

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

FILING DETAILS

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**APPEAL AGAINST TRIAL CHAMBER'S
'DECISION ON THE URGENT APPLICATIONS FOR IMMEDIATE RELEASE OF
NUON CHEA, KHIEU SAMPHAN AND IENG THIRITH' FILED ON BEHALF OF THE
APPELLANT MADAME IENG THIRITH**

Defence for Ieng Thirith:

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Trial Chamber Judges:

KONG Srim, President
Motoo NOGUCHI
Agnieszka KLONOWIECKA-MILART
Chandra Nihal JAYASINGHE
SOM Sereyvuth
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Co-Prosecutors:

CHEA Leang
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I INTRODUCTION AND PETITION

1. On 21 January 2011, the defence for Madame Ieng Thirith (**Appellant**) filed its 'Urgent Request for Immediate Release of Madame Ieng Thirith' (**Appellant's Request**).¹ On 31 January 2011, an oral hearing was held to invite the parties to make oral submissions (**Transcript**).² After hearing the submissions, the Trial Chamber issued its 'Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith' (**Impugned Decision**)³ on 16 February 2011.
2. The Appellant herewith files an appeal from the Impugned Decision, requesting the Supreme Court Chamber to quash the Impugned Decision and to substitute a finding that Appellant was illegally detained between 21 January and 15 February 2011, and to order the Trial Chamber to provide compensation for this illegal detention at the end of the trial stage.

II RELEVANT FACTS

3. The Appellant was arrested by the ECCC authorities and has been provisionally detained since 12 November 2007.⁴ The Closing Order of 15 September 2010 indicted the Appellant with international and domestic crimes, and renewed her provisional detention on the basis of Internal Rule 68.⁵ The defence for the Appellant filed its appeal against the Closing Order with the Pre-Trial Chamber on 18 October 2010.⁶ The Co-Prosecutors filed their observations in response on

¹ Urgent Request for Immediate Release of Madame Ieng Thirith, 21 January 2011, Document No. E21.

² TC, Transcript of Hearing – Application for Immediate Release Nuon Chea, Khieu Samphan, Ieng Thirith, 31 January 2011, Document No. E1/1.1.

³ TC, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, Document No. E50.

⁴ OCIJ, Police Custody Decision, 12 November 2007, Document No. C15.

⁵ Closing Order, paras. 1622-1624.

⁶ Ieng Thirith Defence Appeal from the Closing Order, 18 October 2010, Document No. D427/2/1.

19 November 2010.⁷ Thereafter, the defence submitted its reply to the Co-Prosecutors' Observations on 6 December 2010.⁸

4. On 13 January 2011 the Pre-Trial Chamber issued its unreasoned 'Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order' (**PTC Unreasoned Decision**).⁹ The Trial Chamber then sent a memorandum to the Pre-Trial Chamber asking the latter 'to explain why it has not delivered reasons for its decisions on the Closing Order at the time they were delivered [...]'.¹⁰ The Pre-Trial Chamber responded by way of interoffice memorandum.¹¹ On 15 February 2011 the Pre-Trial Chamber issued the reasoned 'Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order' (**PTC Reasoned Decision**).¹²
5. The Appellant's Request was filed on 21 January 2011 after more than four months had expired since the defence notified the Pre-Trial Chamber of its intention to appeal against the Closing Order which was filed on 18 October 2010. Following Internal Rule 68(2) and (3) and the provisions of Article 249 of the Cambodian Criminal Procedure Code, the renewed detention ordered by the Co-Investigating Judges on 15 September 2010 expired at the latest on 21 January 2011. Consequently, the Charged Person should have been released immediately and continued detention failed to have any basis in law and amounts to a violation of her fair trial rights as enshrined in Internal Rule 21 and human rights instruments by which the Court is bound.

⁷ Co-Prosecutor's Joint Response to Nuon Chea, Ieng sary and Ieng Thirith's Appeal against the Closing order, 19 November 2010, D427/2/7.

⁸ Defence Reply to Prosecution Joint Response to Ieng Thirith Defence Appeal against the Closing Order, 6 December 2010, Document No. D427/2/11.

⁹ PTC, Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 January 2011, Document No. D427/2/13.

¹⁰ TC, Interoffice Memorandum from Judges of the Trial Chamber to Judges of the Pre-Trial Chamber, 3 February 2011, Document No. E32.

¹¹ PTC, Interoffice Memorandum from Judges of the Pre-Trial Chamber to Judges of the Trial Chamber, 9 February 2011, Document No. D427/2/14.

¹² PTC, Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, Document No. D427/2/15.

6. The Appellant was illegally detained between 21 January and 15 February 2011.
The defence submits she should be compensated for such illegal detention.

III RELEVANT LEGAL PROVISIONS

3.1 Provisions Relating to Immediate Appeals from the Trial Chamber

7. The Internal Rules relevant with regard to immediate appeals from a Trial Chamber's decision are set out below:-

Rule 104. Jurisdiction of the Supreme Court Chamber

1. 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.

For these purposes, the Supreme Court Chamber may itself examine evidence and call new evidence to determine the issue.

2. The Supreme Court Chamber may either confirm, annul or amend decisions in whole or in part, as provided in Rule 110.

3. [...]

4. The following decisions of the Trial Chamber are subject to immediate appeal:

- a) [...]
- b) decisions on detention and bail under Rule 82; [...].

Rule 104bis. Rules applicable before the Supreme Court Chamber

In the absence of any specific provision, the rules that apply to the Trial Chamber shall, mutatis mutandis, also apply to the Supreme Court Chamber.

Rule 105. Admissibility

1. An appeal may be filed by:

- [...]
- b) The Accused; [...]

2. A party wishing to appeal a decision of the Trial Chamber where immediate appeal is available under Rule 104(4) shall file an appeal setting out the grounds of appeal and arguments in support thereof. In respect of each ground of appeal it shall:

- a) specify an alleged error on a question of law and demonstrate how it invalidates the decision; or
- b) specify a discernible error in the exercise of the Trial Chamber's discretion which results in prejudice to the appellant; or
- c) specify an alleged error of fact and demonstrate how it occasioned a miscarriage of justice.

3. [...]

4. Appeals shall identify the finding or ruling challenged, with specific reference to the page and paragraph numbers of the decision of the Trial Chamber.

Rule 106. Notices of Appeal and Briefs

1. The Greffier of the Trial Chamber shall immediately notify all other parties and their lawyers in the case of the filing of an appeal.

2. Notices of appeal and immediate appeals shall be filed with the Greffier of the Trial Chamber, and shall be noted in the appeal register of the Trial Chamber.

3. The Accused and the Civil Parties may be represented by their lawyers, who shall have a written authorization from their clients to file an appeal.

4. The notice of appeal or the immediate appeal shall be signed by the appellant or appellant's lawyers, and initialled by the Greffier of the Trial Chamber. The written authorization shall be attached to the appeal.

[...]

6. Where the Accused is in detention, he or she shall file the notice of appeal or the immediate appeal with the head of the ECCC detention facility, who shall immediately submit it to the Greffier of the Trial Chamber. The Greffier shall note it on the appeal register.

Rule 107. Time Limits for Appeal

1. [...].

2. In the case of a decision of the Trial Chamber relating to detention, bail or protective measures, which is subject to immediate appeal as provided for in Rule 104(4) paragraphs (b) and (c), and except as provided in sub-rule 3 below, the appeal shall be filed within 15 (fifteen) days of the date of decision or its notification, as appropriate.

3. [...].

Rule 109. Appeal Hearings

1. Hearings of the Chamber shall be conducted in public. The Chamber may decide to determine immediate appeals on the basis of written submissions only.

3.2 Provisions Relating to Detention

8. Internal Rule 68 sets out the effects of a Closing Order on provisional detention.

This Rule reads:

1. The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limits for appeals against the Closing Order have expired. However, where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail under Rules 63 and 65 are still met, they may, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.
2. Where an appeal is lodged against the Indictment, the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber. The Pre-Trial Chamber shall decide within 4 months.
3. In 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.
4. [...].

9. Article 249 of the 2007 Criminal Procedure Code of the Kingdom of Cambodia contains a similar provision which reads, insofar as is relevant, ‘under separate decisions of a settlement warrant,¹³ the investigating judge can keep the accused person under pre-trial detention until the time he/she appears in the court. [...] The decision to keep the accused person under pre-trial detention shall cease to have effect after 4 (four) months. If the accused person does not appear in the court within 4 (four) months, the accused person shall be automatically allowed to stay outside custody.’
10. The Closing Order extended the provisional detention of the Charged Person accordingly, and thus extended the detention for a maximum period of four months or until the trial started.¹⁴ The trial has not yet started.

3.3 Provisions Relating to Appellant’s Fair Trial Rights

11. Internal Rule 21 provides that ‘ECCC proceedings shall be fair and adversarial [...]’, which right is similarly guaranteed by Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees that ‘everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law’.

IV APPEAL GROUNDS

4.1 Error of Law – Failure to Address Appellant’s Argument

12. The defence submits that its main argument set out in the Appellant’s Request was not addressed in the Impugned Decision.
13. In the Appellant’s Request, the defence argued that the Pre-Trial Chamber’s failure to issue a decision within four months of the defence’s appeal against the

¹³ ‘Settlement Warrant’ in the Cambodian Criminal Procedure Code is what ‘Closing Order’ is in the ECCC proceedings; see Article 247 of the 2007 Cambodian Code of Criminal Procedure.

¹⁴ Closing Order, para. 1624.

Closing Order resulted in a procedural defect, as the PTC Unreasoned Decision does not qualify as a 'decision' under Internal Rule 77(14).¹⁵ The defence further argued that since the Pre-Trial Chamber failed to abide by the provisions of Internal Rule 68(2) and (3), the legal basis for continued detention falls away. The defence made the following submission:¹⁶

Four months have expired since the defence notified the Pre-Trial Chamber of its appeal. In accordance with Internal Rule 68(2) and (3) and the provisions of Article 249 of the Cambodian Criminal Procedure Code, the renewed detention ordered by the Co-Investigating Judges on 15 September 2010 expires at the latest on 21 January 2010. The Appeal Decision by the Pre-Trial Chamber does not qualify as a 'final Closing Order' and the trial against the Charged Person has not yet commenced. Consequently, the Charged Person must be released immediately as continued detention fails to have any basis in the law and is in violation of her fair trial rights as embedded in Internal Rule 21 and human rights instruments by which the Court is bound.

14. The Impugned Decision fails to address this defence submission. Rather, whilst it acknowledges that procedural rules have been breached, it fails to acknowledge that as a consequence thereof the only possible conclusion is that there is no legal basis for continued detention.
15. In paragraph 43 of the Impugned Decision, the Trial Chamber addresses an argument raised by the Khieu Samphan defence that, whilst it partly reflects the above defence argument, it fails to address the specific arguments set out in the Appellant's Request quoted above. Specifically where it relates to the interpretation of Internal Rule 68(2) and (3), as submitted in the Appellant's Request.
16. This omission forms a failure of the Chamber's obligation to reason its decisions. An overview of this obligation is set out clearly in paragraphs 24 – 27 of the same Impugned Decision. The defence submits that the Trial Chamber's failure to address the defence submission set out in paragraph 12 of the Appellant's Request forms a deficiency in the Impugned Decision, resulting in an error of law. As

¹⁵ Appellant's Request, paras. 1 and 12.

¹⁶ Appellant's Request, para. 12.

stated in the Impugned Decision, the obligation to reason a judicial decision is 'considered to be a critical component of the right to a fair trial'.¹⁷

17. The Impugned Decision states:¹⁸

The Chamber finds that the Pre-Trial Chamber'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.

18. The Chamber's failure to address the main defence submission set out in the Appellant's Request constitutes an error of law, as it concerns an infringement of the Appellant's right to a fair trial as guaranteed by Internal Rule 21 and Article 14(1) ICCPR.

4.2 Error of Law – Erroneous Interpretation of Internal Rule 68(2) and (3)

19. The second appeal ground is related to the first appeal ground, but complains not of the fact that the Impugned Decision was unreasoned, but points to the fact that Internal Rule 68 was erroneously interpreted by the Trial Chamber, which forms a separate error of law.

20. The defence submission is that after 21 January 2011 and until the PTC Reasoned Decision of 15 February 2011, there was no legal basis for the Appellant's detention hence it was unlawful. In paragraph 43 of the Impugned Decision, the Trial Chamber touches upon the interpretation of Internal Rule 68, but relies solely on the third limb of that provision, without acknowledging the second limb thereof. Internal Rule 68(2) specifies clearly that:

[W]here an appeal is lodged against the Indictment, the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber. The Pre-Trial Chamber shall decide within 4 months.

21. The Impugned Decision does not take into account this provision, which was raised in the Appellant's Request.¹⁹

¹⁷ Impugned Decision, para. 25.

¹⁸ Impugned Decision, para. 29.

22. Internal Rule 68(2) is unambiguous in that it requires the Pre-Trial Chamber to decide upon the Indictment within four months of the lodging of the appeal. The defence filed its appeal on 18 October 2010, and the four month time period thus expired on 21 January 2011. After that date and until the PTC's Reasoned Decision on 15 February 2011, the Appellant's detention was illegal.
23. It is respectfully submitted that the Trial Chamber's discussion on appropriate remedies²⁰ and on the requirements of Internal Rule 63(3)²¹ is misguided, for without a legal basis for detention, continued detention is illegal and the Appellant does not have to establish prejudice, harm and proportionality²² or show that the requirements of Rule 63(3) are no longer met.
24. Further, it is respectfully submitted that the Trial Chamber's finding that it has to 'assess whether the validity of these decisions was affected in consequence',²³ is not the correct approach. Once it is established that the legal basis for continued detention is procedurally defective, the only possible conclusion is that the continued detention based thereon is no longer legal.
25. The Impugned Decision fails to recognize the correct interpretation of Internal Rule 68(2) and (3). Thus, whilst it acknowledges a procedural defect in the Pre-Trial Chamber's failure to provide reasons in the PTC Unreasoned Decision, it fails to accept the only viable conclusion, namely that the detention between 21 January and 15 February 2011 was illegal. This constitutes an error of law in the Trial Chamber's reasoning.

4.3 Error of Fact – Incorrect Reflection of OCIJ Order

¹⁹ Appellant's Request, para. 12.

²⁰ Impugned Decision, Section 4.2.3 – Applicable remedies.

²¹ Impugned Decision, paras. 38 and 41.

²² See Impugned Decision, para. 35.

²³ Impugned Decision, para. 29.

26. This appeal ground covers an issue that is irrelevant to the substance of the two appeal grounds discussed above. However, in discussing the applicability of the requirements of Internal Rule 63(3), the Impugned Decision makes an incorrect statement to the Appellant's detriment.
27. In paragraph 41 of the Impugned Decision, the Trial Chamber states that '[t]he CIJs have noted that the Accused has significant material resources which would facilitate her flight to another country and that she may be tempted to avoid justice in view of the sentence she faces in case of conviction', whilst referring to 'Order on Extension of Provisional Detention', C20/8, 10 November 2008. This Order does not make such statement, nor did the Co-Investigators make such statement on any other occasion, as far as the defence is aware. Rather, the information available on the Case File indicates that the Charged Person is indigent,²⁴ and no evidence to the contrary has been adduced.
28. This constitutes a separate error of fact, which violates the Appellant's right to a fair trial. Hence, this specific part of the Impugned Decision should also be quashed.

V CONCLUSION

29. At the time the Appellant's Request was filed, the only viable solution for the procedural defect of Internal Rule 68(2) and (3) was the immediate release of the Appellant. However, in the mean time the Pre-Trial Chamber has secured the procedural defect, and immediate release is no longer requested by the Appellant.
30. However, the Appellant has been illegally detained between 21 January and 15 February 2011, and such breach should not be taken lightly. The defence thus

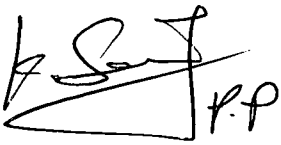
²⁴ See Letter by Mr. Rupert Skilbeck to the Co-Investigating Judges, 28 November 2007, Document No. A91 and Internal Memorandum by the Co-Investigating Judges to Mr. Rupert Skilbeck of 12 December 2007, Document No. A91/1.

submits that the Trial Chamber be directed to take this into account at the end of the trial.

V PRAYER

31. The defence respectfully requests the honorable Supreme Court Chamber to quash the findings of the Impugned Decision, and to find instead:

- a. That the Impugned Decision was insufficiently reasoned;
- b. That the above-quoted statement made in paragraph 41 of the Impugned Decision should be quashed;
- c. That the Appellant was illegally detained between 21 January 2011 and 15 February 2011; and
- d. That such illegal detention must be compensated at the sentencing stage.

Party	Date	Name Lawyers	Place	Signature
Co-Lawyers for Ieng Thirith	3 March 2011	PHAT Pou Seang Diana ELLIS, QC	Phnom Penh	 P.P