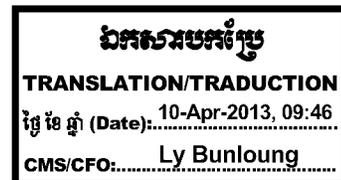


**BEFORE THE TRIAL CHAMBER****EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 002/19-09-2007-ECCC/TC**Party Filing:** Mr KHIEU Samphan**Filed to:** The Trial Chamber**Original Language:** French**Date of Document:** 29 March 2013**CLASSIFICATION****Classification of the Document Suggested by the Filing Party:** Public (Public and confidential annexes)**Classification by the Trial Chamber:****Classification Status:****Records Officer's Name:**


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**Application for Mr Khieu Samphan's Immediate Release on Bail**


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**Before:****The Trial Chamber**

Judge NIL Nonn  
 Judge Silvia CARTWRIGHT  
 Judge YOU Ottara  
 Judge Jean-Marc LAVERGNE  
 Judge YA Sokhan

**The Co-Prosecutors**

CHEA Leang  
 Andrew CAYLEY

**All Civil Party Lawyers****All Defence Teams**

**MAY IT PLEASE THE TRIAL CHAMBER**

1. On 8 February 2013, ruling on an appeal by the Co-Prosecutors, the Supreme Court Chamber, (“the Supreme Court”) declared the severance of Case 002 null and void and found that the parties had suffered many harms.<sup>1</sup>
2. On 18, 20 and 21 February 2013, the Trial Chamber (“the Chamber”) conducted a hearing on the consequences of the Supreme Court decision.<sup>2</sup> During that hearing, Mr Khieu Samphan’s Defence announced that it was going to file an application for release on bail.<sup>3</sup>
3. In fact, the current situation clearly shows that Mr Khieu Samphan’s trial is far from over, if at all it will ever end. The prospects of a judgment ever being rendered in the case are getting slimmer by the day.
4. After a three year judicial investigation and a little more than two years of trial, the procedural consequences of the annulment of an initial severance coupled with a possible new severance, in conformity with the Supreme Court’s directions, constitute an impediment to the expeditious conduct of the trial whose fairness has been seriously called into question by the Supreme Court.
5. How and when will Mr Khieu Samphan be tried in respect of all the charges against him in the Indictment? At this time, it appears that this question cannot be answered.
6. Very recently, more than five years after ordering that Mr Khieu Samphan be placed under provisional detention, Judge Marcel LEMONDE said in an interview granted to the media that Case 002 was proceeding “[TRANSLATION] *in a chaotic, increasingly unsatisfactory manner: delays, repetitive procedural battles, flagging health of the Accused, uncertain funding. There are more and more reasons to be concerned...no one can predict when this will end, but it is highly unlikely to end well. We do not know when there will be a judgment,*

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<sup>1</sup> **E163/5/1/13**, Decision on the Co-Prosecutors’ Immediate Appeal of the Trial Chamber’s Decision Concerning the Scope of Case 002/01, Supreme Court Chamber, 8 February 2013, (“Supreme Court Chamber Decision to Invalidate the Severance”). [*French translation notified on 5 March 2013*].

<sup>2</sup> Transcript of Hearing (“T.”) of 18 February 2013, **E1/171.1**; T., 20 February 2013, **E1/172.1**; T., 21 February 2013, **E1/173.1**.

<sup>3</sup> T., 20 February 2013, **E1/172.1**, p. 76 (Eng).

*if ever there will be one.”*<sup>4</sup>

7. Having been detained “provisionally” for five years and four months, Mr Khieu Samphan is still presumed innocent. He will soon be 82.
8. Mr KHIEU Samphan’s Defence requests the Chamber to find that the conditions for maintaining him in provisional detention are no longer pertinent. In the present context, it is imperative to release him on bail. This is the only cure for the procedural vagaries in this case.
9. Considering the importance of the matter before the Chamber and in view of the burden on the Defence to substantiate its application,<sup>5</sup> the Defence requests that a public and adversarial hearing be held to enable it to expound on the arguments that it can only outline here in writing within the prescribed page limits.<sup>6</sup>

#### **I. MAINTAINING KHIEU SAMPHAN IN DETENTION IS NO LONGER JUSTIFIED**

10. On 16 February 2011, the Chamber ordered that Mr Khieu Samphan be maintained in detention, considering that there were “*well-founded reasons to believe that all three Accused have committed the charged crimes*”<sup>7</sup>. Furthermore, the Chamber “[found] that the potentially severe penalty faced by Mr KHIEU Samphan if convicted creates an incentive to abscond and that the continuation of detention is necessary to ensure his presence during trial proceedings.”<sup>8</sup>
11. On 6 June 2011, the Supreme Court had cured the defect of the Trial Chamber’s failure to reason the decision by basing its confirmation of the decision to maintain him in detention on the risk of the Accused becoming unavailable for trial.<sup>9</sup>

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<sup>4</sup> BOOKS – Interview with Marcel Lemonde, [Translation]: *A judge facing the Khmer Rouge*, by Ghislain Poissonnier, <http://www.lepetitjournal.com/bangkok>, 27 February 2013.

<sup>5</sup> E50/3/1/4, Decision on Immediate Appeal by Khieu Samphan on Application for Release, Supreme Court Chamber, 6 June 2011, (“Supreme Court Decision on KHIEU Samphan”) paras. 48 and 57.

<sup>6</sup> Practice Direction on Filing Documents before the ECCC, article 5.1.

<sup>7</sup> E50, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, Trial Chamber, 16 February 2011, (“2011 Decision of the Chamber”), para. 38.

<sup>8</sup> *Ibid*, para. 40.

<sup>9</sup> Supreme Court Decision on KHIEU Samphan, paras. 52, 54 and disposition.

12. In 2011, the Supreme Court considered that Case 002 would be “*an enormous organizational and logistical undertaking*”. In its view, “[e]ven 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 Supreme Court cited the risks that Mr Khieu Samphan could go into hiding, ignore summonses to appear and the risk of his being temporarily prevented from attending a hearing. The Supreme Court also mentioned the risks of disturbance of public order, endangering the security of the Accused, and even the lack of proper medical care when required.<sup>10</sup>

**A. The risk of undermining the prospect of delivering a judgment within a reasonable time**

13. Almost two years following the Supreme Court decision of June 2011, the risk of undermining the prospect of delivering a judgment within a reasonable time has become an established fact. However, not only is Mr Khieu Samphan not the cause of such risk, he is the one who suffers the most serious harm.

**1) Incontrovertible undermining of the prospect of delivering a judgment within a reasonable time and infringement of Mr Khieu Samphan’s fundamental rights**

14. The **expeditiousness of the trial** is already seriously compromised. There have been numerous delays and such delays persist today, and not only on account of the frequent non-appearance of Mr Khieu Samphan’s co-accused for health reasons.<sup>11</sup>

15. Many of the delays have been caused by the choices and errors made by some parties and the Chamber. For example, the Co-Prosecutors and Civil Parties have chosen to present thousands of documents and the Chamber has chosen not to direct them to revise their lists, and has set an extremely broad admissibility threshold. The Chamber has also chosen not to conduct non-adversarial hearings to enable it to select the relevant documents from the massive volume of documents.<sup>12</sup>

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<sup>10</sup> *Ibid.*, par. 54.

<sup>11</sup> Mr KHIEU Samphan “*failed to appear before the court*” one single time, because he was hospitalized for a few days last January owing to bronchitis.

<sup>12</sup> E263, KHIEU Samphan Defence Request Reasserting his Right to Fair and Adversarial Criminal Proceedings, 6 February 2013.

16. Furthermore, the Chamber chose to divide the trial into several trials.<sup>13</sup> More than a year after, the Co-Prosecutors chose to appeal the severance decision.<sup>14</sup> The Supreme Court identified numerous errors committed by the Chamber and annulled the severance decision which was the basis for launching trial 001.<sup>15</sup> In such an unusual context, the Chamber is currently considering the modalities of a new severance.<sup>16</sup>
17. This has jeopardized not only the prospect of delivering judgment within a reasonable time but also the **prospect of a fair trial**. In fact, the Chamber, while making choices that prolong the trial, is taking many shortcuts to the detriment of the fundamental rights of the accused: violations of the principle of adversarial proceedings, lack of or paucity of reasoning of decisions...Some of these errors (and the resulting harm) have been identified by the Supreme Court.<sup>17</sup> Others have been identified in writing or orally by the Defence teams.
18. In this context, it is **quite simply the prospect of a judgment** which is undermined. In fact, in view of the slow pace of the trial and the complexification of the proceedings thus caused by the Tribunal, the Tribunal has lost the confidence of the donor countries and the budget constraints it now faces are unprecedented, which explains, *inter alia*, the recent paralyzing strike staged by the interpreters.
19. For all these reasons, the current situation is marked by a **lack of foreseeability and legal certainty**. Yet, it is crucial to meet such general standards where one's liberty is at stake.<sup>18</sup>
20. It is outrageous to maintain an accused in custody when there is no prospect of a judgment in the foreseeable and not too distant future. This is all the more so as after five years and four months of deprivation of liberty, **maintaining Mr Khieu Samphan in provisional detention is no longer reasonable and has become excessive**.

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<sup>13</sup> E124, Severance Order Pursuant to Internal Rule 89Ter, Trial Chamber, 22 September 2011.

<sup>14</sup> E163/5/1/1, Co-Prosecutor's Immediate Appeal of Decision Concerning the Scope of Trial in Case 002/01 With Annex I and Confidential Annex II, 7 November 2012.

<sup>15</sup> Supreme Court Decision on Severance.

<sup>16</sup> E264/3, Postponement of Expert Testimony, Trial Chamber, 6 March 2013.

<sup>17</sup> Supreme Court Decision on Severance, paras. 17, 23, 24, 33, 35, 36, 40 to 50.

<sup>18</sup> Case of *Velichko v. Russia*, Judgment, ECHR, 15 January 2013 ("*Velichko Case*"), para. 67; Case of *Tsitsiriggos v. Greece*, Judgment, ECHR, 17 January 2012, paras. 47-48; Case of *Tsarkov v. Russia*, Judgment, ECHR, 16 July 2009 ("*Tsarkov Case*"), paras. 42, 52-54 (para. 53: "*It remained impossible for the applicant to foresee the duration of his continued detention.*")

21. In accordance with internationally recognised human rights standards, any deprivation of liberty must be based on reasonable grounds defined by law and it is the duty of the judges to ensure that the detention is not prolonged excessively in violation of such rights.<sup>19</sup>
22. International human rights bodies uniformly hold that unreasonably long pre-trial detention violates the fundamental rights of an accused, including in cases concerning very serious and particularly complex crimes.<sup>20</sup>
23. Even in such particular cases, the case law of the ECHR is consistent: after some time, the grounds for provisional detention are no longer sufficient and the risks cited at the outset necessarily diminish with time.<sup>21</sup>
24. Again in this type of cases, the ECHR recently held that provisional detention of about two to three years was excessively long.<sup>22</sup> It also emphasized the duty of judges to always take into account the individual circumstances, personal circumstances and behaviour of the suspect or accused.<sup>23</sup>
25. The ECHR held that [TRANSLATION] “*failure to take into account the age of the applicant when it was decided to keep him in pre-trial detention*” could “*in itself be sufficient*” for it to

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<sup>19</sup> See, for example: *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 OA 12, Judgment on the appeal of the Prosecutor against the decision of the Trial Chamber I entitled: “*Decision on the release of Thomas Lubanga Dyilo*”, 21 October 2008, para. 37.

<sup>20</sup> See jurisprudence cited by the Chamber in footnote 56 of **E138/1/10**, Decision on Reassessment of Accused Ieng Thirith’s Fitness to Stand Trial Following Supreme Court Decision of 13 December 2011, 13 September 2012.

<sup>21</sup> Case of *Letellier v. France*, Judgment, ECHR, 26 June 1991, paras. 35, 39, 51; Case of *Labita v. Italy*, Judgment, ECHR Grand Chamber, 6 April 2000, paras. 153, 159, 163; Case of *Soria Valderrama v. France*, Judgment, ECHR, 26 January 2012, (“*Valderamma Case*”), paras. 29-30; Case of *Pyatkov v. Russia*, Judgment, ECHR, 13 November 2012, (“*Pyatkov Case*”), paras. 107, 115 and 118; Case of *Bilal Dogan v. Turkey*, Judgment, ECHR, 27 November 2012 (“*Dogan Case*”), para. 39; Case of *Leontiu v. Romania*, Judgment, ECHR, 4 December 2012 (“*Leontiu Case*”), paras. 76-78; Case of *Velichko*, paras. 84, 87, 90-92; Case of *Kowrygo v. Poland*, Judgment, ECHR, 26 February 2013 (“*Kowrygo Case*”), paras. 63, 66-67.

<sup>22</sup> *Pyatkov Case*: 3 years 5 months and 4 days; *Dogan case*: 9 months and 20 days; *Leontiu Case*: 2 years and 11 months; *Velichko Case* 2 years and 4 months; *Kowrygo Case*: 1 year, 8 months and 25 days. In the *Valderrama Case*, the ECHR considered that a pre-trial detention of 4 years and 8 months appeared *prima facie* unreasonable (para. 30). In the *Tsarkov Case*, the ECHR stated that pre-trial detention exceeding four years “*is a matter of grave concern for the Court*” (para. 64).

<sup>23</sup> *Velichko Case*, para. 87; *Pyatkov Case*, paras. 114 and 116; *Tsarkov Case*, para. 67.

find that the duration of pre-trial detention was excessive.<sup>24</sup>

26. At the ICTY, the personal situation of the accused is also taken into account by judges determining applications for provisional release. The advanced age of an accused militates in favour of his or her release.<sup>25</sup>

27. Mr Khieu Samphan will soon be 82. He has been deprived of his freedom for five years and four months. At the moment, he neither knows when he will be tried nor under what modalities. Consequently, keeping him in provisional detention violates not only his most fundamental rights but also his human dignity.

**2) The risks of going into hiding, ignoring summonses to appear and being temporarily prevented from attending a hearing**

28. Before and since the establishment of the Tribunal in 2004, Mr Khieu Samphan has never attempted to go into hiding even though he knew that he was one of the “*Candidates for Prosecution*”<sup>26</sup>. He did not move house and even granted several interviews up to the eve of his arrest, at which he handed himself in voluntarily. Mr Khieu Samphan has therefore never eluded justice. On the contrary, he has publicly showed his willingness to appear before the Tribunal and to answer the charges against him.<sup>27</sup>

29. Furthermore, Mr Khieu Samphan has no passport, no money, no house abroad and is very attached to his family (which visits him very regularly at the detention centre). Moreover, it is absurd to imagine that at almost 82, Mr Khieu Samphan could go back to live in the jungle.

30. Lastly, Mr Khieu Samphan could only be “*temporarily prevented from attending a hearing*” for health reasons. However, such risk can occur anywhere: in detention and when he is free.

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<sup>24</sup>*Dogan Case*, para. 42. The issue was the pre-trial detention of a minor. The ECHR observed that the detention of an elderly person could engage Article 3 of the Convention (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment): *Case of Mouisel v. France*, Judgment, ECHR, 14 November 2002, (“*Mouisel Case*”), para. 38.

<sup>25</sup> See for example: *Prosecutor v. Vujadin Popovic et al.*, Case No. IT-05-88-T, Decision on Defence Motions for Provisional Release of Radivoje Miletic and Milan Gvero, 7 December 2006, p. 7; *Decision on Gvero’s Motion for Provisional Release During the Break in the Proceedings*, 9 April 2008, paras. 15-17. Milan Gvero was 70 years of age at the time.

<sup>26</sup> **E3/48**, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*, Stephen Heder and Brian Tittlemore, March 2004, pp. 92-99.

<sup>27</sup> See for example: **E3/588** and **E3/588.1**, *Voice of America* interview with KHIEU Samphan, 13 November 2007.

Therefore, such risk cannot in any way justify the deprivation of his liberty. On the contrary, in view of the pathogenic nature of incarceration, such risk can even be said to increase during detention.

### **B. Risk of disturbing public order**

31. In 2011, the risk of disturbing public order was rejected by the Chamber.<sup>28</sup> However, the Supreme Court had considered that the facts established during the judicial investigation showed that if Mr Khieu Samphan was released, his presence at trial would risk being jeopardized because of disturbance of public order.<sup>29</sup>
32. Such facts “*established*” previously are indications based on a number of statements and reactions of victims (in 2008), polling conducted (in 2008 and 2010), the reckoning that part of the Cambodian population which lived under the regime from 1975 to 1979 suffers from post-traumatic stress, the fragile context of Cambodian society and the “*immense*” public interest generated by the trial.<sup>30</sup>
33. These same facts had been “*established*” in previous decisions issued during the judicial investigation to justify keeping Ieng Thirith, Khieu Samphan’s co-accused, in detention. However, the pessimistic predictions relied on at the time turned out to be false. In fact, as noted by the Supreme Court, since Ieng Thirith’s release on 16 September 2012, “*there is no evidence that public order has been disturbed.*”<sup>31</sup>
34. Furthermore, several civil parties have testified in the case since late 2011. Although they have expressed their feelings, none of them have ever showed the slightest inclination to

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<sup>28</sup> For each of the three accused: Chamber Decision of 2011, paras. 39-41.

<sup>29</sup> Supreme Court Decision on KHIEU Samphan, para. 54.

<sup>30</sup> Decision on KHIEU Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, Pre-Trial Chamber, (“Pre-Trial Chamber Decision of 2009”), 3 July 2009, para. 63; **C26/9/12**, Decision on KHIEU Samphan’s Appeal against Order on Extension of Provisional Detention, (“Pre-Trial Decision of 2010”), 30 April 2010, para. 38-39; **E50/3/1/1**, Co-Prosecutors’ Response to Khieu Samphan’s Appeal against the Decision on the Application for Immediate Release, (“Co-Prosecutor’s Response to Khieu Samphan Appeal), 28 March 2011, paras. 27-28.

<sup>31</sup> **E138/1/10/1/5/7**, Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith, Supreme Court Chamber, 14 December 2012 (“2012 Supreme Court Decision on IENG Thirith”), para. 65, footnote 208.

violence.<sup>32</sup>

35. Lastly, studies not mentioned by the Co-Prosecutors show that the Cambodian people are not at all interested in the on-going trial. Thus, in 2008, only 3 per cent of Cambodians were able to name the accused before the ECCC. In 2010, after the public was sensitized to the work of the Tribunal, only 11 per cent of the people were able to name them. In 2010, 83 per cent of Cambodians considered that it was preferable to focus on Cambodia's current problems, while only 16 per cent considered that it was important to focus on the crimes committed during the period of Democratic Kampuchea.<sup>33</sup>

### **C. Risk of endangering the safety of Mr Khieu Samphan**

36. In 2011, the risk of endangering the safety of Mr Khieu Samphan was rejected by the Chamber.<sup>34</sup> On appeal, the Supreme Court had held that the facts established in previous decisions supported the probability that in the event of the release of the Accused, his presence at trial was likely to be jeopardized by attacks on his person.<sup>35</sup>

37. Such facts "*established*" previously and used by the Supreme Court had been mentioned in two previous decisions of the Pre-Trial Chamber. The said facts were: an assault on Mr Khieu Samphan in 1991, some threats (in 2008 and 2009) against former Khmer Rouge leaders, in general, and against Nuon Chea and Kaing Guek Eav *alias* Duch, in particular, and the harassment of Mr Khieu Samphan's former Cambodian lawyer at a press conference held at the ECCC in 2008.<sup>36</sup>

38. The Pre-Trial had considered that "*these emotional reactions displayed by the Victims show, as anticipated by psychiatrists, that the proceedings before the ECCC could lead to a resurfacing of anxieties amongst Victims who suffer from post-traumatic stress and "a rise in*

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<sup>32</sup> See Transcripts of Proceedings: E1/17.1, E1/18.1, E1/24.1, E1/25.1, E1/113.1, E1/115.1, E1/116.1, E1/117.1, E1/135.1, E1/136.1, E1/137.1, E1/138.1, E1/141.1, E1/144.1, E1/145.1, E1/146.1, E1/147.1, E1/148.1, E1/149.1, E1/152.1, E1/153.1, E1/170.1.

<sup>33</sup> *After the first trial*, Human Rights Center, University of California, Berkeley, June 2011, pp. 20, 23.

<sup>34</sup> For each of the three Accused: The Chamber's 2011 Decision, paras. 39-41.

<sup>35</sup> Supreme Court Decision on KHIEU Samphan, para. 54.

<sup>36</sup> 2009 Pre-trial Chamber Decision, paras. 53-58; 2010 Pre-trial Chamber Decision, paras. 34-35 ; Co-Prosecutors' Response to Mr Khieu Samphan's Appeal, paras. 24-26.

*the negative social consequences that may accompany them*<sup>37</sup>. It also considered that: “*as alluded to by the Co-Prosecutors, the final stages of the proceedings in Case 001 and the imminent rendering of the Judgment create the potential for additional severe reactions against the Charged Persons*”<sup>38</sup>.

39. It should be noted that this “*potential*” no longer exists since Duch was finally sentenced to life in February 2012<sup>39</sup> and the sentence must have calmed the “*anxieties amongst Victims who suffer from post-traumatic stress*” and mitigated the “*rise in the negative social consequences that may accompany them*” .
40. Regarding the “assault” on Mr Khieu Samphan in 1991, that was a very long time ago and, indeed, very many commentators of the event agree that it was the result of manipulation by the current government. Furthermore, as already noted, Mr Khieu Samphan has never been insulted or threatened by any of the civil parties who have come to testify in the case.<sup>40</sup>
41. Regarding the incident relating to his Cambodian lawyer, it should be noted that not only did it have to do with isolated utterances made against a lawyer (as opposed to the Accused himself) but, what is more, since that incident, Mr Khieu Samphan has changed his Cambodian lawyer.
42. Lastly, as regards the allegation that Mr Khieu Samphan is targeted by numerous threats against former Khmer Rouge leaders, there is no reason to fear for his safety any more than for that of Mrs Ieng Thirith. Indeed, since the release of Ieng Thirith, “*there appears to have been no threat to the Accused’s safety upon her release.*”<sup>41</sup>

#### **D. Risk of lack of proper medical care when required by Mr Khieu Samphan**

43. This risk which was recently raised by the Supreme Court is based only on practical considerations and it is not justified. In fact, Mr Khieu Samphan does not suffer from any chronic disease. If required, proper medical care can be provided to him not only when he

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<sup>37</sup> 2009 Pre-trial Chamber Decision, para. 57.

<sup>38</sup> 2010 Pre-trial Chamber Decision, para. 34.

<sup>39</sup> **F28**, Case of KAING Guek Eav, *alias* Duch, Judgement, Supreme Court Chamber, 3 February 2012.

<sup>40</sup> *Supra*, para. 34, footnote 32.

<sup>41</sup> 2012 Supreme Court Decision on IENG Thirith, para. 62, footnote 208.

attends hearings but also away from the Tribunal.

44. This practical consideration cannot therefore in any way justify the deprivation of the liberty of Mr Khieu Samphan who is not only presumed to be in good health, but more importantly, is also presumed innocent.
45. The risks cited to justify maintaining Mr Khieu Samphan in provisional detention are very flimsy, if not inexistent. In any event, the Chamber is under a duty to determine “*to what extent these risks may be attenuated by measures not based on detention.*”<sup>42</sup>

## **II. RELEASE FROM DETENTION ON BAIL IS ENOUGH TO PREVENT ANY RISKS**

46. In accordance with the presumption of innocence and the fundamental principle that freedom is the rule and detention the exception, release on bail is still possible at the trial stage.<sup>43</sup>
47. As the Pre-Trial Chamber has noted, it is generally acknowledged that:

*a measure in public international law is proportional only when 1) it is suitable, 2) necessary when 3) its degree and scope remain in reasonable relationship to the envisaged target. Procedural measures should never be capricious or excessive. If it is sufficient to use a more lenient measure, it must be applied.*<sup>44</sup>

48. The Supreme Court reiterated these principles and pointed out that:

*Judicial supervision decisions are fact-intensive and considered on an individual basis. (...) [T]he regime of judicial supervision available under Article 223 of the CPP and Internal Rule 65 is flexible enough to allow for balancing the various interests at stake and design a regime as appropriate in the circumstances.*<sup>45</sup>

49. In the instant case, maintaining Mr Khieu Samphan in detention is neither appropriate nor necessary and it is excessive. Placing him on bail suffices to achieve the same objectives, the more so as it is accompanied by guarantees and could be further supported by public awareness measures.

### **A. Concrete measures that could be taken in lieu of detention**

<sup>42</sup> Supreme Court Decision on Khieu Samphan, para. 54.

<sup>43</sup> Internal Rules 63, 65 and 82; Chapter 3 of the Cambodian Code of Criminal Procedure; see also 2009 Pre-Trial Chamber Decision, para. 90, recalling the principles of the presumption of innocence and primacy of freedom; 2012 Supreme Court Decision relating to IENG Thirith, para. 55, on the Court’s conviction beyond reasonable doubt that she can be placed under judicial detention during the trial phase.

<sup>44</sup> 2009 Pre-Trial Chamber Decision, par. 91.

<sup>45</sup> 2012 Supreme Court Decision on Ieng Thirith, par. 58.

50. Mr Khieu Samphan's Defence proposes a non-exhaustive list of measures that it considers appropriate and proportionate. All these undertakings prevent each of the aforementioned risks.

**1) Undertaking to reside at a specific address, and not to change said address without permission**

51. The address at which Mr Khieu Samphan would reside is provided in the annex to this application for release on bail. The Defence points out that Mr Khieu Samphan will not live alone at that address and will always be in the company of his family.

**2) Undertaking to submit his identity card to the Office of the Greffier**

52. Without his identity card, Mr Khieu Samphan will not be able to obtain a passport and will not be able to travel abroad.

**3) Undertaking to submit to regular checks by the authorities**

53. Mr Khieu Samphan could submit, for example, to one visit by the authorities once or several times a month when the Tribunal is sitting and several times a week when the Tribunal is in recess. A report by the authorities would enable the Tribunal to observe that Mr Khieu Samphan continues to reside at the indicated address and to comply with his bail undertakings. Regular visits by the authorities will also prevent any risk to Mr Khieu Samphan's safety which the Cambodian government has a duty to ensure.<sup>46</sup>

**4) Undertaking to discuss the case only with his lawyers and not to get into touch with the media**

54. This measure will prevent the risk of disturbing public order and obstructing the administration of justice.

**5) Undertaking not to contact any witness, expert or civil party**

55. It is presently impossible to know whether witnesses who have already testified will be

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<sup>46</sup> Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, A/RES/57/228 B, article 24, 22 May 2003, ("UN-Government Agreement"), Article 24.

recalled to testify or not. Furthermore, as the Chamber still has not issued any reasoned decision on all the witnesses proposed by the parties, it is impossible to know which witnesses the Chamber will summon or not summon for the first trial and in subsequent trials. Such an undertaking should therefore include all the witnesses that the parties have proposed to call. However, it should not extend to Witness TCW-673.

56. This undertaking will forestall any risk of pressure being brought to bear on witnesses and the destruction of evidence,<sup>47</sup> even if this risk does not currently justify the continued detention of Mr Khieu Samphan.<sup>48</sup> Furthermore, this undertaking is part of the undertakings by which any citizen is bound not to obstruct the administration of justice.<sup>49</sup>

#### **6) Undertaking to undergo regular medical examinations**

57. Mr Khieu Samphan will be required to undergo regular medical examinations conducted by medical doctors appointed by the Tribunal, for example, once a month when the Tribunal is sitting, and once a week when the Tribunal is in recess. This<sup>50</sup> will prevent the risk—raised by Supreme Court—of shortages of medicines at the time when Mr Khieu Samphan would need them, which would mitigate the risk of temporary absence.

#### **7) Undertaking to be transported by ECCC services (or by the authorities) to the Tribunal.**

58. Such an undertaking will enable the Chamber to ensure that Mr Khieu Samphan will attend hearings and forestall any risk to his safety while in transit to the Tribunal.

#### **B. Undertakings to appear at trial and not to obstruct the administration of justice**

59. Mr Khieu Samphan expressly undertakes to appear at trial (see annex). In the undertaking, he solemnly makes a commitment to be present at his trial and to comply with any conditions that may be imposed on him by the Chamber. He also undertakes not to obstruct the administration of justice and not to pose any danger to third parties.

60. Furthermore, it is submitted that Mr Khieu Samphan's good faith and willingness to

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<sup>47</sup> Internal Rules 63(3)(b) i) and ii).

<sup>48</sup> It was expressly overturned in 2009: 2009 Decision of the Pre-Trial Chamber, paras. 48-49.

<sup>49</sup> Internal Rule 35; 2012 Supreme Court Decision on IENG Thirith, para. 78.

<sup>50</sup> Expressly provided for in Article 223, item 11, Cambodian Code of Criminal Procedure.

participate in his trial cannot be called into question. In fact, he has never tried to evade justice and, quite the contrary, he has always shown his willingness to answer the charges against him.<sup>51</sup> What is more, he has an excellent reputation and reference has even been made to his integrity at the trial, in particular by a historian testifying as an expert witness.<sup>52</sup> His conduct has been exemplary since the commencement of the trial and indeed no one has failed to note that Mr Khieu Samphan is particularly attentive during proceedings and has made it a point of duty to attend them every morning and afternoon.

61. Another guarantee that Mr Khieu Samphan will appear for trial is the solemn undertaking by the persons in whose house and with whom he will live (see annex). These persons have never had any problem with the law and they are very integrated in Cambodian society.
62. Furthermore, the Defence notes that the Chamber may rely on the ECCC's judicial police and on the Cambodian government's cooperation.<sup>53</sup>

### **C. Public awareness as a possible accompanying measure to release on bail**

63. When Mrs IENG Thirith was released, measures were taken to inform the public of the reasons for that decision. The Supreme Court pointed out that that decision had been generally understood and well received by the public. It noted that "*public information remains the best way, in the circumstances, to ensure protection of public order.*"<sup>54</sup> The Defence suggests that similar measures be taken to inform the public at the time of Mr Khieu Samphan's provisional release on bail.
64. To conclude, Mr Khieu Samphan's provisional detention is excessively long and violates his fundamental rights. The risks that initially justified deprivation of his liberty are either very weak today or non-existent. Each of those risks can be prevented by releasing Mr Khieu Samphan on bail. The holding of a public hearing is necessary, not only to enable the Defence to make its case, but also to enable Mr Khieu Samphan to undertake before the Chamber and the public that the fulfil the obligations that will be imposed on him and be present at his trial.

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<sup>51</sup> *Supra*, para. 28.

<sup>52</sup> **E1/93.1**, T., 20 July 2012, p. 113 L.15-24; **E1/95.1**, T., 24 July 2012, pp. 104-106 (Eng).

<sup>53</sup> Internal Rule 15; Article 25 of the UN-Government Agreement. See also 2012 Supreme Court Decision on IENG Thirith, para. 73, footnotes 225 and 226.

<sup>54</sup> 2012 Supreme Court Decision on IENG Thirith, footnote 208.

65. **ACCORDINGLY**, Mr Khieu Samphan's Defence requests the Trial Chamber to:

- FIND that Mr Khieu Samphan's right to be tried within a reasonable time has been violated;
- FIND that maintaining Mr Khieu Samphan in detention is excessive and no longer justified;
- ORDER Mr Khieu Samphan's immediate release;
- ACCOMPANY such release with judicial supervision measures;
- SCHEDULE a public hearing.

	Mr KONG Sam Omn	Phnom Penh	[Signed]
	Ms Anta GUISSÉ	Paris	[Signed]
	Mr Arthur VERCKEN	Paris	[Signed]
	Mr Jacques VERGÈS	Paris	[Signed]
Date	Name	Place	Signature