BEFORE THE SUPREME COURT CHAMBER

EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

Case No: 002/19-09-2007-ECCC/SC

Filing Party: Nuon Chea Defence Team

Filed to: Supreme Court Chamber

Original language: English

Date of document: 03 March 2011

CLASSIFICATION

Classification Suggested by Filing Party: PUBLIC

Classification of OCIJ:

Classification Status: សាធារណៈ/Public

Review of Interim Classification:

Records Officer Name:

Signature:

APPEAL AGAINST DECISION ON THE URGENT APPLICATIONS FOR IMMEDIATE RELEASE OF NUON CHEA, KHIEU SAMPHAN, AND IENG THIRITH

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I. INTRODUCTION

1. Pursuant to Rules 104 and 105 of the ECCC Internal Rules (the 'Rules'), counsel for the Accused Nuon Chea (the 'Defence') submit this appeal (the 'Appeal') to the Supreme Court Chamber (the 'SC') against the Trial Chamber's 'Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan, and Ieng Thirith' (the 'Decision').[1] For the reasons stated below, the Defence submits that: (i) the Appeal is admissible; (ii) the Trial Chamber (the 'TC') erred in law by applying an incorrect interpretation of Rule 68. Accordingly, the SC should annul or amend the Decision and immediately release Nuon Chea.

II. RELEVANT FACTS & PROCEDURAL HISTORY

2. Nuon Chea was arrested by ECCC authorities and provisionally detained by the Co-Investigating Judges (the 'CIJs') for one year on 19 September 2007.[2] His provisional detention period was extended for an additional one-year term on 16 September 2008[3] and again for an identical period on 15 September 2009.[4] On 15 September 2010, the CIJs ordered his continued detention until he was 'brought before the Trial Chamber'.[5] On 13 January 2011, in an unreasoned decision, the Pre-Trial Chamber (the 'PTC') extended Nuon Chea's provisional detention until he was 'brought before the Trial Chamber' (the 'PTC Decision').[6] On 18 January 2011, the Defence filed an urgent

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1 Document No **E-50**, 'Decision on Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan' and Ieng Thirith', 16 February 2011, ERN 00644864-00644878 (the 'Decision'), at ERN 00644878.

2 *See* Document Nos **C-6**, 'Arrest Warrant', 17 September 2007, ERN 00148692–00148693; **C-7**, 'Record of Bringing the Suspect', 19 September 2007, ERN 00148694–00148695; **C-8**, 'Written Record of Adversarial Hearing', 19 September 2007, ERN 00148696–00148700; and **C-9**, 'Provisional Detention Order', 19 September 2007, ERN 00148701–00148705. On appeal, the Provisional Detention Order was upheld by the Pre-Trial Chamber (the 'PTC'). *See* Document Nos **C-11/4**, 'Appeal Against Order of Provisional Detention', 12 November 2007, ERN 00149999–00150442 and **C-11/54**, 'Decision on Appeal Against Provisional Detention Order of Nuon Chea', 21 March 2008, ERN 00172907–00172934.

3 *See* Document No **C-9/3**, 'Order on Extension of Provisional Detention', 16 September 2008, ERN 00224203–00224204. On appeal, the Order on Extension of Provisional Detention was upheld by the PTC. See Document Nos **C-9/4/1**, 'Appeal Against Order on Extension of Provisional Detention', 16 October 2008, ERN 00232728–00232736 and **C-9/4/6**, 'Decision on Appeal Against Order on Extension of Provisional Detention of Nuon Chea', 4 May 2009, ERN 00303454–00303470.

4 *See* Document No **C-9/6**, 'Order on Extension of Provisional Detention', 15 September 2009, ERN 00375956–00375965. The Defence did not appeal this order.

5 Document No **D-427**, OCIJ 'Closing Order', 15 September 2010, ERN 00604508–00605246, at ERN 00604909.

6 Document **D-427/2/12**, 'Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order', 13 January 2011, ERN 00634916-00634922 (the 'PTC Decision'). This decision lacked all reasoning; the PTC stated that it would deliver its reasoning 'in due course', *see* ERN 00634922.

application for immediate release (the 'Application').[7] On 21 January 2011, the PTC issued reasons on the detention portion of the PTC Decision.[8] Oral arguments on the Application were heard on 31 January 2011. On 4 February 2011, the TC sent an Interoffice Memorandum to the PTC,[9] to which the PTC responded on 9 February 2011.[10] On 15 February 2011, the PTC finally issued a fully reasoned decision on the various appeals against the Closing Order.[11] The TC issued its Decision on 16 February 2011, finding (in relevant part) that the delay in issuing reasons had resulted in a breach of Nuon Chea's fundamental rights. However, the TC declared that the violation had been remedied by the later issuing of reasons, and that (for the detention portion) the nature of the remedy in consequence of such breach could be assessed at the end of the trial and ultimately rejected the Application.

III. RELEVANT LAW

A. Effect of the Closing Order on Provisional Detention

3. Rule 68 sets out the effect of a closing order on provisional detention:

> 1. The issuance of a closing order puts an end to provisional detention […] orders once any time limit for appeals against the closing order have expired. However, where the [CIJs] consider that the conditions for ordering provisional detention […] under Rule 63 […] are still met, they may, in a specific, reasoned decision included in the closing order, decide to maintain the accused in provisional detention […] until he or she is brought before the Trial Chamber.
>
> 2. Where an appeal is lodged against the indictment, the effect of the detention […] order of the [CIJs] shall continue until there is a decision from the Pre-Trial Chamber [(the 'PTC')]. The [PTC] shall decide within 4 months.
>
> 3. In any case, the decision of the [CIJs] or the [PTC] 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.[12]

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7 Document No **E-19**, 'Urgent Application for Immediate Release of Nuon Chea', 18 January 2011, ERN 00636352-00636362 (the 'Application').

8 Document No **D-427/3/13**, 'Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order: Reasons for Continuation of Provisional Detention', 21 January 2011, ERN 00637083-00637087

9 Document No **E-23**, 'Request for Information Concerning Reasons for Decision on Appeal Against the Closing Order and Detention Decisions in Trial 002', 3 February 2011, ERN 00641571.

10 Document No **D-427/4/16**, 'Response to the Interoffice Memorandum from the Trial Chamber dated 4 February 2011', 9 February 2011, ERN 00641791-00641796 (the 'PTC Response to the Interoffice Memorandum').

11 Document No **D-427/3/15**, 'Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order', 15 February 2011, ERN 00644462-00644571.

12 The analogous provision of the CCP is comparable to Rule 68, but, unlike the Rules, does not allow for appeals against the Closing Order, *see* CCP, Article 249: ('The closing order terminates provisional detention. […] However, by a separate decision issued together with the closing order, the investigating judge may order to keep the charged person in provisional detention until the time he is called to appear before the trial court. […] The decision to keep the charged person in provisional detention ceases to be effective after four months. If

B. The Requirement of Reasoned Decisions

4. Rule 77(14) reads, insofar relevant: 'All decisions under this Rule […] shall be reasoned […].' The PTC Decision is a 'decision under this Rule' (Rule 77) and must therefore be reasoned.

5. More generally speaking, the requirement of 'reasoning' underlies the entire system imposed by the Rules and therefore the ECCC; almost every positive action that is undertaken by any party (OCP, OCIJ, Defence, PTC and TC) must be 'reasoned'.[13]

6. The requirement of reasoned judicial decisions is also reflected in international legal standards, such as the case law of the European Court of Human Rights (the 'ECtHR'):

> In its case-law the Court has frequently held that the reasoning provided in court decisions is closely linked to the concern to ensure a fair trial as it allows the rights of the defence to be preserved. Such reasoning is essential to the very quality of justice and provides a safeguard against arbitrariness.[14]

7. In the Decision, the TC provided further observations on the obligation to provide reasoned judicial decisions, which the Defence hereby adopts by reference.[15]

C. Applicable Law and Procedure at the ECCC

8. The Constitution provides that the 'detention of any person shall not be done except in accordance with the law'.[16] Echoing the Constitution (as well as the relevant provisions of the ICCPR[17]), the ECCC Agreement and the ECCC Law (together, the 'Constituent

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the charged person is not called to appear before the trial court within these four months, the charged person shall be automatically released.')

[13] See, e.g.: Rules 29(4), 32, 44(2), 50(3), 55(10), 58(6), 59(5), 63(1)(b), 63(2)(a), 63(7) 64(2), 66(2), 67(4), 68(1), 71(4)(d), 72(4)(e), 76(1), 76(2), 77(14), 79(6)(b), 79(6)(c), 89(3), 99(2), 101(1)(a), 109(3), 111(1), 111(5).

[14] ECtHR 926/05, *Taxquet v Belgium*, 'Judgment', 13 January 2009, para 43. This case was referred to the Grand Chamber, which confirmed the reasoning, *see* ECtHR 925/05, *Taxquet v Belgium*, 'Judgment', 16 November 2010, paras 90-91; *See also* ECtHR 12945/87, *Hadjianastassiou v Greece*, 'Judgment', 16 December 1992, para 33 (this decision was also confirmed in *Taxquet v Belgium* (2010), para 91).

[15] Decision, paras 24-27.

[16] 1993 Constitution, Article 38.

[17] *See* ICCPR, Articles 9(1) ('No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are *established by law*.'); 14(1) ('In the determination of any criminal charge against him […] everyone shall be entitled to a […] hearing by a […] tribunal *established by law*.); 14(2) ('Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty *according to law*.); 14(5) ('Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal *according to law*.'); and 16 ('Everyone shall have the right to recognition everywhere as a person *before the law*.') (emphasis added). *N.B.* All chambers of the ECCC 'shall exercise their jurisdiction in accordance with international standards of justice, fairness and due

Instruments') acknowledge the principle of legality: the 'procedure' applied at the ECCC 'shall be in accordance with Cambodian law';[18] and the prosecution, investigation, and trial of any individual shall follow 'existing procedures in force'.[19] Notably, '[c]onditions for the arrest and the *custody* of the accused shall conform to existing law in force'.[20]

9. According to the Cambodian Constitution, the Cambodian Code of Criminal Procedure (the 'CCP'), and the ECCC Agreement and Law, the Accused unquestionably has the right to a fair investigation and subsequent trial. These guarantees are adequately reflected in Rule 21, which provides (among other things) that: (i) the applicable law and procedure 'shall be interpreted so as to always safeguard the interests of [the] [...] Accused';[21] (ii) 'ECCC proceedings shall be fair and adversarial and preserve a balance between the rights of the parties'.[22] At all times, the Trial Chamber 'is under an obligation to ensure that the integrity of the proceedings is preserved'.[23]

D. *Ultimum Remedium*

10. The internationally recognized principle of *ultimum remedium*—which provides that 'where other legal avenues exist which could preserve the interests of justice without having to resort to detention on remand, for instance through release or bail, such an option should be pursued'[24]—is applicable before the ECCC and other Cambodian courts, if only because it is recognized in Article 9(3) of the ICCPR.[25] It is fully endorsed by Article 203 of the CCP, which provides: 'In principle, the charged person shall remain at liberty. Exceptionally, the charged person may be provisionally detained under the conditions stated in this section.' Article 249 of the CCP—which mandates

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process of law, as set out in Articles 14 and 15 of the 1966 [ICCPR], to which Cambodia is a party'. ECCC Agreement, Article 12(2); *See also* ECCC Law, Article 35*new*.

18 ECCC Agreement, Article 12(1); *See also* Document No **E-188**, 'Duch Judgment' 26 July 2010, ERN 00572517-00572797, para 35 at ERN 00572534.

19 ECCC Law, Articles 20*new*, 23*new*, 33*new*.

20 ECCC Law, Article 33 new (emphasis added).

21 Rule 21(1)(chapeau).

22 Rule 21(1)(a).

23 Document No **D-314/1/12**, 'Second Decision on Nuon Chea's and Ieng Sary's Appeal Against OCIJ Order on Requests to Summons Witnesses', 9 September 2010, ERN 00600748–00600774: the dissenting 'Opinion of Judges Catherine Marchi-Uhel and Rowan Downing' in para 10.

24 Geert-Jan Alexander Knoops, THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS (Kluwer 2005), p 151 ('Knoops 2005').

25 Article 9(3) of the ICCPR provides: 'It shall not be the general rule that persons awaiting trial shall be detained in custody [...]'. See, *also*, Constitution, Article 31, for the effect of the ICCPR.

the 'automatic' release of the accused after the expiration of a four-month period—lends further endorsement;[26] as does Rule 68's default 'ceasing' of the effect of detention orders. Taken together, these provisions reveal a clear underlying preference for liberty for the accused.

E. Appeals to the SC

11. TC decisions on detention and bail under Rule 82 are subject to immediate appeal.[27] Rule 104 stipulates that the SC shall hear appeals against decisions of the TC where, *inter alia*, an error on a question of law invalidating the decision is alleged.[28]

IV. ARGUMENT

A. The Application is Admissible

12. As stated above, TC decisions on detention under Rule 82 are subject to immediate appeal.[29] Such an appeal must be filed within fifteen days of receipt of the impugned decision.[30] The Decision was a decision on detention under Rule 82, and the Appeal is timely filed. Accordingly, the Appeal is admissible.

B. The Trial Chamber Has Erred in Law in Its Interpretation and Application of Rule 68

13. The Decision suffers from an error of law, which should lead to its annulment or amendment.[31] The TC (correctly) found that the PTC's 'deferral of reasons on its Decisions on the Closing Order constitutes a procedural defect which initially impacted on the Accused's fundamental fair trial guarantees of legal certainty and clarity'.[32]

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26 *See also* e.g. Article 305 CCP, paragraph 3, and Article 304, final paragraph.
27 Rule 104(4)(b)
28 Rule 104(1)
29 Rule 104(4)(b)
30 Rule 107(2)
31 *N.B.* the Defence will not file submissions on the issues related to Rule 63(3) and the grounds of detention; however, this in no way means that the Defence subscribes to the TC's decisions or the observations by the OCP on this issue. Furthermore, the Decision reads that Nuon Chea has now 'been brought before the [Trial] Chamber under Rule 82(1)'. To the extent that the TC suggests here that Nuon Chea has been brought before the Trial Chamber for purposes of Rule 68(3) and that the 4 month time limit stipulated by that Rule has therefore been satisfied, the Defence disagrees with this interpretation and reserves its rights to challenge this interpretation at the relevant time.
32 Decision, para 29

14. However, the TC then went on to assess whether the validity of the PTC Decision was affected in consequence.[33] In that respect it considered 'a number of specific circumstances' to be relevant,[34] namely: the character of the various appeals;[35] the ultimate issuing of reasons after eight days (with regard to the detention component) and after 32 days (for the appeal itself);[36] the continuous monitoring of the provisional detention by the OCIJ and the PTC; and the possibility of applying to the TC for provisional release.[37] The TC found that the initial procedural defect had been 'remedied' by the subsequent issuance of the full reasoning.[38] It also found that the particular circumstances of the case did not warrant the 'extreme remedy' of immediate release.[39] In short, the TC engaged in a 'balancing exercise', weighing the circumstances of the case and deciding that although Nuon Chea's rights had been violated, immediate release was not the proper remedy. Acting thus, the TC has disregarded the clear wording and purpose of Rule 68, as well as the intentions of its drafters, and thus erred in law.

15. The TC should *not* have engaged in a balancing of circumstances, as the clear solution to the situation at hand *is already provided by the wording of Rule 68*. This Rule provides that, in the current situation, immediate release is the *only* remedy. Pursuant to Rule 68(3), the order by the OCIJ to keep the Accused Person in provisional detention ceases to have effect after four months, unless the PTC issues a 'decision' on the appeal against the Closing Order within that time period, simultaneously extending the detention of the Accused (a 'Rule 68 Decision').

16. Pursuant to Rule 77(14), a Rule 68 Decision must be reasoned. Reasoning is a fundamental and inseparable requirement of a Rule 68 Decision; accordingly, a decision by the PTC that is not reasoned is not a 'decision' for the purposes of the Rules and therefore cannot be considered an actual Rule 68 Decision (even though it may have contained conclusions on certain issues; conclusions are not reasons.[40]) Notably, the

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[33] *Ibid*, para 29
[34] *Ibid*, paras 30-33
[35] *Ibid*, para 31
[36] *Ibid*, para 32
[37] *Ibid*, para 33
[38] *Ibid*, para 34
[39] *Ibid*, para 35
[40] The importance of reasoned judicial decisions (the principle which underlies the requirement of Rule 77(14)), is stressed both in the original Application for Immediate Release (paras 5-7) and in the TC

PTC was not under *any* legal obligation to keep Nuon Chea in provisional detention; it *was*, however, under a clear legal obligation to deliver a reasoned decision.

17. The legal effects, then, are clear: as no Rule 68 Decision was issued within four months, the OCIJ's detention order ceased to have any effect, and Nuon Chea should have been released. Within the system imposed by Rule 68, there is no room whatsoever for any balancing exercise.[41] Rule 68 contains the *definitive* answer to the questions at hand: if there is no Rule 68 Decision by the PTC within four months from the issuance of the order by the OCIJ to extend the provisional detention of the Accused (in the Closing Order), the actual harm to the accused does not need to be examined (because it is presumed by definition). The only possible remedy at that stage is prescribed: termination of the effect of the OCIJ's order and immediate release of the accused.

18. This conclusion flows from the clear wording of Rule 68, the text of which is neither an accident nor the result of thoughtless drafting. Rather, the wording of Rule 68 was carefully determined by the ECCC Plenary in its session of 1 February 2008, after (we can only assume) extensive and thoughtful debate, in the course of which a balance was struck between the interests of justice and those of the Accused. It is furthermore clear that the overriding concern that informed this amendment was *directly related* to the issue we are now facing: the time constraints imposed on the PTC when delivering decisions on the appeal against the Closing Order. The current wording was chosen deliberately to give the PTC enough time to decide on these appeals: four months was *apparently* considered to be ample time for the PTC to come to a reasoned decision.

19. In other words, the very issue that is now the subject of the Appeal has been settled long ago by the Plenary, which has provided the only possible remedy in its adoption of the current version of Rule 68: the automatic termination of the effects of the OCIJ's

Decision (paras 23-27); the Defence clearly subscribes to these considerations. However, strictly speaking, the principles underlying Rule 77(14) are irrelevant when considering the merits of this part of the Defence submission, considering the unequivocal wording of the provision: Rule 77(14) simply *requires* the issuing of *reasoned* decisions, rather than just decisions; the PTC is thus bound by the specific wording of this article, regardless of the principles underlying it.

41 This might have been different if the PTC had actually issued a decision with actual reasoning, but with reasoning that was qualitatively unconvincing; in such a scenario the harm to the accused might be balanced with other interests; this is, however, not the case we are dealing with here; in this case, *no* reasoning was provided altogether, thus rendering the 'decision' moot and preempting a balancing of interests.

detention order.[42] The Defence notes that the TC judges were themselves involved in the drafting of Rule 68, through their participation in the Plenary. This makes the TC's failure to hold the PTC to the strict provisions of Rule 68 all the more objectionable.

20. Considering the above, the TC's misunderstanding of and departure from (the system provided by) Rule 68 amounts to an error of law.

C. The Trial Chamber Has Disregarded the Principle of *Ultimum Remedium*

21. The observations on the wording and effect of Rule 68 as contained in paras 15-19 of this Appeal *in and of themselves* lead to the conclusion that the TC's decision must be annulled. However, should the SC not yet be persuaded by the Defence submissions on this issue, the following additional considerations are relevant and should be considered in combination with the previous submissions.

22. Through its Decision, the TC has sanctioned the PTC's disregard for the principle of *ultimum remedium*. This circumstance further compounds the error of law committed by the TC. As stated, this principle entails that 'where other legal avenues exist which could preserve the interests of justice without having to resort to detention on remand, for instance through release or bail, such an option should be pursued'.[43] The PTC has blatantly failed to do so. It is important to note that the PTC did not merely 'forget' to provide reasons, nor did it try to provide reasons that were later deemed to be qualitatively inadequate. Rather, it *deliberately* issued a decision without reasoning, making a *conscious* choice to do so, and even indicating as much in the decision itself. This approach by the PTC, incidentally, reveals that it was well *aware* of the requirements placed upon it by Rule 77(14), making this course of action all the more objectionable.

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[42] Clearly, the Plenary could have decided to adopt an entirely different version of Rule 68. E.g., it *could* have decided that an initial, unreasoned, decision by the PTC on the appeal against the Closing Order had to be provided within four months, with reasons to follow 'in due course', or 'within 45 days' or a similar provision. It did not choose to do so. Furthermore, it *could* have stipulated that a failure to reach a decision on the appeal within four months would lead to a 'balancing of interests'. It did not choose to do so. Instead, the Plenary chose the current wording; wording by which the PTC is accordingly bound.

[43] *See* Knoops 2005.

23. It is clear that the PTC issued the unreasoned decision of 13 January 2011 *solely* in an attempt to avoid the (automatic) release of Nuon Chea.[44] As stated in the Application,[45] there is nothing wrong with a judicial organ working expeditiously in order to honor time limits which, if violated, would result in the release of an accused whom it thinks should remain in custody; however, there is everything wrong with a judicial organ *deliberately violating* the legal requirements to which it is bound[46] in order to reach such a result.[47]

24. On this topic, it is instructive to consider the PTC Response to the Interoffice Memorandum; this response demonstrates once more that the PTC indeed willfully disregarded the rights of Nuon Chea, and both misunderstood and misapplied the principle of *ultimum remedium*.

25. To explain the absence of reasons in its Decision dated 13 January 2011, the PTC goes to great lengths to discuss the large amount of work that had to be conducted in order to come to a decision, and its concern that 'the rights of the parties would be most egregiously affected by failing to properly thoroughly assess and address all issues raised in the appeals'. It then states: '[I]t is only after such deliberations are completed that proper drafting of the reasons agreed upon by the Chamber can be undertaken. Between the close of pleadings and the date of the issue of the determinative Orders of the Court, being six days, it was impossible to conduct the deliberations and write fully reasoned decisions in respect thereof.'[48]

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44 This position by the Defence, discussed in the initial application and repeated during the oral hearing, has not been challenged by any of the parties, nor by the TC or the PTC, which could have done so in its Interoffice Memorandum dated 9 February 2011. To the contrary, the PTC's answers in this memorandum make clear that keeping Nuon Chea in provisional detention was indeed its main concern, as will be discussed in paras 23-25 of this Appeal.

45 Application for Immediate Release, para 22 ('Again, the Defence does not claim that judicial expeditiousness is something to be lamented; quite to the contrary. But judicial expeditiousness with the sole goal of keeping an accused in prison, while riding roughshod over the provisions of the Internal Rules, the interests of the accused and the *ultimum remedium* principle, is legally indefensible.')

46 And which, it bears noting, it itself helped come into existence, through its role in the plenary session that resulted in the current wording of Rule 68.

47 As argued at length in the Application for Immediate Release (paras 20-21), it is relevant that this was not the first time that the PTC acted with clear disregard for the principle of ultimum remedium: it acted in similar fashion in the months leading up to the issuing of the Closing Order, by improperly delivering unreasoned decisions to allow the OCIJ to issue the Closing Order within three years after Nuon Chea's arrest.

48 PTC Response to the Interoffice Memorandum, pp 2-3.

26. These words are telling. To be sure, the Defence is in no way surprised that it was 'impossible' to conduct the deliberations and write fully reasoned decisions in respect thereof within 'six days'; in fact, this seems a very reasonable observation. However, the Defence cannot stress enough that *no legal requirement existed* for the PTC to do so; the six-day deadline that the PTC was trying to honor was, in fact, self-imposed. The *only* thing that would have happened, after these six days, is that Nuon Chea would have been released in anticipation of his trial. This outcome is not 'bad' as such; actually, this outcome would have been in full conformity with the principle of *ultimum remedium*.[49]

27. Either way, the lack of judicial resources which the PTC is describing does not provide any justification for the violation of Nuon Chea's rights. As the ECtHR, has held: 'States are under the obligation to organize their legal systems so as to ensure compliance with [fair-trial] requirements'.[50] The same reasoning applies to an institution such as the ECCC. In other words, the PTC cannot hide behind an alleged lack of judicial resources to excuse the late provision of reasons.

28. A *proper* exercise of the PTC's obligations, respecting the principle of *ultimum remedium*, would have entailed the issuance of the decision on the appeal against the Closing Order as soon as, indeed, all issues as raised in the appeal were 'properly and thoroughly assessed' and that adequate reasoning could be provided.[51] It is clear that this moment would have come *after* 16 January 2011 (the expiration of the four-month period after the issuing of the Closing Order).[52]

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[49] The approach by the PTC becomes even more objectionable in one considers that the four month time limit exists (arguably: solely) to protect the interests of the *Accused.* (See Urgent Application, para 18, n. 21 on this issue.) The PTC, then, *ostensibly* tries to respect the time limit aimed at protecting the rights of the Accused, but in fact only does so because it desires to keep the Accused in prison. It furthermore manages to 'honor' the time limit by issuing an unreasoned decision, thus further violating the rights of Nuon Chea.

[50] *See* ECtHR 32271/04, *Poppe v The Netherlands*, 'Judgment', 24 March 2009, para 23

[51] Incidentally, the approach by the PTC illustrates the importance of properly reasoned decisions, and especially the effect it has of 'reinforc[ing] the obligation on judges to base their reasoning on objective arguments' (para 26 Decision). According to its own timeline, the PTC had a maximum of six days to conduct deliberations on the multitude of issues that were presented by the parties before it issued the Decision dated 13 January 2011 (page 3). Six days is not much time to debate and decide on so many important and complicated issues. Still, the PTC felt confident enough to at least communicate the *outcome* of these deliberations on 13 January 2011; this could leave a reasonable outside observer with the impression that the outcome of the deliberations (dismissal of the appeal) was preordained, and that the PTC satisfied itself with subsequently buttressing this preordained outcome with arguments, thus inverting the required order of legal reasoning.

[52] A short thought exercise might be helpful to illustrate the position of the Defence. On 12 January 2011, one day *before* the issuing of the unreasoned decision on the appeal against the closing order, the PTC found itself in the position that it *could not* issue a reasoned decision on the appeals because it was simply not

29. The failure to properly appreciate the influence and effect that the principle of *ultimum remedium* should have exerted on the PTC, combined with the flawed interpretation of the wording and purpose of Rule 68 (see paras 13-20 of this Appeal), amounts to an error of law.[53] The Defence further notes that the TC, in its Decision, has altogether failed to explicitly assess and address the effects that the principle of *ultimum remedium* should have had on the issue at hand (although the Defence raised this issue both in its Application as well as during the oral hearing), thus further compounding the error of law.

D. Immediate Release was the Only Appropriate Remedy

30. The TC considered which remedy would be most appropriate, in light of the violation of the fundamental rights of Nuon Chea, and held that the failure to provide reasons for the appeal was already remedied by the eventual provision of reasons. Moreover, it determined that the appropriateness of other remedies in relation to the 'detention portion' may be considered at the conclusion of the trial.[54] The TC's decision suffers from an error of law also in this respect. Again, the Defence submits that the *only* remedy applicable in the current situation is immediate release, simply because this is what Rule 68 provides; this is not (in the words of the TC) an 'extreme remedy',[55] but rather the *default* result when a proper decision is not reached within four months.

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ready to do so. At that moment, there were only two relevant legal requirements at play: one was the requirement to provide a reasoned decision on the Closing Order, whenever such a reasoned decision was finalized; and the other was the requirement to release Nuon Chea four months after the issuing of the Closing Order. What the PTC thus *should* have done was the following: it should have diligently continued work on the reasoned decision on the appeals against the Closing Order. Full stop. It should *not* have proceeded to issue any form of decision on 13 January 2011.

53 A final observation that should inform the appreciation of the PTC's approach to the issuing of an unreasoned order is the fact that the delay in deciding on Nuon Chea's appeal stems from the decision by the PTC to rule on numerous issues filed by different parties at the same time. It bears noting that the Nuon Chea appeal consisted of only 17 pages, on only one distinct issue (legality). It would have been perfectly possible for the PTC to render a reasoned decision on Nuon Chea's appeal alone within the four-month time period prescribed by Rule 68. While the approach by the PTC to consolidate different issues filed by different parties may have been reasonable from its own perspective, especially considering efficiency and workload, it ceased to be reasonable as soon as the four-month time limit was exceeded because of this approach. In other words, it is untenable that Nuon Chea suffers harm from the circumstance that other defense teams decided to file prolonged motions on numerous issues, combined with the PTC's *own* decision to address those motions together with that of Nuon Chea.

54 Decision, para 35

55 Decision, para 35

31. The Defence submits that the *actual* harm to Nuon Chea is irrelevant when considering this issue, as the system of Rule 68 does not envision a balancing of interests (which would indeed include an assessment of harm) but rather provides for automatic release.

32. However, even *if* a 'balancing of interests' *were* undertaken and that therefore actual harm would be considered relevant, the conclusion must be that immediate release is the only applicable remedy, because of the exceptional nature of this actual harm: This harm lies in the fact that a judicial organ of the ECCC, tasked with providing a fair and balanced trial, has engaged in conduct that can only be described as unfair. This judicial organ breached its own Internal Rules; more problematically, it broke a rule that was directly aimed at *protecting* Nuon Chea; and, to make things worse, it did so *deliberately*.[56] Such an intentional violation of the procedural rights of an accused person by a judicial organ amounts to serious harm to the Accused, or, in the words of the TC, to his 'fundamental fair trial guarantees of legal certainty and clarity.'[57]

33. Importantly, the PTC acted as it did in a premeditated attempt to *circumvent* the clear requirements of Rule 68; it was this Rule's automatic release-clause it was trying to avoid. It is for *this* reason that the TC should have looked *solely* at the provisions of this very Rule 68 when considering possible remedies; and, as stressed at length by the Defence, the *only* remedy that Rule 68 provides is immediate release. Any other interpretation would 'reward' the PTC for *intentionally* violating the Internal Rules and the rights of the Accused.

34. Yet another reason to look *solely* at Rule 68 for the answer as to the remedy that should be applied in the current situation is the fact that Rule 68 is the *lex specialis* that should apply when considering the effects of the Closing Order and appeals against the Closing Order on provisional detention. Rule 68 is titled 'Effects on Provisional Detention […]' (of the Closing Order and of appeals against the Closing Order); it is thus clearly distinct from, and in addition to, the general provisions on provisional detention of Rule 63. As we are dealing with subject matter that falls solely and squarely within the realm

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56 Remember, it is clear from the PTC Decision that the PTC knew that it was under an obligation to provide reasons.

57 Decision, para 29

of Rule 68, Rule 68 is the only Rule that applies; and the only remedy this rule acknowledges is immediate release.

35. The decision by the TC has failed to correctly appreciate the above, and therefore suffers from an error of law.

E. Immediate Release Is the Appropriate Remedy Now

36. For these reasons, the SC now must do what the TC should have done, which is to find that, as no adequate legal basis exists for the detention of Nuon Chea (as of 16 January 2011), he should be released immediately. The TC's *own* decision to keep Nuon Chea in detention relies on its flawed interpretation of the law (specifically Rules 68 and 77(14)), and therefore cannot provide an adequate legal basis for continued detention of Nuon Chea either.

V. CONCLUSION

37. For the reasons stated above, the Defence requests the SC to annul the Decision and to order the immediate release of Nuon Chea (or to amend the Decision with the same result), and to hold a hearing on this Appeal as soon as possible.

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