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

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Supreme Court Chamber
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក (០៤)
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(04)

Before: **Judge KONG Srim, President**
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge SIN Rith
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

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សាធារណៈ / Public

DECISION ON IMMEDIATE APPEAL BY KHIEU SAMPHAN ON APPLICATION FOR RELEASE

Accused
KHIEU Samphan

Lawyers for the Accused
KHIEU Samphan
SA Sovan
Jacques VERGÈS

Co-Prosecutors
CHEA Leang
Andrew CAYLEY

Civil Parties Co-Lead Lawyers
PICH Ang
Elisabeth SIMMONEAU-FORT

THE SUPREME COURT CHAMBER of the Extraordinary Chambers in the Courts of Cambodia ("ECCC") is seised of the immediate appeal filed by the Co-Lawyers for the Accused, KHIEU Samphan ("Accused"), against the decision of the Trial Chamber on the Accused's application for release:

1. PROCEDURAL HISTORY

1. On 15 September 2010, the Co-Investigating Judges issued their Closing Order in Case No. 002/19-09-2007/ECCC ("Case 002"), in which they ordered that the Accused remain in provisional detention until he is brought before the Trial Chamber.[1] The Pre-Trial Chamber was seised following the Accused's notice of appeal[2] and appeal submissions[3] against the Closing Order filed (the latter being referred to as "Accused's Appeal Against the Closing Order").

2. On 13 January 2011, the Pre-Trial Chamber filed its decision without reasoning on the Accused's Appeal Against the Closing Order ("Final Disposition"), indicating that reasons would follow in due course.[4] The Final Disposition decided that the Accused's Appeal Against the Closing Order was inadmissible, and ordered the continuance of the provisional detention of the Accused until he is brought before the Trial Chamber.[5] On 21 January 2011, the Pre-Trial Chamber filed full reasons for its Final Disposition, including its order to maintain the provisional detention of the Accused ("Fully Reasoned Decision").[6]

3. On 18 January 2011, the Accused filed a request for release to the Trial Chamber,[7] and on 16 February 2011 the Trial Chamber filed its decision refusing the request ("Trial Chamber's Decision").[8] On 3 March 2011, the Accused filed appeal submissions ("Appeal Submissions") to the Supreme Court Chamber against the Trial Chamber's Decision.[9] The Co-Prosecutors filed

[1] D427, paras. 1622-1624 and p. 402 ("Closing Order"). The Closing Order was filed and notified to the parties on 16 September 2010.
[2] Déclaration d'Appel (KHIEU Samphan), D427/4, 22 September 2010.
[3] Mémoire en Appel Contre L'Ordonnance de Clôture (KHIEU Samphan), D427/4/3, 21 October 2010.
[4] Decision on KHIEU Samphan's Appeal Against the Closing Order, D427/4/14, 13 January 2011.
[5] Final Disposition, p. 4.
[6] Decision on KHIEU Samphan's Appeals Against the Closing Order, D427/4/15, 21 January 2011.
[7] Demande de Mise en Liberté en Vertu de la Règle 82(3) du Règlement, E18, 18 January 2011.
[8] Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, E50, 16 February 2011.
[9] Appel de la Décision Relative à la Demande de Remise en Liberté Immédiate, E50/3, 3 March 2011.

their response ("Response") on 28 March 2011,[10] to which the Accused filed a reply ("Reply") on 11 April 2011.[11]

4. Pursuant to Internal Rule 108(4) (Rev. 7), the Supreme Court Chamber shall decide the Accused's immediate appeal as soon as possible and in any event no later than 6 June 2011, being three months after the date of notification of the Appeal Submissions.[12]

2. SUBMISSIONS

2.1. KHIEU Samphan's grounds of appeal

5. The Accused advances the following three grounds of appeal in his Appeal Submissions.

2.1.1. Misreading of Internal Rule 68(3)

6. The Accused submits that the "4 (four) months" in Internal Rule 68(3) commence on the notification of the Closing Order, and that this interpretation is reinforced by the Code of Criminal Procedure of Cambodia ("CCP") and shared by the Co-Prosecutors. If any doubts remain about the commencement date, the doubt should be resolved in favour of the Accused.[13]

7. A related submission of the Accused is that the Trial Chamber committed an error of law by finding that the extension of his detention by the Co-Investigating Judges, pursuant to Internal Rule 68(3), started to run from the date upon which the Trial Chamber was seised of the case file.[14] There is no reference in Internal Rule 68 to the Trial Chamber being seised, or even to such seizure as marking the start of the four month period.[15] The four month period commences upon notice of the Closing Order (16 September 2010), and not on the date on which the Trial

[10] Co-Prosecutors' Response to KHIEU Samphan's Appeal Against the Decision on the Application for Immediate Release, E50/3/1/1, 28 March 2011.
[11] Réplique, E50/3/1/3, 11 April 2011.
[12] Internal Rule 108(4). Since Internal Rule 105(2) clearly does not require a notice of appeal, in contrast to Internal Rule 105(3), the term "notice of appeal" in Internal Rule 108(4) must refer to the "appeal setting out the grounds of appeal and arguments in support thereof" in Internal Rule 105(2), which are the appeal submissions. In the Khmer version of Internal Rule 108(4), the three month deadline commences on the receipt of the "case file". The Supreme Court Chamber has therefore decided that the three month deadline in Internal Rule 108(4) commenced on the date of notification of the Appeal Submissions, which was 4 March 2011. Three months after 4 March 2011 was Saturday, 4 June 2011. Pursuant to Internal Rule 39(3), since the deadline expired on a Saturday, the deadline is automatically extended to the next working day, which is Monday, 6 June 2011.
[13] Appeal Submissions, para. 8, relying also on Internal Rule 21.
[14] Appeal Submissions, para. 12.
[15] Appeal Submissions, para. 14.

Chamber was seised of the case (14 January 2011). The Trial Chamber was obligated to bring KHIEU Samphan before it by the expiration of the time limit on 16 January 2011, but the Trial Chamber failed to do so because of its lack of diligence.[16]

2.1.2. Erroneous Justification for Continued Detention

8. The Trial Chamber erred in law by ordering the continued detention of the Accused based solely on the incentive to abscond created by the potentially severe penalty faced by the Accused if convicted. Having regard to the presumption of innocence, this factor by itself is insufficient to justify denial of provisional release.[17] This error by the Trial Chamber invalidates its Decision, and the Accused ought to be released since his detention is justified by no other criterion than the one set out in Internal Rule 63(3)(b)(iii).[18]

2.1.3. Violation of the Right to a Fair Trial

9. During the hearing held by the Trial Chamber on 31 January 2011, the Trial Chamber invited the Accused and Co-Prosecutors to indicate whether they considered the pre-conditions for the maintenance of provisional detention in Internal Rule 63(3) to exist, and whether any material change in circumstances had occurred in relation to any of the three Accused. The Accused alleges that his right to have sufficient time to prepare a defence has been violated by the Trial Chamber's lack of notice to the Accused to make arguments on the conditions listed in Internal 63(3).[19] The Accused submits, "Had the Chamber at least given the Defence advance notice that the matter would be addressed during the hearing, the Defence could have expanded and consolidated the arguments raised during the hearing."[20] The Accused rejects the "possible 'remedy'" offered by the Trial Chamber as insufficient.[21]

10. The Accused also submits that the Trial Chamber committed two errors of law by failing to address in its Decision the Accused's arguments on the issue of bail.[22] First, the Trial Chamber erred by failing to give enough weight to the Accused's arguments relating to bail, and thereby

[16] Appeal Submissions, para. 15.
[17] Appeal Submissions, paras. 17-23.
[18] Appeal Submissions, para. 23.
[19] Appeal Submissions, paras 25-26.
[20] Appeal Submissions, para. 26.
[21] Appeal Submissions, para. 27, referring to the statement by the Trial Chamber in paragraph 42 of its Decision that it would not require the Accused to establish a change in circumstances in the event of a fresh application under Internal Rule 82.
[22] Appeal Submissions, para. 29.

failed to reason its Decision. Second, since Internal Rule 82(2) requires the Trial Chamber to decide on the question of bail, the Trial Chamber must have completely overlooked the possibility of granting bail.[23] The Trial Chamber's Decision is therefore invalidated by the errors of law committed by the Trial Chamber because maintaining the Accused in detention is not justified by the insufficiency of bail conditions, given that, in any case, bail ensures the presence of the Accused during proceedings.[24]

11. The Accused requests the Supreme Court Chamber to:

a. Reverse the Trial Chamber's Decision with respect to the impugned dispositions;
b. Order that KHIEU Samphan shall be released immediately; and
c. Find that KHIEU Samphan's right to a fair trial has been violated and that he has suffered serious prejudice.

2.2. Co-Prosecutors' submissions

12. The Co-Prosecutors have responded to the Accused's Appeal Submissions with the following arguments.

2.2.1. The Trial Chamber Correctly Concluded that Internal Rule 68 Provides for Two Distinct 4-Month Periods

13. The Co-Prosecutors argue that Internal Rule 68(3) provides for the possibility of two four month periods: the first which may be ordered by the Co-Investigating Judges in the Closing Order, and a second which can be ordered by the Pre-Trial Chamber in the event of an appeal against the Closing Order.[25] The Accused's contention that the Co-Prosecutors had previously argued that there was only one four month period is fallacious, as the cited submission only dealt with NUON Chea's argument that detention was limited to a total period of three years.[26]

[23] Appeal Submissions, paras. 31-34.
[24] Appeal Submissions, para. 38.
[25] Response, para. 9.
[26] Response, para. 10.

2.2.2. The Accused's Detention Continues under Internal Rule 82(1)

14. The Co-Prosecutors submit that because the Pre-Trial Chamber validly extended the Accused's detention, and because the Accused was brought before the Trial Chamber within four months of that decision, his detention automatically continues pursuant to Internal Rule 82(1).[27] Comparing with the requirements for imposing detention under Internal Rule 63 where a charged person is under investigation, and relying further on the rules of procedure and evidence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the Special Court for Sierra Leone, the Co-Prosecutors submit that Internal Rule 82 effectively shifts the presumption in relation to detention from the moment the Trial Chamber is seised of a case.[28] Given that the Trial Chamber rejected the Accused's application, which was solely based on the argument that his detention had lapsed, the Accused's detention automatically continues. As the Trial Chamber was under no obligation to consider the factors in Internal Rule 63(3), the Accused continues to be validly detained.[29]

2.2.3. The Trial Chamber's Consideration of Internal Rule 63(3) Factors Did Not Invalidate His Detention

15. The Co-Prosecutors accept that the reason given by the Trial Chamber, namely the fact that the Accused has been indicted for serious crimes, does not, in and of itself, justify a finding that detention is necessary to ensure his presence during the proceedings.[30] However, the Co-Prosecutors argue that this failure should be viewed in the following context: the Accused did not apply for release on the basis of factors under Internal Rule 63(3); the Trial Chamber only invited oral submissions on Internal Rule 63(3) at the hearing; and the Trial Chamber noted the correct basis for detention – being Internal Rule 82(1).[31] The Trial Chamber's concession that a change in circumstances would not need to be proven in a subsequent application for release leaves unaffected the Accused's right to make an application for release based on Internal Rule 63(3), and therefore ensures no prejudice flows to the Accused.[32]

[27] Response, para. 11.
[28] Response, para. 13.
[29] Response, para. 14.
[30] Response, para. 16.
[31] Response, para. 17.
[32] Response, para. 18.

2.2.4. Substantive Grounds for the Accused's Detention in Internal Rule 63(3) are Fulfilled

16. The Co-Prosecutors argue that it is within the Chamber's discretion to conduct a fresh review of the facts and either uphold or amend the Trial Chamber's Decision, including by providing its own reasoning.[33] They submit that the Accused's continued detention is justified pursuant to Internal Rule 63(3)(b)(iv) and (v), that is, on the grounds of protecting the Accused's security and preserving public order, respectively.[34] The Co-Prosecutors list various pieces of evidence to justify their claims in respect of these grounds.[35]

2.2.5. The Trial Chamber Did Not Infringe the Accused's Fair Trial Rights

17. The Co-Prosecutors submit that the Accused's argument relating to a breach of his fair trial rights is without basis, as the Trial Chamber gave the Accused an option to make submissions under Internal Rule 63(3), but also informed him that he is entitled to make a fresh application for release. The Co-Prosecutors further argue that it is only upon a properly reasoned application for release under Internal Rule 82(2), supported by evidence as to any alternatives to detention, that the Trial Chamber can be expected to consider specific alternatives, such as bail.[36]

2.3. KHIEU Samphan's Reply to the Co-Prosecutors' submissions

18. In his Reply, the Accused first submits that Internal Rules 104 and 105 also allow for the possibility of immediate appeals in respect of errors of law or fact on the part of the Trial Chamber. Consequently, his Appeal Submissions related to errors of law were not required to demonstrate a discernible error in the exercise of the Trial Chamber's discretion, as alleged by the Co-Prosecutors in their Response.[37] The Accused also argues that Internal Rule 110(1)

[33] Response, paras. 5, 6 and 19.
[34] Response, para. 23.
[35] For risk to the security of the Accused, see Response, paras. 24-26 (recalling that the Accused was nearly lynched when he returned to Phnom Penh in 1991, that he subjected his appearance at a public forum in 2000 to guarantee for his safety, and stating that victims' emotional reactions, including desires of revenge, which emerge from press reports and transcript of hearings, signal the likelihood that, if released, his security would be seriously at risk). For risk to public order, see Response, paras. 27-28 (referring to the worsening of the general security situation in Cambodia, compounded with victims' suffering from post-traumatic stress disorder which would be aggravated should the Accused be released).
[36] Response, paras. 29-30, relying on Decision on KHIEU Samphan's Appeal Against Order on Extension of Provisional Detention (Pre-Trial Chamber), C26/9/12, 30 April 2010, para. 34.
[37] Reply, paras. 6-7.

limits the scope of the Supreme Court Chamber's review to the submissions in the immediate appeal, and that the Supreme Court Chamber must exercise caution not to lightly overturn findings of fact made by the Trial Chamber.[38] Further, in both Internal Rules 82(1) and (2), there is no doubt that the phrase "in accordance with these IRs" refers to Internal Rule 63(3)(b)(iii), and that continuing detention must not therefore be ordered automatically in the absence of precise criteria that are defined in law.[39]

3. STANDARD OF APPELLATE REVIEW FOR IMMEDIATE APPEALS

19. Pursuant to Internal Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:

- An error on a question of law invalidating the decision;
- An error of fact which has occasioned a miscarriage of justice; and
- A discernible error in the exercise of the Trial Chamber's discretion, which resulted in prejudice to the appellant.

20. In response to the Co-Prosecutors' contention as to the standard of review, the Chamber clarifies that the grounds for appeal listed under Internal Rule 105(2) are to be read as disjunctive. Accordingly, in order to invoke either the first or second of these grounds of appeal (error of law or error of fact) an appellant is not required to additionally demonstrate a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to him or her. Internal Rule 104(1) states, "[a]dditionally, an immediate appeal against a decision of the Trial Chamber may be based on a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant". This expression establishes an additional ground for immediate appeals that is not available for appeals against judgments. It does not, however, create an exclusive ground for immediate appeals.

4. FINDINGS

4.1. Admissibility

21. Pursuant to Internal Rule 104(4)(b), decisions of the Trial Chamber on detention under Internal Rule 82 are subject to immediate appeal to the Supreme Court Chamber. All applicable time

[38] Reply, paras. 10-12.
[39] Reply, para. 17.

limits have been complied with, and the Appeal Submissions, Response, and Reply are therefore admissible.[40]

4.2. Commencement of Four Month Time Limit in Internal Rule 68(2)

22. In order to determine whether a decision of the Pre-Trial Chamber concerning the continued provisional detention of an accused has been issued within the time period allowed under the Internal Rules, it is first necessary to determine when the operative period begins and ends. The Supreme Court Chamber notes that the Trial Chamber's Decision fails to make findings in this respect and focuses instead on the question whether the Pre-Trial Chamber's decision to issue its unreasoned Final Disposition first, and to reserve its reasons to a later date, constituted a procedural violation which infringed the rights of the Accused. The Supreme Court Chamber observes that this question would only need to be considered if it has been established that the relevant decision, including the reasons for that decision, had been delivered by the Pre-Trial Chamber outside the time period allowed under the Internal Rules. If, on a proper construction of the Internal Rules, both the Final Disposition and the reasons were delivered within the time allowed, then the question of their separation becomes moot. It is thus necessary first to decide whether the Pre-Trial Chamber's Fully Reasoned Decision was delivered within the overall time period allowed for a decision by the Pre-Trial Chamber on the Accused's Appeal Against the Closing Order.

23. In order to dispose of the requests before it, the Trial Chamber should have begun with the determination of the expiration of the four month deadline in Internal Rule 68(2), in particular, by interpreting the silence of this Internal Rule as to the starting point for the running of the deadline. This issue called for clarification, as it may have been among the reasons behind the Pre-Trial Chamber's particular choice to separate the Final Disposition and the Fully Reasoned Decision. The Supreme Court Chamber notes the Accused's assertion that notice of the Closing Order marks the start of the time limit.[41] The Co-Prosecutors do not make a specific submission on this point.

[40] The Accused was granted an extension of time to file his Reply: Decision on KHIEU Samphan's Request for an Extension of Time to Reply to the Response by the Co-Prosecutors, E50/3/1/2/1, 7 April 2011.
[41] Appeal Submissions, para. 8: "[…] Rule 68(3) is clear, notice of the Closing Order marks the start of the time limit", and para. 15: "The four-month period therefore commences upon notice of the Closing Order, in this instance [on] 16 September 2010 […] The time limit therefore expired on 16 January 2011 […]".

24. For the reasons following in the subsequent paragraphs, the Supreme Court Chamber holds that the four month time limit in Internal Rule 68(2) commences from the filing of the appeal submissions against the Co-Investigating Judges' Closing Order. The matter is controlled by Internal Rule 68(1)-(3), which states:

> 1. The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Order have expired. However, where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail under Rules 63 and 65 are still met, they may, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.
>
> 2. Where an appeal is lodged against the Indictment, the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber. The Pre-Trial Chamber shall decide within 4 months.
>
> 3. In any case, the decision of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in Provisional Detention, or to maintain bail conditions, shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time.

25. In the absence of explicit language in Internal Rule 68(2), the commencement date of the four month time limit must be determined through analyses of its systemic context and the purposes of the time limit. Regarding the first contextual element, the opening clause of the provision ("Where an appeal is lodged against the Indictment") readily signals that the activation of the time limit under this paragraph attaches to the lodging or filing of an appeal, as opposed to the fact of the issuance of the Closing Order. Therefore, the starting time for the time limit under Internal Rule 68(2) cannot attach to the moment of the issuance of the Closing Order, an event which necessarily precedes the lodging of an appeal. With regard to the purpose of the four month time limit under Internal Rule 68(2), it is to prevent excessive detention of the Accused. Hence, where the Pre-Trial Chamber decides to maintain the detention, it must file its decision within this period of time. At the same time, however, the deadline is meant to give the Pre-Trial Chamber a reasonable amount of time sufficient to examine the case and complete its decision. It would be unreasonable to interpret the "4 months" in Internal Rule 68(2) to include the period of time during which the Pre-Trial Chamber is not in a position to consider the appeal for reasons beyond its control, such as the lack of knowledge of the lodging of an appeal, or the lack of knowledge of the scope of an appeal.

26. There are procedures and formalities foreseen by the Internal Rules that effectively condition the Pre-Trial Chamber's ability to commence work on appeals before it. Internal Rule 77(2) provides that, upon receipt of notice of appeal, the Greffier of the Co-Investigating Judges shall forward the case-file, or a safeguard copy, to the Pre-Trial Chamber within 5 days. Internal Rule 75(1) and (3) provide that appellants have 10 days to file a notice of appeal and 30 days to file appeal submissions from the date that notice of the impugned decision or order was received. Consistent with the rationale for the time limit as stated above, it would be unreasonable to tie the commencement of the "4 months" in Internal Rule 68(2) to the filing date of an appellant's notice of appeal. Unlike a notice of appeal to the Supreme Court Chamber against a judgment of the Trial Chamber,[42] a notice of appeal to the Pre-Trial Chamber is a bare indication of an appellant's intention to appeal a decision or order of the Co-Investigating Judges.[43] In contrast, the appeal submissions to the Pre-Trial Chamber "shall contain the reasons of fact and law upon which the appeal is based together with all supporting documents."[44] Therefore, only upon receipt of appeal submissions from an appellant and the case file from the Co-Investigating Judges can the Pre-Trial Chamber determine the scope of review that it must undertake on the appeal.

27. The same rationale for the calculation of the time limit is demonstrated by the necessity to ensure a reasonable time for the appellant to appeal, without impacting on the time allotted for the Pre-Trial Chamber to decide. The appeal submissions must be filed by the appellant within 30 days of being notified of the impugned decision or order. In the event an appellant files his or her notice of appeal on the first day of the 10 day time limit under Internal Rule 75(1), the Pre-Trial Chamber could wait up to 29 days for "the reasons of fact and law upon which the appeal is based." The Pre-Trial Chamber could wait even longer if it grants an extension of time to file the appeal submissions due to exceptional circumstances. Other provisions in the Internal Rules support the interpretation that the commencement date for the "4 months" in Internal Rule 68(2) is no earlier than the filing date of the appellant's appeal submissions to the Pre-Trial Chamber. In particular, the three months within which the Supreme Court Chamber must decide an immediate appeal on detention commences on the date of notification of the appellant's appeal submissions.[45]

[42] Internal Rule 105(3).
[43] Internal Rule 75. The Supreme Court Chamber recalls that the Plenary specifically introduced the requirement for a notice of appeal to be filed before the Pre-Trial Chamber with a view to the impermanence of that Chamber in Cambodia.
[44] Internal Rule 75(4).
[45] See explanation in footnote 12 above.

28. The Supreme Court Chamber notes that its finding on the commencement of the deadline in Internal Rule 68(2) has no equivalent in the relevant provisions in the Code of Criminal Procedure of the Kingdom of Cambodia ("CCP"), and therefore the reliance by the Accused on Article 249 of the CCP has no merits.[46] Even if the "four months" in Article 249[47] of the CCP commences on the date of the closing order, the relevance of this provision, as well as other CCP provisions that control appeals against the closing order,[48] must be evaluated against their systemic background. In this respect, significant differences must be noted between the approaches in the CCP and the Internal Rules to appeals against closing orders, reflecting the particularities of ECCC proceedings due to the gravity of the crimes and complexity of investigations, the need for greater pre-trial scrutiny over the charges and the need to broaden recourse available to the defence. Thus, the CCP does not foresee an appeal against the closing order by the charged person as broadly as is foreseen within the Internal Rules. In the Internal Rules, a challenge against a closing order may be brought independently on jurisdictional grounds, and/or on grounds related to continuing detention.[49] Furthermore, consistent with the narrow authorisation for appeals, appellate deadlines in the CCP are far shorter for the parties, being five days only.[50] In contrast, deadlines for appeals against closing orders in the Internal Rules are extended in accordance with the presumed complexity of ECCC cases. Finally, an appeal against a closing order under the CCP is a request for a *de novo* review, whereas the Internal Rules require an appeal to focus on demonstrated legal and factual grounds. In conclusion, the CCP does not provide guidance for the matter at hand, as its provisions in the related area are not adequate for appeals designed for indictments in international crimes. The calculation of the deadline in Internal Rule 68(2) from the filing of the appeal submissions against the closing order, on the other hand, follows as a logical consequence from the adoption of other ECCC-specific arrangements in the Internal Rules.

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[46] Appeal Submissions, para. 7.

[47] Article 249, CCP states:

> The closing order terminates provisional detention. Article 276 (Release of a Detained Charged Person) of this Code shall apply.
>
> However, by a separate decision issued together with the closing order, the investigating judge may order to keep the charged person in provisional detention until the time he is called to appear before the trial court. In his order, the investigating judge shall refer to the conditions defined in Article 205 (Reasons of Provisional Detention) of this Code.
>
> The decision to keep the charged person in provisional detention ceases to be effective after four months. If the charged person is not called to appear before the trial court within these four months, the charged person shall be automatically released.
>
> ...

[48] See, for example, Articles 266-268.

[49] Internal Rule 74(3)(a) and (f). See the Pre-Trial Chamber's reasoning in its Fully Reasoned Decision, para. 14.

[50] Article 270. The only exception is that the General Prosecutor has one month to appeal.

29. In the present case: the Closing Order was notified on 16 September 2010; KHIEU Samphan's notice of appeal against the Closing Order was filed on 22 September 2010; and the Accused's Appeal Against the Closing Order was filed on 21 October 2010. The Supreme Court Chamber therefore finds that, in the circumstances of the Accused, the four month time limit prescribed by Internal Rule 68(2) commenced on 21 October 2010. The final day to comply with the four month time limit was 21 February 2011. On 21 January 2011, the Pre-Trial Chamber filed its Fully Reasoned Decision. The Supreme Court Chamber finds accordingly that the Pre-Trial Chamber's decision was issued within the prescribed time limit.

30. The Accused relies on Internal Rule 21(1) and the principle of *in dubio pro reo*.[51] The Supreme Court Chamber holds that the calculation of the commencement date of the deadline as the filing of the appellate submission is consistent with the principle expressed by Internal Rule 21(1) that the Internal Rules shall be interpreted so as to always safeguard the interests of the Accused. In order to demonstrate this consistency, first the principle expressed in Rule 21(1) needs to be interpreted. In this respect the Supreme Court Chamber holds that Internal Rule 21(1) is to be read to mean that the interpretation of the Internal Rules must not lead to infringement of any interests of the Accused that emanate from fundamental rights guaranteed under statutes and applicable international legal instruments, such as the presumption of innocence, the right to fair trial, the right to silence, and the right to defence. Therefore, in establishing the normative sense of an Internal Rule, the interpreting entity should proceed according to the rules of interpretation, in consideration of general systemic principles which, among other principles, safeguard the rights of the Accused, and with the end result tested through a prism of these rights. The interpretative direction of Rule 21(1) does not, on the other hand, mean that Internal Rules are to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules.

31. An issue related to Internal Rule 21 is the notion of *in dubio pro reo*.[52] The Supreme Court Chamber must stress that the *in dubio pro reo* rule, which results from the presumption of innocence, is guaranteed by the Constitution of Cambodia[53] and has as its primary function to denote a default finding in the event where factual doubts are not removed by the evidence. In so far as *in dubio pro reo* is applicable to dilemmas about the meaning of the law, it must be limited to doubts that remain after interpretation. Therefore, *in dubio pro reo* is properly applied

[51] Appeal Submissions, paras. 8, 11.
[52] Appeal Submissions, para. 8.
[53] Article 38.

to doubts about the content of a legal norm that remain after application of the civil law rules of interpretation, that is, upon taking into account the language of the provision, its place in the system, including its relation to the main underlying principles, and its objective. As such, as a practical matter, *in dubio pro reo* will usually be unnecessary on the occasion of addressing legal *lacunae*, but rather may come into play in the far rarer event of a collision of norms.

32. Turning back to the calculation of the deadline in Internal Rule 68(2), the Supreme Court Chamber notes that the question is not, in itself, a matter of the fundamental rights of the Accused. This is rather a technical issue of statutory interpretation from which no exercise of fundamental rights arises. Thus it is a technical question, calling for a technical response, which should follow as a result of balancing different interests in proceedings. The interest on the part of the Accused is in being afforded sufficient time for the preparation of an appeal and in having the court afforded sufficient time for the consideration of the appeal, thus strengthening the guarantee that insufficiently supported charges will not be forwarded for trial. The choice as to the filing of an appeal, and how to use the time limits allotted for it is an autonomous decision of the appellants. This interest is satisfied at the expense of the lengthening of the proceedings, including detention where ordered, and runs contrary to the interest of those parties who do not appeal the Closing Order and benefit from a right to be tried within a reasonable time. However, a legislative or, as in this case, interpretative decision on establishing the starting point of the deadline one month earlier or later in Internal Rule 68 does not disable any of the fundamental rights of the Accused, in particular the right to be tried within a reasonable time.

33. For the foregoing reasons, the holding that the time limit in Internal Rule 68(2) commences on the filing of the appellate submissions does not contravene Internal Rule 21(1) or the *in dubio pro reo* rule.

4.3. First Ground of Appeal: Misreading of Internal Rule 68(3)

34. The Supreme Court Chamber notes that the premise of this ground of appeal is that the "4 months" prescribed by Internal Rule 68(2) and (3) commenced on 16 September 2010. For the reasons enumerated above, the Supreme Court Chamber has found that the four month time limit in Internal Rule 68(2), which is the same period of time as the four month time limit in Internal Rule 68(3) as it applies to the decision of the Co-Investigating Judges, commenced on 21 October 2010 (being the date on which the Accused's Appeal Against the Closing Order was

filed) and expired on 21 February 2011. Since the Pre-Trial Chamber filed its Fully Reasoned Decision on 21 January 2011, there has been no violation of Internal Rules 68(2), (3), or 77(14).

35. The Accused alleges an error of law in the Trial Chamber's finding that the applicable four month period of provisional detention commenced on the date on which the Trial Chamber was seised of Case 002,[54] and further argues that there is only one applicable four month period.[55] The Supreme Court Chamber holds that Internal Rule 68(2)-(3) permits two separate four month periods where there is an appeal against an Indictment. The first four month period commences on the filing of the appellant's submissions to the Pre-Trial Chamber, and the second four month period commences on "the decision of ... the Pre-Trial Chamber" within the meaning of Internal Rule 68(3). This ground of appeal is accordingly rejected.

4.4. No procedural defect or violation of the Accused's rights

36. The Trial Chamber found that "the Pre-Trial Chamber's deferral of reasons on its Decisions on the Closing Order constitutes a procedural defect which initially impacted on the Accused's fundamental fair trial guarantees of legal certainty and clarity."[56]

37. The Supreme Court Chamber recalls that by 21 February 2011, being the expiration of the four month time limit in Internal Rule 68(2), the Pre-Trial Chamber had filed its Fully Reasoned Decision. By doing so, the Pre-Trial Chamber complied with the procedural obligation in Internal Rules 68(2) and 77(14) to issue its decision on the Accused's Appeal Against the Closing Order within four months. The Supreme Court Chamber has therefore found that the Pre-Trial Chamber did not commit a procedural defect by having acted beyond the deadline. With this element eliminated, there is no basis to maintain the Trial Chamber's findings that in the process of the issuance of the Pre-Trial Chamber's decision, there was a breach of the rights of the Accused. The Supreme Court Chamber holds that there was no breach of the Accused's rights under the Internal Rules, and the question of remedy does not therefore arise. Consequently, the Supreme Court Chamber deletes the second and third paragraphs[57] in the Disposition of the Trial Chamber's Decision.

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[54] Trial Chamber's Decision, para. 43.
[55] Appeal Submissions, paras. 12-15.
[56] Trial Chamber's Decision, para. 29.
[57] Trial Chamber's Decision, p. 15:

> "...FINDS that the delay in issuing reasoning of the detention portions of the Decisions on the Closing Order has resulted in a breach of the Accuseds' rights;

4.5. Second Ground of Appeal: Internal Rule 63(3)

38. In ordering the continuation of the Accused's provisional detention pursuant to Internal Rule 68(3), the Pre-Trial Chamber found, as had the Co-Investigating Judges before in their Closing Order, that all five conditions in Internal Rule 63(3)(b) had been met.[58] At the hearing before the Trial Chamber on 31 January 2011, the Co-Prosecutors submitted that all five conditions in Internal Rule 63(3)(b) continued to be present.[59] In its Decision, the Trial Chamber ordered the continuation of the Accused's detention pursuant to one of those five conditions only, namely, Internal Rule 63(3)(b)(iii), because "the potentially severe penalty faced by [the Accused] if convicted creates an incentive to abscond."[60] While the Trial Chamber stated it had "also considered whether the grounds [i.e., conditions] on which the Accused were detained in the Closing Order and the PTC Decisions on the Closing Order are still satisfied,"[61] it rejected "the remainder of the Co-Prosecutor's submissions in support of continued detention."[62] No reasoning whatsoever has been offered to substantiate this rejection.[63]

39. Internal Rule 63(3) states that detention may be ordered where two conditions are met. The first condition from Internal Rule 63(3)(a) is the requirement for a well-founded suspicion that the person who is to be detained has committed a crime charged. This is a general premise that must be positively established in order for any of the specific conditions for detention from point (b) to be considered. The second condition is that at least one of the five grounds listed in Internal Rule 63(3)(b) must be present.

DECLARES that the nature of the remedy in consequence of this breach may be assessed at the end of the trial, after hearing the parties on this issue…"

[58] Fully Reasoned Decision, para. 29 (the Pre-Trial Chamber "adopts" the reasons given by the Co-Investigating Judges in the Closing Order, paras. 1622-1624).

[59] Transcript, 31 January 2011, Doc. E1/1.1, ERN 00642325-00642411 (EN), p. 55, line 9 – p. 59, line 7 (Mr. Andrew CAYLEY addressing each of the five conditions in relation to NUON Chea); p. 65, line 22 – p. 67, line 11 (Ms. CHEA Leang addressing Internal Rule 63(3)(b) in relation to KHIEU Samphan and IENG Thirith and stating "I would like to add to what has been said by my colleague [in relation to NUON Chea]"); p. 79, line 21 – p. 83, line 2 (Mr. SA Sovan stating that KHIEU Samphan "will not flee" ostensibly in reply to Mr. CAYLEY's oral submissions in relation to NUON Chea on Internal Rule 63(3)(b)(iii)).

[60] Trial Chamber's Decision, para. 40.

[61] Trial Chamber's Decision, para. 38.

[62] Trial Chamber's Decision, para. 40.

[63] In relation to NUON Chea, the first of three Accused considered by the Trial Chamber in its Decision, the Trial Chamber stated, "It rejects the remainder of the Co-Prosecutor's submissions in support of continued detention on *grounds of lack of substantiation*." (Trial Chamber's Decision, para. 39, emphasis added) For the subsequent two Accused considered, KHIEU Samphan and IENG Thirith, the Trial Chamber states, "it rejects the remainder of the Co-Prosecutor's submissions in support of continued detention." (Trial Chamber's Decision, paras. 40-41)

40. In evaluating whether the condition in Internal Rule 63(3)(b)(iii) is met, the Supreme Court Chamber agrees with the Appeals Chamber of the ICTY that:

> It is reasonable for a Trial Chamber to take into account the gravity of the offences charged in order to determine whether facing the possibility of a lengthy sentence would constitute an incentive for an accused to flee. It is evident that the more severe the possible sentence which an accused is facing, the greater is his incentive to flee.[64]

The Supreme Court Chamber recalls, however, that international standards are clear that "[t]he seriousness of the crimes charged is merely one of the factors the Trial Chamber takes into account in evaluating whether the Accused will appear for trial, if released."[65] The expectation of a lengthy sentence cannot be held against an accused *in abstracto* as the sole factor determining the outcome of an application for release, because all the accused persons before the ECCC, if convicted, are likely to face heavy sentences.[66]

41. Therefore, the Supreme Court Chamber finds that even though the Trial Chamber invoked a valid statutory condition for detention, it regarded the potential severity of the sentence as determinative, thus giving it undue weight for justifying the Accused's detention.[67]

42. The Supreme Court shall now turn to discussing the consequences of the Trial Chamber's insufficient reasoning. The Accused submits that the Trial Chamber's insufficient reasoning "invalidates the [Trial Chamber's] Decision; the Appellant ought to be released since his detention is justified by **no other** criterion than the one set out in [Internal] Rule 63(3)(b)(iii) of the [Internal] Rules."[68] In their Response, the Co-Prosecutors submit that continued detention has a basis in Internal Rule 82(1), and it is within the discretion of the Supreme Court Chamber "to conduct a fresh review of the facts and either uphold or amend the Trial Chamber's decision, including by providing its own reasoning."[69] The Co-Prosecutors provide reasoning which they

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[64] Prosecutor v. Ivan Cermak and Mladen Markac, Decision on Interlocutory Appeal Against Trial Chamber's Decision Denying Provisional Release, Case No. IT-03-73-AR65.1, App. Ch., 2 Dec. 2004, para. 25.
[65] Prosecutor v. Jovica Stanisic, Decision on Provisional Release, Case No. IT-03-69-PT , T. Ch., 28 July 2004, para. 22. See also: Proscutor v. Vujadin Popovic, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release, Case No. IT-05-88-AR65.1, App. Ch., 24 Jan. 2006, para. 5; Prosecutor v. Zdravko Tolimir, Decision on Interlocutory Appeal Against the Trial Chamber's Decisions Granting Provisional Release, Case No. IT-04-80-AR65.1, App. Ch., 19 Oct. 2005, paras. 25-26, and *Ilijkov v. Bulgaria*, European Court of Human Rights, App. No. 33977/96, Judgement of 26 July 2001, para. 81.
[66] Prosecutor v. Jadranko Prlic, Order on Provisional Release of Jadranko Prlic, Case No. IT-04-74-PT, T. Ch., 30 July 2004, para. 29; Prosecutor v. Ivan Cermak and Mladen Markac, para. 26.
[67] See Prosecutor v. Ivan Cermak and Mladen Markac, para. 27.
[68] Appeal Submissions, para. 23 (emphasis in original).
[69] Response, para. 19.

submit is sufficient for the Supreme Court to rely on to continue the detention of the Accused pursuant to Internal Rule 63(3)(b)(iv)-(v).[70] For the following reasons, the Supreme Court Chamber finds that it is inappropriate to either release the Accused or to consider whether any additional conditions in Internal Rule 63(3)(b) are met.

43. The second sentence of Internal Rule 82(1) states, "Where the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber's judgment is handed down, subject to sub-rule 2." This Internal Rule is an ECCC-adjusted modification of Articles 305-307 of the CCP. Several interpretative questions arise on the basis of this provision.

44. The first question concerns the notion of "initial appearance". The Supreme Court Chamber considers that the initial appearance referred to in Internal Rule 82(1) is distinct from the initial hearing that marks the beginning of the trial pursuant to Internal Rule 80*bis*(1) and encompasses any appearance of the Accused before the Trial Chamber, whether at his or her request or ordered by the Trial Chamber, and relates to any matter within the Trial Chamber's competence, as long as the Trial Chamber is seised of the case. In this sense the initial appearance resembles the function of a habeas corpus hearing by the trial court. The Supreme Court Chamber finds that the hearing conducted by the Trial Chamber on 31 January 2011 constituted an "initial appearance" within the meaning of Internal Rule 82(1) because it was the first time the Accused appeared before the Trial Chamber after it had been seised of Case 002.

45. The second question concerns the notion of "accused in detention." The Supreme Court Chamber holds that the phrase "[w]here the Accused is in detention" in Internal Rule 82(1) necessarily implies that the detention referred to has a lawful basis in a judicial decision. The Supreme Court Chamber has found above that the Pre-Trial Chamber complied with the four month time limit in Internal Rule 68(2)-(3). Consequently, it is no longer debatable that the Accused was in lawful detention at the time of his initial appearance before the Trial Chamber on 31 January 2011.

46. The more difficult question concerns the normative purport of Internal Rule 82(1) and, to the same effect, Article 305(5th paragraph) of the Code of Criminal Procedure. The Supreme Court

[70] Response, paras. 19-28.

notes that the Cambodian legal system is fundamentally protective of the right to liberty.[71] Article 9 of the ICCPR establishes a presumption of liberty, namely the requirement of legality and the prohibition of arbitrariness. Deprivation of liberty shall not be allowed except on such grounds and in accordance with procedure as established by law.[72] A person detained under criminal charges shall be tried within reasonable time or shall be released,[73] and it shall not be a general rule that persons awaiting trial shall be detained in custody.[74] Likewise, in the system of the European Convention on Human Rights ("ECHR") the presumption is in favour of release and its jurisprudence is therefore relevant.[75] The legal framework applicable to the ECCC does not lift the presumption of liberty resulting for the Accused from Article 9 of the ICCPR. Accordingly, Internal Rule 82(1) and Articles 305–307 of the CCP on which it is based must be read in the light of the presumption of liberty. Several consequences stem from this.

47. The presumption of liberty requires that the detention of an accused must at all times have a basis in a judicial decision, issued in accordance with the statutorily determined procedure and pursuant to statutorily defined conditions. Internal Rule 82(1) and Article 305(5th para.) of the CCP provide that, where an accused is in detention "at the initial appearance before the Chamber" (IR 82(1)) or "during a criminal trial" (CCP, Article 305(5th para.)), he or she shall remain in detention until the Chamber's judgment is handed down. The result of these provisions is that the effect of continued detention derives from detention previously ordered by a judicial authority. Accordingly, Internal Rule 82(1) only goes as far as to establish a presumption that conditions for detention, as previously ordered by the Co-Investigating Judges, in an adversarial procedure and with the option for appellate review by the Pre-Trial Chamber, continue to apply when the case has been forwarded for trial. Additionally, Internal Rule 82(1) may not be read as an authorisation to detain the Accused without the demonstration of statutory conditions. This understanding is confirmed by the explicit language of Article 306 of the CCP, which states that "at any time the court may order the release [...] or order that detention be continued *according to Article 205 CCP [grounds for provisional detention]*" (emphasis added).

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[71] See Constitution of the Kingdom of Cambodia, Articles 31, 32, and 38. Moreover, Cambodia became a party to the International Covenant on Civil and Political Rights (ICCPR) in 26 May 1992. On the domestic applicability of international human rights treaties in Cambodia, see the decision of the Cambodian Constitutional Council, Case No. 131/003/2007, Decision No. 092/003/2007, 10 July 2007.
[72] ICCPR, Article 9(1)
[73] ICCPR, Article 9 (3)
[74] Ibid.
[75] See, for example, Kudła v. Poland, European Court of Human Rights, Grand Chamber Judgment, App. No. 30210/96, 26 October 2000, paras. 110-111.

48. Moreover, the presumption of continued conditions for detention in Internal Rule 82(1) is a factual presumption, not binding on the trial court. The first sentence of Internal Rule 82(2) states, "The [Trial] Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these IRs." This is rebuttable, as demonstrated by the first sentence of Internal Rule 82(3), which reads, "The Accused, or his or her lawyers, may request the Chamber to release him or her either orally during a hearing, or by written application submitted to the Greffier of the Chamber." In accordance with this provision, from the initial appearance until the Trial Chamber's judgment is handed down, the onus is on an accused to challenge the persistence of the grounds of his or her detention in a request to the Trial Chamber.

49. At the initial appearance, the Trial Chamber, at the request of an accused, is obligated to consider whether the conditions for that accused's detention under Internal Rule 63(3) are still applicable; the Trial Chamber may also review the lawfulness of the detention on its own motion. However, the review must be meaningful. Where, as in this case, the Accused filed a request for release in which he did not contest the conditions under Internal Rule 63(3)(b), the Trial Chamber was not obligated to consider whether such conditions are still pertinent, and could rely on the presumption from Internal Rule 82(1). The Trial Chamber was only obliged to decide upon the Accused's request. Nevertheless, the Trial Chamber went beyond the scope of the Accused's request for release by deciding to consider afresh whether the conditions in Internal Rule 63(3) were met. While the Trial Chamber, as discussed above, was fully authorised to carry out such a review, the procedure in which it was carried out and the outcome of it raise concerns.

50. The Trial Chamber's Decision sweepingly removed most of the previously established specific conditions for detention, thus annihilating the presumption of their continuity in the trial phase. The only condition retained by the Trial Chamber as valid was Internal Rule 63(3)(b)(iii). This, as discussed above, has not been adequately substantiated.

51. Concerning Internal Rule 82(2), the Supreme Court Chamber points out that the manner by which the Trial Chamber hears the parties must allow them to have adequate time and facilities to prepare for the hearing. In this case, the first time that the Trial Chamber informed the parties that it would consider Internal Rule 63(3) was at the actual hearing. The Trial Chamber did not notify the parties in advance of the hearing to prepare submissions on Internal Rule 63(3). By not providing adequate notice, the Trial Chamber may not have received full submissions from

and therefore may not have properly heard all parties on Internal Rule 63(3). This is demonstrated in the present attempt by the Co-Prosecutors in their Response to admit before the Supreme Court Chamber, in support of conditions for Internal Rule 63(3)(b)(iv)-(v), factual information that was available at the time of the hearing but was not put forth. The Supreme Court Chamber considers that while the Trial Chamber's decision to not require the Accused to establish a change in circumstances in a fresh application for release is an appropriate remedy for the lack of sufficient notice of the Trial Chamber's consideration of Internal Rule 63(3), it does not affect the finding that the Trial Chamber fell short of conducting a meaningful review.

52. The Supreme Court Chamber is not in a position to consider whether the other conditions in Internal Rule 63(3)(b) are met. It has to be stressed that the Supreme Court Chamber, being the final court of appeal, reviews the impugned decision within the grounds of appeal and consistent with the direction of the appeal. Given that the Co-Prosecutors decided not to appeal the Trial Chamber's Decision, the Supreme Court Chamber's cognizance of the case pertains only to the review of the single current ground for detention, that is, the need to ensure the presence of the Accused during the proceedings. Furthermore, the outcome of an appeal that has been filed exclusively by an accused must not go to the detriment of that accused (*non reformationis in peius*), a principle embraced by Internal Rule 110(3), Article 399(1) of the CCP, and which reflects basic fairness. Accordingly, the appeal of an accused against the sole condition of detention identified by the first instance decision may not lead to the finding of additional conditions for detention by the appellate court. Thus, while the Co-Prosecutors are correct that an appellate court may substitute its own reasoning for the flawed reasoning of a first instance decision, it must nonetheless be kept in mind that this is provided that the issue has been subject to appeal, and that there are factual findings available that enable the correction.

53. Regarding the Pre-Trial Chamber's decisions cited in the Co-Prosecutors' response in support of substituting reasoning of the first instance,[76] the Supreme Court finds that the decisions must be distinguished from the proceedings before the Supreme Court Chamber for two reasons. First, they concern appeals filed against the broad scope of first instance findings. Second, the scope of the Pre-Trial Chamber's review of the Co-Investigating Judges' orders – at least as it was interpreted at the time – was not limited to grounds similar to Internal Rule 104.[77] Notably, more recent Pre-Trial Chamber decisions, including one recommended by the Co-Prosecutors to

[76] Response, para. 5, fn. 10.
[77] The standard of appellate review by the Pre-Trial Chamber has evolved since certain decisions cited in the Response, as marked by decisions D164/3/6 of 12 November 2009, D164/4/13 of 18 November 2009 and D97/14/15 of 20 May 2010.

the Supreme Court to follow in the adoption of the ICTY test on the scope of review, the Pre-Trial Chamber notes that "Appeals Chambers of international tribunals have a very limited scope of review when dealing with appeals against discretionary decisions of a first instance jurisdiction,"[78] and proceed to cite an ICTY holding on the limited intervention on first instance discretionary findings. At no point does the Pre-Trial Chamber or the ICTY entertain the idea that an appellate chamber may decide outside of the scope of the appeal.

54. For the above reasons, the Supreme Court Chamber (Judge NOGUCHI dissenting) agrees with the Accused that the Trial Chamber failed to provide sufficient reasoning to order the Accused's detention pursuant to Internal Rule 63(3)(b)(iii). The Supreme Court Chamber (Judge NOGUCHI dissenting) finds however that the legal basis for the Accused's detention under Internal Rule 63(3)(b)(iii) is still valid. The lawfulness of the Accused's detention is based in the presumption resulting from Internal Rule 82(1). The reasons have less to do with the general risk of the Accused absconding in the face of the severity of potential penalty, and more to do with the risk of the Accused becoming unavailable for trial. Facts transpiring from the case file demonstrate that the trial in Case 002 is an enormous organisational and logistical undertaking involving four accused, most of whom have health problems, and numerous civil parties and multi-person legal teams. Even a single instance of an accused failing to appear before the court might undermine the prospect of arriving at the judgment within a reasonable time. The goal of speedy proceedings may be easily frustrated if the Accused goes into hiding, decides to disregard summons or even temporarily is prevented from attending a hearing. The facts invoked by the Co-Prosecutors in their Response[79] may not be used by the Supreme Court Chamber to affirm additional conditions for detention. These facts are nevertheless well established in previous decisions[80] and do support the probability of the Accused not being able to attend proceedings because of disturbance of public order or attacks on his person, or even lack of proper medical care when required. To what extent these risks may be attenuated by measures not based in detention must be evaluated by the Trial Chamber upon a proper examination of all relevant factors and facts adduced in an adversarial dispute.

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[78] Decision on the Appeal From the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, D164/3/6, 12 November 2009, para. 25.
[79] See above, para. 16.
[80] *See*, for example, Decision on KHIEU Samphan's Appeal Against Order Refusing Request for Release and Extension of Provisional Detention Order (Pre-Trial Chamber), C26/5/26, 3 July 2009, paras. 53-58, 63; Decision on KHIEU Samphan's Appeal Against Order on Extension of Provisional Detention (Pre-Trial Chamber), C26/5/35, 30 April 2010, paras. 34, 35, 38, 39; and Decision on KHIEU Samphan's Appeal Against the Closing Order (Pre-Trial Chamber), D427/4/15, 21 January 2011, para. 29.

4.6. Third Ground of Appeal

55. With respect to the first part of the Accused's third ground of appeal, the Supreme Court Chamber notes that the Trial Chamber acknowledged that it failed to give the parties, including the Accused, adequate notice to prepare submissions on Internal Rule 63(3). As a form of remedy for the lack of notice, the Trial Chamber stated that "the Defence shall not be required to establish a change in circumstances under Rule 82(4) should a fresh application for release be subsequently made before the Chamber."[81] The Accused's assertion that with advance notice from the Trial Chamber he "could have expanded and consolidated the arguments raised during the hearing"[82] does not demonstrate any prejudice that could not be remedied by the solution offered by the Trial Chamber.

56. Regarding the second part of the Accused's third ground of appeal, as explained above in paragraph 46, the fundamental principle governing pre-trial detention is that of presumption in favour of release. Courts assessing the lawfulness of provisional detention must accordingly evaluate all reasons warranting detention, and weigh them against the basic right to personal liberty. As the European Court of Human Rights has held, continued detention can be justified only as long as there are "specific indications of a genuine ... public interest" which outweighs the presumption of liberty.[83] In doing so, to adduce a general risk of flight, absconding, or obstructing proceedings does not suffice unless it is grounded upon specific circumstances of the given case, which bar release even if subject to bail conditions.[84]

57. However, as held by the European Court of Human Rights, this obligation on courts does not imply a duty of an appellate court to examine every argument contained in an accused's submission, but calls for courts to address any "concrete facts" set out in those submissions.[85] As established by Internal Rule 82(1) and (2), the burden to substantiate the factual

[81] Trial Chamber's Decision, para. 42.
[82] Appeal Submissions, para. 26.
[83] McKay v United Kingdom, Grand Chamber Judgment, App. No. 543/03, 3 October 2006, para. 42.
[84] See ECHR, Boicenco v Moldova, Chamber Judgment, App. No. 41088/05, 11 July 2006, para. 143; Human Rights Committee, CCPR/C/94/D/1178/2003, Communication No. 1178/2003, Smantser v Belarus, 17 November 2008, para. 10.3; Human Rights Committee, CCPR/C/59/D/526/1993, Communication No. 526/1993, Hill v Spain, 2 April 1997, para. 12.3. The Accused submits that "Like the French *Cour de Cassation,* the Supreme Court Chamber ought to reverse the Decision [of the Trial Chamber of the ECCC] by which the Judges [of the Trial Chamber of the ECCC] extended the provisional detention without explaining why the guarantees offered by bail are insufficient, and thereby failed to give reasons for their Decision" (Appeal Submissions, para. 35). In the decision referred to by the Accused, the French *Cour de Cassation* quashed and reversed the decision of the Pre-Trial Chamber of the Nimes Court of Appeal because the latter violated domestic law by failing to provide legal and factual reasons as to why release on bail was considered inadequate (Criminal Division, Appeal Case No. 97-83014, 19 August 1997). This decision is not relevant in light of Internal Rule 82(1).
[85] Nikolova v. Bulgaria, Chamber Judgment, App. No. 31195/96, 25 March 1999, para. 61.

circumstances and conditions attaching to bail is placed on the Accused. Only then is a court obligated to assess the adequacy of release on bail. This distribution of burdens is in line with the case law of the ICTY.[86]

58. The Accused requests the Supreme Court Chamber to reverse the Trial Chamber's Decision because the Trial Chamber failed to consider release on bail. While noting that the Trial Chamber could have investigated in a deeper fashion alternative measures other than detention which could have equally ensured the presence of the Accused at trial, its Decision is not invalid as the Accused's written and oral submissions did not provide any details as to the means of securing such presence.[87] The Supreme Court therefore rejects this part of the Accused's third ground of appeal.

5. DISPOSITION

FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:

AMENDS the Trial Chamber's Decision in accordance with paragraph 37 above;

AMENDS (Judge NOGUCHI dissenting) the Trial Chamber's Decision in accordance with paragraph 54 above; and

REJECTS the remainder of the Accused's immediate appeal.

Judge NOGUCHI's dissenting opinion will follow.

Phnom Penh, 6 June 2011

President of the Supreme Court Chamber

KONG Srim

[86] "The Appellant was required to show to the Trial Chamber that sufficient security measures were in place to counter any risk of flight" (Prosecutor v. Vujadin Popovic et al., Decision on Vujadin Popovic's interlocutory appeal against the Decision on Popovic's Motion for provisional release, Case No. IT-05-88-AR65.7, App. Ch., 1 July 2008, para. 17; see also Prosecutor v. Stanisic and Simatovic, Case No. IT-03-69-PT, Decision on provisional release, T. Ch., 26 May 2008, para. 37).

[87] Transcript, 31 January 2011, p. 79, line 21 – p. 83, line 1 (EN) (SA Sovan).