

**BEFORE THE SUPREME COURT CHAMBER  
EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA**

**FILING DETAILS**

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**CO-PROSECUTORS' RESPONSE TO NUON CHEA'S APPEAL  
AGAINST THE DECISION ON THE URGENT APPLICATIONS FOR IMMEDIATE  
RELEASE OF NUON CHEA, KHIEU SAMPHAN, AND IENG THIRITH**

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## I. INTRODUCTION

1. On 16 February 2011, the Trial Chamber issued its Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith (“Trial Chamber Detention Decision”).<sup>1</sup> On 3 March 2011, the Accused Nuon Chea (“Accused”) filed his Appeal Against Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan, and Ieng Thirith (“Defence Appeal”).<sup>2</sup> In the Defence Appeal, the Accused argues that the Trial Chamber erred in law by (1) applying an incorrect interpretation of Rule 68<sup>3</sup> and (2) failing to recognize that the only appropriate remedy in this situation is immediate release.<sup>4</sup> The Accused requests that the Supreme Court Chamber annul or amend the Decision and order the immediate release of the Accused.<sup>5</sup>
2. The Co-Prosecutors submit that the Defence Appeal should be dismissed in its entirety since (1) the Trial Chamber’s conclusion on remedies was reasonable and within the scope of its discretion; (2) the Trial Chamber properly exercised its independent authority to continue the provisional detention of the Accused; and (3) the Accused fails to explain how his interests have been prejudiced by the purported errors in the Trial Chamber Detention Decision, as required pursuant to the Rule 104 standard for immediate appeals.

## II. STANDARD OF REVIEW

3. Internal Rule 104 sets out the applicable standard of review, providing that an immediate appeal against a decision of the Trial Chamber must be based on a “discernable error in the exercise of the Trial Chamber’s discretion which resulted in prejudice to the appellant.”<sup>6</sup> With respect to the first prong of this standard, the Co-Prosecutors submit that the Supreme Court Chamber should look for guidance in the ICTY’s elaboration of what is required for a showing of abuse of discretion.<sup>7</sup>

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<sup>1</sup> Trial Chamber, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011 (“Trial Chamber Detention Decision”).

<sup>2</sup> Appeal Against Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan, and Ieng Thirith, Case File No. 002/19-09-2007-ECCC/SC, Defence, 3 March 2011, E50/1/1/1 (“Defence Appeal”).

<sup>3</sup> Defence Appeal, paras. 13-20. The Accused argues that the Trial Chamber’s failure to explicitly address the principle of *ultimum remedium* “compound[s]” the Trial Chamber’s error in interpreting Rule 68.

<sup>4</sup> *Id.* at paras. 30-35.

<sup>5</sup> *Id.* at para. 37.

<sup>6</sup> ECCC Internal Rules (Rev.7), *rev’d* 23 February 2011 (“Rules”), rule 104.

<sup>7</sup> *See, e.g.,* Milošević v. Prosecutor, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, IT-02-54-AR73.7, ICTY Appeals Chamber, 1 November 2004, paras. 9-10 (stating that a Trial Chamber’s exercise of discretion will be overturned if the challenged decision was (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).

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### III. THE TRIAL CHAMBER'S CONCLUSION ON REMEDIES WAS REASONABLE AND WITHIN THE SCOPE OF ITS DISCRETION.

4. The Accused argues that the Trial Chamber erred in law by not recognizing that the “only remedy applicable in the current situation is immediate release” pursuant to the terms of Rule 68.<sup>8</sup> On the contrary, the Trial Chamber acted within the scope of its discretion in finding (1) that the Pre-Trial Chamber Decisions on the Closing Order (“PTC Closing Order Appeal Decisions”), including their detention portions, were not nullified by the lack of immediate reasoning; and (2) that the Trial Chamber can consider the appropriate remedy at the conclusion of the trial, after hearing the parties’ submissions.<sup>9</sup>
5. The Trial Chamber’s holdings with respect to remedies, including its conclusion that immediate release was not an appropriate remedy, were reasonable and well within the scope of its discretion. In affirming the validity of the PTC Closing Order Appeal Decisions, the Trial Chamber Detention Decision is firmly supported by the jurisprudence cited within it as well as the jurisprudence cited by the Co-Prosecutors at the Detention Hearing, including the case of *Prosecutor v. Popović*.<sup>10</sup> In *Popović*, the ICTY Appeals Chamber found that the Trial Chamber, in determining that the accused should continue to be detained, had committed an error by not providing sufficient reasoning but stated that the error was not sufficient in and of itself to overturn the Trial Chamber’s decision on detention.<sup>11</sup> Similarly, the decision of the Trial Chamber to defer further consideration of remedies to the conclusion of the trial is consistent with international jurisprudence where the appropriateness of remedies for procedural defects has been addressed at the conclusion of the trial.<sup>12</sup>

<sup>8</sup> Defence Appeal, para. 30.

<sup>9</sup> See Trial Chamber Detention Decision, paras. 35-36.

<sup>10</sup> See Trial Chamber Detention Decision, paras. 33-35; Detention Hearing Transcript, Case File No. 002/19-09-2007-ECCC/TC, 31 January 2011 (“Detention Hearing Transcript”), T. 52-53;

<sup>11</sup> *Prosecutor v. Popović*, Decision on Interlocutory Appeal of Trial Chamber’s Decision Denying Ljubomir Borovčanin Provisional Release, IT-05-88-AR65.3, ICTY Appeals Chamber, 1 March 2007 (“*Popović*”), paras. 13, 20.

<sup>12</sup> See, e.g., *Prosecutor v. Barayagwiza*, Judgement and Sentence, ICTR-99-52-T, 3 December 2003, paras. 1106-1107 (reducing the accused’s sentence where he had been detained without notification of the charges against him for a period of time); *Kajelijeli v. Prosecutor*, Judgement, ICTR-98-44A-A, ICTR Appeals Chamber, 23 May 2005, paras. 323-324 (reducing the accused’s sentence where he had been detained for a period without knowing the charges against him and was not brought before a judge without undue delay); *Semanza v. Prosecutor*, ICTR Appeals Chamber, 20 May 2005, paras. 323-328 (reducing the accused’s sentence to account for a period during which the accused was detained without notification of the charges against him).

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**IV. THE TRIAL CHAMBER DID NOT ERR IN EXERCISING ITS INDEPENDENT  
AUTHORITY TO CONTINUE THE ACCUSED'S DETENTION.**

6. The Accused argues that the Trial Chamber's decision to keep him in detention relies on its flawed interpretation of Rules 68 and Rules 77(14) and therefore does not constitute an "adequate legal basis" for the continued detention of Nuon Chea.<sup>13</sup> However, this claim is unfounded because the Trial Chamber's decision regarding Nuon Chea's continued detention was based on Rule 82 – not Rule 68 or Rule 77(14).<sup>14</sup>
7. Rule 82 clearly provides a legal basis for the continued detention of the Accused. Sub-rule 82(1) provides that "where the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber's judgement is handed down, subject to sub-rule 2." Sub-rule 82(2) provides that "the Chamber may, at any time during the proceedings . . . detain an Accused in accordance with [the Internal Rules]."<sup>15</sup> Nothing in the Rules supports the proposition that the prior existence of any form of procedural defect in a Pre-Trial Chamber detention decision negates the Accused's continued detention, or the power of the Trial Chamber to order detention pursuant to its own independent authority. The Accused does not cite any jurisprudence that would support such a conclusion.
8. Because the Trial Chamber properly determined that the detention portion of the PTC Closing Order Decision was valid, the Accused continues to be detained in accordance with Rule 82(1). However, even if the Supreme Court Chamber were to reach a different conclusion as to the validity of the detention portion of the PTC Closing Order Decision, the Trial Chamber has properly exercised its authority pursuant to Rule 82(2) to continue the detention of the Accused.<sup>16</sup> As the Co-Prosecutors stated at the Detention Hearing, the OCIJ and PTC have consistently found – on a basis of an examination of the available evidence – that the provisional detention of the Accused is merited.<sup>17</sup> Most recently, the

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<sup>13</sup> Defence Appeal, para. 36.

<sup>14</sup> See Trial Chamber Detention Decision, pp. 13-15; ECCC Rules, rule 82.

<sup>15</sup> ECCC Rules, rule 82(2).

<sup>16</sup> The Trial Chamber Detention Decision found that there are well-founded reasons to believe that the Accused has committed the charged crimes and that detention is necessary to ensure the Accused's presence at trial. See Trial Chamber Detention Decision, paras. 38-39. The Trial Chamber indicated that it had considered the parties' submissions on continued detention as well as the grounds on which the Accused was detained in the Closing Order and the PTC Decisions on the Closing Order. See Trial Chamber Detention Decision, para. 39.

<sup>17</sup> Detention Hearing Transcript, T. 54-59; Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges, 19 September 2007, C9; Decision on Appeal against Provisional Detention Order of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 01), Pre-Trial Chamber, 20 March 2008, C11/54; Order on Extension of Provisional Detention, Case File No. 002/19-09-

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OClJ found and the PTC confirmed that the continued detention of the Accused was warranted on the basis of the need to ensure the presence of the Accused at trial, protect the security of the Accused, preserve public order and avert the risk of the Accused exerting pressure on witnesses or victims or destroying evidence if released.<sup>18</sup>

9. At the hearing, the Accused did not allege any change in circumstances that would warrant a departure from the consistent conclusion of the OClJ and PTC that detention is warranted.<sup>19</sup> Similarly, nowhere in the Appeal does the Accused claim that there is an insufficient evidentiary basis for the Trial Chamber's affirmation of the continued detention of the Accused pursuant to Rule 82. Thus, the Accused's claim that the continuation of his detention is invalid is unfounded.

**V. THE ACCUSED FAILS TO EXPLAIN HOW HIS INTERESTS HAVE BEEN PREJUDICED BY THE PURPORTED ERRORS IN THE TRIAL CHAMBER DETENTION DECISION.**

10. The plain language of Rule 104 indicates that an immediate appeal against a Trial Chamber decision, including a decision on detention under Rule 82, must establish both "a discernable error in the exercise of Trial Chamber's decision" and "prejudice to the appellant" as a result of that error.<sup>20</sup> Ignoring this standard, the Appeal fails to explain – or even allege – that the Trial Chamber Detention Decision has resulted in prejudice to him.
11. To the extent that the Accused alleges any sort of prejudice, it relates to the perceived unfairness of the PTC Closing Order Appeal Decision pertaining to him.<sup>21</sup> In particular, the Accused repeats the claim that he made at the Detention Hearing, namely that actual harm has occurred because "a judicial organ of the ECCC, tasked with providing a fair

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2007-ECCC/OClJ, Office of Co-Investigating Judges, 16 September 2008, C9/3; Decision on Appeal against Order on Extension of Provisional Detention of Nuon Chea, Case File No. 002/19-09-2007-ECCC/OClJ (PTC 13), Pre-Trial Chamber, 4 May 2009, C9/4/6; Order on Extension of Provisional Detention, Case File No. 002/19-09-2007-ECCC/OClJ, Office of Co-Investigating Judges, 15 September 2009, C9/6; Closing Order, Case File No. 002/19-09-2007-ECCC/OClJ, Office of Co-Investigating Judges, 15 September 2010, D427, ("Closing Order"), paras. 1614-1624.

<sup>18</sup> Closing Order, para. 1622-1624; Decision on Ieng Thirith's and Nuon Chea's Appeal Against the Closing Order: Reasons for Continuation of Provisional Detention, Case File No. 002/19-09-2007-ECCC/OClJ (PTC 145 & 146), Pre-Trial Chamber, 21 January 2011, D427/3/13; Decision on Appeals by Nuon Chea and Ieng Thirith Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OClJ (PTC 145 & 146), Pre-Trial Chamber, 15 February 2011, D427/2/15.

<sup>19</sup> See Detention Hearing Transcript, pp. 79-81 (Accused's submissions on basis for detention).

<sup>20</sup> See Rule 104(1) (second paragraph).

<sup>21</sup> See, e.g. Defence Appeal, para. 22-29, 32.

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and balanced trial, has engaged in conduct that can only be described as unfair.”<sup>22</sup> However, the standard for immediate appeals to the Supreme Court Chamber requires a showing of prejudice on account of an error by the *Trial Chamber*, not the Pre-Trial Chamber.<sup>23</sup>

12. Furthermore, the “discernible error” and “prejudice” requirements for immediate appeal at the ECCC indicate that the mere fact that the Accused disagrees with the Trial Chamber’s conclusion is not a sufficient basis for an appeal. The ECCC Internal Rules governing immediate appellate review are not designed to allow an appellant to simply re-litigate the same issues brought before a lower court. Instead, they set out a limited review mechanism that allows for immediate redress of the most serious and prejudicial errors. This approach to appellate review makes good sense in this particular context and is consistent with the approach of other international tribunals.<sup>24</sup>
13. To the extent that the Accused means to assert that the purported errors of law in the Trial Chamber Detention Decision themselves demonstrate prejudice, this position is contradicted by the plain language of Rule 104(1), which sets out a two-pronged standard for immediate appeals that requires the identification of a discernible error as well as a showing of prejudice to the Appellant on account of that error.<sup>25</sup> Interpreting Rule 104(1) to allow for immediate appeals where errors but no prejudice is alleged would effectively render superfluous the second prong of the standard set out in Rule 104(1). Such an interpretation is inconsistent with the elementary rule of interpretation that “one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.”<sup>26</sup>
14. It is apparent that the Accused has not suffered any actual harm or prejudice as a result of the Trial Chamber Detention Decision. The Trial Chamber followed well-established

<sup>22</sup> Defence Appeal, para. 32; Detention Hearing Transcript, p. 17 (stating that “there lies prejudice in the simple fact that the Court is not upholding its own law”).

<sup>23</sup> See Rule 104(1) (stating that “an immediate appeal against a decision of the *Trial Chamber* may be based on a discernible error in the exercise of the *Trial Chamber’s* discretion which resulted in prejudice to the appellant”) (emphasis added).

<sup>24</sup> See *Prosecutor v. Rutaganda*, ICTR Appeals Chamber, 26 May 2003, para. 15 (stating that “in contrast with the procedure in certain national legal systems, [the ICTY and ICTR appeals procedure] is of a corrective nature, and is thus ‘not an opportunity for the parties to reargue their case’”); *Prosecutor v. Muvunyi*, ICTR Appeals Chamber, 29 August 2008, para. 11 (stating that “[a] party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber’s rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber”).

<sup>25</sup> See Rule 104(1).

<sup>26</sup> *Prosecutor v. Tadić*, Judgement, IT-94-1-A, Appeals Chamber, 15 July 1999, para. 284.

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principles in assessing whether immediate release was a proportional remedy in this instance.<sup>27</sup> Furthermore, regardless of any defect in the relevant PTC Closing Order Appeal Decision and/or its detention portion, the Trial Chamber has independent authority to order detention under Rule 82, and it clearly indicated the basis on which it continued to detain the Accused.<sup>28</sup> Finally, even if the Trial Chamber had found that immediate release was the appropriate remedy for the procedural defect in the PTC Decision on the Closing Order, the practical outcome would have been no different since the Trial Chamber would have had the power to immediately detain the Accused again pursuant to Rule 82.<sup>29</sup>

15. Furthermore, while the Accused cites a purported “internationally recognized principle of *ultimum remedium*” to support his continued claims that the Pre-Trial Chamber’s approach was incorrect,<sup>30</sup> the issue on appeal here is not whether the Pre-Trial Chamber should have acted differently.<sup>31</sup> Rather, the relevant question is whether the Trial Chamber – in its assessment on remedies – erred in the exercise of its discretion in a way that caused prejudice to the Accused.

## VI. CONCLUSION

16. For the above-stated reasons, the Co-Prosecutors respectfully request that the Supreme Court Chamber:

<sup>27</sup> See *supra*, Section III.

<sup>28</sup> See Trial Chamber Detention Decision, paras. 38-39.

<sup>29</sup> As noted above, nothing in the Rules supports the notion that a procedural defect in a detention decision in one part of the proceedings acts as a permanent bar to future provisional detention; in other words, there is no reason to believe that the Trial Chamber’s independent Rule 82 authority to order detention “at any time during the proceedings” has been affected by the finding that the Pre-Trial Chamber committed a procedural error.

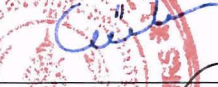
<sup>30</sup> See Defence Appeal, para. 22-28. The Co-Prosecutors note that the Accused’s particular expression of this principle is thinly supported and dubious in its breadth. See Defence Appeal, para. 22. Article 9(3) of the ICCPR sets out a more limited notion, i.e. that it should not be a general rule that persons are detained awaiting trial. It is not a “general rule” at the ECCC that persons are detained awaiting trial. See Rule 63-64, 82. However, once an accused has been detained, there is a (rebuttable) presumption that detention will continue through the trial. See Rule 64 (allowing for release of an accused from provisional detention upon showing of a “change in circumstances”); Rule 82 (providing that “[w]here the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber’s judgement is handed down”). This is consistent with international practice. See Geert-Jan Alexander Knoops, *THEORY AND PRACTICE OF INTERNATIONAL AND INTERNATIONALIZED CRIMINAL PROCEEDINGS* (2005), p. 150 (recognizing that “under the ICTY, ICTR and SCSL systems, the onus rests upon an accused to vindicate the facts that he or she will appear for trial and will not interfere with trials”).

<sup>31</sup> Indeed, by recognizing the existence of a procedural defect in the initial Pre-Trial Chamber Decision on the Closing Order, the Trial Chamber in effect accepted the Accused’s argument that the Pre-Trial Chamber should have acted differently. See Trial Chamber Detention Decision, para. 29.



- i) Deny the Accused's request for annulment or amendment of the Trial Chamber's Decision;
- ii) Deny the Accused's request for immediate release; and
- iii) Deny the Accused's request for hearing on this matter.

Respectfully submitted,

Date	Name	Place	Signature
25 March 2011	Yet Chakrya Deputy Co-Prosecutor	Phnom Penh	
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