BEFORE THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Case No: 002/14-08-2006

Case Name: KANG GUEK EAV

Filed before: The Pre-Trial Chamber

Filing date: 5 September 2007

Filed by: The Defence

Languages: Original in French

Type of document: CONFIDENTIAL

APPEAL BRIEF

CHALLENGING THE ORDER OF PROVISIONAL DETENTION

OF 31 JULY 2007

FOR:	In the presence of:
Mr KANG Guek Eav, alias Duch, born on 17 November 1942 in Cambodia, having Cambodian nationality, a teacher by profession, currently held at the ECCC detention centre. Represented by: **Mr KAR Savuth** **Mr François ROUX** Assisted by: **Héleyn UÑAC** **CHAN Ravuth**	**The Co-Prosecutors** **CHEA Leang** **Robert PETIT**

MAY IT PLEASE THE PRE-TRIAL CHAMBER

I. BACKGROUND

1. On 10 May 1999, Mr KANG was arrested by the authorities of the Kingdom of Cambodia.

2. From 10 May 1999 to 28 February 2005, judicial investigations involving Mr KANG were begun in turn by the investigating judge of the military court for crimes committed at the time of Democratic Kampuchea when Mr KANG was the former director of centre S-21. Mr KANG was indicted for crimes against domestic security (on 10 May 1999[1]), the crime of genocide[2], crimes against humanity (22 February 2002[3]) and finally for war crimes and crimes against internationally protected persons (28 February 2005[4]).

3. In February 2002, the charges against Mr KANG and the orders placing and holding him in detention were based explicitly on the Law on the Establishment of the Extraordinary Chambers of 10 August 2001 and more specifically on the following:

    - articles 5 and 39 of the Law on the Establishment of the Extraordinary Chambers of 10 August 2001 for the charges of crimes against humanity.[5]
    - articles 6 and 8 of the Law on the Establishment of the Extraordinary Chambers of 10 August 2001 for the charges of war crimes and crimes against internationally protected persons.[6]

[1] See the "Order to Forward Case for Investigation" from the Military Prosecutor of 10 May 1999.
[2] See the "Order to Forward Case for Investigation" from the Military Prosecutor of 6 September 1999.
[3] See the Detention Order rendered by the investigating judge of the military court of 22 February 2002.
[4] See the Detention Order rendered by the investigating judge of the military court of 28 February 2005.
[5] See the Detention Order rendered by the investigating judge of the military court of 22 February 2002, 2203 and 2004.
[6] See the Detention Orders rendered by the investigating judge of the military court of 28 February 2005, 2006 and 2007.

4. On 30 July 2007, the Co-Investigating Judges of the Extraordinary Chambers in the Courts of Cambodia (ECCC) issued a warrant to bring Mr KANG before them immediately. Mr KANG was then transferred from the military court detention centre to that of the ECCC.

5. During this entire period, from the date of his arrest on 10 May 1999 to that of his transfer before the ECCC on 30 July 2007, Mr KANG was kept in provisional detention by the Phnom Penh military court, in other words for a total duration of 8 years, 2 months and 20 days.

6. On 31 July 2007, the Co-Investigating Judges of the ECCC opened a judicial investigation against Mr KANG who "*is accused of directing the Security Prison S-21 between 1975 and 1979 where, under his authority, countless abuses were allegedly committed against the civilian population (arbitrary detention, torture and other inhumane acts, mass executions etc.) which occurred within a political context of widespread or systematic abuses and constitute crimes against humanity, crime(s) set out and punishable under articles 5, 29(new) and 39(new) of the Law on the Establishment of the Extraordinary Chambers dated 27 October 2004*".

7. In the Order of 31 July 2007, the Co-Investigating Judges ordered that Mr KANG be placed in provisional detention for a period not exceeding one year.

8. The Defence lodged an appeal against this Order of Provisional Detention with the Greffier of the Co-Investigating Judges on 23 August 2007 and wishes to develop the submissions in support of its appeal hereinafter.

9. Before doing so, the Defence calls on the Pre-Trial Chamber to order that the adversarial hearing on this appeal be held in public pursuant to rule 77(6) of the Internal Rules.

10. The Defence maintains that such a measure is in the interest of the correct administration of justice and would not be prejudicial to law and order.

II – DEFENCE SUBMISSIONS

11. The Defence requests that the above-mentioned order of 31 July 2007 be set aside and that Mr KANG be released immediately on the grounds that his provisional detention, since 10 May 1999, is a violation of Cambodian law and of the international standards for the protection of human rights and that the Co-Investigating Judges have not drawn the necessary legal inferences from such a violation **(A)**.

12. The Defence also maintains that the Co-Investigating Judges had a duty to take into account the eight years Mr KANG had already spent in detention when they ruled on whether or not it was appropriate to detain him for a further year and that the conditions for detaining Mr KANG as at 31 July 2007 were not met. Consequently the Defence requests that Mr KANG be released on these additional grounds. **(B)**

13. In any case, the Defence requests that Mr KANG be awarded compensation for the harm he has suffered as a result of the time he has spent in provisional detention which has exceeded the legal time limits. **(C)**

A. ON THE ILLEGALITY OF MR KANG'S PROVISIONAL DETENTION AND THE INFERENCES WHICH SHOULD HAVE BEEN DRAWN IMMEDIATELY THEREFROM

14. The Defence calls on the Pre-Trial Chamber to consider that the Co-Investigating Judges have not responded to the submissions which the Defence developed regarding the excessive duration of Mr KANG's provisional detention.

15. During the adversarial hearing, the Defence submitted that Mr KANG had been held for more than eight years, which constituted a violation of Cambodian law and of the international standards for the protection of human rights.

16. The Defence specifically referred to the violation of article 14 (3) of the International Covenant on Civil and Political Rights (ICCPR) and of article 5 (3) of the European Convention on the Protection of Human Rights (ECHR) (which includes a similar provision to that of article 9 (3) of the ICCPR), which both assert the fundamental principle that any accused person is entitled to trial within a reasonable time or to release.

17. The Defence wishes to reiterate the submission developed before the Co-Investigating Judges whereby Mr KANG's provisional detention was illegal under Cambodian law and under the international standards for the protection of human rights. (1)

18. The Defence further submits that the judges of the ECCC have jurisdiction to draw the legal inferences required by such a violation. (2)

19. The Defence considers that only Mr KANG's release can remedy in part such a violation of his rights. (3)

(1) Mr KANG's provisional detention is illegal under Cambodian law and the international standards for the protection of human rights

20. The Defence maintains that Mr KANG's provisional detention violates the entitlement of the accused to trial within a reasonable time or to release under Cambodian law and under the international standards for the protection of human rights.

a. Cambodian law

21. The legal provisions for provisional detention which apply in the present case are set out in the following legal documents: the Constitution of the Kingdom of Cambodia of 1993, the UNTAC penal code of 1992, the Law on Temporary Detention Period of 26 August 1999.

22. The Constitution of the Kingdom of Cambodia sets out fundamental principles whereby: "*Every Khmer citizen shall have the right to life, personal freedom and security*" (article 32) and "*The prosecution, arrest, or detention of any person shall not be done except in accordance with the law*" (article 38).

23. The UNTAC penal code of 1992, which was the law which applied at the time of Mr KANG's arrest in May 1999, in its article 21 (1), provides that any person, whether or not in detention, must be judged no later than six months after arrest.

24. The Law on Temporary Detention Period was promulgated in August 1999. Article 21 thereof states that for crimes of genocide, war crimes and crimes against humanity the temporary detention period shall not exceed three years in total.

25. Mr KANG has been held in provisional detention in accordance with this law from September 1999. Mr KANG was charged at that time and he was ordered to be held in provisional detention for the crime of genocide.

26. In accordance with this law, Mr KANG should have been tried within three years at most or released.

27. However, the military investigation file shows that as new charges were filed against him in February 2002, Mr KANG's provisional detention would continue for a further three years. Mr KANG was then also being prosecuted for crimes against humanity in accordance with articles 5 and 39 of the Law on the Establishment of the ECCC of 10 August 2001.

28. New charges were once again brought against him in February 2005; charges of war crimes and crimes against internationally protected persons, and Mr KANG remained in detention at the Phnom Penh military court detention centre until his transfer to the ECCC on 30 July 2007.

29. Reading the military case file, and in particular the detention order rendered by the investigating judge of the military court, there is no doubt that new charges were brought against Mr KANG not because new circumstances had emerged, which justified a new order to detain the accused, but in order to enable Mr KANG's detention to be extended beyond the three year legal time limit.

30. In doing so the Phnom Penh military court did not apply the law, but on the contrary purely and simply subverted it in order to achieve its goal, which was to keep Mr KANG in provisional detention for an unlimited period.

31. The judges of the ECCC should therefore note that the right of Mr KANG to be judged within the three year legal time limit was violated in September 2002.

32. From that date, Mr KANG's detention exceeded the maximum three year legal time limit, as stipulated by the Law on Temporary Detention Period of 1999.

33. As his provisional detention was not ordered in accordance with the law, as required by article 38 of the Constitution, Mr KANG's detention became illegal from September 2002 and he should therefore have been released at that time.

34. The Defence notes, moreover, that article 203 of the new Code of Criminal Procedure, which entered into force on 20 August 2007 and which applies to the

present court from that date,[7] recalls the principle whereby freedom is the rule and detention the exception in Cambodian law.[8]

35. Article 210 of the new Code of Criminal Procedure also states that the duration of temporary detention in the case of crimes against humanity, crimes of genocide or war crimes shall not exceed one year. As this time limit may only be extended twice, the new code therefore states that temporary detention may only be ordered for a maximum of three years for such crimes.[9]

36. This provision therefore reasserts the rule whereby temporary detention which exceeds three years is illegal under Cambodian law.

37. In view of all these documents, a provisional detention period of more than eight years is clearly excessive and illegal under Cambodian law.

b) International law

38. Article 31 of the Constitution of the Kingdom of Cambodia of 1993 states that: "*The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's and children's rights*".

[7] In accordance with article 608 of the new Code of Criminal Procedure: "*The time limit for temporary detention for an ongoing case shall remain the same as the time limit provided in the previous law, except the cases of crimes against humanity, genocide or war crimes*."
[8] Article 203 (Principle of temporary detention) of the new Code of Criminal Procedure:
"*As a general principle the freedom of an accused must be allowed. In special circumstances the accused can be temporarily detained under the conditions stated in this section*."
[9] Article 210 (Duration of temporary detention in case of crime against humanity) of the new Code of Criminal Procedure:
"*In case of charges for crime against humanity, genocide crime or war crime, temporary detention shall not exceed one year for each of these offenses. However, when this period of time ends, the investigating judge can extend temporary detention for another one year by warrant with a clear and fair statement of reasons*."

39. Under this provision, the judicial authorities of the Kingdom of Cambodia are required to apply the provisions of the international documents on human rights such as the International Covenant on Civil and Political Rights (ICCPR) of 1966.

40. In a recent decision dated 10 July 2007, the Constitutional Council of the Kingdom of Cambodia reasserted that the Cambodian judges must comply with such documents.[10]

41. The Defence recalls that the Kingdom of Cambodia ratified the ICCPR on 26 August 1992 and that this document was therefore legally binding from that date.

42. Consequently Mr KANG should have benefited from the protection afforded by the ICCPR to any person accused of crimes as soon as he was arrested.

43. In particular, the judicial authorities of Cambodia responsible for his case should have complied with article 9 (3) of that international treaty.

44. Similarly, the ECCC also has a duty to respect this provision.[11]

45. Article 9 (3) of the ICCPR provides that:

"*Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release*

[10] In the present case this involved the application of the Convention on the Rights of the Child.
[11] In addition, the ECCC also has a duty to respect article 14 (3) (c) of the ICCPR which guarantees the right to trial within a reasonable time. See new articles 33 and 35 of the Law on the Establishment of the ECCC of 27 October 2004, and articles 12 and 13 of the Agreement between the United Nations Organization and the Royal Government of Cambodia, which refer back to article 14 of the ICCPR. See also Rule 21 (4) of the Internal Rules which makes provision for the accused be tried within a reasonable time.

may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".[12]

46. In a general comment on article 9 (3) of the ICCPR, the Human Rights Committee recalled the principle whereby provisional detention should be an exception and must be as short as possible.[13]

47. The Human Rights Committee made this point in the case of Sandy Sextus v. Trinidad and Tobago[14] as follows:

"*As to the claim of unreasonable pre-trial delay, the Committee recalls its jurisprudence that "[i]n cases involving serious charges such as homicide or murder, and where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible".*[15] *In the present case, where the author was arrested on the day of the offence, charged with murder and held until trial, and where the factual evidence was straightforward and apparently required little police investigation, the Committee considers that substantial reasons must be shown to justify a 22-month delay until trial. The State party points only to general problems and instabilities following a coup attempt, and acknowledges delays that ensued. In the circumstances, the Committee concludes that the author's rights under article 9, paragraph 3 and article 14, paragraph 3 (c), have been violated*".[16]

48. Similarly the Committee held that article 9 (3) of the ICCPR had been violated in the case of *Koné v. Senegal*[17] for the following reasons:

"*in the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or to his representative", "a delay of four years and four months, during which the*

[12] Emphasis added.
[13] *CCPR General Comment No 8: Right to liberty and security of persons (Art. 9): 30/06/82*.
[14] Communication no 818/1998, *Sextus v. Trinidad and Tobago* (views adopted on 16 July 2001, seventy-second session), para. 7.2
[15] *Barroso v. Panama* (Communication 473/1991, para. 8.5).
[16] Emphasis added.
[17] Communication no 386/1989, Koné v. Senegal (views adopted on 27 October 1994, fifty-second session), para. 8.7

author was kept in custody cannot be deemed compatible with article 9, paragraph 3".[18]

49. Finally, in the case *Pillastre and Bizouarn v. Bolivia,*[19] the Human Rights Committee rejected the various motives put forward by the State in an attempt to justify the excessive duration of detention for the applicants as follows:
"*The lack of adequate budgetary appropriations for the administration of criminal justice alluded to by the State party does not justify unreasonable delays in the adjudication of criminal cases. Nor does the fact that investigations into a criminal case are, in their essence, carried out by way of written proceedings, justify such delays. In the present case, the Committee has not been informed that a decision at first instance had been reached some four years after the victims' arrest. Considerations of evidence-gathering do not justify such prolonged detention. The Committee concludes that there has been, in this respect, a violation of article 9, paragraph 3".*

50. It should be noted here that the international criminal tribunals regularly refer not only to the decisions of the Human Rights Committee but also to the decisions of the European Court of Human Rights in their decisions in order to assist them in the application and interpretation of points of law or rules of procedure.[20]

[18] Emphasis added.
[19] Communication 336/88, *Pillastre and Bizouarn v. Bolivia* (views adopted on 6 November 1991, forty-third session), para. 6.5
[20] See, for example, *The Prosecutor v. Barayagwiza*, ICTR, Appeals Chamber decision of 3 November 1999, para. 40 which states: "*The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom*". See also *The Prosecutor v. Hadžihasanović*, ICTY, Trial Chamber, "Decision granting provisional release to Enver Hadžihasanović", 19 December 2001, paras. 6 and 7. The following is noted in this decision: "*Rule 65 must be read in the light of the ECHR and the ICCPR"* and that *"de jure pre-trial detention should be the exception and not the rule as regards prosecution before an international court"* and finally that *"mandatory detention on remand is per se incompatible with Article 5(3) of the European Convention on Human Rights*".

51. The Defence recalls that the European Court has interpreted the concept of a reasonable time-limit in the same way as the Human Rights Committee.

52. In many cases, the European Court has also concluded that there had been a violation of article 5 (3) of the ECHR, even though the detention period was much shorter than eight years.[21]

53. The Court has also stated consistently in its decisions that, even though the grounds invoked by the competent authorities in order to justify provisional detention might be relevant and sufficient,[22] it is necessary to establish in each case "*whether or not the competent national authorities have ensured "particular diligence" in conducting the proceedings"*[23] [unofficial translation – original text exists only in French]. In the absence of any evidence that the judicial authorities have demonstrated such diligence, the Court concluded that the entitlement to trial within a reasonable time or to release, as guaranteed by article 5 (3) of the ECHR, had been violated.

54. Thus in the judgment *Gosselin v. France*, the European Court noted that "*several years of inactivity are attributable to the judicial authorities*" and that "*the length of the provisional detention of the applicant was attributable in particular to the fact that court sessions were saturated*". The Court, after recalling that "*it is the responsibility of States to ensure that their legal system is arranged in such a way that their courts can meet the requirements of article 5*", concluded that article 5 (3)

[21] See, for example, the following cases: *Punzelt v. Czech Republic*: duration of provisional detention: 2 years, 6 months and 18 days; *Labita v. Italy*: duration of provisional detention of 2 years and 7 months; *Jecius v. Lithuania*: duration of provisional detention of 13 months and 16 days; *Vaccaro v. Italy*, duration of provisional detention of 4 years and 8 months; *Khudla v. Poland*: duration of provisional detention of 2 years, 4 months and 3 days; *Iliowiecki v. Poland*: duration of provisional detention of 1 year, 9 months and 19 days. These examples are taken from a book entitled "*A Practioner's guide to the European Convention on Human Rights*" by Karen Reid.

[22] The Defence is of the opinion that in the present case, such grounds are quite simply non-existent (see below).

[23] *Gérard Bernard v. France*, 26 September 2006, para. 37, which quotes the leading judgment on this issue, in other words the judgment of *Letellier v. France*, 26 June 1991, para. 35, together with the judgments rendered in the cases *I.A. v. France*, 23 September 1998, para. 35; *Zannouti v. France*, 31 July 2001, para. 43.

of the ECHR had been violated on the grounds that "*the authorities did not act with the necessary promptness, whereas the applicant had not been particularly obstructive, reasonably using the channels of the law which were available to him*".[24] [unofficial translations – original texts exist in French only]

55. The Defence maintains that in the present case Mr KANG has not been tried "*in as expeditious a manner as possible*" or, failing that, released, as required under the above-mentioned international standards for the protection of human rights.

56. On the contrary, the judicial authorities responsible for his case have detained him for more than eight years, without giving any reasons to explain such a delay.

57. The Defence notes, in the first instance, that the military investigating judge has given no reason to justify the provisional detention ordered for Mr KANG.[25]

58. The Defence notes, in the second instance, that the reason for such a delay seems to be based on the desire by the judicial authorities to bring Mr KANG before the ECCC, even if this means waiting several years for that court to be established.

59. Consequently, the Defence calls on the Pre-Trial Chamber to find that in the present case, eight years is quite clearly an excessive period of time in light of the international standards for the protection of human rights.

60. The Defence further calls on the Pre-Trial Chamber to note that this excessive length of time is not attributable to either Mr KANG or his Defence, but that it may quite clearly be imputed to the judicial authorities responsible for the present case.

[24] *Gosselin v. France*, 13 September 2005, para. 34.
[25] See Orders of detention rendered by the investigating judge of the military court dated 22 February 2002, 2003 and 2004 and of 28 February 2005, 2006 and 2007.

61. Consequently, the Defence calls on the Pre-Trial Chamber to find that the right of Mr KANG to be tried within a reasonable time or released in accordance with article 9 (3) of the ICCPR has been violated.

(2) <u>The judges of the ECCC have jurisdiction to draw the legal inferences required by such a violation</u>

62. The Co-Investigating Judges noted that: "*Within the context of these military proceedings, [Mr KANG] was placed in provisional detention beginning 10 May 1999 and he remains in detention to this date. His continued provisional detention is problematic in light of the international standards of justice and, more specifically, articles 9(3) and 14(3)(c) of the International Covenant on Civil and Political Rights, which states that any individual arrested or detained for a criminal offence shall be entitled to a trial within a reasonable time period or to be released*".[26]

63. However, the Co-Investigating Judges considered that they did not have jurisdiction "*to determine the legality of DUCH's prior detention*".[27]

64. The Defence calls on the Pre-Trial Chamber on the contrary to recognise that, in view of the fact that Mr KANG's entitlement to a trial within a reasonable time or to release has been violated (as previously indicated), the Chamber must draw all the necessary legal inferences from this violation.

65. The Defence notes, moreover, that **in ordering the provisional detention of Mr KANG for a ninth year**, the Co-Investigating Judges have thus contributed to the excessive duration of Mr KANG's detention and in doing so have validated all the prior proceedings relating to Mr KANG's detention, even though they were clearly

[26] See paragraph 2 of the Order of Provisional Detention of 31 July 2007 (the Order).
[27] See paragraph 20 of the Order.

illegal under Cambodian law and under the international standards for the protection of human rights.

66. As a result, the Defence calls on the Pre-Trial Chamber to declare that it has jurisdiction to rule on this issue and to state that provisional detention lasting 9 years is excessive and illegal under Cambodian law and under the international standards for the protection of human rights and, finally, to draw all the requisite legal inferences from this violation.

67. The factors set out below support the Defence's application.

68. Firstly, the link between the extension of Mr KANG's provisional detention by the military investigating judge and the fact that the case will be brought before the ECCC in the future is obvious.

69. In order to be convinced of this, one simply needs to consult the Detention Order of 22 February 2002 and the subsequent orders which were issued by the investigating judge of the Phnom Penh military court, all of which refer to the Law on the Establishment of the ECCC of 2001 in order to justify Mr KANG being charged and detained for crimes against humanity initially and then for crimes committed against internationally protected persons.[28]

70. It also emerges from this case file that the military investigating judge rendered no order of termination of the proceedings or notification to proceed with a prosecution to the military court with a view to a future trial, even though more than 8 years after the start of the first judicial investigation against Mr KANG the investigating judge should have been in a position to render such an order.

[28] See the Detention Orders issued by the investigating judge of the military court dated 22 February 2002, 2003 and 2004 and 28 February 2005, 2006 and 2007.

71. It is quite clear that Mr KANG has been detained whilst awaiting the establishment of the ECCC and his future trial before that court.

72. The judges of the ECCC cannot deny this fact and have a duty to draw all the legal inferences therefrom.

73. Similarly, the proceedings against Mr KANG before the military court and the ECCC are intrinsically linked, given that evidence from the military investigation file has been registered in the record of the Co-Investigating Judges of the ECCC.

74. Secondly, the Defence wishes to remind, if this is indeed necessary, the Pre-Trial Chamber that, as the Co-Investigating judges noted in their Order of 31 July 2007: "*Article 12 of the Agreement between the United Nations and the Royal Government of Cambodia dated 6 June 2003 expressly states that the Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice*"[29].

75. This principle is also clearly stated in article 33 of the Law on the Establishment of the ECCC of 2004.

76. In addition, article 21(1) of the Internal Rules recalls the fundamental rule whereby: "*The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused…*".

77. Consequently, as the ECCC was established with the objective of fully adhering to the international standards for the protection of human rights, the judges of the ECCC are bound to apply the rights of the accused in an effective, and not just theoretical, manner.

[29] See paragraph 3 of the Order.

78. To this end, the decisions of the European Court are relevant before the ECCC in order to give an indication of what is meant by the effective application of the entitlement "*to trial within a reasonable time or to release*", as guaranteed by article 5 (3) of the ECHR.

79. Thus a certain number of decisions rendered by the European Court in respect of article 5 (3) of the ECHR are relevant in that they have confirmed both that the period of detention under examination starts from the arrest or initial detention of the applicant and that the period of detention prior to the date on which the Court was granted jurisdiction to examine the violation invoked had to be taken into consideration.

80. Thus in a decision *Mansur v. Turkey* of 23 May 1995, the Court held that:[30]
"*Having regard to the conclusion in paragraph 44 of this judgment, the Court can only consider the period of one year and twenty-eight days which elapsed between the deposit of the declaration whereby Turkey recognised the Court's compulsory jurisdiction (22 January 1990) and the judgment of the Edirne First Assize Court (19 February 1991). However, when determining whether the applicant's continued detention after 22 January 1990 was justified under Article 5 para. 3 (art. 5-3) of the Convention, it must take into account the fact that by that date the applicant, having been placed in detention on 5 November 1984 (see paragraph 23 above), had been in custody for nearly five years and three months*."[31] In the present case, the Court concluded that article 5 (3) of the ECHR had been violated.

81. A contrary position would have run counter to the goal of the European Court which, like the ECCC, is bound to apply the international standards of human rights in an effective manner.

[30] Judgment *Mansur v. Turkey* delivered by the European Court on 23 May 1995, para. 51.
[31] Emphasis added. See also the judgment *Kalashnikov v. Russia*, delivered by the European Court on 15 July 2002, para. 111.

82. The Defence maintains that similarly, the decision rendered by the Appeals Chamber of the ICTR in the Barayagwiza case on 3 November 1999 sets out unequivocally the principle whereby an international criminal tribunal which has just had a case brought before it must take into account the time spent in detention by the accused before the case was referred to it, even if this period of detention is attributable to another tribunal. Since the tribunal has had the case referred to it then it has jurisdiction to rule on the claims of the accused.

83. In that decision, the ICTR held the following:

"*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*".[32]

(3) Mr KANG must be released, under a bail order if required.

84. The Defence is of the opinion that only Mr KANG's immediate release can remedy in part the violation of his entitlement to trial within a reasonable time or to release.

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

85. The Defence notes that the international criminal tribunals have allowed similar applications for release for persons accused of crimes as serious as the ones which Mr KANG has been accused of.[33]

86. The Defence therefore calls on the Pre-Trial Chamber to order Mr KANG's immediate release, if necessary under a bail order, which could take the form of house arrest.

B. ON THE CONDITIONS OF PROVISIONAL DETENTION ORDERED BY THE CO-INVESTIGATING JUDGES

87. If, by some remote chance, the Pre-Trial Chamber were to validate the challenged Order on the ground that the Co-Investigating Judges of the ECCC did not have jurisdiction to examine the illegal nature of the provisional detention lasting more than 8 years ordered by the military investigating judge, the Defence maintains that in any event the Co-Investigating Judges of the ECCC were bound to take into account these 8 years when they themselves had to issue a ruling on whether or not it was appropriate to place Mr KANG in detention for a ninth year[34] and that the conditions for placing Mr KANG in detention on 31 July 2007 were not met. Consequently the Defence seeks the release of Mr KANG on these other grounds.

88. The Defence is of the opinion that, contrary to the decision taken by the Co-Investigating Judges, the conditions for placing (and in reality keeping) Mr KANG in provisional detention are not met.

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[33] For example, see *The Prosecutor v. Ramush Haradinaj*, ICTY, Trial Chamber, "Decision on Ramush Haradinaj's motion on provisional release", 6 June 2005. Mr Haradinaj was prosecuted on 37 charges of crimes against humanity and war crimes and was released pending his trial; *The Prosecutor v. Rahim Ademi*, ICTY, Trial Chamber, "Order on Motion for Provisional Release", 20 February 2002; *The Prosecutor v. Hadžihasanović*, ICTY, Trial Chamber, 19 December 2001, "Decision granting provisional release to Enver Hadžihasanović".

[34] In support of this argument, see judgments from the European Court of Human Rights quoted above,: *Mansur v. Turkey* of 23 May 1995, para. 51 and *Kalashnikov v. Russia* of 15 July 2002, para. 111. See also *The Prosecutor v. Rahim Ademi*, 20 February 2002 "Order on Motion for Provisional Release", para. 26 "*… the duration of pre-trial detention is a relevant factor to be considered when deciding whether or not detention should continue. […] This issue may need to be given particular attention in view of the provisions of Article 9(3) of the ICCPR and Article 5(3) of the ECHR*".

89. The Order of Provisional Detention from the investigating judges is based on rule 63(3) of the Internal Rules which states that:

"*The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:*
a) there is a well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
[...]
iii. ensure the presence of the Charged Person during the proceedings;
iv. protect the security of the Charged Person; or
v. preserve public order".[35]

90. The Co-Investigating Judges were of the opinion that Mr KANG had to remain in detention for the following reasons:
- In order to preserve public order;
- In order to ensure that Mr KANG would be present in court;
- In order to protect Mr KANG's own safety.[36]

91. The Defence also wishes to reiterate the consistent jurisprudence of the European Court of Human Rights as far as the conditions for release of an accused are concerned, which is as follows:
"*The persistence of well-founded reasons to suspect that the person arrested has committed a crime is an essential condition for the legality of keeping that person in detention, but after a certain amount of time this is no longer sufficient; the Court must therefore establish if the other grounds adopted by the judicial authorities still legitimise the loss of freedom. When these grounds are "pertinent" and*

[35] See also article 205 of the new Code of Criminal Procedure, which sets out similar conditions for detention and which has applied to this court since 20 August.
[36] See paragraphs 22 and 23 of the Order.

"sufficient", the Court seeks moreover to establish whether the competent national authorities have brought "particular diligence" to the conduct of the proceedings".[37] [unofficial translation – original text exists in French only]

92. The Defence maintains that the grounds invoked by the judges in order to justify placing – or rather keeping – Mr KANG in detention are neither pertinent nor sufficient under the international standards for the protection of human rights. (1)

93. The Defence further submits that in any case, as mentioned above, the competent authorities have failed in their obligation to apply "particular diligence" to the conduct of the proceedings.[38]

94. Therefore, the Defence calls on the Pre-Trial Chamber to set aside the Order of Detention of 31 July 2007 and to release Mr KANG, under a bail order if necessary. (2)

(1) <u>The reasons invoked by the Co-Investigating Judges are neither pertinent nor sufficient to justify placing (or keeping) Mr KANG in detention</u>

95. It is important to note that the European Court of Human Rights held that "*provisional detention lasting almost three years must be <u>strongly</u> justified*".[39] [unofficial translation – original text exists in French only] In the present case, placing (or keeping) Mr KANG in provisional detention for a ninth year is not based on any such justification, as set out below.

a) <u>Preserving public order</u>

[37] *Gerard Bernard v. France*, 26 September 2006, para. 37, citing other judgments of the Court such as the *Letellier v. France* judgment of 26 June 1991.
[38] See previous development of this point in section (A).
[39] Emphasis added. See *Bernard v. France*, 26 September 2006, para. 38 and *Gosselin v. France*, 13 September 2005, para. 32.

96. The Co-Investigating Judges ordered Mr KANG to be placed in detention on the grounds that "*the acts alleged against the Charged Person are of a gravity such that, 30 years after their commission, they profoundly disrupt the public order to such a degree…*"[40]

97. The Co-Investigating Judges also held that: "*it is not excessive to conclude that the release of the person concerned risks provoking, in the fragile context of today's Cambodian society, protests of indignation which could lead to violence*".[41]

98. The Defence wishes to recall the jurisprudence of the European Court of Human Rights on this type of ground.

99. The Court holds that a person may only be kept in detention on the grounds that his or her release would disturb public order if there are exceptional circumstances and under certain conditions.[42]

100. Condition 1: "*Facts which demonstrate that the release of the detained person would disturb public order*" must exist [unofficial translation – original text exists in French only].[43]

101. Condition 2: "*Detention remains legitimate only if there is a threat to public order; it may not be used in anticipation of a custodial sentence*"[unofficial translation – original text exists in French only].[44]

102. In the present case, the Co-Investigating Judges indicated that the crimes Mr KANG has been accused of do disturb public order, but they have not communicated evidence in support of this claim, nor demonstrated how public order was disturbed.

[40] See paragraph 22 of the Order.
[41] See paragraph 22 of the Order.
[42] See *Gerard Bernard v. France*, 26 September 2006, para. 46
[43] Ibid.
[44] Ibid.

103. Similarly, no evidence has been supplied to confirm, as the Co-Investigating Judges claim, that Mr KANG's release "*risks provoking […] protests of indignation which could lead to violence"*.

104. The Defence wonders on what information the Co-Investigating Judges have based their assessment that there might be a risk of violence. It could also be claimed that keeping Mr KANG in detention in violation of national and international law could cause strong reactions.

105. As the Defence stated at the adversarial hearing, Mr KANG was free between 1979 and 1999 without any resulting disturbance of public order. Only this piece of evidence in the case file gives any indication of the possible public reaction to Mr KANG's release.

106. It is worth noting that at the International Criminal Tribunal for the Former Yugoslavia, for example, persons accused of crimes against humanity have been released pending trial without any disturbance of public order being noted in the wake of such a decision and this just a few years after the crimes the person is accused of took place.[45]

107. The Defence therefore maintains that disturbing public order is a ground which is neither sufficient, nor pertinent to justify the detention of Mr KANG.

108. On the assumption that the Pre-Trial Chamber considered this ground pertinent, it should be noted that the European Court held that whilst the imperative of public order may constitute a pertinent factor in keeping the applicant in detention, this factor decreases over time.[46]

[45] See for example, the case of Mr Ramush Haradinaj, quoted above.
[46] See *Gerard Bernard v. France*, 26 September 2006, para. 46

109. The Defence maintains that as a result, although this ground may have been deemed pertinent in 1999, 8 years after Mr KANG's initial arrest and thirty years after the crimes he has been accused of, this is no longer the case.

b) Ensuring Mr KANG's own safety

110. The Co-Investigating Judges held that: "*it is not excessive to conclude that the release of the person concerned risks provoking, in the fragile context of today's Cambodian society, […] and perhaps imperil the very safety of the person concerned*"[47].

111. Once again, the Co-Investigating Judges do not mention any evidence in their decision to support the alleged risk which Mr KANG might encounter if he were to be released.

112. In addition, the Defence wishes to remind the Pre-Trial Chamber that, as previously mentioned, Mr KANG's personal safety was not in danger between 1979 and 1999 as a result of the crimes he now stands accused of.

113. Similarly, other suspects whose names have been published in the press are now free and their safety is not in danger.

114. As the Co-Investigating Judges have not demonstrated that such a genuine threat to Mr KANG's safety exists then he cannot be detained on that ground.

115. The Defence notes, moreover, that if the judges of the ECCC fear for Mr KANG's safety and wish to offer him protection, other measures may be adopted which would allow him to remain free, whilst protecting him from any danger to his personal safety, such as house arrest.

[47] See paragraph 22 of the Order.

c) Ensuring that Mr KANG appears in court

116. The Co-Investigating judges also held that Mr KANG's provisional detention was also necessary: "*to guarantee that the Charged Person remains at the disposition of justice*"[48].

117. The Co-Investigating Judges were of the opinion that "*because DUCH may be sentenced to life imprisonment, it is feared that he may seek, as a consequence, to flee any legal action*"[49].

118. Once again no evidence has been submitted in support of this ground. The only justification invoked by the judges is the fact that Mr KANG may be sentenced to life imprisonment.

119. The Defence wishes to recall the consistent position of the European Court of Human Rights on this point, that on the one hand the risk that the person will abscond must be established;[50] and on the other hand that "*the risk of absconding may not simply be assessed on the basis of the gravity of the sentence*" [unofficial translation – original text exists in French only].[51]

120. The Defence maintains that the following information must be taken into consideration:
    - Mr KANG continued to live in Cambodia in 1979;
    - he did not resist arrest in May 1999;
    - he has never denied being the chief of centre S-21;
    - he has said that he is prepared to reveal details of all the crimes committed by the Khmer Rouge.

[48] See paragraph 23 of the Order.
[49] See paragraph 22 of the Order.
[50] See *Muller v. France*, 18 February 1997, para. 42
[51] See *Gerard Bernard v. France*, 16 September 2006, para. 45

121. Mr KANG has, moreover, indicated that he is prepared to be tried by the ECCC.

122. This information shows that, if Mr KANG were to be released, he would not seek to evade justice.

123. In addition, Mr KANG can meet bail conditions:
- Mr KANG has four children and grand-children who all live in Cambodia and with whom he is in regular contact.
- Mr KANG does not have the financial means to enable him to flee the country;
- Mr KAR Savuth, his lawyer, agrees to offer personal surety that Mr KANG will be present in court.

(2) Mr KANG will have to be released, under a bail order if necessary

124. In light of the foregoing, the Defence requests that the Pre-Trial Chamber set aside the Order of Detention of 31 July 2007 and release Mr KANG, under a bail order if necessary.

125. The Defence maintains that alternative measures to detention may be adopted.

126. In particular, the Pre-Trial Chamber could decide to place Mr KANG under house arrest, which would have the added advantage of isolating him from the other persons who are likely to be arrested and charged and with whom he has a conflict of interest.

C. In any case, the Defence requests that Mr KANG be awarded reparations for the harm he has suffered following provisional detention which has exceeded all legal limits

127. The Pre-Trial Chamber is requested to state that:

- in the event of an acquittal, financial compensation should be paid to Mr KANG as a reparation both for the eight years plus he has spent in provisional detention and also for the harm he has suffered as a result of the violation of his entitlement to trial within a reasonable time or to release;
- in the event of a conviction, the eight years he has already served will have to be deducted from the sentence to be served and a further sentence reduction will have to be granted as compensation for the harm he has suffered as a result of the violation of his entitlement to trial within a reasonable time or to release.

128. The decision rendered by the Appeals Chamber of the International Criminal Tribunal for Rwanda on 31 March 2000 in the case of *The Prosecutor v. Barayagwiza* supports the Defence's application.

129. In this decision, the Appeals Chamber confirmed that the rights of Mr Barayagwiza were violated, and that as a result he was entitled to a remedy as follows:

"...DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of judgement at first instance, as follows:

a) If the Appellant is found not guilty, he shall receive financial compensation;

b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights".[52]

130. In its decision of 3 December 2003, the ICTR Trial Chamber applied the above-mentioned decision, as mentioned below.

131. After considering that the most appropriate sentence for Mr Barayagwiza was life imprisonment, the Chamber initially took into consideration the violation of his

[52] See *The Prosecutor v. Barayagwiza*, ICTR, Appeals Chamber, Decision (Prosecutor's request for review or reconsideration), 31 March 2000, paragraphs 74 and 75.

rights and reduced the sentence to thirty five years in prison and then later deducted the time spent in provisional detention.

132. Mr Barayagwiza was therefore eventually sentenced to a prison sentence of 27 years, 3 months and 21 days.[53]

133. The Defence therefore maintains that if Mr KANG were to be convicted, in addition to the deduction of the total time he spent in provisional detention from the sentence, in accordance with article 503 of the new Code of Criminal Procedure[54] and as far as international jurisprudence is concerned,[55] the violation of his entitlement to trial within a reasonable time or to release affords him the right to a remedy of additional years to be deducted from his sentence.

FOR THESE REASONS

134. TO ORDER that the appeal hearing be held in public pursuant to article 77 (6) of the Internal Rules.

TO ALLOW Mr KANG's appeal and set aside the challenged Order

ON THE FIRST GROUND

TO STATE AND RULE that Mr KANG's entitlement to trial within a reasonable time or to release during the proceedings has been violated and that his provisional detention lasting more than 8 years, which has been renewed by the Co-Investigating Judges for a ninth year, is illegal under Cambodian law and under the international standards for the protection of human rights.

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[53] See *The Prosecutor v. Barayagwiza*, ICTR, Trial Chamber, "Judgment and Sentence", 3 December 2003, paragraphs 1106 and 1107.

[54] Article 503 (Deduction of the Length of Temporary Detention) of the new Code of Criminal Procedure: "*The length of any pre-trial detention shall be considered part of the sentence decided by the court or a total of duration of sentence that has been imposed following the combination of sentences*".

[55] See for example, *The Prosecutor v. Tadic*, ICTY Appeals Chamber, "Judgment in sentencing appeals", 26 January 2000, para. 38: "*… the Appeals Chamber recognises that the criminal proceedings against the Appellant in the Federal Republic of Germany emanated from substantially the same criminal conduct as that for which he now stands convicted at the International Tribunal. Hence, fairness requires that account be taken of the period the Appellant spent in custody in the Federal Republic of Germany prior to the issuance of the Tribunal's formal request for deferral*".

ON THE SECOND GROUND

TO STATE AND RULE that the conditions for placing him in detention on 31 July 2007 were not met,

CONSEQUENTLY

TO ORDER in any event the immediate release of Mr KANG

TO PLACE Mr Kang under a bail order if required, which may take the form of house arrest.

IN ANY EVENT

TO STATE AND RULE that, as a result of the violation of his entitlement to trial within a reasonable time or to release during the proceedings, Mr KANG is entitled to reparation which shall be determined at the time of judgment by the Trial Chamber as follows:

a. If Mr KANG is acquitted, he will be entitled to financial compensation;

b. If Mr KANG is convicted, the time he spent in provisional detention will be deducted from the sentence and his sentence will be reduced in order to take into account the violation of his rights.

WITHOUT PREJUDICE

05/09/2007	Phnom Penh	Mr KAR Savuth Mr François ROUX	[signed]
Date	Place	Name	Signature