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Filed by:	Mr PAK Chanlino	Position:	Greffier of the OCP		
Address:	Room No. 319, ECCC	Email:	Pak.chanlino@eccc.gov.kh	Telephone Number:	Extn: 6037

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A. Seth MYDANS, "Khmer Rouge Torturer Converts, Feels His Life is Like That of St Paul", *The Seattle Times,* 2 May 1999.

B. Nic Dunlop, *The Lost Executioner: A Story of the Khmer Rouge* (Bloomsbury: 2005), pp. 252-253 & 270-289. *Exceeds 30 pages.*

C. Media article by DC-Cam, "Searching for the Truth", Special English Edition, July 2003, page 36 (ERN 00080431).

D. The interview with the Office of the UNHCHR on 4-6 June 1999, ERN 00002494-00002557, pp. 1,2,3, 13, 14, 25, 26, 47, 57-59. *Exceeds 30 pages.*

E. Nate Thayer in the *Far Eastern Economic Review* May 13, 1999 "Death in Detail" (ERN 00087513-00087514).

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G. Amnesty International's Urgent Action 93/99 "Fear for Safety" 29 April 1999 AI Index ASA 23/08/99.

H. Geerteke JANSEN, *Voices of Takeo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia* (Phnom Penh: Documentation Center of Cambodia, October 2006), pp. 1-3, 20-33, 38-48. *Exceeds 30 pages.*

I. EA Meng-Try and SIM Sorya, *Victims and Perpetrators – Testimony of Young Khmer*

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J. Japan Assistance Team for Small Arms Management in Cambodia, "Weapons Collection Record 2005-2007" (JSAC, 2007).

K. Christine Wille, "How Many Weapons Are There in Cambodia?", Small Arms Survey Working Paper (Geneva: Small Arms Survey, 2005), pp. 1-11, 20-29, 30-44. *Exceeds 30 pages.*

L. "Summary of the Speech of Mr. Thor Saron, Cambodian Judge", in *National Workshop Report on Awareness Raising in Arms Law, July 16-18, 2006*, pages 15-16 (Working Group on Weapons Reduction, 2006), pp. 1-6, 8, 15-17. *Exceeds 30 pages.*

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THE PRE - TRIAL CHAMBER OF THE ECCC
លេខ No. : 001
ថ្ងៃទី 03-10-2007
Date:
ម៉ោង 11H00 AM
Time

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA
BEFORE THE PRE-TRIAL CHAMBER

Criminal Case File No.	:	002/14-08-2006
Investigation No.	:	001/18-07-2007
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CO-PROSECUTORS' RESPONSE TO DEFENCE APPEAL AGAINST CO-INVESTIGATING JUDGES' ORDER OF THE PROVISIONAL DETENTION OF KANG KECK IEV alias DUCH ON 31 JULY 2007

Filed by:

Office of the Co-Prosecutors:
Ms. CHEA Leang
Mr. Robert PETIT
Mr YET Chakriya
Mr William SMITH
Mr PICH Sambath
Mr Alex BATES

Distributed to:

The Pre-Trial Chamber Judges:
Mr PRAK Kimsan
Mr NEY Thol
Mr HUOT Vuthy
Ms Katinka LAHUIS
Mr Rowan DOWNING

Co-Investigating Judges:
Mr. YOU Bunleng
Mr. Marcel LEMONDE

Defence Counsel:
Mr KAR Savuth
Mr François ROUX

INTRODUCTION

Procedural History

1. KANG Keck Iev ("The Charged Person") was first arrested and held in pre-trial detention by the Military Court of Phnom Penh ("the Military Court") in 1999. As far as the available records show, a judicial investigation was opened against him and he has been kept in unbroken pre-trial detention by the Military Court since 1999. Such proceedings, to the knowledge of the Co-Prosecutors, are still open.

2. The Co-Prosecutors submitted their first Introductory Submission against five named suspects on 18 July 2007, requesting that a judicial investigation be opened and that all five suspects be arrested and provisionally detained.

3. The Charged Person was arrested pursuant to an order of the Co-Investigating Judges on 30 July 2007. The following day he was charged with crimes against humanity relating to a period between 1975 and 1979 when he is alleged to have directed the Security Centre S-21 in Phnom Penh ("S-21"). Following an adversarial hearing the Charged Person was provisionally detained for one year by the Co-Investigating Judges, as confirmed in their Order of Provisional Detention of 31 July 2007.

4. The Charged Person has appealed the order by written pleadings dated 23 August and 5 September 2007 ("The Defence Appeal"). The Co-Prosecutors received the English translation of this appeal on 18 September 2007, and by order of the Pre-Trial Chamber have 15 days from this date (3 October 2007) to file a response.

The Defence Appeal

5. The Defence requested that the oral hearing of this appeal should be held in public.

6. The Defence Appeal has two main points:

   (i) The grounds for ordering provisional detention under rule 63.3 of the Internal Rules of the ECCC ("the Internal Rules") were not met;

   (ii) The Charged Person should be immediately released because of the excessive period of time spent in pre-trial detention since 10 May 1999 was a violation of

Cambodian law and international standards for the protection of his right to trial within a reasonable time;

7. Additionally, the Charged Person made two further requests:

(i) In the event that it is determined that rule 63.3 is satisfied, that he should be placed under judicial supervision;

(ii) That the Pre-Trial Chamber declare that upon conclusion of the trial, the Charged Person be awarded financial compensation if acquitted and a reduction in sentence if convicted as an additional remedy to the breach of his right to trial within a reasonable time.

The Co-Prosecutors' Response

8. The Co-Prosecutors agree that the oral hearing of this appeal should be held in public and respectfully request the Pre-Trial Chamber to so order.

9. The Co-Prosecutors submit that the Defence Appeal should be dismissed in its entirety and the order of the Co-Investigating Judges for provisional detention for one year against the Charged Person should be confirmed because:

(i) the Co-Investigating Judges were correct in finding that the grounds for provisional detention under rule 63.3 of the Internal Rules were satisfied (**Submission A**);

(ii) the Co-Investigating Judges' did not err in failing to immediately release the Charged Person for breach of his right to be tried within a reasonable time, because (**Submission B**):

(a) Such violations are not attributable to the ECCC (**Part I**); and

(b) Such violations are not of such seriousness as would require the ECCC, as a court dealing with serious violations of international criminal law, to provide the Charged Person with a remedy at the investigative phase (**Part II**).

10. Additionally, the Co-Prosecutors seek a ruling from the Pre-Trial Chamber on the correct interpretation of the rules in relation to the filing of documents before the ECCC. It appears

that the Defence appeal document dated 23 August 2007 was defective in that it contained neither grounds nor argument.[1] It also appears that the Defence appeal document dated 5 September 2007 did not comply with rule 75[2] of the Internal Rules in that it was filed five days out of time. The Defence have not requested, pursuant to rule 39.4 of the Internal Rules,[3] either an extension of time for the filing of their document on 5 September 2007 or an order recognising the validity of this document submitted after the expiry of the time limit. Whilst it is not entirely clear whether the 30 day time limit for the filing of documents relates to substantive appeals or merely notices of appeal, the Pre-Trial Chamber is invited to clarify this for future certainty of interpretation of the rules.

Public Hearing

11. The Co-Prosecutors join with the Defence in submitting that in the interests of justice the Pre-Trial Chamber should declare that the oral hearing of this appeal be held in public, in accordance with rule 77.6 of the Internal Rules.[4]

12. The ECCC is the first criminal court to adjudicate upon the serious international crimes committed in the Democratic Kampuchea ("DK") regime alleged against the senior leaders and others most responsible. The commencement of judicial proceedings before the ECCC is thus an historic occasion for Cambodians and non-Cambodians alike.

13. As far as it is permissible under the applicable laws, and with due respect to the protection of witnesses and victims, the Co-Prosecutors submit that court hearings before the ECCC should be held in public for justice to be seen to be done. As a general principle of international law, court hearings, including hearings on detention, should be in public.[5] The

[1] The draft Practice Direction on filing of pleadings before the ECCC had not entered into force as at the time of writing.
[2] Rule 75 states "Except as provided otherwise in these IRs, any appeal to the Pre-Trial Chamber must be filed within 30 days from the date that notice of the decision or order was received. The lawyers for the Charged Person ...may file a notice of appeal on their behalf."
[3] Rule 39.4 states "The Co-Investigating Judges or the Chambers may, *at the request of the concerned party*: (a) extend any time limits set by them; or (b) recognize the validity of any action executed after the expiration of a time limit prescribed in these IRs on such terms, if any, as they see fit" (emphasis added).
[4] Rule 77.6 states that "The Pre-Trial Chamber may, at the request of any judge or party, decide that all or part of a hearing be held in public...if the Pre-Trial Chamber considers that it is in the interests of justice and it does not affect public order or any protective measures authorized by the court."
[5] Article 14.1 of the International Covenant on Civil and Political Rights, GA Res 2200A (XXI), U.N. Doc. A/6316 (1966), 999 UNTS 171, entered into force 23 March 1976: "...everyone shall be entitled to a fair and public hearing...."

fair and efficient functioning of criminal justice systems is a matter of public concern, all the more so when the subject-matter concerns the entire international community.

SUBMISSION A

GROUNDS FOR PROVISIONAL DETENTION UNDER RULE 63.3

14. The Co-Prosecutors submit that there was no error in finding that the grounds exist for ordering provisional detention. Pursuant to rule 63.3.a there are well founded reasons to believe that the Charged Person committed the offences alleged in the Introductory Submission. There is also a solid evidentiary basis for finding that provisional detention is a necessary measure pursuant to rule 63.3.b in order to: (1) Prevent pressure on witnesses or collusion with accomplices; (2) Ensure the presence of the Charged Person; (3) Protect the security of the Charged Person; and additionally (4) Preserve public order.

15. The Co-Prosecutors further submit that there was no error in the Co-Investigating Judges' finding that no bail conditions under rule 65 would adequately guarantee the presence of the Charged Person and ensure the protection of others.

THE LAW

Legal Sources and Standards at the ECCC

16. In applying procedural law at the ECCC, such as the law relating to pre-trial detention, the Extraordinary Chambers must use national and international law as their source by virtue of the Agreement establishing the Court. The standard to which the law is applied should be internationally recognized by virtue of Article 12 (2) of the Agreement where is states, "The Extraordinary Chambers shall exercise their jurisdiction in accordance with 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, to which Cambodia is a party."

17. In order to reach this international standard of justice Article 12 (1) of the Agreement makes clear that the Court procedure should be in accordance with Cambodian procedural law and international procedural rules, where appropriate. The Agreement recognizes the uniqueness of the ECCC mandate and encourages the Court to apply procedural rules established at an international level where :

(i) the Cambodian law does not deal with a particular matter, or

(ii) there is uncertainty regarding the interpretation or the application of a relevant rule of Cambodian law, or

(iii) there is a question regarding the consistency of such a rule with international standards.

18. The Extraordinary Chambers, recognizing the unique subject matter of this Court, through its Plenary of Judges, consolidated the applicable Cambodian procedure to be used at the ECCC. The Judges agreed on a set of Internal Rules, which contain the most specific set of regulations governing the proceedings before this Court. Both these Internal Rules and the ECCC Law give direct effect to the Agreement between the Royal Cambodian Government and the United Nations.

19. It is submitted therefore that the Pre-Trial Chamber - in addition to referring to the Internal Rules - should also apply international procedural rules and jurisprudence in order to meet the international standards as required by Article 12 (2) of the Agreement. Moreover, it is submitted, the international procedural rules being developed through international and internationalised criminal tribunals dealing with massive human rights violations are the most relevant international standards for the ECCC to follow.

20. The Defence has quoted extensively from regional and supra-national courts and committees, such as the European Court of Human Rights ("ECHR") (a regional court which deals with cases from national courts) and the Human Rights Committee ("HRC") (which is not in fact a court but a committee established to determine compliance with the International Covenant on Civil and Political Rights, the ICCPR). The Co-Prosecutors submit that although ECHR and HRC cases may provide some guidance on general principle,[6] the subject-matter of their cases is completely different from those before the ECCC or before other tribunals dealing with serious violations of international criminal law such as the International Criminal Tribunals for the Former Yugoslavia and for Rwanda ("ICTY" and "ICTR") and the Special Court for Sierra Leone ("SCSL"). The Pre-

[6] As held in and *Prosecutor v Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, 3 November 1999, para 40, such sources being "persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law"

Trial Chamber is therefore invited to exercise caution in examining cases from such regional or supra-national courts or committees.

Rule 63.3 Grounds

21. By rule 63.3 of the Internal Rules, the Co-Investigating Judges may order the provisional detention of the Charged Person only where two conditions are fulfilled:

"(a) there is well-founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplemental 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 witness 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."

22. The five alternative grounds under rule 63.3.b are *disjunctive*. There is no requirement for the Co-Investigating Judges to find that every one of the grounds must be satisfied before they consider that provisional detention is a necessary measure. On the contrary, should the Co-Investigating Judges consider that any *one* of these five grounds exist, this limb of the test for provisional detention is met. This approach is followed before other tribunals dealing with serious international crimes.[7]

23. Additionally, the standard upon which the Co-Investigating Judges must base their findings in relation to any of the five alternative grounds is that they are required to "consider" that the grounds are made out. There is no requirement of proving the existence of any of these grounds beyond a reasonable doubt, nor even on the balance of probabilities.

[7] *Prosecutor v Sainovic and Odjanic,* Decision Refusing Ojdanic Leave to Appeal Case No. IT-99-37-AR65.2, ICTY Appeals Chamber, 27 June 2003, page 4.

24. The Co-Investigating Judges of the ECCC have a discretion in how they reach their conclusion that provisional detention is a necessary measure. Such judicial discretion is usually exercised by taking into account all features of the case such as the gravity of the charges, the cogency of the evidence, the past and present character and behaviour of the suspect, the interests of witnesses and victims and the interests of justice as a whole. The most recent decisions of the ICTY confirm that this is also the accepted practice in international criminal law.[8]

The Standard of Review

25. Although there is no guidance in either the Internal Rules or the Cambodian Criminal Procedure Code as to the basis on which the exercise of judicial discretion in matters of provisional detention may be challenged on appeal, international tribunals have applied a restrictive standard of review. Only where it can be shown that a "discernable error" was made by a lower court in the exercise of its discretion will the appeal be successful. It is not for an appellate court to substitute its own discretion for that of the lower court. As was stated by the Appeals Chamber of the ICTY in the case of *Prosecutor v Ljube Boskoski and Johan Tarculovski*:[9] *"The relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather 'whether the Trial Chamber has correctly exercised its discretion in reaching that decision'."*

26. The ICTY Appeals Chamber went on to define a "discernable error" as either: " *'(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.'*"[10]

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[8] *Prosecutor v Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, para 4. See also *Prosecutor v Popovic et al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release, Case No. IT-05-88-AR65.1, ICTY Appeals Chamber, 24 January 2006, page 3 and *Prosecutor v Milosevic*, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, Case No. IT-99-37-AR73, ICTY Appeals Chamber,18 April 2002, paras 3-6.

[9] *Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, para 4, quoting *Prosecutor v Prlic et al,* Confidential Decision on the Prosecution Appeal of the Trial Chamber's "Décision relative à la demande de mise en liberté provisoire de l'accusé Pusić", Case No. IT-04-74-AR65.4, ICTY Appeals Chamber, 20 July 2007, para 6.

[10] *Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, para 4

27. The Co-Prosecutors respectfully submit that this standard of review should guide the Pre-Trial Chamber in its review of the discretion exercised by the Co-Investigating Judges.

Burden of Proof

28. The burden of demonstrating that the Co-Investigating Judges wrongly exercised their discretion in finding that the grounds are made out under rule 63.3 is on the Defence. The Defence has failed to discharge of this burden.

29. As rule 77.13 stipulates, the Pre-Trial Chamber can only overturn decision by the Co-Investigating Judges if a supermajority of the Judges so agree. This should be understood to mean that the exercise of the Co-Investigating Judges' discretion will not be disturbed unless the appellant party (the Defence in this case) can persuade the Pre-Trial Chamber otherwise. This approach is also followed at the ICTY, where it has been held that the burden of establishing that there has been any discernable error by a lower court in the exercise of its discretion falls on the appellant party.[11]

30. Should the Pre-Trial Chamber not concur with the Co-Prosecutors position on the Standard of Review set out in Paragraphs 24 to 26 above, the Chamber is invited to find that the grounds for detention under rule 63.3 have been and are still made out. The burden of showing that Provisional Detention is no longer a necessary measure falls on the Defence. The Defence has failed to discharge of this burden.

31. Although there is no specific guidance in the Internal Rules or Cambodian domestic criminal law, the established practice in international criminal law is that the burden of proof falls on the accused[12] to satisfy the court that he meets the conditions justifying a grant of "provisional release".[13] Each case is to be judged on its own merits, however

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[11] *Prosecutor v Popovic at al.*, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic's Motion for Provisional Release, Case No. IT-05-88-AR65.1, ICTY Appeals Chamber, 24 January 2006, page 3.

[12] See: *Prosecutor v Prlic et al.*, Decision on Motions for Re-Consideration, Clarification, Request for Release and Applications for Leave to Appeal, Case No. IT-04-74-AR65, ICTY Appeals Chamber, 8 September 2004, para 28; *Prosecutor v Haradinaj*, Decision on Ramush Haradinaj's Motion on Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 06 June 2005, para 21; *Prosecutor v Brdjanin and Talic*, Decision on Motion by Momir Talic for Provisional Release, Case No. IT-99-36-T, ICTY Trial Chamber, 28 March 2001, paras 17-18.

[13] At the ICTY, ICTR and SCSL, release may only be ordered if the court is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person (Rules 65 of the ICTY, ICTR and SCSL Rules of Procedure and Evidence).

provisional release has in practice rarely been granted before other international or internationalized courts.[14]

32. Under the Internal Rules, the expression "provisional detention" rather than "provisional release" is used. However, at the ECCC as at other tribunals the same considerations apply in the prosecution of *"Universally Condemned Offences [genocide, crimes against humanity and war crimes]"*, as they were recently described by the Appeals Chamber of the ICTY in the case of *Nikolic*.[15] The international community has an expectation that those accused of serious violations of international humanitarian law will be brought to justice. Although always to be balanced with the fundamental rights of the accused,[16] this factor is unique to tribunals which deal with crimes of such international concern. As has been recognized at the Special Court for Sierra Leone in the case of *Prosecutor v Issa Hasan Sesay*[17]: *"...one should bear in mind that, in the specific nature of international tribunals, the crimes over which such tribunals have jurisdiction can be categorized as the most serious crimes under international law. Therefore, it can be said that the approach to bail that prevails in national courts of law may be different than that for an international tribunal."*

33. The Co-Prosecutors respectfully submit that these principles should further guide the Pre-Trial Chamber.

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[14] ICTY cases: *Prosecutor v Darko Mrdja*, Decision on Darko Mrdja's Request for Provisional Release, Case No. IT-02-59-P, ICTY Trial Chamber, 15 April 2002, para 29; *Prosecutor v Mile Mrksic*, Decision on Appeal Against Refusal to Grant Provisional Release, Case No. IT-95-13/1-AR65, ICTY Appeals Chamber, 8 October 2002; *Prosecutor v Pasko Ljubicic*, Decision on the Defence Motion for the Provisional Release of the Accused, Case No. IT-00-41-PT, ICTY Trial Chamber, 2 August 2002; Prosecutor *v Limaj et al*, Decision on Provisional Release of Fatmir Limaj, Case No. IT-03-66-PT, ICTY Trial Chamber, 12 September, 2003, confirmed by the Appeals Chamber in a Decision of 31 March 2003, at paragraph 40. SCSL cases: *Prosecutor v Sesay et al.*, Decision on the Motion by Morris Kallon for Bail, Case No. SCSL-04-15 PT, SCSL Trial Chamber, 23 February 2004, para 35; *Prosecutor v Sam Hinga Norman*, Decision on Motion for Modification of Conditions of Detention, Case No. SCSL-2003-08-PT, 26 November 2003, para 8. Provisional release has never been granted by either the ICTR or the Special Court for Sierra Leone: See Archbold, *International Criminal Courts: Practice, Procedure and Evidence* (London: Sweet and Maxwell 2005), section 7-128, page 284.

[15] *Prosecutor v Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, ICTY Appeals Chamber, 5 June 2003, para 25.

[16] *Prosecutor v Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest, Case No. IT-94-2-AR73, ICTY Appeals Chamber, 5 June 2003, para 30.

[17] *Prosecutor v Issa Hasan Sesay* Decision on Application of Issa Sesay for Provisional Release, Case No. SCSL-04-15-PT, 31 March 2004, para 40.

THE FACTS

Well-Founded Reasons

34. As was identified by the Co-Investigating Judges, the Charged Person is accused, amongst other matters, of *"...directing the Security Prison S-21 between 1975 and 1979 where, under his authority, countless abuses were allegedly committed against the civilian population (arbitrary detention, torture and other inhumane acts, mass executions, etc) which occurred within a political context of widespread and systematic abuses and constitute crimes against humanity."*[18]

35. The Co-Investigating Judges' findings conform to paragraphs 49-55 of the Introductory Submission, which set out in detail the scope of the criminal acts committed at S-21, and paragraphs 104-113, which outline the Charged Person's authority at S-21. All such allegations are fully supported by witness testimony from former survivors and staff within S-21. Hundreds of documents contained in the case file submitted by the Co-Prosecutors support these allegations. Minutes of meetings, telegrams, communications between the Charged Person and his superiors as well as subordinates, prisoner lists, interrogation schedules, handwritten and typewritten "confessions" extracted from detainees under torture, execution lists and photographs reveal the meticulous details of S-21 and how, under the precise direction and authority of the Charged Person, more than 14,000 people were killed.

36. The Defence has not sought to challenge the reasoning of the Co-Investigating Judges that there are well-founded reasons to believe that the Charged Person has committed crimes as alleged in the Introductory Submission. The Charged Person has admitted that he was indeed the deputy and then the Chairman of S-21, from at least 1975 onwards. During his interviews with the Co-Investigating Judges to date however he has attempted to distance himself from any responsibility for the crimes committed there. He contends that his authority was theoretical rather than actual, and that his role was merely as a conduit of information from his superiors in the party to his subordinates in S-21. The Co-Prosecutors do not accept the Charged Person's contentions.

[18] Co-Investigating Judges' Order of Provisional Detention, 31 July 2007, para 1.

Provisional detention is a necessary measure

37. In paragraphs 118.a-118.d of the Introductory Submission, and at the adversarial hearing on 31 July 2007, the Co-Prosecutors requested a finding that provisional detention was a necessary measure on four alternative grounds. The evidence in support of such findings was extensively presented in the case file, and in brief at the adversarial hearing on 31 July. The Co-Investigating Judges ordered provisional detention against the Charged Person on three of these four grounds as follows.

Ground 1

Ensuring the presence of the Charged Person (rule 63.3.b.iii)

38. The Co-Investigating Judges determined that provisional detention was a necessary measure to ensure the presence of the Charged Person, relying on the gravity of the offences alleged and the seriousness of any sentence if convicted.[19]

39. The Co-Prosecutors agree with the finding that the gravity of the offences and the seriousness of potential sentence are relevant to assessing flight risk when considered with all the other factors in the case. This is in conformity with jurisprudence from both the International Criminal Court and the ICTY.[20]

40. As the Co-Prosecutors argued in the adversarial hearing, and by his own admission,[21] from 1979 until his arrest in 1999 the Charged Person repeatedly changed his name. In fact, he had completely disappeared from public view. He repeatedly changed his location and his

[19] Co-Investigating Judges' Order of Provisional Detention, 31 July 2007, para 22.
[20] See: *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Application for the Interim Release of Thomas Lubanga Dyilo, Case No. 01/04-01/06, Single Judge of the ICC, 18 October 2006, pages 5-6; see also the ICTY cases of *The Prosecutor v Mico Stanisic*, Decision on Mico Stanisic's Motion for Provisional Release, Case No. IT-04-79-PT, ICTY Trial Chamber, 19 July 2005, paras 8-9; *The Prosecutor v Cermak and Markac*, Decision on Interlocutory Appeal against Trial Chamber's Decision Denying Provisional Release, Case No. IT-03-73-AR 65.1, ICTY Appeals Chamber, 02 December 2004, para 25; *The Prosecutor v Limaj et al*, Decision on Provisional Release of Haradin Bala, Case No. IT-03-66-AR 65.2, ICTY Trial Chamber, 16 September 2003, page 5; *The Prosecutor v Brdjanin*, IT-99-36-T, Decision on Motion by Radoslav Brdjanin for Provisional Release, Case No. IT-99-36-T, ICTY Trial Chamber, 25 July 2000, para 16; *Seselj*, Decision on Defence Motion for Provisional Release, Case No. IT-03-67-PT, Trial Chamber II, 23 July 2004, para 9.
[21] *Procès-verbal*,English version 23 August 2007, page 8; see also Seth MYDANS, "Khmer Rouge Torturer Converts, Feels His Life is Like That of St Paul", *The Seattle Times*, 2 May 1999 (See Appendix A).

employment.[22] He maintained no contact with close family members and his own mother thought he was dead.[23] He attempted to do everything he could to conceal his past.

41. The Charged Person claims that he is "ready to reveal crimes of the Khmer Rouge" and as such does not pose any flight risk. The Pre-Trial Chamber should not attach any weight to this. Based on his interviews to date, the Charged Person does not appear willing to accept either his own responsibility for the crimes committed at S-21, or the full extent of his authority as Chairman of that detention centre.[24]

42. The Charged Person's lawyer, Mr Kar Savuth, has indicated that he will "personally guarantee" the attendance of his client at future court hearings if he is released. It is not clear on what basis such assurance is given, nor how it is suggested that this may be enforced should the Charged Person fail to attend if subsequently released. The Pre-Trial Chamber is invited to rule that such a practice is not appropriate for the crimes under consideration by the ECCC.

43. For all these reasons, there was thus no "discernable error" in the Co-Investigating Judges' exercise of discretion in finding that provisional detention is a necessary measure to ensure the presence of the Charged Person. Alternatively, the Defence has failed to prove that the presence of the Charged Person would be ensured in the proceedings should he be released.

Ground 2

Protecting the security of the Charged Person (rule 63.3.b.iv)

44. The Co-Investigating Judges determined that provisional detention was a necessary measure to protect the security of the Charged Person. They reasoned that releasing him

[22] Once, whilst working as a teacher in Svay Chek, the Charged Person was recognised as the former Chairman of S-21. He sought and was granted an immediate transfer to Samlaut, a region known as a Khmer Rouge stronghold, where, as he was later to tell one journalist, "there would be people to protect him": book by Nic DUNLOP entitled *The Lost Executioner: A Story of the Khmer Rouge* (See Appendix B), p252. See also Seth MYDANS, "Khmer Rouge Torturer Converts, Feels His Life is Like That of St Paul", *The Seattle Times,* 2 May 1999 (See Appendix A).
[23] Media article by DC-Cam, "Searching for the Truth", Special English Edition, July 2003, page 36 (ERN 00080431) (See Appendix C).
[24] *Procès-verbal,* English version, 7 Aug 2007: "Those under my command. I have forgotten all that" (page 3); "I did not dare do anything autonomously" (page 4); *Procès-verbal,* English version, 23 Aug 2007: "Hor was actually in charge in Phnom Penh" (page 6); "I was a Chairman without power…never made decisions by myself…my duty was just to transmit orders…I was only the Chairman in theory" (page 7).

"risks provoking...protests of indignation which could lead to violence and perhaps imperil the very safety of the person concerned".[25]

45. The Co-Prosecutors agree with the finding that the safety of the Charged Person would be imperilled if he were released. Since his discovery by Western journalists in 1999, the Charged Person has given many interviews[26] concerning his activities in Democratic Kampuchea ("DK"). He confirmed his previous senior position as Chairman of S-21. He also substantially implicated the most senior leaders and others most responsible for the crimes. During the interviews before the Co-Investigating Judges, the Charged Person has confirmed the existence of S-21 and his position as Chairman. He has alluded to its important role within the security system of the DK regime. He has confirmed that the senior leaders of the regime knew of its existence and its purpose.[27]

46. Evidence submitted in the case file supports the conclusion that the security of the Charged Person would be at risk if released. The Charged Person himself has recognised the dangers posed to his own security by speaking about the DK regime. Upon being discovered working under an assumed name by Western journalists in 1999, it was reported that he "clearly fear[ed] for his life". He often spoke in whispers to the journalists, and at other times asked to be driven to areas where he would not be overheard.[28] In another interview with the same journalist, he admitted: "I fear the people around me. I don't know who is the man of Nuon Chea, of Ta Mok, of Khieu Samphan. I am in danger. My life is at risk...They can kill me".[29]

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[25] Co-Investigating Judges' Order of Provisional Detention, 31 July 2007, para 22.

[26] See, in particular, the interview with the Office of the UNHCHR on 4-6 June 1999, ERN 00002494-00002557 (See Appendix D). See also interview conducted by Nate Thayer and Nic Dunlop, reported in two articles by Nate THAYER in the *Far Eastern Economic Review,* May 13, 1999: "Death in Detail" (ERN 00087513-00087514) (See Annex E) and "I am in Danger" (See Appendix F) and in the book by Nic DUNLOP entitled *The Lost Executioner: A Story of the Khmer Rouge* (Bloomsbury: 2005), pages 270-278 (See Appendix B).

[27] See, for example, *procès-verbal*, English version, 7 August 2007 (in particular pages 5 and 6), *procès-verbal*, English version, 23 August 2007 (in particular pages 3, 5 and 9) and *procès-verbal*, English version, 5 September 2007 (in particular pages 5, 6 and 7).

[28] Nate THAYER, "Death in Detail", *Far Eastern Economic Review*, 13 May 1999 (ERN 00087513-00087514) (See Appendix E).

[29] See Nate THAYER, "I am in Danger", *Far Eastern Economic Review,* May 13, 1999 (ERN 00087513-00087514) (See Appendix F): "I don't want any man to know our [Duch and Thayer's] relationship...They will make me unsafe...I fear the people around me. I don't know who is the man of Nuon Chea, of Ta Mok, of Khieu Samphan. I am in danger. My life is at risk...They can kill me. They will say I am the man of the CIA who sold out to the USA" (See Appendix F).

47. Threats posed to the Charged Person by other suspects have been recognised internationally. Thomas Hammerberg, former Special Representative of the United Nations to Cambodia on Human Rights, has expressed his concerns.[30] Amnesty International, too, issued an "Urgent Action" on 23rd April 1999 in which they considered that the Charged Person "may be killed to stop him testifying against others involved in crimes against humanity".[31]

48. Threats to the Charged Person's security may also be posed by victims or their families. As the former Chairman of S-21 he is a likely target for those who seek retribution. As has been observed by the Special Court for Sierra Leone, where a tribunal sits directly in the territory where the alleged crimes were committed there are special sensitivities to be borne in mind when a court is considering the release of an accused.[32]

49. The Co-Prosecutors submit that the passage of time has not diminished the relevance of these threats to the Charged Person. After many years of negotiations, the ECCC is now a reality. The commencement of judicial operations has significant implications for the security of the Charged Person. His recent appearance before the Co-Investigating Judges has created immense media interest. His recent photograph has appeared in virtually every newspaper and on television stations in Cambodia. Despite his many years spent under an assumed name, the whole country is now familiar with him and the allegations against him. The Defence allege that there were no attacks on the Charged Person's personal safety between 1979 and 1999. This is unsurprising given his multiple changes of name, employment and locality. However, in the minds of the Cambodian population he is now firmly associated with the Khmer Rouge regime in general and the crimes at S-21 in particular. Every decision taken by the ECCC in relation to his case is widely reported in the media. Any release of the Charged Person would not only create similarly massive interest but, given what is now widely known in Cambodia about the allegations against him, real dangers for his personal safety.

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[30] See Nate THAYER, "I am in Danger", *Far Eastern Economic Review,* May 13, 1999 (ERN 00087513-00087514) (See Appendix F).

[31] See Amnesty International, Urgent Action 93/99, "Fear for Safety" 29 April 1999 AI Index ASA 23/08/99 (See Appendix G).

[32] *Prosecutor v Issa Hassan Sesay,* Decision on Application of Issa Sesay for Provisional Release, Case No. SCSL-04-15-PT, SCSL Trial Chamber, 31 March 2004, para 55.

50. For all these reasons, there was thus no "discernable error" in the Co-Investigating Judges' exercise of discretion in finding that provisional detention is a necessary measure to ensure the personal security of the Charged Person. Alternatively, the Defence has failed to prove that there would be no dangers to the security of the Charged Person should he be released.

Ground 3

Preserving Public Order (rule 63.3.b.v)

51. The Co-Investigating Judges determined that provisional detention was a necessary measure to preserve public order, identifying the "fragile context of today's Cambodian society"[33] as a relevant factor.

52. The Co-Prosecutors agree with the finding that the release of the Charged Person risks provoking "protests of indignation which could lead to violence".[34] There has never been any trial of suspects for the crimes of the DK regime, under which approximately a quarter of the population died. The commencement of judicial activities before the ECCC may pose risks to Cambodian society.[35]

53. The Defence argue that thirty years after the occurrence of the facts in question, the risk of disorder no longer remains relevant. This assertion is disputed by the Co-Prosecutors. The impact of the systematic crimes of the DK regime, in which more than 1.7 million Cambodians were killed, continues to this day. Recent nationwide public fora and outreach projects in anticipation of the trials have raised public awareness even further. Public anticipation is high. It is likely that the risk of a volatile and unpredictable situation will increase as memory and suffering is reactivated by commencement of ECCC process. It is also likely that there would be negative reactions among the population to any provisional release of the senior leaders and others most responsible for the crimes of the DK regime during this process.

54. For all these reasons, there was thus no "discernable error" in the Co-Investigating Judges' exercise of discretion in finding that provisional detention is a necessary measure to

[33] Co-Investigating Judges' Order of Provisional Detention, 31 July 2007, para 22.
[34] Co-Investigating Judges' Order of Provisional Detention, 31 July 2007, para 22.
[35] See also Geerteke JANSEN, *Voices of Takeo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia* (Phnom Penh: Documentation Center of Cambodia, October 2006) (see Appendix H).

preserve public order. Alternatively, the Defence has failed to prove that there would be no dangers to public order should the Charged Person be released.

Additional Ground 4

Exerting Pressure on Witnesses (rule 63.3.b.i)

55. The Co-Investigating Judges did not specifically address the Co-Prosecutors' submissions as pleaded in paragraph 118.c of the Introductory Submission and as elaborated in the adversarial hearing that provisional detention is a necessary measure to prevent the Charged Person from exerting pressure on witnesses. It can be inferred from this omission that the Co-Investigating Judges have failed to exercise their discretion on this point at all. The Co-Prosecutors submit that, in the absence of any finding by the Co-Investigating Judges, the Pre-Trial Chamber is entitled to substitute its own discretion. The Co-Prosecutors' submissions on this additional ground are thus as follows.

56. As Chairman of the most important security center in DK, the Charged Person ran S-21 along highly secretive lines. Communications between and amongst detainees and staff were strictly controlled. Under his authority, more than 14,000 inmates were detained, tortured and executed, out of which number only a handful survived. Under his authority, S-21 staff were themselves subjected to a harsh regime, with those who did not strictly obey the rules being arrested for treason, tortured and killed in the Centre. This contributed to a "ubiquitous feeling of fear among the young comrades" serving as prison guards.[36]

57. These survivors from S-21, whether former inmates or staff, are crucial witnesses. Some of them have been interviewed by scholars or journalists. Their identities in some cases are thus well-known. Many of these potential witnesses are elderly, some are in poor health and none currently have the benefit of any extensive measures to protect their safety. It is expected that the majority of these potential witnesses will be able to speak to the Charged Person's authority and influence, and will be able to assist the Co-Investigating Judges in determining his responsibility for the crimes under investigation.

[36] See the book by EA Meng-Try and SIM Sorya, *Victims and Perpetrators – Testimony of Young Khmer Rouge Comrades*, (Phnom Penh: Documentation Center of Cambodia, 2001), page 35 (Introductory Submission document number 4.31, ERN 00079767) (See Appendix I).

58. It is likely that any interference, pressure or harm on the very small number of such remaining potential eye-witnesses to the events at S-21 would be highly publicised. This would have serious adverse consequences on the willingness of other such witnesses to come forward, and would severely prejudice the investigation. The Trial Chamber in the ICTY case of *Prosecutor v Haradinaj*[37] has very recently spoken of "the need to ensure the integrity of the proceedings by avoiding any ... risk that the parties will not be able to adduce the necessary evidence in support of their respective cases".[38] This approach is commended to the Pre-Trial Chamber.

59. As has been discussed already, the Charged Person has asserted that his authority was limited and that his Chairmanship of S-21 was in theory only.[39] It is anticipated that the potential witnesses will contradict this. The Charged Person thus has a substantial motive to exert pressure on these witnesses.

60. Reports have shown that amongst all potential witnesses to the crimes of the DK regime there is a widespread fear of testifying before the ECCC, based on concerns of revenge and intimidation.[40] This should be seen in the light of the overall situation in the country, where there is little if any witness protection measures and where there is still a high incidence of violent crime and access to weapons and explosives.[41]

61. It is likely that the Charged Person has continuing contacts with former Khmer Rouge, and may even have some support in certain areas. He stated to journalist Nic Dunlop in 1999

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[37] *Prosecutor v Haradinaj*, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, Case No. IT-04-84-T, ICTY Trial Chamber, 20 July 2007.

[38] *Prosecutor v Haradinaj*, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, Case No. IT-04-84-T, ICTY Trial Chamber, 20 July 2007, para 30.

[39] See paragraph 35 above.

[40] See: Geerteke Jansen, *Voices of Takeo: A Pilot Fear Assessment with Respect to Possible Witnesses of the Extraordinary Chambers in the Courts of Cambodia*, (Phnom Penh: Documentation Center of Cambodia, October 2006 (see Appendix H).

[41] See Japan Assistance Team for Small Arms Management in Cambodia, "Weapons Collection Record 2005-2007" (JSAC, 2007), showing 16,940 small arms, 66,373 rounds of ammunition and 8,754 explosives collected in Kompong Thom and Battambang provinces between September 2005 and August 31, 2007 (See Appendix J); Christine WILLE, "How Many Weapons Are There in Cambodia?", Small Arms Survey Working Paper (Geneva: Small Arms Survey, 2005), estimating that between 22,000 and 85,000 illegally held arms are still circulating in Cambodia (See Appendix K); "Summary of the Speech of Mr. Thor Saron, Cambodian Judge", in *National Workshop Report on Awareness Raising in Arms Law, July 16-18, 2006*, pages 15-16 (Working Group on Weapons Reduction, 2006), discussing the problems that small arms cause in Cambodian society (See Appendix L). See also "Weapons burned to help banish deadly legacy of Cambodia's Khmer Rouge", *Associated Press*, March 30, 2005, describing the ceremonial burning of 3,500 guns, rocket launchers and other munitions as part of an attempt to decommission surplus arms left over from Cambodia's conflicts (see Appendix M).

that he would "be protected" if he moved to Samlaut, a town with strong Khmer Rouge support.[42] Such support increases the risk that he may enlist others to assist him in exerting pressure on witnesses.

62. During the adversarial hearing, the Defence submitted that the Charged Person did not know the names of any potential witnesses. However, during his interviews before the Co-Investigating Judges he has already volunteered the names of detainees at S-21 who may become witnesses before this court. His claim that he does not know the names of any witnesses is false. In any event, the full case file has been made available to him, including the names of potential witnesses who may testify against him. Armed with this knowledge, he has the potential to exert pressure upon them.

63. The Pre-Trial Chamber is therefore entitled to find that grounds exist to justify the conclusion that provisional detention is a necessary measure to prevent the Charged Person exerting pressure on witnesses and victims.

Reliance on individual ICTY cases where release has been granted

64. The Defence have asserted that there are precedents for the provisional release of persons suspected of serious international crimes before other tribunals. All of these cases can be clearly distinguished on factual grounds.[43] It is of limited value whether, *in general*, provisional release for cases involving serious international crimes has been granted or not. It is a recognized international standard that decisions on provisional detention need to address the particular circumstances of the instant case.[44] The Pre-Trial Chamber is invited to conclude that the Defence argument on this point is of minimal assistance.

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[42] See book by Nic DUNLOP entitled *The Lost Executioner: A Story of the Khmer Rouge* (Bloomsbury: 2005), page 252 (See Appendix B).

[43] *Haradinaj, Ademi and Hadzihasanovic*, so-called "flip-side accused" were all commanders of defending armies whose crimes were substantially inferior to the Serb accused: *Prosecutor v Haradinaj*, Decision on Ramush Haradinaj's Motion for Provisional Release, Case No. IT-04-84-PT, ICTY Trial Chamber, 6 June 2005; *Prosecutor v Ademi*, Decision on Motion for Provisional Release, Case No. IT-01-46-PT, ICTY Trial Chamber, 20 February 2002; *Prosecutor v Hadzihasanovic*, Decision Granting Provisional Release to Enver Hadzihasanovic, Case No. IT-01-47-PT, ICTY Trial Chamber, 19 December 2001. These accused were prosecuted for individual murders charged as war crimes / crimes against humanity. In fact the latest Trial Chamber judgment from *Prosecutor v Haradinaj* denied the accused provisional release during the summer recess, despite strong grounds to justify otherwise, on the basis of witness interference: *Prosecutor v Haradinaj*, Decision on Motion on Behalf of Ramush Haradinaj for Provisional Release, Case No. IT-04-84-T, ICTY Trial Chamber, 20 July 2007.

[44] *Prosecutor v Ljube Boskoski and Johan Tarculovski*, Decision on Johan Tarculovski's Interlocutory Appeal on Provisional Release, Case No. IT-04-82-AR65.4, ICTY Appeals Chamber, 27 July 2007, para 6.

No Error in Rejecting the Imposition of Bail Conditions

65. The Co-Investigating Judges ruled that no bail order would be rigorous enough to sufficiently satisfy the needs of ensuring the presence of the Charged Person, the protection of his personal safety and the preservation of public order.[45]

66. The Co-Prosecutors support this reasoning. The only form of judicial supervision envisaged by the Internal Rules is a bail order under rule 65. The Co-Investigating Judges are empowered, either at the request of the parties or on their own motion, to release the Charged Person and may order the payment of a bail bond and/or the imposition of such conditions as are necessary to ensure the presence of the person during the proceedings and the protection of others. Such conditions are not further defined.

67. The new Cambodian criminal procedure code has only recently introduced the concept of a bail order.[46] There is no precedent, practical experience or proven capacity to provide either safeguards or enforcement mechanisms for suspects who may be released on bail, particularly for those suspects with the notoriety of the Charged Person. In any event, the Defence have provided no facts in support of how any proposed judicial supervision of the Charged Person at liberty would operate, where he would live and how he would be kept apart from witnesses, victims or accomplices.

Conclusion

68. The Defence Appeal has failed to demonstrate that the impugned decision of the Co-Investigating Judges is suffering from any discernable error. The Co-Investigating Judges decision was not based on an incorrect interpretation of the law governing provisional detention. On the contrary, rule 63 of the Internal Rules was strictly applied. Nor has it been demonstrated that the decision was based on patently incorrect conclusions or amounted to an abuse of discretion. The Co-Investigating Judges were fully justified in reaching the conclusions they did.

69. Considering the grounds for provisional detention as argued above, there was thus no "discernable error" in the Co-Investigating Judges' exercise of discretion in finding that

[45] Co-Investigating Judges' Order of Provisional Detention, 31 July 2007, para 23.
[46] Articles 223-230 of the Cambodian Criminal Procedure Code, 2007.

there are no bail conditions which would both adequately guarantee the presence of the Charged Person during the proceedings and ensure the protection of others.

SUBMISSION B

NO ERROR IN FAILING TO IMMEDIATELY RELEASE THE CHARGED PERSON

70. The Defence submit that even if the grounds of detention are met there has been such a fundamental breach of the Charged Person's rights in being detained by order of the Military Court for over eight years that, as a minimum, he should be immediately released from provisional detention.

71. The Co-Investigating Judges rejected the Defence submission for two reasons. Firstly, the judges reasoned that the ECCC does not have the jurisdiction to determine the legality of the Charged Person's prior detention.[47] Such violations as there may have been of the Charged Person's rights are not attributable to the ECCC. Secondly, they held that such violations do not in any event reach the level of seriousness required for the court to intervene. Any remedy for such violations, therefore, is not at issue during the investigative phase.[48]

Part I

Violations not attributable to ECCC

72. The Co-Investigating Judges held that they had no jurisdiction to determine the legality of the prior detention of the Charged Person on the basis that[49]

(i) The ECCC only became operational on 22 June 2007, the date of entry into force of the Internal Rules; and

(ii) Prior to the initiation of the current judicial investigation, the Co-Investigating Judges, as sole authority empowered to decide upon provisional detention, had no means of intervening.

73. The Charged Person has been detained since 1999 by the Military Court.

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[47] Paragraph 20.
[48] Paragraph 21.
[49] Paragraph 20.

74. The Defence submit that by ordering that the Charged Person be provisionally detained for an "additional" year, the Co-Investigating Judges have "validated" the previous detention orders of the Military Court. It appears that the Defence are arguing that the ECCC proceedings are a continuation of the Military Court proceedings, and that the Co-Investigating Judges' order for provisional detention compounds the previous detention such that the Pre-Trial Chamber must provide a remedy.

75. The Co-Prosecutors note that as soon as the Co-Investigating Judges were seised of the Charged Person's case, they acted within 12 days.[50]

76. The Co-Prosecutors submit that, rather than a "validation" of the prior detention ordered by the Military Court, the Co-Investigating Judges' order was an independent judicial decision taken in the exercise of their unique jurisdiction, in that:

(i) The ECCC is an independent judicial entity, separate from the Military Court.

(ii) The ECCC has never acted in concert with nor has it adopted the actions of the Military Court.

(i) ECCC's Independence

77. The ECCC and the domestic Military Court have no judicial interdependence and legal or functional link. The ECCC is not subject to control or review by national authorities. Nor can it bind or compel other courts in Cambodia. On the contrary, the ECCC has distinct characteristics which make it a "special internationalised tribunal":[51]

(i) It was created by international treaty;[52]

(ii) It was created to address serious violations of national and international law which were "of vitally important concern to the international community",[53] and

[50] Paragraph 20 – this is the time lapse between the lodging of the Introductory Submission and the arrest warrant.
[51] In the words of the Co-Investigating Judges in their Order For Provisional Detention, paragraph 20.
[52] The Agreement Between the Royal Government of Cambodia and the United Nations – Court document.
[53] See The Agreement Between the Royal Government of Cambodia and the United Nations – Court document. See also UN General Assembly Resolutions: Situation of Human Rights in Cambodia, GA Res 52/135, 27 February 1998, A/RES/52/135; Khmer Rouge Trials, GA Res 57/228 A, 27 February 2003, A/RES/57/228 A; Khmer Rouge Trials, GA Res 57/228B, 22 May 2003, A/RES/57/228 B

is therefore "part of the machinery of international justice"[54] to combat such crimes;

(iii) Its jurisdiction is very different to the national courts of Cambodia, limited both materially,[55] temporally[56] and personally;[57]

(iv) No appeal lies to other courts in Cambodia from the judgments of the ECCC;

(v) It has a limited life-span, dissolving following the definitive conclusion of the proceedings;[58]

(vi) It has unique structural characteristics unparalleled in the domestic courts:

(a) Autonomous international judges and prosecutors who are independent from the national judicial hierarchy;

(b) A Pre-Trial Chamber dispute resolution mechanism;

(c) A super-majority voting system;

(d) The senior international judicial officers are afforded "privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations";[59]

78. The Appeals Chamber of the Special Court of Sierra Leone ("SCSL") in the case of *Prosecutor v Charles Taylor* found a number of these features relevant to the consideration that the SCSL was an international court.[60] Particularly persuasive were the facts that the SCSL was established by treaty; that its creation was "an expression of the will of the international community"[61] and "part of the machinery of international justice";[62] and that

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[54] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, SCSL Appeals Chamber, 31 May 2004, para 39.
[55] Limited to the prosecution of specific crimes under the 1956 Penal Code (homicide, torture and religious persecution), genocide, crimes against humanity, grave breaches of the Geneva Conventions, destruction of cultural property and crimes against internationally-protected persons (see Articles 3-8, ECCC Law).
[56] Limited to crimes committed between 17 April 1975 and 6 January 1979 (Article 2 of the ECCC Law).
[57] Limited to the senior leaders of the Khmer Rouge and others most responsible for (Article 2 of the ECCC Law).
[58] Article 47 of the ECCC Law.
[59] Article 41 of the ECCC Law.
[60] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, SCSL Appeals Chamber, 31 May 2004, paras 41-2.
[61] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, SCSL Appeals Chamber, 31 May 2004, para 38.

its jurisdiction in trying international crimes of the utmost seriousness is broadly similar to the ICTY, ICTR and ICC.[63]

(ii) No Concerted Action Between the ECCC and the Military Court

79. The ECCC has never acted in concert with the Military Court. The fact that the Military Court invoked ECCC law in ordering detention of the Charged Person is of no consequence. To evaluate the ECCC's responsibility for the actions of the Military Court the focus must be on the conduct of the ECCC itself.

80. Only if an internationalised court can be said to have acted "in concert" with the national authorities can liability for the latter's actions be imputed to the former.[64] Additionally, mere knowledge on the part of international judicial authorities of the investigations or actions carried out by national authorities has been held[65] to be no proof of involvement by the international authorities in such investigations or in how they were conducted.

81. In opening a judicial investigation against the Charged Person the Co-Investigating Judges of the ECCC commenced entirely separate proceedings against him from those ongoing in the Military Court. There is no judicial continuity, either in fact or in law, as between the proceedings before the Military Court and between the ECCC:

(i) The ECCC never requested the Military Court to detain the Charged Person;

(ii) The Co-Prosecutors of the ECCC conducted their own preliminary investigation rather than continuing the Military Court's investigation;

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[62] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, SCSL Appeals Chamber, 31 May 2004, para 39.

[63] *Prosecutor v Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, Case No. SCSL-2003-01-I, SCSL Appeals Chamber, 31 May 2004, para 41(c).

[64] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, Case No. 01/04-01/06, Pre-Trial Chamber of the ICC, 3 October 2006, page 10, consolidating the previous analyses in the cases of *Prosecutor v Dragan Nikolic*, Decision on Interlocutory Appeal Concerning Legality of Arrest, ICTY Appeal Chamber, Case No. IT-94-2-AR73, 5 June 2003, para 30 and *The Prosecutor v Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, 3 November 1999, paras 74 – 77.

[65] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Case No. 01/04-01/06 (OA4), Appeals Chamber of the ICC, 14 December 2006, para 42.

(iii) The Charged Person is not before the ECCC by way of transfer of jurisdiction from the Military Court, but rather through a warrant of arrest, independently issued by the Co-Investigating Judges of ECCC under their own authority;

(iv) The complete files of the Military Court have never been placed before the Co-Investigating Judges.

82. The ECCC has acted appropriately in accordance with its own Law and Internal Rules. It has neither acted in concert nor ratified or validated the actions of the Military Court. The ECCC cannot, therefore, be held responsible for the actions of this separate judicial entity. Such violations as there may have been of the Charged Person's rights are therefore not attributable to the ECCC.

83. Finally, the Defence do not indicate whether, and to what extent, they have appealed the Military Court's successive orders for provisional detention. It would appear that the Charged Person has been represented by the same defence counsel throughout the proceedings in the Military Court. The Co-Prosecutors submit that the Pre-Trial Chamber should examine the extent to which the Charged Person has exhausted his remedies of appeal before the Military Court if he is to assert that the ECCC, a court with distinct jurisdiction, should itself provide a remedy for breaches in the Military Court.

Part II

No Residual Basis for Providing Charged Person with a Remedy

84. The Co-Prosecutors support the reasoning of the Co-Investigating Judges who held that there was no residual basis for providing the Charged Person with a remedy on the following grounds:[66]

(i) Prolonged detention of the Charged Person under the jurisdiction of the Military Court cannot be considered a sufficiently grave violation of his rights to require an immediate remedy; and

(ii) Any eventual remedy for such detention is not at issue during the investigative phase of the proceedings.

[66] Paragraph 21.

(i) Prolonged detention insufficiently grave a violation in itself

85. In the absence of any formal relationship between independent international and national courts, and in the absence of any "concerted action" between them, the basis upon which an international (and therefore an internationalised) court may provide a remedy for breach of a suspect's rights before a national court is strictly limited.

86. The Appeals Chamber of the International Criminal Court in the case of *Thomas Lubanga Dyilo*[67] confirmed the judgment of its own Pre-Trial Chamber which had stated that providing an additional guarantee of the rights of the accused was: *"confined to instances of torture or serious mistreatment by national authorities of the custodial State in some way related to the process of arrest and transfer of the person to the relevant international tribunal."*[68]

87. The Defence have asserted that there have been serious violations of the Charged Person's rights to trial within a reasonable time. They have relied extensively on ECHR jurisprudence and referrals to the HRC. All these cases deal with ordinary "national" crimes. None of them relate to serious violations of international humanitarian or international criminal law. Defence reliance on these cases appears largely dependant upon a specific implied assertion that the ECCC's proceedings are a continuation of the Military Court's proceedings. As has been submitted, there has in fact been no continuity.

88. The quoted ECCC of ECHR and HRC cases illustrate that excessive pre-trial detention is unlawful according to international standards of the right to trial within a reasonable time. The existence of such an international standard is not in dispute. However, the Co-Prosecutors question the relevance of such jurisprudence to the particular circumstances of the Charged Person's case. On the contrary, the jurisprudence from international and internationalised tribunals is far more helpful,[69] which demonstrates that only where there

[67] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute of 3 October 2006, Case No. 01/04-01/06 (OA4), Appeals Chamber of the ICC, 14 December 2006, para 40.

[68] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, Case No. 01/04-01/06, Pre-Trial Chamber of the ICC, 3 October 2006, page 10.

[69] *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v Thomas Lubanga Dyilo*, Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19(2)(a) of the Statute, Case No. 01/04-01/06, Pre-Trial Chamber of the ICC, 3 October 2006; *Prosecutor v Dragan Nikolic*, Decision on

is evidence of torture or serious mistreatment must a tribunal trying serious international crimes provide an immediate remedy for breaches occurring in a national court.

89. The Defence have not suggested that the Charged Person was subjected to torture or serious mistreatment during his detention by the Military Court, let alone any such actions being related to the process of his arrest and transfer to the ECCC.

90. In the absence of evidence of any such torture or serious mistreatment, and if the grounds for provisional detention are met, the ECCC has no basis upon which to order the Charged Person's release from provisional detention.

(ii) No remedy for lesser violations at the investigative phase

91. On the face of the record, the Co-Prosecutors do not disagree that the Charged Person's detention before the Military Court may very well be problematic in the light of international standards of justice. As has been discussed however, the remedy of immediate release is not available to the ECCC. Nevertheless, there may be limited circumstances in which the Charged Person could be provided with a remedy.

92. It has been held before the ICTR[70] that breaches of an accused's rights falling short of torture or serious mistreatment may result in remedies at the conclusion of a trial. This may involve financial compensation in the event of an acquittal or a reduction in sentence in the event of a conviction.[71]

93. Such remedies are entirely at the discretion of the Trial Chamber. Neither the Co-Investigating Judges nor the Pre-Trial Chamber can bind the Trial Chamber on matters of such a discretionary remedy, which, as was correctly observed by the Co-Investigating Judges "is not at issue during the investigative phase".[72]

Interlocutory Appeal Concerning Legality of Arrest, ICTY Appeal Chamber, Case No. IT-94-2-AR73, 5 June 2003, and *Prosecutor v Jean Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, 3 November 1999.

[70] *Prosecutor v Jean Bosco Barayagwiza*, Prosecutor's Request for Review or Reconsideration, Case No. ICTR-97-19-AR72, ICTR Appeals Chamber, 31 March 2000.

[71] The sentencing court in *Barayagwiza* followed the Appeals Chamber review decision by reducing the accused's sentence upon conviction to take into account the time served in the custody of the domestic jurisdiction. See *Prosecutor v Jean Bosco Barayagwiza*, Judgment and Sentence, Case No. ICTR-99-52-T, ICTR Trial Chamber, 3 December 2003.

[72] Co-Investigating Judges' Order of Provisional Detention, 31 July 3007, para 21.

REQUEST

94. The Prosecution, therefore, requests the Pre-Trial Chamber to DISMISS the Defence Appeal in totality other than its request for the oral hearing to be held in public.

Respectfully submitted

Signed in Phnom Penh, Kingdom of Cambodia on this third day of October 2007 on behalf of the Co-Prosecutors.

YET Chakriya	William SMITH
Deputy Co-Prosecutor	Deputy Co-Prosecutor