

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

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**CO-PROSECUTORS' RESPONSE TO IENG THIRITH'S APPEAL AGAINST THE
TRIAL CHAMBER'S "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”).¹ On 3 March 2011, the Accused Ieng Thirith (“Accused”) filed an appeal against the Decision (“Defence Appeal”).² In the Defence Appeal, the Accused argues that the Trial Chamber abused its discretion by failing to address the Accused’s main argument and by incorrectly interpreting Rule 68.³ The Accused also claims that the Trial Chamber misrepresented the Co-Investigating Judges’ findings with respect to the Accused’s access to significant material resources.⁴
2. In light of these alleged errors, the Accused requests that the Supreme Court Chamber quash the Trial Chamber Detention Decision, substitute a finding that the Accused was illegally detained between 21 January and 15 February 2011, and order the Trial Chamber to provide compensation for this illegal detention at the end of the trial stage.⁵
3. In response, the Co-Prosecutors submit that the Defence Appeal should be rejected in its entirety as the Accused has failed to demonstrate that the Trial Chamber discernibly erred in the exercise of its discretion since (1) the Trial Chamber adequately addressed the Accused’s arguments; (2) the Trial Chamber’s conclusion on remedies was reasonable and within the scope of its discretion; and (3) the Trial Chamber accurately represented the findings of the Co-Investigating Judges with respect to the evidence pertaining to the Accused’s access to material resources. The Accused has also failed to demonstrate that the error in the Trial Chamber’s exercise of its discretion has resulted in prejudice to her.

II. STANDARD OF REVIEW

4. 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.”⁶

¹ Trial Chamber, Decision on the Urgent Applications for Immediate Release of Nuon Chea, Khieu Samphan and Ieng Thirith, Case File No. 002/19-09-2007-ECCC/TC, Trial Chamber 16 February 2011 (“Trial Chamber Detention Decision”).

² 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, Case File No. 002/19-09-2007-ECCC/SC, Defence, 3 March 2011, E50/2/1/1 (“Defence Appeal”).

³ Defence Appeal, paras. 12, 19.

⁴ Defence Appeal, paras. 26-28.

⁵ Defence Appeal, para. 2.

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

III. THE TRIAL CHAMBER ADEQUATELY ADDRESSED THE ACCUSED'S ARGUMENTS.

5. The Accused argues that the Trial Chamber Detention Decision did not constitute a reasoned decision because it did not address the Accused's argument "relat[ing] to the interpretation of Internal Rule 68(2) and 68(3)."⁷
6. The Co-Prosecutors submit that the Accused has failed to meet her burden of alleging a discernible error in the Trial Chamber's exercise of its discretion. In particular, the Accused fails to explain how her argument about the interpretation of Internal Rule 68 is distinct from the arguments that were addressed in detail by the Trial Chamber in paragraphs 23 – 36 of the Trial Chamber Detention Decision, or, alternatively, in paragraph 43 of the Decision.⁸ The mere fact that the Accused disagrees with a conclusion of the Trial Chamber Detention Decision is not a sufficient basis for alleging a lack of reasoning in the Decision.
7. In any case, the Trial Chamber adequately discharged its burden of providing reasons for its legal findings, including on the issue of remedies. In particular, the Trial Chamber cited international jurisprudence in support of its conclusion: that while the lack of immediate reasoning constituted a procedural defect in the Pre-Trial Chamber Closing Order Appeal decisions, this defect had been remedied by the subsequent issuance of the full decision and did not serve to invalidate the decisions on the Closing Order and their detention provisions.⁹

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

8. The Accused further argues that the Trial Chamber committed an error of law in failing to hold that the detention of the Accused between 21 January 2011 and 15 February 2011 was illegal and must be compensated.¹⁰
9. The Co-Prosecutors submit, however, that the Trial Chamber acted within the scope of its discretion in holding (1) that the Pre-Trial Chamber Decisions on the Closing Order,

⁷ Defence Appeal, para. 15.

⁸ See Trial Chamber Detention Decision, para. 23 ("In considering NUON Chea and IENG Thirith's claim that the Decisions on the Closing Order cannot qualify as decisions under Rule 68(2) and (3) because they lack reasoning, the Chamber has reviewed . . ."); para. 9 (referring to Nuon Chea and Ieng Thirith's argument that the Decisions on the Closing Order cannot qualify as decisions under Rule 68(2) and (3)).

⁹ Trial Chamber Detention Decision, para. 34-35 (citing *Khudoyorov v. Russia*, Judgement, ECHR (no. 6847/02), 8 November 2005, paras. 128-129, 132).

¹⁰ Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OClI, Office of Co-Investigating Judges, 14 November 2007, C20, para. 8.

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.¹¹

10. The Trial Chamber's conclusions are reasonable and well within the scope of its discretion.¹² Indeed, the Trial Chamber Detention Decision, affirming the validity of the Pre-Trial Chamber's 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*.¹³ 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.¹⁴ Similarly, the Trial Chamber Detention Decision 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.¹⁵
11. Furthermore, as acknowledged by the Accused, the Pre-Trial Chamber "secured the procedural defect, and immediate release is no longer requested by the [Accused]."¹⁶ The Accused is not alleging any present prejudice as a result of the procedural defect, and the issue of the potential appropriateness of remedies for the procedural defect is best left until the conclusion of trial, as held by the Trial Chamber.

¹¹ See Trial Chamber Detention Decision, paras. 35-36.

¹² In contrast, the Accused fails to cite any authorities in support of her assertion that "[o]nce 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." See Defence Appeal, para. 24.

¹³ See Trial Chamber Detention Decision, paras. 35; Detention Hearing Transcript, Case File No. 002/19-09-2007-ECCC/TC, 31 January 2011 ("Detention Hearing Transcript"), T. 52-53;

¹⁴ *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.

¹⁵ 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).

¹⁶ Defence Appeal, para. 29.

V. THE TRIAL CHAMBER ACCURATELY REPRESENTED THE FINDINGS OF THE CO-INVESTIGATING JUDGES WITH RESPECT TO THE ACCUSED'S ACCESS TO MATERIAL RESOURCES.

12. The Accused claims that the Trial Chamber Detention Decision incorrectly represented the findings of an Order of the Office of the Co-Investigating Judges (“OCIJ”) regarding the Accused’s possession of “significant material resources” and that this portion of the Decision should be quashed.¹⁷ In the impugned part of the Trial Chamber Detention Decision, the Trial Chamber cited a 10 November 2009 OCIJ Order in support of the statement 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.”¹⁸
13. The Accused submits that the OCIJ Order cited by the Trial Chamber does not support the assertion at issue. On the contrary, the Co-Prosecutors assert that the OCIJ Order supports the Trial Chamber’s statement since by finding no change in circumstances, the OCIJ in effect affirmed its prior findings, which relied on evidence relating to the Accused’s access to material resources and how that might impact her risk of flight.¹⁹
14. In their 14 November 2007 Provisional Detention Order, the OCIJ stated that “numerous elements show that IENG Thirith (who has a residence abroad and has made numerous voyages outside of Cambodia) has the material means necessary to facilitate her flight to another country, especially those with which Cambodia does not have any extradition agreements. It may, thus, be feared that the Charged Person, who faces a maximum sentence of life imprisonment if convicted, will be tempted to flee the legal process.”²⁰
15. Similarly, in their 10 November 2008 Order, the OCIJ stated that: “[i]ndeed, numerous elements show that Ieng Thirith has significant material resources that could facilitate her flight, including to foreign countries, especially those with which Cambodia has not signed any extradition treaty. It may thus be feared that she would be tempted to avoid justice now that she faces a maximum penalty of life imprisonment if convicted.”²¹

¹⁷ Defence Appeal, paras. 27-28.

¹⁸ Trial Chamber Detention Decision, para. 41.

¹⁹ See Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges, 10 November 2009, C20/8, paras. 23-24.

²⁰ Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges, 14 November 2007, C20, para. 8.

²¹ Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges, 10 November 2008, C20/4, para. 28.


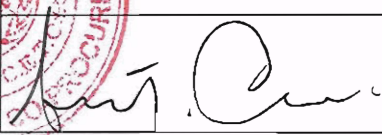
16. In light of the above, the Trial Chamber did not err in its representation of the OCIJ's findings, and there is no need to augment paragraph 41 of the Trial Chamber Detention Decision in any way. If additional support for the impugned statement is deemed necessary, the Co-Prosecutors submit that the Supreme Court Chamber amend the Trial Chamber Detention Decision by adding in a reference to the 14 November 2007 and 10 November 2008 OCIJ Orders.²²

VI. CONCLUSION

17. Therefore, the Co-Prosecutors respectfully request that the Supreme Court Chamber:

- i) Deny the Accused's request to find the Trial Chamber Detention Decision was insufficiently reasoned;
- ii) Deny the Accused's request to quash the statement in the Trial Chamber Detention Decision regarding the Accused's significant material resources;
- iii) Deny the Accused's request to hold that the Accused was illegally detained between 21 January 2011 and 15 February 2011; and
- iv) Deny the Accused's request to order the Trial Chamber to provide compensation at the end of the trial stage.

Respectfully submitted,

Date	Name	Place	Signature
21 March 2011	CHEA Leang Co-Prosecutor	Phnom Penh	
	Andrew CAYLEY Co-Prosecutor		

²² The appropriate references would be as follows: Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges, 14 November 2007, C20, para. 8; Provisional Detention Order, Case File No. 002/19-09-2007-ECCC/OCIJ, Office of Co-Investigating Judges, 10 November 2008, C20/4, para. 28.