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

Approved
Receiving

Case No: 002/19-09-2007-ECCC-OCIJ (PTC03)

Case Name: IENG Sary

Filed Before: The Pre-Trial Chamber

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AMICUS CURIAE BRIEF RELATING TO THE APPEAL CHALLENGING THE ORDER OF PROVISIONAL DETENTION OF 14 NOVEMBER 2007

TABLE OF CONTENTS

C22/D114

I. INTEREST OF AMICI CURIAE

1. We refer to the public notice by the President of the Pre-Trial Chamber on 4 February 2008 (the "Public Notice") inviting *amicus curiae* briefs in relation to the appeal filed by Mr. Ieng Sary, (the "Appeal Brief") against the Order of Provisional Detention of the Office of the Co-Investigating Judges ("OCIJ") dated 14 November 2007 (the "Detention Order").

2. This is the joint *amicus curiae* brief of Mr. Mahdev MOHAN and Mrs. Vinita Ramani MOHAN. Mr. Mahdev Mohan, *ASIArb* is a Lecturer of Law at the Singapore Management University and a Fulbright Fellow. He is the former Pro-bono Attorney (2007) of the Center for Social Development, an indigenous non-government organization dedicated to the observance of human rights, justice and national reconciliation in Cambodia. He is also the former Regional Partner (2007) of the Asian International Justice Initiative, a collaborative project between the War Crimes Studies Center at the University of California (Berkeley) and the East-West Center at the University of Hawaii, established to foster justice initiatives and capacity-building programs throughout the Asia-Pacific region. Mr. Mohan is an advocate and solicitor of the Singapore Supreme Court and a former Military Prosecutor who served with the Ministry of Defence (Singapore).

3. Mrs. Vinita Ramani Mohan is a Research Assistant with the Rajaratnam School of International Studies (Singapore), and an Asia Research Institute Affiliate (Singapore). She was an Asia Fellow with the Asian Scholarship Foundation (ASF) from July 2007 to January 2008. During this period, she conducted research in Cambodia on social memory and the role of civil society organisations in the Khmer Rouge Tribunal. Apart from volunteering on occasion with the Center for Social Development and the Documentation Center of Cambodia, Mrs Mohan conducted interviews with both older Cambodian survivors and Cambodian youth on their memories or knowledge of the Khmer Rouge era, as well as their expectations and impressions of the upcoming trial. She was also a former journalist with Singapore's daily newspaper TODAY, where she was based at both the local and foreign desks.

4. We emphasize that this brief is a neutral opinion on points of law raised in the Detention Order and the Appeal Brief. Its scope is limited to assisting this Honourable Chamber determine these points alone and is without prejudice to the Appellant's innocence or guilt in respect of

any crimes for which he now stands accused. Our review will rely on, *inter alia*, the jurisprudence and practice of the international and hybrid criminal tribunals[1], the International Criminal Court ("ICC") and the writings of scholars and civil society organizations pertaining to the factual considerations inherent in the criteria for ordering provisional detention.

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

II. SUMMARY OF ARGUMENT

6. The ECCC will only take into account the most abhorrent crimes known to mankind – namely, genocide, crimes against humanity and the most serious of war crimes. At this juncture, the ECCC, and indeed all other international and hybrid criminal courts with jurisdiction to try persons accused of such crimes, have a responsibility to address and balance certain competing considerations when determining whether or not to order the provisional detention of or grant bail to accused persons such as the Appellant.

7. Our opinion addresses three separate legal issues, which we hope will offer guidance to the Honourable Chamber for its determinations. First, the discretion afforded the OCIJ in determining whether it is necessary to provisionally detain the Appellant and whether that discretion was, as a matter of law, properly exercised. It seems clear that the decision of the OCIJ to provisionally detain the Appellant in the public interest was within the exercise of its discretion. Further, given the stringent standards for review that have been imposed at the other international tribunals, it is at least questionable whether the OCIJ's decision could be made the subject of an appeal, taking into account all the circumstances and operational realities in Cambodia briefly described in paragraphs 16 -19 of the Detention Order. The OCIJ ought to, in the

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

future, provide proper justification for why a charged person should be provisionally detained or released to avoid having its decisions be challenged on the basis of being speculative and unsupported. It ought to avail itself of the studies and reports put together by local and international civil society organizations and writers who have comprehensively captured public sentiment, perceptions and confidence relating to the ECCC in the light of the (potential) arrest, provisional detention and trial of charged persons such as the Appellant.

8. Second, the OCIJ has, on its own instance, needlessly asked if the present proceedings against the Appellant infringes on the trial held by the People's Revolutionary Tribunal ("PRT") in 1979, its judgment and death sentence against the Appellant. We submit that this is a non-issue: the PRT's judgment has been rendered null and void by the Royal Decree of 1996 pardoning the Appellant for and conferring an amnesty with respect to the law criminalizing the Khmer Rouge ("the Pardon and Amnesty"). Even if the PRT trial and judgment were construed to be a legal impediment to the ECCC's prosecution by potentially offending the principle of double-jeopardy (explained below), the OCIJ has not adequately explained how these past proceedings fall under an exception to this principle. Nor has it explained how the ECCC's present proceedings are materially different from that PRT trial and judgment as a matter of fact/law, apart from their mere international legal characterization.

9. Third, the Pardon and Amnesty do not *prima facie* restrain the OCIJ's power to order provisional detention unless the ECCC's other judicial chambers were to decide otherwise. It is unfortunate that the Law itself does not conclusively limit or negate the effect of the Pardon and Amnesty. But we agree with the OCIJ's interpretation that the ECCC Law vests it with the power to do so. We would add that limiting or negating the scope of a pre-existing Pardon and Amnesty is consistent with jurisprudence, practice and customary international law relating to national blanket amnesties to (alleged) perpetrators of international crimes.

III. QUESTION PRESENTED

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

    a) Whether the OCIJ was entitled to make the Detention Order despite the PRT's trial and judgment of 1979;

b) Whether the OCIJ was entitled to make the Detention Order despite the Pardon and Amnesty of 1996; and

c) Whether the OCIJ's exercise of discretion in making the Detention Order ought to be reviewed.

IV. ARGUMENT

A. The PRT trial and judgment have no bearing on the ECCC's proceedings against the Appellant.

11. Under the principle of *ne bis in idem* or double jeopardy, a court may not institute proceedings against a person for a crime that has already been the object of criminal proceedings before a national or international court, and for which the person has already been convicted or acquitted. This principle is codified in the Statutes of the International Criminal Tribunals as well as widely ratified international instruments and has evolved into a customary rule of international criminal law, at least with respect to heinous international crimes.[2] The double jeopardy principle does not apply when in the first trial:[3]

a) The person was prosecuted and punished for the same fact or conduct but the crime was characterised as an ordinary crime (e.g. murder), not an international crime (e.g. genocide), with a view to deliberately avoiding the stigma and implications of international crimes; or

b) The prosecution or the court did not act with due diligence as required by international standards; or

c) The court did not comply with fundamental safeguards of a fair trial or did not act independently or impartially; or

d) The court conducted a sham trial for the purpose of shielding the accused from international criminal responsibility.

12. The rationale behind these exceptions is to permit a second prosecution and trial of a person for the same or similar acts and under the same or similar legal characterisation where the first proceeding

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[2] See Cassese, Antonio. International Criminal Law. Oxford: Oxford University Press, 2003. (pp. 319-321)

[3] *Ibid*, p. 321)

C22/I/14

was designed to circumvent the person's criminal accountability or was hindered by gross procedural impropriety by the prosecution or court.

13. In the event the PRT trial and judgment could preclude or have a bearing upon the ECCC's jurisdiction to prosecute and try the Appellant (which is denied), the OCIJ has failed to adequately explain the applicable exception to the double jeopardy principle. It is not immediately apparent from reading the PRT's trial transcripts or judgments if any of these exceptions apply.[4] Regardless of our criticisms of or reservations relating to the PRT, the OCIJ cannot surmise that one or more of the exceptions to the double jeopardy principle apply, absent demonstrable proof. Having raised these exceptions to the principle[5], the OCIJ was, with respect, remiss in not stating which of them it relied on to ignore the PRT judgment. Its allusion to a future "in-depth analysis" of the PRT trials is ambiguous, unhelpful and all too convenient.

14. The OCIJ did not have to raise the PRT judgment as a potential obstacle to the ECCC proceedings. Having done so, and thereby considering it, at least in principle, a bar to the Appellant's prosecution, it should have then dealt with the nature and context of the PRT's trial and judgment, not ignored them altogether. The better view is that the double jeopardy principle is a red-herring in this context. The PRT's trial and judgment of 1979 are immaterial for the ECCC's purposes as the Appellant received a Pardon and Amnesty, which, even if not binding on the OCIJ/ECCC (see discussion below), nullified the effect of the PRT's trial, judgment and sentence *apropos* the Appellant.

B. The OCIJ was entitled to provisionally detain the Appellant despite the Pardon and Amnesty.

15. Recent practice in both the national and international settings support the prohibition for amnesty for international crimes. For example, the Inter-American Court of Human Rights has held that granting an amnesty to the authors of gross violations of humanitarian law such as torture, summary executions and forced disappearances (which form the basis of certain charges against the Appellant) was contrary to non-derogable rights contained in the body of international human

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[4] See generally: Genocide in Cambodia – Documents from the Trial of Pol Pot and Ieng Sary. Eds., Howard J. De Nike, John Quigley, Kenneth J. Robinson with Helen Jarvis and Nereida Cross. Philadelphia: University of Pennsylvania Press, 2000.

[5] Detention Order, para 8.

C22/D/14

rights law and "devoid of legal effects"[6]. The Peace Agreement between the government of Sierra Leone and the Revolutionary Front of Sierra Leone contains a disclaimer that "amnesty or pardon...shall not apply to international crimes."[7] Article 10 of the Statute of the SCSL further provides that an amnesty granted for crimes falling under the court's jurisdiction "shall not be a bar to prosecution."

16. Article 40 of the ECCC law does not go so far. It includes a commitment by the Royal Cambodian Government not to request amnesties or pardon and leaves to the ECCC to decide the scope of a previously granted amnesty or pardon. Nonetheless, we agree with the OCIJ[8] that Article 40 was included precisely so that the Appellant, the only surviving recipient of the pardon and amnesty, can be prosecuted and tried. It also represents the position at customary international law that when general rules prohibiting heinous international crimes come to acquire the nature of peremptory norms (or *jus cogens*), they may then be construed as imposing the obligation not to cancel by executive fiat the very crimes these rules proscribe.[9] Since international crimes constitute attacks on universal values, no State government should arrogate to itself the right to decide to cancel such crimes, or set aside their legal consequences.

C. The standard of judicial review required to overturn the OCIJ's Detention Order and grant bail is not easily met.

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

17. Rules 63-65 of the ECCC's Internal Rules which relate to provisional release or detention do not expressly make liberty the rule and detention the exception for accused persons awaiting trial. Nonetheless, the OCIJ can only order provisional detention if, *inter alia*, it considers that to be a necessary measure. Even if an accused person is detained, the OCIJ may order his/her bail at any time if it thinks it fit. Put simply, "*the focus must be on the particular circumstances of each*

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[6] *Barrios Altos* case (*Chumbipuma Aguirre and others v. Peru*), Inter-American Court of Human Rights, judgment of March 14 2001.
[7] UN Doc. S/1999/777.
[8] Detention Order, para 11.
[9] Cassese, Antonio. International Criminal Law. Oxford: Oxford University Press, 2003. (p. 316)
Also see: *Furundzija (Formal Complaint to the Chief Prosecutor)*, ICTY, Trial Chamber II, decision of 5 June 1998 (case no. IT-95-17/1-T, para. 155).

C22/D/14

individual case without considering that the eventual outcome is either the rule or the exception." [10]

18. As a general rule, "*a decision to release an accused should then be based on an assessment of whether public interest elements, demonstrated by the Prosecution, outweigh the need to ensure respect for an accused's right to liberty*"[11]. In other words, when determining whether or not to order provisional detention, release or bail, it is for the OCIJ to exercise its discretion and strike a balance between public interest requirements, on one hand, and the accused person's right to liberty, on the other. These decisions should only be overturned by this Honourable Chamber on appeal if they are (a) based on an incorrect interpretation of the governing law; (b) based on a patently incorrect conclusion of fact; or (c) are so unfair or unreasonable as to constitute an abuse of the OCIJ's discretion[12].

19. Any decision by the OCIJ to order provisional detention or bail is a purely discretionary one. That is significant. Appellate chambers in other international and hybrid criminal tribunals have established that the standard of review of interlocutory motions on appeal is high: they have not interfered with the discretion of a first-instance chamber, save in exceptional circumstances. As the ICTY Appeals Chamber observed in the ***Milosevic*** case, a decision must be "*so unreasonable as to show that the Trial Chamber failed to exercise its discretion judiciously*" before it can be overturned.[13] The SCSL Appeals Chamber has adopted the same standard for judicial review of bail determinations. In the ***Fofana*** case, that Chamber held that "*where the Judge or Trial Chamber has exercised his or their discretion to grant or refuse bail, the Appeals Chamber will not substitute its own*

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[10] *The Prosecutor v. Sesay*, SCSL-04-15-PT-069, Decision on Application for Provisional Release, paragraph 39. See also *The Prosecutor v Miodrag Jokic* and *The Prosecutor v Rahim Ademi*, IT-01-42-PT and IT-01-46-PT, Orders on Motions for Provisional Release, Trial Chamber, 20 February 2002.

[11] *The Prosecutor v. Sesay*, SCSL-04-15-PT-069, Decision on Application for Provisional Release, para 39.

[12] See *Slobodan Milosovic v The Prosecutor*, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, ICTY, Case No. IT –02-54-AR7.3.7, 1 November 2004, para 10.

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

discretion for that of the Judge or Trial Chamber"[14]. It went on to add that a decision to deny bail would only be quashed if it was "*logically perverse and evidentially unsustainable*".[15]

20. These guiding principles can be applied to the present case.

21. The OCIJ's decision, while regrettably containing certain factual omissions (as discussed below), does not appear to meet this high threshold of unreasonableness. The Appeals Chambers of both the ICTY and the ICTR and the SCSL have made it clear that an Appeals Chamber can only review facts determined by a Trial Chamber where a reasonable trier of fact could not come to the same conclusion or if the decision itself is wholly erroneous. As was noted by the ICTR Appeals Chamber in ***Semanza***, "*on appeal, a party cannot merely repeat arguments that did not succeed at trial in the hope that the Appeals Chamber will consider them afresh. The appeals process is not a trial de novo and the Appeals Chamber is not a second trier of fact.*"[16]

22. The same could be said of appeals made at the pre-trial stage to this Honourable Chamber. The OCIJ has clearly outlined the factors that have been taken into account in coming to their conclusion in paragraphs 15-21 of the Detention Order. Even if this Honourable Chamber disagrees with the OCIJ's determination, such disagreement is not grounds to quash the decision. Case law on the matter would tend to suggest that the Honourable Chamber should not, with respect, consider arguments *de novo* or substitute its own discretion for that of the OCIJ to order provisional detention. If the Pre-Trial Chamber does quash the OCIJ's decision, we would urge the Chamber to explain the distinction between its standards of review and that of the other international and hybrid criminal tribunals, the practice and jurisprudence of which are a persuasive source of law for this Honourable Chamber.

23. In the event that the Honourable Chamber determines that threshold for reviewing the OCIJ's determination had been met, another

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

[15] *Ibid*, at para 20.

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

significant factor must be taken into consideration: i.e. that that the OCIJ can revisit the Detention Order at a future date on its own motion.[17]

24. The Honourable Chamber should take note of the unique periodic review procedures established by the Internal Rules, which can be distinguished from the rules governing provisional detention and release in other international criminal tribunals.[18] Unlike the rules of the ICTY, ICTR and the SCSL, Rule 64 and 65 of the Internal Rules provide that a pre-trial detention order is only provisional in nature and gives the OCIJ the further discretion to revisit its order and call for the Appellant's release at a later stage. Alternatively, the Appellant can file applications for release to the OCIJ at any moment during the period of provisional detention, falling which, he can appeal the OCIJ's decision or make further applications in three-monthly intervals seeking reconsideration of the OCIJ's order, if he can show that there has been a change in his circumstances.

25. The fact that the ECCC has a periodic review and monitoring procedure in place to ensure that any prolonged detention is necessary should be taken into account when considering the strength of the Appellant's arguments in support of his immediate release.[19] In particular, it must be remembered that the Detention Order does not deprive the Appellant of seeking a further remedy at a later stage of his detention, should his provisional detention clearly prove to be unnecessary – in that event, the Appellant is perfectly entitled to seek his release.

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

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[17] Rule 64, Internal Rules.

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

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

26. Despite considering the legal grounds for its decision at length in its 7-page Detention Order, we note that the OCIJ has provided limited discussion of the factual basis supporting that decision, allocating no more than 4 paragraphs for this purpose.

27. We understand that a discretionary decision such as the Detention Order does not have to be accompanied by an exhaustive list of reasons as long as concrete dangers are identified[20], but the OCIJ has done very little to elaborate on the facts behind these concrete dangers. For example, the OCIJ has cited no evidence to substantiate its claim that, "*in the fragile context of today's Cambodian society*", the Appellant's alleged crimes are so egregious that his release could provoke "*protests of indignation* which *could lead to violence*" among the population that could "*imperil the very safety*" of the Appellant[21]. The Defence is correct to point out that the OCIJ has not adduced a shred of evidence to substantiate these claims. This is disconcerting. It is not the first time that the OCIJ has made such claims – identical assertions appear in its detention orders relating to other charged persons. With respect, the OCIJ fails to appreciate the facts which support these claims as well as the differing public reactions to and perceptions of provisional release of each of these charged persons.

28. But that does not mean, as the Appellant suggests, that Cambodian society is a "*picture of peace and stability*" and that any suggestion that Cambodian society may be fragile and require the Appellant to be provisionally detained automatically calls the fairness and impartiality of the entire ECCC process into question.[22] The first assertion is untrue and the second illogical. There is considerable evidence (see below) that Cambodia, which, as the Appellant admits, emerged from a Khmer Rouge led insurgency less than 10 years ago, has not attained the socio-political (or psychological) peace the Appellant so confidently asserts. Moreover, public outcry at the prospect of the law not being able to take its course in the event that the Appellant is provisionally released and flees or interferes with the ECCC's process in some way is a relevant factor which must be taken into consideration to determine if provisional detention is necessary to preserve public order. Far from questioning fairness, provisional detention (if warranted) could be a viable way to ensure it.

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

[21] Detention Order, para 16.

[22] Appeal Brief, paras 9, 13.

29. The OCIJ's claims relating to the disruption of public order in the event that the Appellant is provisionally released are not make believe, as the Appellant seems to suggest. They find support in the preponderance of research and surveys conducted by local and international civil society organisations or researchers in respect of contemporary public sentiment about the pre-trial detention of the Appellant and the trials before the ECCC in general. Members of the Cambodian public have come forward to expressly state, *inter alia*, that (a) a trial is necessary for healing and reconciliation; (b) they are doubtful the process will be fair, given that the government has "*former KR members in it*"; and (c) they need reassurances that they need not fear the "*culture of impunity*" repeating itself. Some have even pre-emptively asked what would happen if the detainees "*do not join the court*" or "*refuse all the evidence*" and whether former leaders who have "*reconciled with the government*" will incite civil conflict again if they are brought to trial.[23] Other preliminary research indicates that Cambodian youth fear that a trial will incite further conflict, and they would rather have funds devoted to the country's developmental needs.[24]

30. The OCIJ failed to avail itself of these (and similar) sources of public narrative and commentary. Nonetheless, leading jurisprudence suggests that the factual omissions in the OCIJ's Detention Order are not appealable errors (defined above). In other words, the OCIJ's reasons for ordering provisional detention in paragraphs 15-21 of the Detention Order are not so unreasonable as to be logically perverse or to lack judiciousness.

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

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[23] Comments by participants at the Public Forums for Justice and National Reconciliation held by the Center for Social Development in Kampong Thom (27 July, 2007), Kep (31 August, 2007) See reports of the Public Forum Unit at <www.csdcambodia.org>. On the "culture of impunity", see Craig Etcheson After the Killing Fields: Lessons from the Cambodia Genocide. Westport: Praeger, 2005.

[24] Mohan Ramani, Vinita. Social Memory and Civil Society in post-conflict Cambodia. Unpublished manuscript: Asian Scholarship Foundation, 2007-2008. (p. 25-27). The author also conducted an initial survey of over 70 Cambodian youth and found that many feel the legal system is essentially "rigged" to favour those who have political influence and/or connections with the government. Also see Aafke Sanders. The Evil Within – Genocide, Memory and Mythmaking in Cambodia. Unpublished Masters dissertation. Radboud University Nijmegen, Amsterdam. November 2006 (pp. 55-64).

C 22/D/14

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

32. The burden of proof is on the Appellant to satisfy the Pre-Trial Chamber that a bail order should replace the OCIJ's Detention Order.[25] The Appellant has raised several grounds to show that, if released, he would not evade justice.[26] He also notes in the Appeal Brief that similar applications by persons accused of crimes as heinous as the ones the Appellant is accused of have been allowed by the ICTY.[27]

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

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

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

    (iii) Written guarantees provided by the accused person that he will fully comply with the terms of his provisional release, and not in any way interfere with victims or potential witnesses or otherwise interfere with the administration of justice; and

    (iv) Written guarantees from the relevant government authorities that they have the means and capability to apprehend the accused, should he attempt to flee.[28]

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[25]Case No.IT-04-84-PT, *The Prosecutor v Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj* 'Decision on Ramush Haradinaj's Motion for Provisional Release', 6 June 2005, at paragraph 21.

[26]Appeal Brief, para. 37-39.

[27]Appeal Brief, para. 39.

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

C22/D/14

34. There are three obstacles in the way of the Appellant being granted bail or provisional release.

35. First, as the OCIJ has rightly observed, the Appellant has stated publicly on more than one occasion that he would resist the ECCC[29]. These statements undermine the Appellant's belated assurances that he will now co-operate with it in the interests of discovering the truth.

36. Second, although the Appellant (or his counsel) has expressed gestures of good will and is prepared to make guarantees to ensure his appearance at trial, a "*guarantee is only a guarantee if the applicant can establish it, at least to the court's satisfaction*"[30].

37. There is no right to be granted bail *per se* in the sense that an accused person is entitled to be freed unless the prosecuting authorities can prove particular allegations against him; it's a right to apply for bail, to a court which is open to persuasion that the pre-trial detention of the defendant is not necessary to secure the efficacy of the trial or for any other public reason.[31] As Judge David Hunt observed in ***Sainovic***, "the more serious the matter asserted or the more serious the consequences flowing from a particular finding, the greater the difficulty there will be in satisfying the relevant tribunal that what is asserted is more probably true than not. That is only common sense."[32] It follows that the Honourable Chamber must be convinced that the Appellant, if granted bail will (a) not pressure witnesses or victims or otherwise interfere with the legal process, (b) remain safe, and (c) appear for trial, and (d) not flee legal action to avoid a possible sentence of life imprisonment. Finally, this Chamber must ask if public order will be served. In making this determination, it must take cognisance of the severity and notoriety of the crimes that the Appellant has been charged with as well as the potential impact the Appellant's provisional release would have on the Cambodian public and their confidence in the rule of law in Cambodia.

38. In its decision relating to the provisional detention of Kaing Guek Eav alias "Duch", this Chamber relied on the surveys conducted by civil

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[29] Detention Order, para 18.

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

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

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

society organizations, such as the Documentation Center of Cambodia, which indicate that potential witnesses "*are afraid that the charged persons or their relatives can put pressure on them or seek revenge*".[33] The same (if not heightened) fear exists among potential witnesses or victims who wish to come forward and provide evidence in the proceedings against the Appellant. After all, the Appellant enjoys a great deal of political and financial clout in Cambodia.

39. As it stands, the ECCC has yet to establish a Witness Support Section, and is still seeking Witness Assistants who will be tasked with, among other things, "*maintaining the well-being of witnesses, particularly vulnerable or threatened witnesses, and ensuring that all witnesses are comfortable and cared for during their stay in Phnom Penh / at the ECCC.*"[34] In the circumstances, it cannot be said with confidence that the mechanisms are in place to protect potential witnesses if the Appellant is released on bail. Further, independent interviews indicate that potential witnesses who wish to come forward are waiting for the ECCCC's instructions in this regard and will not do so until they are provided sufficient assurances that they and their families will not be harmed if they reveal critical information pertaining to the Appellant.[35]

40. Finally, the Appeal Brief does not contain or refer to any assurances from the Royal Cambodian Government that they have the means and capability to apprehend the accused, should he attempt to flee. This is a significant omission. Indeed, "*increased state co-operation vis-à-vis the ICTY has been a decisive factor*" behind the ICTY's recent provisional releases of charged persons[36]. The same cannot be said of the ICTR or of the Cambodian context, notwithstanding the fact that the ECCCC is an internationalized UN/Cambodian tribunal. Although the operational realities in Cambodia are different from those concerning the ICTY/R, one would expect, at the very least, certain assurances from relevant ministries of the Royal Government stating that they have the capacity to ensure the Appellant would not be

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[33] Pre-Trial Chamber, Decision on Appeal Against Provisional Detention Order Kaing Guek Eav alias "Duch", 3 December 2007, paras 33, 34.

[34] See: http://www.eccc.gov.kh/english/job_opportunity.aspx?mode=viewArcive&doc_id=9

[35] Interview with female respondent from Battambang. Interview conducted by OM Chariya and Vinita Ramani Mohan during Center for Social Development's Ground Tour for Battambang residents, at Tuol Sleng Genocide Museum. 25 September, 2007. Unpublished records of CSD's Public Forum Unit.

[36] Cryer, Robert, Hakan Friman, Darryl Robinson, Elizabeth Wilmhurst. An Introduction to International Criminal Law and Procedure. Cambridge: Cambridge University Press, 2007. (p. 370)

able to flee the country were he to be released. No such guarantees have been made at the present time. Instead, there are grave concerns that the ECCC/Cambodian authorities do not have the resources to ensure that the Appellant does not interfere with the legal process, enforce the Appellant's proposed release conditions, or effect a re-arrest should he flee.

41. The Appellant's reference to His Excellency Prime Minister Samdech Hun Sen's "*Herculean efforts to bring peace and tranquillity to Cambodia*" as a basis to suggest that the Appellant will remain safe without provisional detention is, with respect, self-serving. It appears to be a veiled caution to this Honourable Chamber to refrain from ordering provisional detention. We take the view that this statement does not advance the Appellant's case. If anything, it betrays the Appellant's (and his extended family's) reported connections to the ruling party which, in the eyes of the reasonable Cambodian, may put the Appellant above the law if left to his own devices or, at the very least, in a position to interfere with the administration of justice[37].

42. While the Appellant has cited reports from the UNDP and World Bank stating that "full peace was only achieved in 1999", they disregard the fact that this was "only" less than 10 years ago as well as recent criticisms of the legal system's systemic failure to mete out justice. Cambodia still fares poorly in international assessments of its human rights record, and in particular, in issues pertaining to law and order. Corruption in the police force and judiciary and violence specifically incited against opposition political parties is endemic.[38] In its report on Cambodia for 2007, Amnesty International states that "*long-awaited reform including laws governing the judiciary and criminal justice system did not take place*" and that the "*anti-corruption law, which had been set as a top priority in the concluding statement of the*

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[37] Heder, Steven. "Khmer Rouge again slipping away from punishment." Phnom Penh Post, Issue 7/13, July 3 – 16, 1998. This was an excerpt of Professor Heder's edited testimony before the U.S. Senate Foreign Relations Sub-Committee on East Asia and the Pacific. The testimony captures the political alliances of the day and the possible problems this could create for the Tribunal down the road.

[38] "US: Notorious Cambodian Police Chief in US for Counter-Terror Talks at FBI." *Human Rights Watch*, 27 April 2007. <http://hrw.org/english/docs/2007/04/16/usint15717.htm> Also see: "Cambodia: After 10 Years, No Justice for Grenade Attack on Opposition." *Human Rights Watch*, 29 March 2007. <http://hrw.org/english/docs/2007/03/28/cambod15587.htm> Also see the following for a full country report, 2006: http://hrw.org/englishwr2k7/docs/2007/01/11/cambod14866.htm

annual donors' meeting in March, was not passed."[39] The murder of labour union activist Chea Vichea and the questionable detention of Born Samnang and Sok Sam Oeun in this case were reportedly attributable to a senior police officer who remains free and a close ally of the ruling elite.[40] Therefore, there is little or no force in the Appellant's argument that the immense efforts made to "*bring peace and tranquility to Cambodia*" have sufficiently succeeded.[41]

d) The Appellant's trial is imminent

43. Furthermore, the ICTY has been mindful, when ordering provisional release, of the length of time the accused will have to wait to face trial. For example, in the ***Ademi*** case, the Trial Chamber took into account the fact that it '*did not appear likely that the trial of the accused will start soon*'.[42] The length of time that the Appellant is likely to spend in further detention should be taken into account when determining whether or not to allow his provisional release, as well as what is required to ensure the Appellant remains at the disposition of justice. A further detention of six months, subject to the ongoing review of the OCIJ, makes the terms of the Appellant's provisional detention distinguishable from that of the ICTY case law on which he relies.

V. CONCLUSION

44. We hope that our survey of the relevant jurisprudence and practice of other international criminal tribunals assists the Honourable Chamber decide if the OCIJ should order the Appellant's provisional detention. The cases suggest that a balance must be struck between public interest elements, on one hand, and the need to ensure respect for the Appellant's right to liberty, on the other. Ultimately, it is for the Pre-Trial

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[39] See the following link for the full report: http://thereport.amnesty.org/eng/Regions/Asia-Pacific/Cambodia

[40] "Cambodia: The Situation of Human Rights in 2006." Asian Human Rights Commission, see: <http://material.ahrchk.net/hrreport/2006/Cambodia2006.pdf> Also see: Vong Sokheng. "Hun Sen's Nephew still at large, as death toll climbs." Phnom Penh Post, Issue 12/23, November 7 – 20, 2003.

[41] On ongoing sentiments of hatred or anger and efforts towards reconciliation, see: Craig Etcheson. "Beyond the Khmer Rouge Tribunal". Commentary, Phnom Penh Post Issue 12/22, October 24 - November 6, 2003. Incidentally, this issue of the Phnom Penh Post has headline news on the murder of an actress and a pro-FUNCINPEC journalist suggest that peace and stability are not immediately apparent, certainly as late as 2003.

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

C22/D/1X

Chamber to decide whether the OCIJ's discretionary decision, which tipped the scales in favour of the former, was manifestly unreasonable in the circumstances. In doing so, we hope that this Chamber will lay down guidelines on how the OCIJ could comprehensively deal with the factual basis of its detention decisions so as to avoid unnecessary appeals. We opine that this discretion was not restrained by the principle of double jeopardy vis-à-vis the PRT's trial (which does not apply here) nor the pre-existing Pardon or Amnesty (which, properly construed, are not a bar to the ECCC's prosecution or trial).

(signed.)
MAHDEV MOHAN
MOHAN

(signed.)
VINITA RAMANI

18th February 2008