan is being held arbitrarily, based on a non-existent juridical act [*titre inexistent*], and whereas proceedings are dogged by delays. Regarding these violations, complaints have been raised in the appeal against extension of the provisional detention.⁷ The Pre-Trial Chamber is seised of the matter and should render its decision soon. It is against this background that the present supplemental application has been filed.
7. By virtue of the powers attributed to him under the Code of Criminal Procedure, the President of the Pre-Trial Chamber shall “verify the conditions for implementing provisions concerning provisional detention, court orders (...). The president of the Investigation Chamber shall supervise that there be no undue delay in the implementation of proceedings.”
8. The Defence recalls that in essence, provisional detention is a measure which causes tremendous hardship to an individual, who may not only be not guilty, but also may be innocent, without any prospect for remedy with regard to his reputation, livelihood and wellbeing.⁸
9. In the instant case, there has been clear unlawful violation of KHIEU Samphan’s rights over the last several months, in particular, his right to defend himself and that of being tried within a reasonable time. The Pre-Trial is due to render decisions on the appeal concerning translation and the legality of the proceedings as a whole, and it could annul the judicial investigation proceedings and find the detention to be arbitrary. Nonetheless, the Co-Investigating Judges have twice affirmed the legality of the provisional detention on no other grounds than the gravity of the crimes of which they are seised.
10. The Defence therefore considers that the situation is urgent, and that it has been going on for far too long. It is therefore necessary to take urgent, exceptional measures in order to safeguard the Charged Person’s rights.
11. The Co-Lawyers therefore request the President of the Pre-Trial Chamber, in his capacity as representative of the judiciary and by virtue of his powers within the Pre-Trial Chamber, to

⁷ Appeal Brief Against the Order on Extension of Provisional Detention, 4 December 2008.

⁸ Faustin Hélie: *Tribunal d'instruction criminelle*, 1846, IV, n°1948.

order the only suitable measure, namely the release of KHIEU Samphan.

IV. PRAYER

12. Noting the appeal briefs filed by the Defence on 22 July, 27 November and 4 December 2008;
13. Considering the URGENCY of the situation and the clearly unlawful BREACHES of the rights of the Defence, the Co-Lawyers for the Defence pray the President of the Pre-Trial Chamber to ORDER HIS PROVISIONAL RELEASE – as a precautionary and preventative measure – subject to the conditions the President may deem suitable, pending the decisions on the merits of the appeals filed by the Defence.

(Signed)

SA Sovan

(Signed)

Jacques VERGES