

**BEFORE THE TRIAL CHAMBER
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

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**APPLICATION FOR RELEASE PURSUANT TO RULE 82(3) OF THE INTERNAL
RULES**

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Before:

The Trial Chamber

Judge NIL Nonn

Judge Silvia CARTWRIGHT

Judge THOU Mony

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

Co-Prosecutors

CHEA Leang

Andrew CAYLEY

MAY IT PLEASE THE TRIAL CHAMBER**I- INTRODUCTION**

1. On 18 July 2007, the Co-Prosecutors filed their Introductory Submission, in English and Khmer, requesting the arrest and provisional detention of five suspects, including Mr KHIEU Samphan,¹ on charges of crimes against humanity.
2. On 19 November 2007, Mr KHIEU Samphan was arrested, and appeared before the Co-Investigating Judges for an initial appearance and an adversarial hearing to determine whether he should be placed in provisional detention or released. At the end of the adversarial hearing and “in light of the many documents and witness statements contained in the case file”,² the Co-Investigating Judges ordered that Mr KHIEU Samphan be provisionally detained for one year.
3. On 8 October 2008, Mr KHIEU Samphan filed an Urgent Application for Release.³
4. On 28 October 2008, the Co-Investigating Judges issued an Order Refusing Request for Release,⁴ by which they denied Mr KHIEU Samphan’s application for release. Mr KHIEU Samphan appealed the Order Refusing Request for Release.⁵
5. On 18 November 2008, the Co-Investigating Judges ordered the extension of the detention of Mr KHIEU Samphan;⁶ Mr KHIEU Samphan appealed the order extending his provisional detention.⁷
6. On 3 July 2009, the Pre-Trial Chamber dismissed the appeals against the Order Refusing Release and the Extension of Provisional Release Order.⁸
7. By Notice dated 5 October 2009, the Co-Investigating Judges advised “the Charged Person and his lawyers that the term of provisional detention set down in [their] Provisional

¹ Introductory Submission, D3.

² Provisional Detention Order, para. 5, C26.

³ Urgent Application for Release, C40.

⁴ Order Refusing Request for Release, C40/4.

⁵ Appeal Brief against the Order of 28 October 2008 Refusing Release, 27 November 2008, C40/5/1.

⁶ Extension of Provisional Detention Order, C26/4.

⁷ Appeal Brief against the Order on Extension of Provisional Detention, 4 December 2008, C26/5/1.

⁸ Decision on Khieu Samphan’s Appeals against Order Refusing Request for Release and Extension of Provisional Detention Order, C26/5/26.

Detention Order dated 18 November 2008 [was due to] expire on 19 November 2009 and that [they were] considering whether to extend that provisional detention”.⁹

8. On 20 October 2009, Mr KHIEU Samphan filed his objections to the Extension of Provisional Detention Order.¹⁰

9. On 18 November 2009, the Co-Investigating Judges ordered the extension of the provisional detention.¹¹

10. On 17 December 2009, Mr KHIEU Samphan appealed the Extension of Provisional Detention Order.¹²

11. On 30 April 2010, the Pre-Trial Chamber dismissed Mr KHIEU Samphan’s appeal against the Order on Extension of Provisional Detention¹³

12. On 16 August 2010, the Co-Prosecutors filed their Final Submission, by which they requested the Co-Investigating Judges to indict Mr KHIEU Samphan and send him for trial on charges of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949 and breaches of the 1956 Penal Code of Cambodia.¹⁴

13. On 16 September 2010, the Co-Investigating Judges issued their Closing Order by which they ordered that Mr KHIEU Samphan be maintained in provisional detention.¹⁵

14. On 18 October 2010, Mr KHIEU Samphan filed his appeal against the Closing Order.¹⁶

15. On 15 November 2010, the Co-Prosecutors filed a response to Mr KHIEU Samphan’s Appeal.¹⁷

16. On 10 December 2010, Mr KHIEU Samphan filed a reply to the Co-Prosecutors’ Response.¹⁸

⁹ Notice (Rule 63.7), C26/6.

¹⁰ Objections to the Extension of the Provisional Detention of Mr KHIEU Samphan, C26/7.

¹¹ Provisional Detention Order, C26/8.

¹² Appeal against the Order on Extension of Provisional Detention, C26/9/1.

¹³ Decision on Khieu Samphan’s Appeal against Order on Extension of Provisional Detention, C26/9/12.

¹⁴ Co-Prosecutors’ Final Submission (Rule 66), D390.

¹⁵ Closing Order, D427.

¹⁶ Appeal against the Closing Order, D427/4/3.

¹⁷ Co-Prosecutors’ Response to Khieu Samphan’s Appeal against the Closing Order, D427/4/7.

17. On 13 January 2011, the Pre-Trial Chamber declared Mr KHIEU Samphan's Appeal against the Closing Order inadmissible and sent him for trial before the Trial Chamber.¹⁹

II- ADMISSIBILITY

18. According to Rule 82(3) of the ECCC Internal Rules (the Rules), "[t]he Accused, or his or her lawyers, may request the Chamber to release him or her (...) by written application submitted to the Greffier of the Chamber".

III- RELEVANT LEGAL PROVISIONS

19. Rule 63(6)(a) of the Internal Rules limits provisional detention to one year. Rule 63(7) of the Internal Rules permits two extensions for a total of three years. Rules 68(1) and 68(3) of the Internal Rules read together permit the Co-Investigating Judges to extend provisional detention for an additional term of four months, pursuant to a specific decision in the Closing Order. According to Rule 68(3) of the Internal Rules "[i]n any case, the decision of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in Provisional Detention, or to maintain bail conditions, shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time".

20. Rule 2 of the Internal Rules provides: "Where in the course of ECCC proceedings, a question arises which is not addressed by these IRs, (...) the Chambers shall decide (...) having particular attention to the fundamental principles set out in Rule 21 and the applicable criminal procedural laws. In such a case, a proposal for amendment of these IRs and the applicable criminal procedural laws".

21. Rule 21 the Internal Rules provides: "The (...) Internal Rules (...) shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused (...) and so as to ensure legal certainty and transparency of proceedings (...)".

22. Article 305 of the Code of Criminal Procedure of Cambodia provides: "(...) According to Article 249 (Provision of Closing Orders in Relation to Provisional Detention and Judicial Supervision) of this Code, the order to keep the accused in provisional detention will expire after four months. If the accused has not been brought before the court during this period, the accused shall be automatically released".

¹⁸ Reply to the Co-Prosecutors' Response, D427/4/13.

¹⁹ Decision on KHIEU Samphan's Appeal against the Closing Order, D427/4/14.

IV- EXPIRATION OF THE LAWFUL TERM

23. On 19 November 2007, Mr KHIEU Samphan was arrested and placed under provisional detention. The provisional detention was **extended twice**²⁰ for a term of one year. On 16 September 2010, the Co-Investigating Judges decided to maintain Mr KHIEU Samphan in provisional detention pursuant to Rule 68(1) of the Internal Rules, i.e. until Mr KHIEU Samphan was brought before the Trial Chamber.²¹ The Internal Rules stipulate that Mr KHIEU Samphan must be brought before the Trial Chamber within four months following the Co-Investigating Judges' decision to maintain him in provisional detention.

24. Indeed, Rule 68(3) of the Internal Rules clearly states in French: “[e]n tout état de cause, la décision des co-juges d’instruction (...) de maintenir l’accusé en détention provisoire (...) cesse de produire effet à l’expiration d’un délai de 4 (quatre) mois, à moins que l’accusé ne comparaisse devant la Chambre de première instance avant la fin de ce délai.” and in English “[i]n any case, the decision of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in Provisional Detention (...) shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time”. The expression used in the French version, “*en tout état de cause*”, and perhaps even more clearly in the English version, “in any case”, leaves no shadow of a doubt as to the interpretation of this Rule. It means that there can be no derogation from the Rule.

25. This interpretation is further reinforced by Article 305 the Code of Criminal Procedure of Cambodia. Entitled “Appearance of Accused upon Indictment”, this Article provides: “(...) According to Article 249 (Provision of Closing Orders in Relation to Provisional Detention and Judicial Supervision) of this Code, the order to keep the accused in provisional detention will expire after four months. If the accused has not been brought before the court during this period, the accused shall be **automatically** released”. As of the date of this application, more than four months had elapsed since the Co-Investigating Judges' decision to maintain Mr KHIEU Samphan in provisional detention, without him being brought before the Trial Chamber.

²⁰ Order on Extension of Provisional Detention, 18 November 2008, C26/4. Order on Extension of Provisional Detention, 18 November 2009, C26/8.

²¹ Closing Order, paras. 1617 to 1624, D427.

26. Mr KHIEU Samphan notes the decision dated 13 January 2011²² by which the Pre-Trial Chamber sent him before the Trial Chamber, but the decision must not be equated with his appearance before the said Chamber. The term “appearance” means “[TRANSLATION] to attend **in person** before an authority.”²³ The English version of the Rules explains this term further. Rule 68(3) of the Internal Rules provides: “[i]n any case, the decision of the Co-Investigating Judges (...) to continue to hold the Accused in Provisional Detention (...) shall cease to have any effect after 4 (four) months unless the accused is **brought before** the Trial Chamber within that time”. It must be noted that the English, French and Khmer versions of the Internal Rules are equally authoritative,²⁴ and that under Rule 21 of the Internal Rules, the “Internal Rules (...) shall be interpreted so as to safeguard the interests of (...) Accused”.

27. Pursuant to Rule 68(3) of the Internal Rules, the Co-Investigating Judges’ decision to continue to hold Mr KHIEU Samphan in provisional detention has ceased to have any effect. The Pre-Trial Chamber must therefore order the immediate release of Mr KHIEU Samphan.

FOR THESE REASONS

28. Mr KHIEU Samphan requests the Trial Chamber:

- TO RENDER a decision as soon as possible.
- TO ORDER his immediate release.

WITHOUT PREJUDICE, AND IT WILL BE JUSTICE

	SA Sovan	Phnom Penh	
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²² Decision on KHIEU Samphan’s Appeal against the Closing Order, D427/4/14.

²³ CORNU (G.), *Vocabulaire juridique*, Presses universitaires de France, “*comparution*”, page 181 (annexed hereto).

²⁴ Article 45 of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

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Date	Name	Place	Signature