

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S APPEAL  
AGAINST THE DECISION ON THE APPLICATION FOR IMMEDIATE RELEASE**

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## I. INTRODUCTION

1. On 15 September 2010 the Co-Investigating Judges (CIJ) issued their Closing Order indicting Khieu Samphan (the “Accused”) for genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and violations of the 1956 Penal Code. In the Closing Order, the CIJ ordered that the Accused’s detention be extended until he is brought before the Trial Chamber.<sup>1</sup> On 13 January 2011 the Pre-Trial Chamber (PTC) rendered its decision on the Accused’s appeal against the Closing Order, dismissing the appeal as inadmissible and ordering his detention to continue.<sup>2</sup> On 21 January 2011, the PTC provided the reasons for this decision, in which it approved the grounds relied upon by the CIJ to justify the Accused’s continued detention, and found that there had been no change in the relevant circumstances.<sup>3</sup>
2. On 25 January 2011, the Accused submitted an application for his immediate release pursuant to Subrule 82(3). He argued in that application that Subrule 68(3) (as reinforced by Articles 249 and 305 of the Code of Criminal Procedure) required that he be brought before the Trial Chamber within four months of the date of the Closing Order; and that, since this deadline was not met, he was to be automatically released.<sup>4</sup> On 31 January 2011, the Trial Chamber held a hearing at which it heard oral arguments on this application. On 16 February 2011, the Chamber issued its *Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith* (the “Impugned Decision”).<sup>5</sup> In the Impugned Decision, the Chamber rejected the Accused’s application: holding that Subrule 68(3) provides for an additional four month period of detention that can be ordered by the PTC; noting that the Accused’s detention during trial continues automatically under Subrule 82(1); and additionally finding that the Accused’s continued detention was justified under the conditions found in Subrules 63(3)(a) and 63(3)(b)(iii).<sup>6</sup> The Accused submitted his appeal against the Impugned Decision on 21 March 2011.<sup>7</sup>

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<sup>1</sup> Closing Order, 15 September 2010, D427, at paragraph 1624.

<sup>2</sup> Decision on Khieu Samphan’s Appeal Against the Closing Order, 13 January 2011, D427/4/14.

<sup>3</sup> Decision on Khieu Samphan’s Appeal Against the Closing Order, 21 January 2011, D427/4/15, at paragraph 29.

<sup>4</sup> Application for Release Pursuant to Rule 82(3) of the Internal Rules, 25 January 2011, E18.

<sup>5</sup> Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, E50 (the “Impugned Decision”).

<sup>6</sup> Trial Chamber Decision, at paragraph 40.

<sup>7</sup> Appeal Against the Decision on the Application for Immediate Release, 21 March 2011, E50/3 (“Appeal”).

3. In the appeal, the Accused asserts that the Trial Chamber: committed an error of law in its interpretation of Subrule 68(3); committed an error of law with respect to its reasoning under Subrule 63(3)(b)(iii); and violated his fair trial rights by failing to give him adequate time to prepare his defence, as well as by failing to consider his submissions on the issue of bail. The Co-Prosecutors submit that the Appeal should be dismissed for the following reasons: i) the Trial Chamber correctly concluded that Subrule 68(3) allows for two distinct four-month detention periods after the issuance of a Closing Order; ii) the Trial Chamber correctly held that the Accused's detention continues automatically in accordance with Subrule 82(1); and iii) even if the Trial Chamber erred with respect to the condition in Subrule 63(3)(b)(iii), the Accused's continued detention is justified and the Supreme Court Chamber has the power to substitute its own reasons for those given by the Trial Chamber.

## **II. STANDARD OF REVIEW AND SUPREME COURT CHAMBER'S POWER TO SUBSTITUTE REASONS**

4. Internal Rule 104 establishes a two pronged test for immediate appeals against Trial Chamber decisions, pursuant to which an appellant must show: 1) that there has been a discernible error in the exercise of the Trial Chamber's discretion, and 2) that that error has resulted in prejudice to the appellant.<sup>8</sup> In relation to the first prong, the Co-Prosecutors submit that, in the absence of guidance in the Rules and the Code of Criminal Procedure, the Supreme Court Chamber should adopt the following ICTY test on the scope of review, which has been followed by the PTC:

“In order to challenge a discretionary decision, appellants must demonstrate that ‘the Trial Chamber misdirected itself either as to the principle to be applied or as to the law which is relevant to the exercise of the discretion,’ or that the Trial Chamber ‘[gave] weight to extraneous or irrelevant considerations, ... failed to give weight or sufficient weight to relevant considerations, or ... made an error as to the facts upon which it has exercised its discretion,’ or that the Trial Chamber's decision was ‘so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.’ In practice, this array of factors boils down to the following simple algorithm: a Trial Chamber's exercise of discretion will be overturned if the challenged decision was (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.”<sup>9</sup>

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<sup>8</sup> Under Subrule 104(1), an immediate appeal may be based on a “discernable error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.”

<sup>9</sup> ICTY, Milošević v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of The Trial Chamber's Decision on the Assignment of Defense Counsel, ICTY Appeals Chamber, 1 November 2004, at paragraph 10 (references removed); followed in the present case, in Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, at pages 9-11.

5. In a detention-related appeal, if reasons given by the Trial Chamber are found to be *prima facie* insufficient, it is open to the Supreme Court Chamber to consider afresh the grounds for detention. In appeals against CIJ orders on the (then) Charged Persons' detention, the PTC conducted its own analysis against the criteria contained in Subrule 63(3) by considering the parties' submissions and the evidence on the Case File as at the date of the hearing.<sup>10</sup>
6. It is also within the discretion of the Supreme Court Chamber to uphold or amend the decision of the Trial Chamber, while substituting its own reasoning for those given in the decision.<sup>11</sup> The PTC used this approach in several decisions on appeal against detention orders,<sup>12</sup> and also on other appeals against discretionary decisions where the CIJ had failed to provide sufficient reasons.<sup>13</sup> Similarly, in *Popovic*, where the ICTY Trial Chamber did not give sufficient reasons for a decision on provisional release, the Appeals Chamber considered the evidence on the issue and provided its own reasons.<sup>14</sup>

### **III. THE TRIAL CHAMBER CORRECTLY CONCLUDED THAT RULE 68 PROVIDES FOR TWO DISTINCT 4-MONTH PERIODS**

7. The Accused submits that the Trial Chamber misdirected itself as to the applicable legal principles under Subrule 68(3) and also failed to give reasons in response to his argument that that provision allows for only one four-month period of detention. Contrary to these submissions, the Trial Chamber considered and dismissed his argument, and in doing so pointed to the clear wording of Subrule 68(3).<sup>15</sup>
8. The Co-Prosecutors submit that the Trial Chamber reached the correct legal conclusion as to the effect of Subrule 68(3). The Accused's argument ignores the plain language of this provision:

<sup>10</sup> See, for example: Decision on Khieu Samphan's Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C26/9/12 at paragraph 25; Decision on Appeal against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, at paragraph 42; Decision on Appeal against Provisional Detention Order of Kaing Guek Eav *alias* "Duch", 3 December 2007, C5/45, at paragraph 27; and Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/1/26, at paragraph 18.

<sup>11</sup> Subrule 104(1) gives the Supreme Court Chamber the discretion to "examine evidence and call new evidence," while Subrule 104(2) empowers it to amend decisions being appealed in whole or in part.

<sup>12</sup> Decision on Appeal against Provisional Detention Order of Ieng Thirith, 9 July 2008, C20/1/26, Decision on Appeal against Provisional Detention Order of Nuon Chea, 20 March 2008, C11/54, and Decision on Appeal against Provisional Detention Order of Kaing Guek Eav *alias* "Duch", 3 December 2007, C5/45.

<sup>13</sup> Decision on Appeal and Further Submissions in Appeal against OCIJ Order on Nuon Chea's Requests for Interview of Witnesses (D318, D319, D320, D336, D338, D339 & D340), 20 September 2010, D375/1/8, at paragraph 102.

<sup>14</sup> ICTY, *Prosecutor v Popovic*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovcanin's Provisional Release, ICTY Appeals Chamber, 1 March 2007, paragraphs 13 - 20.

<sup>15</sup> Paragraph 43 of the Impugned Decision.

“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.” (emphasis added)

9. If the Accused’s submission was to be accepted, the words “or the Pre-Trial Chamber” would be rendered obsolete.<sup>16</sup> And yet, their effect is clear: a decision by the PTC to continue to hold the Accused in detention ceases to have effect after four months unless the Accused is brought before the Trial Chamber. Therefore, the Rules provide for the possibility of two four-month detention periods: the first which may be ordered by the CIJ in the Closing Order; and a second which can be ordered by the PTC in the event of an appeal against the Closing Order.
10. The Accused argues that the Trial Chamber ignored what had “consistently been the Co-Prosecutors’ position” – namely that there is only one four month period applicable under Subrule 68(3).<sup>17</sup> The Co-Prosecutors did not take such a position in the filing referred to by the Accused. The submission dealt with Nuon Chea’s argument that detention before the ECCC was limited to a total period of three years. In illustrating the fallacy of that argument, the Co-Prosecutors pointed to the fact that Subrule 68(3) allows for a four-month extension of detention *by the Co-Investigating Judges* beyond the three year limit applicable to the judicial investigation. They made no comment as to extensions of detention by the PTC. The Co-Prosecutors also note that Nuon Chea accepted in his applications before the Trial Chamber that the Pre-Trial Chamber has the power to order a continuation of his detention.<sup>18</sup>

#### **IV. THE ACCUSED’S DETENTION CONTINUES UNDER SUBRULE 82(1)**

11. Given that the Accused’s detention was validly extended by the PTC, and that the Accused was brought before the Trial Chamber within four months of that decision, his detention automatically continues pursuant to Subrule 82(1).
12. Subrules 82(1) and (2) provide:

1. The Accused shall remain at liberty whilst appearing before the Chamber unless provisional Detention has been ordered in accordance with these IRs. Where the Accused is in

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<sup>16</sup> The Co-Prosecutors note that, in quoting this provision (at paragraph 13 of the Appeal), the Accused omits the words emphasised above.

<sup>17</sup> Appeal, paragraph 10.

<sup>18</sup> Urgent Application for Immediate Release of Nuon Chea, 18 January 2011, E19, at paragraphs 12-13; Request for Immediate Release of Madame Ieng Thirith, 21 January 2011, E21, at paragraphs 11-12.

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.

2. The 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. The Chamber shall so decide after hearing the Co-Prosecutors, the Accused and his or her lawyers.

13. These provisions effectively shift the presumption in relation to detention from the moment the Trial Chamber is seized of a case: During the judicial investigation, a charged person remains at liberty unless a detention order is issued.<sup>19</sup> However, if an accused is in detention at the time of his / her first appearance before the Trial Chamber, he / she remains in detention until and unless an order is made for his / her release. The latter provision is consistent with rules applicable before the international *ad hoc* tribunals.<sup>20</sup>
14. The Trial Chamber correctly applied the Rules by concluding that the Accused continues to be detained pursuant to Subrule 82(1), subject to the possibility of release under Subrule 82(2).<sup>21</sup> The Accused had made an application for immediate release based on the argument that his detention had lapsed. Given that the Chamber rejected that argument, the Accused's detention automatically continues. Although the Trial Chamber gave the parties an opportunity to make submissions on the conditions in Subrule 63(3) *sua sponte*, it was under no obligation to do so. Therefore, irrespective of the Chamber's consideration of the factors in Subrule 63(3), the Accused continues to be validly detained.

#### **V. THE TRIAL CHAMBER'S CONSIDERATION OF SUBRULE 63(3) FACTORS DID NOT INVALIDATE HIS DETENTION**

15. In considering the substantive detention conditions in Subrule 63(3), the Trial Chamber found that: i) there are well founded reasons to believe that the Accused has committed the crimes he is charged with (Subrule 63(3)(a));<sup>22</sup> and ii) detention is necessary to ensure the Accused's presence during the trial (Subrule 63(3)(b)(iii)).<sup>23</sup> The Accused challenges only the second finding, arguing that the Chamber misdirected itself as to the applicable legal principles. Specifically, he points to the Chamber's reliance on the severity of the

<sup>19</sup> Subrule 63(3) states that provisional detention may be ordered only where the conditions set out in that provision are met.

<sup>20</sup> Rules 64 and 65 of the Rules of Procedure and Evidence of the ICTY, ICTR and Special Court for Sierra Leone.

<sup>21</sup> See the dispositive part at page 15 of the Impugned Decision.

<sup>22</sup> Subrule 63(3)(a); see paragraph 38 of the Impugned Decision.

<sup>23</sup> Subrule 63(3)(b)(iii); see paragraph 40 of the Impugned Decision.

charged crime alone to justify a finding that detention is necessary to ensure his presence at trial.<sup>24</sup>

16. The Co-Prosecutors accept that the reasons given by the Trial Chamber would be insufficient to satisfy the test in Subrule 63(3)(b)(iii). As the authorities cited by the Accused indicate, the fact that he 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.<sup>25</sup> However, this does not invalidate the Chamber's decision, nor does it affect the validity of his continued detention.
17. The Trial Chamber understood the importance of giving sufficient reasons, and specifically referred to detention matters in this respect.<sup>26</sup> Its provision of limited reasons with respect to the ground in Subrule 63(3)(b)(iii) should be viewed in the context of the following facts:
  - a. The Accused did not make an application for release on the basis of Subrule 63(3), nor did he allege in his application that there had been any change in the circumstances since the Co-Investigating Judges' or the Pre-Trial Chamber's decisions extending his detention. His application for release was based solely on his submissions as to the effect of Subrule 68(3).
  - b. In deciding on this application, the Chamber did not invite formal written submissions on the grounds in Subrule 63(3), but rather gave the parties an opportunity to make oral submissions on the issue at the hearing.
  - c. In the Impugned Decision, the Chamber notes the correct basis for detention - Subrule 82(1), which does not require a consideration of Subrule 63(3) factors.
18. The Chamber specifically stated that, if the parties wish to make a future application for release, they will not be required to show a change in circumstances. It therefore left unaffected the Accused's right to make an application for release based on the criteria in Subrule 63(3), and thus ensured that no prejudice flows to the Accused from its consideration of those criteria at the hearing.

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<sup>24</sup> Appeal, paragraphs 19-22.

<sup>25</sup> Ibid.

<sup>26</sup> Impugned Decision, paragraph 33 where the Chamber "acknowledg(ed) the particular importance of reasoning in relation to [detention decisions]."

**VI. IN ANY EVENT, THE SUBSTANTIVE GROUNDS FOR THE ACCUSED'S  
DETENTION IN SUBRULE 63(3) ARE FULFILLED**

19. As indicated in Section II, it is within the Supreme Court 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.

20. Subrule 63(3) states:

The Co-Investigating Judges may order the provisional detention of the Charged Person only where the following conditions are met:

- a. There is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
- b. The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
  - i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
  - ii) preserve evidence or prevent the destruction of any evidence;
  - iii) ensure the presence of the Charged Person during the proceedings;
  - iv) protect the security of the Charged Person; or
  - v) preserve public order.

21. The criterion in Subrule 63(3)(a) is a condition *sine qua non*. If it is shown that there is no founded reason to believe that the individual may have committed the crimes he / she is charged with, detention cannot be ordered and a consideration of the conditions in Subrule 63(3)(b) is not required. As noted in Section V above, the Accused does not challenge the Trial Chamber's finding that the condition in 63(3)(a) is satisfied; and clearly, the issuance of the Closing Order by the CIJ demonstrates that the condition is met. The Co-Prosecutors will therefore focus on the conditions in Subrule 63(3)(b).

22. The Accused's provisional detention was initially ordered by the CIJ on 19 November 2007.<sup>27</sup> The second and final 12-month extension of that detention during the judicial investigation was ordered on 18 November 2009 on the basis that the conditions in Subrule 63(3)(b)(iv) and (v) were satisfied.<sup>28</sup> The PTC upheld this decision on appeal.<sup>29</sup> In the Closing Order, the CIJ found that, in addition to these grounds, the Accused's continued detention was also justified by the grounds contained in Subrule 63(3)(b)(i),(ii)

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<sup>27</sup> Provisional Detention Order, 19 November 2007, C26.

<sup>28</sup> Order on Extension of Provisional Detention, 18 November 2009, C26/8.

<sup>29</sup> Decision on Khieu Samphan's Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C26/9/12.



and (iii).<sup>30</sup> Although the Accused appealed the Closing Order, he did not challenge this conclusion,<sup>31</sup> and the PTC adopted the same grounds when extending the Accused's detention in January 2011.<sup>32</sup> However, in the Impugned Decision, the Trial Chamber found that only Subrule 63(3)(b)(iii) was satisfied.<sup>33</sup>

23. While noting these decisions, the Co-Prosecutors submit that the Accused's continued detention is justified pursuant to Subrules 63(3)(b)(iv) and (v), and address these conditions in turn.

*A. RISK TO THE SECURITY OF THE ACCUSED*

24. The Accused is a former Head of State and a well known figure who has been subjected to public acts of violence as a result of his former role in Democratic Kampuchea and the Communist Party of Kampuchea. In November 1991, during a visit to Phnom Penh, he was physically assaulted and nearly lynched by a group of protestors.<sup>34</sup> In 2000, he made guarantees for his safety a prerequisite to speaking at a public forum.<sup>35</sup>

25. The following more recent events demonstrate that the Accused's security continues to be at risk, and that a release could expose him to serious harm:

- a. An article published in the *New York Times* on 17 June 2008 reported that a victim stated, in relation to the former leaders of the Khmer Rouge: "I want them to suffer the way I suffered" and "only killing them will make me feel calm." Another victim of the Khmer Rouge reportedly stated that "she would slice the elderly man [Nuon Chea] into ribbons and pour salt into his wounds. She would beat him up and torture him and give him electric shocks to make him talk."<sup>36</sup>
- b. Threats were also made against Kaing Guek Eav, *alias* Duch, during the trial proceedings of Case 001, when a victim exclaimed that "[a]ll of us want to get up

<sup>30</sup> Closing Order, 16 September 2010, D427, paragraph 1624.

<sup>31</sup> Appeal Against the Closing Order, 10 November 2010, D427/4/3.

<sup>32</sup> Decision on Khieu Samphan's Appeal Against the Closing Order, 21 January 2011, D427/4/15, at paragraph 29.

<sup>33</sup> Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February, 2011, E50, at paragraph 40.

<sup>34</sup> "He Has No Right to Live", *Time*, 9 December 1991, D29.

<sup>35</sup> Anette Marcher and Yin Soeum, "Khieu Samphan wants to go public", *Phnom Penh Post*, 4-17 February 2000, D29.

<sup>36</sup> Seth Mydans, "In Khmer Rouge Trial, Victims Will not Stand Idly By", *The New York Times*, 17 June 2008, C20/5/7.7.

and punch him.”<sup>37</sup> While expressing his anger at Duch, the brother of a victim who was killed at S-21 stated during his testimony in Case 001 that “[t]hose that have not pleaded guilty and accept the harm they have caused are doubly worthy of all their hate and ridicule.”<sup>38</sup>

- c. During a press conference at the ECCC on 4 December 2008, three individuals threatened the Accused’s counsel. Visibly distressed, one of the victims threatened to “call a terrorist from Al Qaida and ask him to perform a terrorist attack at the ECCC” if the Court does not progress to achieve justice.<sup>39</sup>

26. As the PTC held in its 3 July 2009 decision, these emotional reactions displayed by the victims are examples of the effects of post-traumatic stress disorder (“PTSD”), which have resurfaced amongst the victims of the Khmer Rouge as a result of the ECCC proceedings.<sup>40</sup> The level of anger and feelings of revenge towards those perceived as former senior leaders of the Khmer Rouge, including the Accused, clearly remains high.<sup>41</sup> The Co-Prosecutors submit that the evidence described above, considered in light of the present context of the Cambodian society, clearly establishes that, if released, the Accused would be exposed to a serious risk to his own security. The condition in Subrule 63(3)(b)(iv) is therefore satisfied.

#### *B. RISK TO PUBLIC ORDER*

27. In considering a criterion similar to that found in Subrule 63(3)(b)(v), the European Court of Human Rights has held that, for detention to be justified, “facts capable of showing that the accused’s release would actually disturb public order” must be shown; and further, that “detention will continue to be legitimate only if public order remains actually threatened.”<sup>42</sup> Applying this test to the present case, the Co-Prosecutors submit that there is clear evidence that a release of the Accused would pose a real risk to public order. This

<sup>37</sup> Erika Kinetz and Yun Samean, “Duch Faces Judges in 1<sup>st</sup> Public ECCC Hearing”, *The Cambodia Daily*, 21 November 2007, C11/11.

<sup>38</sup> Transcript of Trial Proceeding, Case 001, 17 August 2009, E1/63.1, at page 93.

<sup>39</sup> Claire Duffet, “Khmer Rouge Genocide Tribunal tumbles as French Defense Lawyer Demands New Translation,” *Law.com: International News*, 10 December 2008; see also G. Wilkins, “Disorder in the court as hearing ends in disarray”, *The Phnom Penh Post*, 5 December 2008, C20/5/7.12.

<sup>40</sup> Rob Savage, “Post Traumatic Stress Disorder: A Legacy of pain and violence”, *Monthly South Eastern Globe*, July 2007, pages 24-27, C11/11, cited in Decision on Khieu Samphan’s Appeal Against Order Refusing Request for Release and Extension of Provisional Detention Order, 3 July 2009, C26/5/26, at paragraph 57.

<sup>41</sup> See the discussion of the results of the 2010 study by the Berlin Center for the Treatment of Torture Victims, in the next section.

<sup>42</sup> *Letellier v. France*, European Court of Human Rights, 26 June 1991, paragraph 51.

is evidenced by victim statements and reactions, public surveys, prevalence of PTSD in Cambodia, and the fragile context of the Cambodian society:

- a. The general security situation in Cambodia has deteriorated over the past three years. In 2009, the *Global Peace Index Report*, which examines the incidence of crime, public unrest and the general security situation in a country, ranked Cambodia 105<sup>th</sup> out of 144 countries.<sup>43</sup> This represented a drop from Cambodia's 2008 rank of 91.<sup>44</sup> In 2010, the country's score deteriorated even further, resulting in a rank of 111.<sup>45</sup>
- b. A 2010 survey and analysis of victims' opinions and attitudes about the Khmer Rouge has found that victims continue to harbour feelings of revenge, an inability to forgive, and reluctance towards reconciliation. The report indicates that 72.8% of interviewees who applied for Civil Party status before the ECCC and 49.9% of those who were not participants in the proceedings responded that they have feelings of revenge towards the former Khmer Rouge. When asked whether they forgive the former Khmer Rouge, 76.1% of the interviewees in the first category, and 58.5% in the second category responded in the negative. As to whether they are ready to reconcile with the former Khmer Rouge, 66.8% of the Civil Party applicants, and 59.4% of non-participants at the ECCC responded in the negative. More than two thirds of the participants stated that reconciliation with the Khmer Rouge had not yet occurred in their villages.<sup>46</sup>
- c. During the trial in Case 001, Dr. Chhim Sotheara, a psychiatric expert, discussed the effects of PTSD and opined that countless traumatised victims are susceptible to depression, anger, alcoholism and domestic violence.<sup>47</sup> He emphasised that the denial of responsibility by those perceived as the former leaders of the Khmer

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<sup>43</sup> Institute for Economics & Peace, *Global Peace Index, 2009 Methodology, Results & Findings*, C22/9/10.1, pg. 111.

<sup>44</sup> Institute for Economics & Peace, *Global Peace Index, 2008 Methodology, Results & Findings*; See, Decision on Appeals Against Order refusing Request for Release and Order on Extension of Provisional Detention, 3 July 2009, C26/5/26, at paragraph 62.

<sup>45</sup> Institute for Economics & Peace, *Global Peace Index, 2010 Methodology, Results & Findings* [New evidence, attached as Annex 5]. The report states, at page 14: "As last year, there is a marked divide in south-east Asia, with Taiwan, Vietnam and Indonesia all in the top 70, while Cambodia, Thailand and the Philippines are all ranked below 110th. Scores in all three countries deteriorated last year, with growing political instability a common theme."

<sup>46</sup> Berlin Center for the Treatment of Torture Victims, "The Survivors' Voices: Attitudes on the ECCC, the Former Khmer Rouge and Experiences with Civil Party Participation," December 2010, at pages 31-33 [New evidence, attached as Annex 4].

<sup>47</sup> Transcript of Trial Proceeding, Case 001, 25 August 2009, E1/68.1, pages 15-16.

Rouge inhibits the psychological healing of Cambodian victims, and creates a significant additional burden on them.<sup>48</sup>

- d. Other experts have commented that, while incidents of mental illness are rising from year to year, psychological treatment for victims remains insufficient.<sup>49</sup>

28. Given the stage of proceedings in Case 002, the scope of the allegations in the indictment, and the enormous public interest in this case, a release of the Accused would clearly aggravate the conditions of victims across the country and, as a consequence, present a substantial risk to public order. Provisional detention remains a necessary measure to ensure public order, and the condition in Subrule 63(3)(b)(v) is therefore satisfied.

#### **VII. THE TRIAL CHAMBER DID NOT INFRINGE THE ACCUSED'S FAIR TRIAL RIGHTS.**

29. Insofar as the Accused was not making an application for release based on a change in circumstances, his argument that the Trial Chamber breached his fair trial rights by failing to give him adequate time to prepare is without basis. As described in Section V above, the Trial Chamber gave the Accused an option to make submissions under Subrule 63(3), but also informed him that he is entitled to make a fresh application for release.

30. The Accused argues that the Chamber further breached his fair trial rights by failing to consider the possibility of bail, and ignoring his submissions on this point. As indicated in Section IV above, given that the Accused's submissions as to the operation of Subrule 68(3) were rejected, his detention continues by force of Subrule 82(1). It is only upon a properly reasoned application for release under Subrule 82(2), supported by evidence as to any alternatives to detention, that the Chamber can be expected to consider such specific alternatives. The general and brief submissions by the Accused's counsel at the hearing did not trigger this obligation. Similar submissions by the same counsel have previously been rejected by the PTC as they were not supported by any evidence.<sup>50</sup>

31. Finally, the Co-Prosecutors submit that bail is in any event not an appropriate measure to safeguard against the risks to the Accused's own safety and public order, as discussed above.

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<sup>48</sup> Ibid. page 38.

<sup>49</sup> Cambodia's long walk backwards; doctors struggle to heal troubled country, AFP, 3 September 2007.

<sup>50</sup> Decision on Khieu Samphan's Appeal Against Order on Extension of Provisional Detention, 30 April 2010, C26/9/12 at paragraph 34.

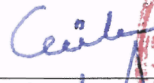
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### VIII. CONCLUSION

32. For the above-stated reasons, the Co-Prosecutors submit that the Accused has failed to establish that the Trial Chamber committed a discernible error in the exercise of its discretion which resulted in prejudice to him. The Co-Prosecutors respectfully request the Supreme Court Chamber to:

- a. Deny the Accused's request for reversal of the Impugned Decision and his immediate release, and confirm that he is properly detained pursuant to Subrule 82(1); and
- b. Substitute the reasons contained in Section VI above for those given by the Trial Chamber in paragraph 40 of the Impugned Decision, if the Chamber deems it necessary to reconsider the substantive grounds for detention.

Respectfully submitted,

Date	Name	Place	Signature
28 March 2011	YET Chakriya Deputy Co-Prosecutor	Phnom Penh	
	William SMITH Deputy Co-Prosecutor		