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EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

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REPLY TO CO-PROSECUTOR'S 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. Pursuant to Article 8.4 of the Practice Direction on 'Filing of Documents Before the ECCC',[1] counsel for the Accused Nuon Chea (the 'Defence') hereby submits this reply (the 'Reply') to the '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' (the 'Response'),[2] which was notified to the parties on 28 March 2011.

2. On 29 March 2011, the Defence was informed that the Supreme Court Chamber (the 'SCC') would not hold an oral hearing on this appeal (the 'Appeal').[3] Pursuant to Article 8.4 of the Practice Direction, the Defence has five calendar days to submit a reply after notification of the response to which it is replying. The Reply is timely filed.

II. SUBMISSIONS IN REPLY

A. The Response Relies on the Wrong Standard of Review and Is Thus Largely Inapposite

3. The Response is largely inapposite, as it relies on a standard of review that is neither applicable to the Appeal nor invoked by the Defence. The Office of the Co-Prosecutors (the 'OCP') seems to have misread the relevant Rules on appeals before the SCC; as a result, it relies on a standard of review that is wholly irrelevant in assessing the Appeal.

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1 Practice Direction ECCC/01/2007/Rev6. According to Article 8.4: ''A reply to a response shall only be permitted where there is to be no oral argument on the request, and such reply shall be filed within 5 calendar days of notification of the response to which the participant is replying.'

2 Document No **E-50/1/1/1/1**, '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', 25 March 2011, ERN 00656590–00656597 (the 'Response').

3 Document No **E-50/1/1/1**, 'Appeal Against Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith', 3 March 2011, ERN 00649280-00649293 (the 'Appeal'); *See also* Email communication from Christopher Mark Ryan (SCC) to Andrew Ianuzzi (NC Defence) of 29 March 2011 ('The Chamber has decided pursuant to IR 109(1) to not hold a hearing to determine your pending appeal on detention.').

4. Rule 105(2) provides that, to be admissible, an 'immediate appeal' can be based on one or more of *three* distinct grounds: (1) an error in law, (2) an error in the exercise of discretion by the Trial Chamber (the 'TC'), or (3) an error of fact.[4]

5. Yet the Response demonstrates that the OCP erroneously believes that an immediate appeal can be based *only* on an error in the exercise of discretion by the TC; the OCP proceeds to assess the merits of the Appeal relying on *only* that (inapplicable) standard of review.[5]

6. As the Response relies on this flawed interpretation of the Rules, the OCP addresses the Appeal in the context of a ground of appeal/standard of review that simply does not apply. Indeed, the Defence never alleged an error in the exercise of the TC's discretion; in fact, the word 'discretion' is nowhere mentioned in the Defence submissions on Appeal. Rather, the Appeal alleges an *error in law* by the TC, which position is substantiated at length in the submissions. The OCP, relying on the wrong standard of review/ground of appeal, fails to address this error of law altogether.

7. For this reason, paragraphs 3–5 and 10–15 of the Response (which rely directly on and/or discuss at length the irrelevant 'error in the exercise of discretion'-standard of review) are inapposite and can be disregarded by the SCC in reaching its decision.[6] As

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4 Rule 105(2)(a), Rule 105(2)(b) and Rule 105(2)(c) respectively; clearly, the Appeal is an 'immediate appeal', pursuant to Rule 104(4)(b).

5 *See* Response, *inter alia* paras 3 and 10. The OCP's position seems to stem from a misreading of Rule 104(1), and a total disregard of Rule 105(2). Rule 104(1) reads:
The Supreme Court Chamber shall decide an appeal against a judgment or a decision of the Trial Chamber on the following grounds:
a) an error on a question of law invalidating the judgment or decision; or
b) an error of fact which has occasioned a miscarriage of justice.
Additionally, 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.
The OCP has apparently understood this language to mean that an 'error in discretion' is the only ground on which immediate appeals can be based. It fails to appreciate that the term 'appeal' in Rule 104(1) refers to appeals in general, and therefore also encompasses 'immediate appeals'; an immediate appeal can thus, like a 'regular' appeal, be based on an error in law and/or an error of fact. Immediate appeals are 'special' in the sense that they have an *additional* ground of review, namely the error in the exercise of discretion. However, this in no way means that this additional ground is the *only* ground of review. Not only is this the most logical reading of Rule 104(1) (after all, there is no principled reason why an immediate appeal could or should *not* rely on errors of law and/or fact), this reading is furthermore plainly supported by the language of Rule 105, which, as discussed, sets out the *three* distinct grounds of appeal for Immediate Appeals.

6 More specifically, contrary to the OCP's assertions, the Defence does not need to show an error in the exercise of the TC's discretion, nor does it need to show prejudice to the Accused. Rather, it needs to show an error of law which invalidates the decision (Rule 105(2)(a)). In its Appeal, the Defence has done just that.

a result, the submissions by the Defence on the error of law by the TC remain uncontested.

B. The Detention of Nuon Chea Lacks an Adequate Legal Basis

8. The remaining paragraphs (6–9) of the Response claim that the TC 'did not err in exercising its independent authority to continue the Accused's detention'. The OCP states: '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.' It furthermore states that '[…] even if the [SCC] were to reach a different conclusion as to the validity of the detention portion of the PTC Closing Order Decision, the [TC] has properly exercised its authority pursuant to Rule 82(2) to continue the detention of the Accused'.[7]

9. In short, the OCP claims that the TC had the authority to order Nuon Chea's detention pursuant to Rule 82, regardless of a possible prior procedural defect. The OCP fails to appreciate (and therefore fails to address) the Defence submissions on the exceptional nature of the 'procedural defect' in this case. The unreasoned decision rendered by the Pre-Trial Chamber (the 'PTC') was not merely an 'inadvertent' procedural defect; it was a deliberate exercise by the PTC to circumvent the protection offered to the Accused by the Rules.[8] The *deliberate* violation of the Accused's fundamental rights by a judicial organ of the ECCC (the PTC), instigated with the sole goal of keeping the Accused in provisional detention, impacts fatally on the authority of reviewing judicial organ (the TC) to (in effect) uphold and extend that legally flawed detention. In other words, the TC's discretion with regard to this issue has dissolved as a result of the untenable decision by the PTC to deliberately contravene both the letter and the spirit of the Rules.

10. Moreover, the decision to extend the detention is directly based on, and therefore inextricably linked with, the error of law the TC committed, and therefore fatally flawed.

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7 Note: the Defence, in fact, never challenged the actual validity of the detention portion of the Closing Order, as this validity was irrelevant in light of its submissions; after all, this detention portion ceased to have any effect after four months, pursuant to Rule 68(3).

8 See Appeal, paras. 22-23; Document No **D-427/3/12**, 'Decision on Ieng Thirith's and Nuon Chea's Appeals Against the Closing Order', 13 January 2011, ERN 00634916-00634922 [unreasoned], followed by 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 [reasoned].

Simply put, if the TC had *correctly* appreciated the wording and purpose of Rule 68, it would not have extended the detention of Nuon Chea; it would have understood that immediate release was the only remedy available on 16 January 2011 (the expiry of the four month period and the date upon which the provisional detention ordered by the Office of the Co-Investigating Judges (the 'OCIJ') in its Closing Order 'ceased to have any effect'). Release was similarly the only remedy available on the day of the TC hearing, on the day of the pronouncement of the TC's decision, and—as argued herein—now. This is partly due to the fact that, as explained in the Appeal, Rule 68 must be considered the *lex specialis* when it comes to detention issues stemming from the issuing of the Closing Order.[9] This means that the TC was not free to simply invoke its putative authority pursuant to Rule 82, but rather should have (referred to and) deferred to the express provisions of Rule 68, which prescribe immediate release.[10]

11. Lest the SCC be sidetracked by the OCP's insistence on the TC's proper use of its 'discretion', the Appeal does *not* revolve around a proper or improper exercise of discretion by the TC; rather, it concerns the TC having *erred in law* by failing to properly appreciate what Rule 68 entails (which is: release from detention for the Accused, four months after the issuing of the Closing Order, unless a reasoned decision[11] is reached by the PTC).

12. Furthermore, in paragraphs 8 and 9, the OCP speaks of the detention being 'merited', of the Defence not alleging any 'change in circumstances', nor claiming an 'insufficient evidentiary basis' for the continued detention. Again, the OCP fails to appreciate one of the main submissions of the Appeal: there is *no need* to assess the grounds of the detention (or, more abstractly, to assess whether OCIJ, PTC, and/or TC adequately assessed these grounds). Rule 68(3) does not speak of grounds; it speaks of the ceasing of

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9 Appeal, para 33.

10 Furthermore, it would be a cynical approach towards the spirits of the Rules if the TC could use a hearing which was made necessary *only* by the PTC's error in law (which error violated the Accused's fundamental rights by not releasing him on the date he should have been released) to *remedy* that error/violation by simply 're-issuing' a Rule 82 detention order. (This is a situation that must be distinguished from the situation in which the Accused, after having been released pursuant to the effects of Rule 68, is detained by the TC once the Initial Hearing has commenced; *this* must be the type of situation which the drafters of the Rules must have had in mind. Incidentally, it is highly likely that the TC in such a scenario would *not* order Nuon Chea's arrest once he appears at the Initial Hearing, as such an appearance would demonstrate that the fear of flight is simply unfounded).

11 The Defence notes that the OCP nowhere disputes that the Decision on the Appeal of the Closing Order had to be a *reasoned* decision.

effect of the OCIJ's detention order after four months if no (reasoned) decision is provided within that time. Whether or not grounds for detention exist is irrelevant to the Rule 68(3) analysis.

C. *Ultimum Remedium*

13. Albeit in a footnote, the OCP takes issue with the Defence's invocation of the principle of *ultimum remedium*.[12] To support its position, the OCP points to some articles in the Rules that would indicate that the principle is of only limited relevance before the ECCC and furthermore points to 'international practice' that would support its position.

14. The Defence reiterates that the principle is firmly established in the Cambodian legal system and once more points to Article 203 of the CCP: '*In principle*, the charged person shall remain at liberty. *Exceptionally*, the charged person may be provisionally detained under the conditions stated in this section.'[13] This wording reflects a strong adherence to the principle of *ultimum remedium*. Moreover, and importantly, the principle is reflected in the very article of the Rules around which the current Appeal revolves: Rule 68(3). This Rule provides for the *automatic* ceasing of the effect of the OCIJ's detention order after four months; it is thus an unambiguous manifestation of the principle of *ultimum remedium*, which principle should therefore inform the assessment by the SCC of the current Appeal (and should have informed the assessment of the issue by both the PTC and the TC at the earlier stages of these proceedings).

III. CONCLUSION

15. For the reasons stated herein, as well as those set out in the Appeal, the Defence requests the SCC to annul the Decision (or to amend the Decision with the same result) and to order the immediate release of Nuon Chea.

CO-LAWYERS FOR NUON CHEA

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[12] Response, n 30.
[13] Article 203 Cambodian Code of Criminal Procedure (emphasis added).