



អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER  
CHAMBRE PRELIMINAIRE

Criminal Case File No. 002/12-09-2007-ECCC (PTC04)

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..... SANN BADA .....	

Phnom Penh, 22 April 2008

**REPORT OF EXAMINATION (PUBLIC VERSION)**

- I- Proceedings
- II- Examination of the case by the co-rapporteurs

<b>ឯកសារបានត្រឹមត្រូវតាមច្បាប់ដើម</b>	
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..... SANN BADA .....	

**I- PROCEEDINGS**

**A) Introduction**

Pursuant to Rule 77(10) of the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (“the Internal Rules”), the President of the Pre-Trial Chamber has assigned Judges Huot Vuthy and Rowan Downing to set out the details of the decision of the Co-Investigating Judges to make a Provisional Detention Order, against which an appeal has been lodged, and of the relevant facts of Case File No. 002/12-09-2007-ECCC (PTC04).

Identification of the Charged Person

*Khieu Samphan*, alias Hem, male, born on 27 July 1931, at Commune of Rom Chek, District of Rom Duol, Province of Svay Rieng, Cambodia, Khmer nationality pre-arrest address village of Konkoung Sangkat Otavao, Khan Pailin, Pailin City, father’s name Khieu Long (deceased), mother’s name Por Kong (deceased), spouse’s name So Socheat, with four children.

Khieu Samphan is represented by Co-Lawyers Mr. Say Bory and Mr. Jacques Vergès.

### Charges

Khieu Samphan is under investigation for crimes against humanity (murder, extermination, imprisonment, persecution and other inhuman acts) and grave breaches of the Geneva Conventions of 12 August 1949 (wilful killing, wilfully causing great suffering or serious injury to body or health, wilful deprivation of rights to a fair trial of a prisoner of war or civilian, unlawful deportation or transfer or unlawful confinement of a civilian), being crime(s) set out and punishable under articles 5, 6, 29(new) and 39(new) of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia dated 27 October 2004 (the "ECCC Law"):

"for having, throughout Cambodia during the period from 17 April 1975 to 6 January 1979:

- in his capacity as Head of State (Chairman of the State Presidium), a leader within the Centre Political Office (Office 870), and as a full-rights member of the Central Committee of the Communist Party of Kampuchea (CPK),
- instigated, or otherwise aided and abetted in the commission of the aforementioned crimes;
- by directing, encouraging, enforcing, or otherwise rendering support to CPK policy and practice which was characterised by murder, extermination, imprisonment, persecution on political grounds and other inhumane acts such as forcible transfers of the population, enslavement and forced labour;
- as part of a widespread or systematic attack targeting a civilian population;
- noting that there was a state of international armed conflict between Democratic Kampuchea and the Socialist Republic of Vietnam during all or part of the period between 17 April 1975 and 6 January 1979."<sup>1</sup>

#### **Purpose of this report**

This report of the co-rapporteurs sets out the details of the decision appealed against and the facts at issue before this court. It is to assist those who are not parties to the proceedings understand the matters before the court.

#### **B) Co-Prosecutors' request for provisional detention**

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<sup>1</sup> Written Record of Initial Appearance, 19 November 2007, D42, p. 3.

On 18 July 2007, the Co-Prosecutors of the ECCC filed an Introductory Submission in which they asked the Co-Investigating Judges to open a judicial investigation against a number of suspects, including Khieu Samphan, and asked that all suspects be arrested and detained.<sup>2</sup>

The Co-Prosecutors requested that Khieu Samphan be placed in provisional detention on the grounds that there are well-founded reasons to believe that he is guilty of the aforementioned crimes and that such detention is necessary to prevent pressure on witnesses, ensure his presence at the trial, protect his personal safety and preserve public order.<sup>3</sup>

### C) Detention Order of the Co-Investigating Judges

On 16 November 2007, the Co-Investigating Judges issued an arrest warrant to bring Khieu Samphan before the Court.<sup>4</sup> On 19 November 2007, Khieu Samphan was arrested and brought before the Co-Investigating Judges for his initial appearance.<sup>5</sup> Khieu Samphan agreed that the adversarial hearing on provisional detention should take place immediately but requested a suspension of the hearing to consult his lawyer. The same day, after a one-hour adjournment, the adversarial hearing proceeded<sup>6</sup> and the Co-Investigating Judges issued a Provisional Detention Order for a period not exceeding one year.<sup>7</sup>

### Factual situation and legal issues raised in the Decision

The Co-Prosecutors requested the provisional detention of Khieu Samphan on the following grounds:

“there is a danger that he will flee, as he lives near the Thai border and now faces a maximum sentence of life imprisonment if convicted; that, if he remains at liberty, this could provoke the anger of victims and the public (especially because, since arrests have been made, the number of complaints is constantly increasing); that there would, thus, be a danger of disruption of public order and acts of revenge that could place the personal security of the Charged Person at risk, as shown by the violence to which he was subjected in 1991 at the time of his return to Phnom Penh; that most of the witnesses are former subordinates of KHIEU Samphan and would no longer dare to testify if he remains at liberty. They stressed that he was Head of State of a regime

<sup>2</sup> Introductory Submission, 18 July 2007, para. 124.

<sup>3</sup> Introductory Submission, para. 118.

<sup>4</sup> Arrest Warrant, 16 November 2007, C24.

<sup>5</sup> Record of the Suspect's Arrest, 19 November 2007, C24/I.

<sup>6</sup> Written Record of Adversarial Hearing, 19 November 2007, C25.

<sup>7</sup> Provisional Detention Order, 19 November 2007, C26.

responsible for 1.7 million victims; that, while it is true that he was not a member of the CPK Standing Committee, he was present during its meetings; and that he never made the slightest declaration or intervention to prevent the crimes.”<sup>8</sup>

At the adversarial hearing, Khieu Samphan disputed the allegations. He argued that it was not sufficient for the Co-Prosecutors to recall the functions he had occupied and that, in fact, he had no effective power within the Democratic Kampuchea Regime. He declared that as Chairman of the State Presidium, he only had a representative role, that he was never Chairman of Office 870, that the Central Committee had no decisive power and that when he attended some “widened” meetings of the Standing Committee, of which he was not member, it was only to be informed of general issues.<sup>9</sup>

Furthermore, Khieu Samphan argued that the conditions for provisional detention were not satisfied because:

“he never had the intention to escape, that the risk of disrupting public order was inexistent (*sic*), noting that, since 1998 when he rallied the Government, he has lived in several houses in Pailin without any specific protection [...] and that the 1991 events, of which he was victim, intervened in the specific context of the application of the Paris Agreements.”<sup>10</sup>

The issues before the Co-Investigating Judges were (i) whether, pursuant to Rule 63(3)(a), there are well-founded reasons to believe that Khieu Samphan may have committed the crimes with which he has been charged and (ii) whether provisional detention is a necessary measure pursuant to the criteria set out in Rule 63(3)(b).

### **Conclusion of the Co-Investigating Judges**

The Co-Investigating Judges decided as follows:

“In light of the many documents and witness statements contained in the Case file, there are well-founded reasons to believe that KHIEU Samphan is criminally responsible for the acts with which he is charged. In particular, as a senior CPK

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<sup>8</sup> Provisional Detention Order, para. 3.

<sup>9</sup> Provisional Detention Order, para. 4.

<sup>10</sup> Provisional Detention Order, para. 4.

[Communist Party of Kampuchea] leader and as Head of State, he exercised real authority, as perceived both in Cambodia and abroad.”<sup>11</sup>

They therefore found that the requirement under Rule 63(3)(a) had been satisfied.

The Co-Investigating Judges determined that provisional detention was a necessary measure with reference to the grounds set out in Rule 63(3)(b) (i), (iv) and (v). They first found that provisional detention was necessary to protect public order and Khieu Samphan’s security:

“These crimes are of a gravity such that, 30 years after their commission, they still profoundly disrupt public order to such a degree that it is not excessive to conclude that a decision to leave the Charged Person at liberty would, in the fragile context of today’s Cambodian society, risk provoking protests of indignation which could lead to violence and perhaps imperil the very safety of the charged person, given that the situation is clearly no longer perceived in the same way since the official prosecution has commenced.”<sup>12</sup>

They further stated that if Khieu Samphan were to remain at liberty, it may be feared that he will interfere with witnesses, since he will have access to the whole Case File, including the names of witnesses.<sup>13</sup>

Finally, the Co-Investigating Judges stated that no bail conditions would be rigorous enough to meet the requirements of Rule 63(3)(b) and, therefore, detention remained the only means to achieve these aims.

#### **D) Appeal lodged by Khieu Samphan against the Provisional Detention Order**

On 14 December 2007, Khieu Samphan’s lawyers filed a Notice of appeal against the Provisional Detention Order and, on 21 December 2007, they filed an Appeal Brief.

The Co-Lawyers ask the Pre-Trial Chamber “[t]o declare and rule that Mr Khieu Samphan is no longer a Charged Person, because it has been recognised that Mr Khieu Samphan had no real power of command over any person whatsoever or any unit in the hierarchy and that he was simply

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<sup>11</sup> Provisional Detention Order, para. 5.

<sup>12</sup> Provisional Detention Order, para. 6.

<sup>13</sup> Provisional Detention Order, para. 7.

a Head of State in name only”<sup>14</sup> and “[t]o dismiss the Provisional Detention Order of 19 November 2007 because Mr Khieu Samphan is not guilty”. The Co-Lawyers did not make any submission in their appeal brief regarding the Co-Investigating Judges’ decision that provisional detention is a necessary measure with regard to the grounds set out in Rule 63(3)(b) of the Internal Rules.

### **E) Response of the Co-Prosecutors**

Submissions in response to the Appeal Brief were filed by the Co-Prosecutors on 6 February 2008. By their response, the Co-Prosecutors submit that the appeal should be dismissed in its entirety and the Provisional Detention Order should be confirmed, as the conditions of Internal Rule 63(3) were and are still met.

### **F) Response of the Civil Parties**

On 24 March 2008, the Pre-Trial Chamber allowed Civil Parties to file a response to the Charged Person’s appeal brief within 15 days, a delay which was subsequently extended until 17 April 2008. On 17 April 2008, the Civil Party Co-Lawyers filed a Joint Response to the Appeal of Khieu Samphan against the Provisional Detention Order.<sup>15</sup> By their response, the Co-Lawyers ask that the Defence’s appeal be rejected and support the position of the Co-Prosecutors.

## **II- EXAMINATION BY THE CO-RAPPORTEURS**

### **A) Particular assertions by Khieu Samphan’s Co-Lawyers**

#### **1. The collective accusation**

The Co-Lawyers submit that accusations brought collectively by the Co-Prosecutors against a number of suspects are “gratuitous [...] impersonal and general”<sup>16</sup> and invalid in law.

The Co-Lawyers argue that the Co-Prosecutors’ accusation is a “collective accusation of all the leaders of the CPK”.<sup>17</sup> They contend that the Democratic Kampuchea Party was not illegal during the relevant period.

<sup>14</sup> Appeal Brief Against the Provisional Detention Order of 19 November 2007, 21 December 2007, C26/I/3 (the “Appeal Brief”), p.12.

<sup>15</sup> Civil Party Co-Lawyers’ Joint Response to the Appeal of Khieu Samphan against the Provisional Detention Order, 17 April 2008, C26/I/21 (the “Civil Parties Response”).

<sup>16</sup> Appeal Brief, para. 25

<sup>17</sup> Appeal Brief, para. 24.

The Co-Lawyers further submit that the Co-Prosecutors are “unsure of their accusation regarding the existence of a common criminal plan”.<sup>18</sup> The Co-Lawyers argue that “the general principle of criminal law does not permit accusations based on doubt”<sup>19</sup> and “call for the charge involving the existence of a common criminal plan to be dismissed outright”<sup>20</sup> on the basis of Article 38(6) of the Constitution of the Kingdom of Cambodia. “Consequently, the Co-Lawyers for the Defence call for the collective form of the accusation against Mr Khieu Samphan to be dismissed.”<sup>21</sup>

Finally, the Co-Lawyers submit that “[t]he ECCC are (*sic*) not a political tribunal established to try a political party and a political regime” and that “their jurisdiction is limited to trying individuals, not institutions”.<sup>22</sup> They argue that in the Introductory Submission, “the acts committed by the CPK and the government institutions of DK are lumped together with the individual acts of the 5 suspects in an inadmissible fashion.”<sup>23</sup> Referring to Article 29(new) of the ECCC Law, they submit that “[d]etachable acts, which may also be attributed to each of the suspects, must be specifically identified”<sup>24</sup> and “call on the Pre-Trial Chamber to dismiss all the collective accusations which run counter to the spirit and the letter of the aforementioned Article 29 (New)”<sup>25</sup>.

## 2. The absence of individual fault

The Co-Lawyers first submit that “[t]he information presented in the [Introductory] Submission is essentially based on documents and statements which are not objective and which are false for the most part”.<sup>26</sup> They request that the Pre-Trial Chamber assign “recognised, qualified and independent international experts” in order to evaluate the “authenticity and legality” of “all the documents and statements which formed the basis for the charging of Mr Khieu Samphan”.<sup>27</sup>

<sup>18</sup> Appeal Brief, para. 28.

<sup>19</sup> Appeal Brief, para. 28.

<sup>20</sup> Appeal Brief, para. 29.

<sup>21</sup> Appeal Brief, para. 30.

<sup>22</sup> Appeal Brief, para. 31.

<sup>23</sup> Appeal Brief, para. 32.

<sup>24</sup> Appeal Brief, para. 34.

<sup>25</sup> Appeal Brief, para. 37.

<sup>26</sup> Appeal Brief, para. 40.

<sup>27</sup> Appeal Brief, paras 40 and 41.

The Co-Lawyers further submit that no fault can individually be attributed to Khieu Samphan since he did not have any “real and effective power”<sup>28</sup> within the Democratic Kampuchea Regime. More precisely, the Co-Lawyers allege that:

- (1) “Because of his social background, Mr Khieu Samphan, who was deemed by Pol Pot to be the *son of a ruined feudalist*, could never hold any real and effective power”.<sup>29</sup>
- (2) “The post of President of the Presidium and therefore Head of State was an honorific and formal post, without real and effective powers over any state institution or any person whatsoever”.<sup>30</sup>
- (3) “Mr Khieu Samphan was never appointed or elected ‘Chairman of Office 870’”.<sup>31</sup> As a simple member, he was responsible for fixing the prices of the products, distributing goods of the Angkar and maintaining good relations with Prince Norodom Sihanouk.
- (4) Khieu Samphan had no link with Office S71 and was not in charge of the political education of the persons returning from exile.
- (5) Since the Democratic Kampuchea Party was governed by a rule of secrecy, Khieu Samphan “would not have known very much, even about what was going on around him”.<sup>32</sup>

In application of Article 38(6) of the Constitution of the Kingdom of Cambodia, the Co-Lawyers ask the Pre-Trial Chamber to declare that Khieu Samphan is not guilty of the crimes for which he has been charged.

## **B) Particular assertions by the Co-Prosecutors**

### **Preliminary issues**

#### **1. The Defence’s request for a dismissal order**

In response to the Defence’s request that the Pre-Trial Chamber dismiss the entire case against Khieu Samphan for lack of evidence, the Co-Prosecutors submit that “[a]t this early stage of the judicial investigation, there is no basis in law for the case to be dismissed either by the Co-

<sup>28</sup> Appeal Brief, para. 39.

<sup>29</sup> Appeal Brief, para. 42.

<sup>30</sup> Appeal Brief, para. 45.

<sup>31</sup> Appeal Brief, para. 51.

<sup>32</sup> Appeal Brief, para. 56.



Investigating Judges or by the Pre-Trial Chamber”.<sup>33</sup> They further allege that “the full standard of criminal proof beyond a reasonable doubt is only applied at the conclusion of the trial” and that only at that time “is the evidence evaluated in full and the benefit of any doubt given to an accused”.<sup>34</sup>

2. The Defence’s request for the assignment of experts

The Co-Prosecutors submit that the Co-Lawyers’ request for the assignment of experts should be dismissed for it “fails to particularise which documents or statements are allegedly inauthentic; it fails to provide any arguments in support of this contention; and it fails to specify exactly what type of analysis should be conducted”.<sup>35</sup> They add that “[i]f by ‘legality’ the Defence mean the admissibility, the relevance or the weight of evidence, such issues are exclusively within the competence of the judges of the ECCC”.<sup>36</sup>

### **Provisional Detention**

1. The existence of well-founded reasons to believe that the Charged Person may have committed the crimes specified in the Introductory Submission (Internal Rule 63(3)(a))

The Co-Prosecutors submit that Rule 63(3)(a) requires that there be “some evidence to show that the Charged Person may be criminally responsible for the crimes; that this evidence is essentially consistent; and that the evidence is on its face capable of belief”.<sup>37</sup>

The Co-Prosecutors contend that “the Defence concedes in numerous places that the crimes were indeed committed; their argument is restricted to disputing that KHIEU Samphan himself bears criminal responsibility”.<sup>38</sup> In response to the Co-Lawyers’ assertions that Khieu Samphan is accused collectively, the Co-Prosecutors repeat that Khieu Samphan bears individual responsibility for the crimes specified in paragraphs 122 a-d of the Introductory Submission. According to the Co-Prosecutors, “KHIEU Samphan held high office in the DK regime. He attended and participated in privileged meetings at which CPK and DK policy was discussed, reviewed and created. He was the

<sup>33</sup> Co-Prosecutors’ Response to Khieu Samphan’s Appeal against Provisional Detention Order of 19 November 2007, 6 February 2008, C26/I/9 (“the Co-Prosecutors’ Response”), para. 6.

<sup>34</sup> Co-Prosecutors’ Response, para. 9.

<sup>35</sup> Co-Prosecutors’ Response, para. 20.

<sup>36</sup> Co-Prosecutors’ Response, para. 21.

<sup>37</sup> Co-Prosecutors’ Response, para. 25.

<sup>38</sup> Co-Prosecutors’ Response, para. 33.

Chairman of Office 870, one of the most important and secretive offices in the DK regime. He delivered speeches nationally and internationally in support and justification of the regime.”<sup>39</sup>

The Co-Prosecutors further draw the attention of the Pre-Trial Chamber to some illustrations, which, in their view, “demonstrate Khieu Samphan’s individual knowledge and participation”<sup>40</sup> in such crimes. Considering that the investigation shall remain confidential at this stage of the proceedings, the particular assertions made by the Co-Prosecutors with this respect have been redacted from the public version of the Report of examination.

2. Provisional Detention as a necessary measure (Internal Rule 63(3)(b))

The Co-Prosecutors first point out that while “the Defence made submissions on the individual grounds for provisional detention” at the adversarial hearing, “none of these submissions were further elaborated in the written Defence Appeal”.<sup>41</sup>

The Co-Prosecutors submit that according to international jurisprudence, “the burden of proof falls on the charged person to show that the factors justifying provisional detention do not exist”.<sup>42</sup>

*Necessary measure to prevent the Charged Person from exerting pressure on any witnesses or victims, or to prevent collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC (Internal Rule 63(3)(b)(i))*

The Co-Prosecutors first submit that contrary to Khieu Samphan’s assertion, “there is credible evidence to suggest that the Charged Person had a significant number of staff under his command at Office 870”. They further allege that Khieu Samphan “has been a powerful and influential man in Cambodia for most of his adult life”<sup>43</sup> and that he “continues to enjoy popular support in the Pailin area of Cambodia, a region traditionally described as a Khmer Rouge stronghold.”<sup>44</sup> According to the Co-Prosecutors, “KHIEU Samphan’s influence particularly still exists and extends over those who witnessed and who were victims of the crimes committed in the DK era”.<sup>45</sup>

<sup>39</sup> Co-Prosecutors’ Response, para. 38.

<sup>40</sup> Co-Prosecutors’ Response, para. 39.

<sup>41</sup> Co-Prosecutors’ Response, para. 15.

<sup>42</sup> Co-Prosecutors’ Response, para. 31.

<sup>43</sup> Co-Prosecutors’ Response, para. 55.

<sup>44</sup> Co-Prosecutors’ Response, para. 56.

<sup>45</sup> Co-Prosecutors’ Response, para. 56.

The Co-Prosecutors submit that:

“KHIEU Samphan has publicly warned of ‘retaliation’ if he is brought to trial. It was not specified against whom there would be retaliation but given that he is a former political leader with considerable influence this must be taken as an indirect threat against all those who would participate in the trial process, in particular witnesses and victims. This should be seen in the light of the overall situation in the country, where there is no witness protection scheme and where there is still a high incidence of violent crime and easy access to weapons and explosives.”<sup>46</sup>

The Co-Prosecutors add that “there is a widespread fear of testifying before the ECCC, based on concerns of revenge and intimidation”<sup>47</sup>

*Necessary measure to ensure the presence of the Charged Person during the proceedings (Internal Rule 63(3)(b)(iii))*

The Co-Prosecutors submit that “the possibility of a lengthy sentence would provide a strong incentive for the Charged Person to flee”.<sup>48</sup> They also allege that “Khieu Samphan’s public statements reveal that he does not believe justice will be delivered by the ECCC” and that “[t]his represents an additional motive for him to flee”.<sup>49</sup>

The Co-Prosecutors submit that Khieu Samphan has the economic means to abscond since he “owns and lived in a home in the Pailin area of Cambodia, close to the Thai border”<sup>50</sup> and “[i]t is believed that his family owns numerous homes including [in] Pailin, near Anlong Veng and in Phnom Penh”.<sup>51</sup> They add that “Khieu Samphan also owns a poultry business”.<sup>52</sup> They further allege that “despite his denials, it is highly likely that KHIEU Samphan possesses a passport”<sup>53</sup> and

<sup>46</sup> Co-Prosecutors’ Response, para. 57.

<sup>47</sup> Co-Prosecutors’ Response, para. 58.

<sup>48</sup> Co-Prosecutors’ Response, para. 60.

<sup>49</sup> Co-Prosecutors’ Response, para. 65.

<sup>50</sup> Co-Prosecutors’ Response, para. 62.

<sup>51</sup> Co-Prosecutors’ Response, para. 62.

<sup>52</sup> Co-Prosecutors’ Response, para. 62.

<sup>53</sup> Co-Prosecutors’ Response, para. 63.

that “[h]is connections and contacts in Thailand and China may be of considerable assistance to him if he sought to flee the jurisdiction of the ECCC.”<sup>54</sup>

*Necessary measure to protect the security of the Charged Person (Internal Rule 63(3)(b)(iv))*

The Co-Prosecutors submit that Khieu Samphan’s “publicly documented arrest will mean that if released, he will not enjoy the same protections that he otherwise may have without such coverage”.<sup>55</sup> According to the Co-Prosecutors, “[t]he increased media interest in KHIEU Samphan’s arrest and the more widely, publicly-known allegations against him pose real dangers for his safety”.<sup>56</sup> They point out that “the increased risk of ‘attacks of revenge’ can be evidenced from the DUCH Provisional Detention Appeal Hearing on 21 and 22 November 2007”, where “it was reported that members of the public at the hearing had difficulty refraining from spontaneous acts of violence on seeing DUCH at such close range”.<sup>57</sup>

The Co-Prosecutors also allege that “KHIEU Samphan was physically attacked when making his first public appearance in Phnom Penh since the fall of the DK regime” and that “the passage of time has not diminished the relevance of such threats to the Charged Person”.<sup>58</sup> According to the Co-Prosecutors, “the general public is beginning to believe that there is an end to impunity” and Khieu Samphan’s release may, at this point in time, “well ignite the anger of certain parts of the community to take revenge against him”.<sup>59</sup>

*Necessary measure to preserve public order (Internal Rule 63(3)(b)(v))*

The Co-Prosecutors allege that since “the proceedings before the ECCC are the very first time that suspects are being tried for crimes committed during the DK regime, during which 1.7 million Cambodians were killed”, Khieu Samphan’s provisional release “may pose risks to Cambodian society, through resurfacing of anxieties and their attendant negative social consequences”.<sup>60</sup>

<sup>54</sup> Co-Prosecutors’ Response, para. 64.

<sup>55</sup> Co-Prosecutors’ Response, para. 67.

<sup>56</sup> Co-Prosecutors’ Response, para. 68.

<sup>57</sup> Co-Prosecutors’ Response, para. 68.

<sup>58</sup> Co-Prosecutors’ Response, para. 69.

<sup>59</sup> Co-Prosecutors’ Response, para. 69.

<sup>60</sup> Co-Prosecutors’ Response, para. 70.

The Co-Prosecutors point out that “support for the Khmer Rouge leaders still exists in Pailin, their traditional stronghold” and that “[l]ocal government officials in Pailin have publicly stated that the arrest of suspects by the ECCC are saddening and disturb the peace”.<sup>61</sup> According to the Co-Prosecutors, “recent events, such as the anti-Thai riots in 2003 [...] demonstrate that a minor attack on Cambodian identity or history can be potentially explosive”.<sup>62</sup>

The Co-Prosecutors further contend that Khieu Samphan’s public statements of “retaliation” if he is brought for trial “have the potential to seriously affect public order” in “the unpredictable and volatile context of Cambodian society”.<sup>63</sup>

#### *Bail conditions*

The Co-Prosecutors point out that at the adversarial hearing, Khieu Samphan “has offered to stay in a house in Phnom Penh, to be considered as a personal promise that he will abide by certain enumerated conditions, should he be released on bail”.<sup>64</sup> The Co-Prosecutors submit that the Co-Investigating Judges were correct in not granting release on bail, for Khieu Samphan’s declaration is not an affidavit, does not set out the consequences in the event of his failure to meet these conditions and does not address concerns related to the protection of his security nor to the preservation of public order.

### **C) Particular assertions by the Co-Lawyers for the Civil Parties**

The Co-Lawyers for the Civil Parties submit that “[p]ursuant to Rule 63(3)(a) of the Internal Rules the Provisional Detention Order was based on sufficient evidence to conduct (*sic.*) that there are well-founded reasons to believe that the Charged Person may have committed crimes (*sic.*) detailed in the Introductory Submissions.”<sup>65</sup> They further submit that “the discretion of the OCIJ [Co-Investigating Judges] has been properly exercised and shows no unreasonable and unsustainable grounds”.<sup>66</sup> In their views, “[t]he Defence’s request to dismiss the case because the Charged Person is not guilty is not an appropriate ground on which to object to the Provisional Detention Order”.<sup>67</sup>

<sup>61</sup> Co-Prosecutors’ Response, para. 72.

<sup>62</sup> Co-Prosecutor’s Response, para. 72.

<sup>63</sup> Co-Prosecutors’ Response, para. 73.

<sup>64</sup> Co-Prosecutors’ Response, para. 76.

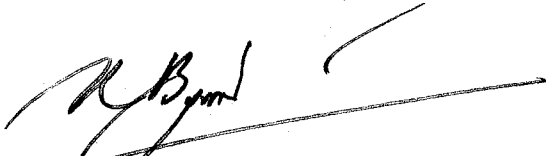
<sup>65</sup> Civil Parties Response, para. 5.

<sup>66</sup> Civil Parties Response, para. 5.


<sup>67</sup> Civil Parties Response, para. 5.

Phnom Penh, 22 April 2008

Co-Rapporteurs



Justice HUOT Vuthy



Justice Rowan DOWNING