

BEFORE THE TRIAL CHAMBER
OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

FILING DETAILS

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Party Filing: Mr Khieu Samphan

Filed Before: The Trial Chamber

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APPEAL AGAINST THE DECISION ON THE APPLICATION FOR IMMEDIATE
RELEASE

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Before:

The Trial Chamber

Judge NIL Nonn

Judge Silvia CARTWRIGHT

Judge THOU Mony

Judge Jean-Marc LAVERGNE

Judge YA Sokhan

For the attention of:

The Supreme Court Chamber

Judge KONG Srim

Judge Motto NOGUCHI

Judge SOM Sereyvuth

Judge Agnieszka KLONOWIECKA

MILART

Judge SIN Rith

Judge Chandra Nihal JAYASINGHE

Judge YA Narin

MAY IT PLEASE THE SUPREME COURT CHAMBER

1. On 18 January 2011, Mr KHIEU Samphan filed an application for his release under Rule 82(3) of the Rules (“the Rules”).¹
2. On 16 February 2011, the Trial Chamber issued a decision rejecting the Application (“the Decision”).²
3. Mr KHIEU Samphan hereby files an appeal, pursuant to Article 36 of the Law on the Establishment of the ECCC and Rules 104(b), 105(2), 106(2)(3)(4), and 107(2) of the Rules.³
4. The Trial Chamber (the “Chamber”) committed an error of law invalidating its Decision, and a discernible error in the exercise of the Trial Chamber’s discretion which resulted in serious prejudice to the Appellant.

I - MISREADING OF RULE 68(3)

5. The Trial Chamber held the view that the continued detention of Mr KHIEU Samphan has a legal basis.⁴ According to the Chamber, the Appellant’s interpretation is based on a “misreading” of Rule 68(3), as the four months under provisional detention set forth in this Rule accordingly commenced on the date upon which it was seized of the case file.
6. The reality is that the Chamber deliberately misrepresented Mr KHIEU Samphan’s submissions, and misdirected itself as to the applicable legal principles.
7. Contrary to the Chamber’s statement,⁵ it was not the Appellant’s submission that Rule 68(3) should be “read together with Articles 305 and 249 of the Code of Criminal Procedure” (the “CCP”), and the reference to the CCP provisions is relevant. This is clearly

¹ Application for Release Pursuant to Rule 82(3) of the Internal Rules, 18 January 2011, E18 (the “Application”)

² Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, 16 February 2011, E50.

³ According to Rule 104(4)(b), decisions on matters relating to provisional detention and bail, pursuant to Rule 82, are subject to immediate appeal.

⁴ Decision, para. 43, p 15.

⁵ Decision, paras. 11 and 43, pp. 4-5 and 15.

revealed by a careful reading of the Application for Release and the transcript of the proceedings in their entirety.⁶

8. Mr KHIEU Samphan's position is plain: a) Rule 68(3) is clear, notice of the Closing Order marks the start of the time limit; b) this interpretation is *further reinforced* by the relevant provisions of the CCP and shared by the Co-Prosecutors; c) should there be any doubt as to the interpretation of the Rule, it should definitely benefit the Accused.

9. The Supreme Court Chamber will note that the Chamber not only misrepresented the Appellant's submissions, but it also refused to take into account the essential arguments presented to it, and it omitted to give reasons for its findings concerning those arguments.

10. The Trial Chamber simply ignored what has consistently been the Co-Prosecutors' position – a position that they changed without any justification at the hearing – namely that the period of four months commenced on the date upon which the Closing Order **was notified**.⁷

11. Furthermore, the Chamber completely ignored the Appellant's right to legal certainty,⁸ as enshrined in Rule 21 of the Rules, according to which the Rules must be interpreted so as to always safeguard the interests of the Accused.

12. Moreover, the Chamber misdirected itself as to the applicable legal principles. It committed an **error of law** by finding that the extension of the provisional detention ordered by the Co-Investigating Judges, pursuant to Rule 68(3), started to run from the date upon which it was seized of the case file. The Chamber's interpretation is without any legal basis.

⁶ Application, paras. 1 to 28; Application, para. 25: "This application is further reinforced by Article 305 [of] the Code of Criminal Procedure of Cambodia." By way of comparison and illustration, see Article 305 of the Code of Criminal Procedure of Cambodia; See also **Khmer version** of the Transcript of Hearing of 31 January 2011, E1/1.1, 00642341, p. 15, lines 1 to 4

⁷ Co-Prosecutors' Response to NUON Chea's Application for Provisional Release, 13 September 2010, C65/2, para. 11. The original version is very clear: "It [Rule 68] provides that the issuance of a Closing Order "puts an end" to the prior provisional detention, but authorizes the Co-Investigating Judges in the Closing Order to "maintain the Accused in Provisional Detention" for a period of four months. The four-month detention period is the same time period provided to the Pre-Trial Chamber in rule 68(2) to decide any appeals of the Closing Order, and is clearly intended to provide an additional period of detention following an indictment that allows sufficient time for appeals to be resolved and for the Accused to be brought before the Trial Chamber. Rule 68(3) expressly provides that any such decision by the Co-Investigating Judges in a Closing Order to detain an Accused "shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time. (emphasis added) (footnote omitted)".

⁸ The Application, para. 21; Transcript of Hearing of 31 January - Application for Immediate Release NUON Chea, KHIEU Samphan, IENG Thirith PUBLIC, E1/1.1.

13. In fact, Rule 68(3) is unequivocal: “[i]n any case, the decision of the Co-Investigating Judges [...] 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.”

14. **There is no** reference **anywhere** in Rule 68 to seisin of the Trial Chamber, or even to such seisin as marking start of the fourth-month period. The Rule only specifies that the accused must be brought before the Trial Chamber within that time frame.

15. The four-month period therefore commences upon notice of the Closing Order, in this instance 16 September 2010, and not on the date upon which the Trial Chamber was seised of it, i.e., 14 January 2011. The time limit therefore expired on 16 January 2011, since the Chamber was supposed to bring Mr KHIEU Samphan before it, but failed to do so owing to lack of diligence. It cannot now hide behind a purported erroneous interpretation of Rule 68(3) by the Appellant to justify his arbitrary continued detention.

16. The error of law committed by the Chamber is flagrant and invalidates its Decision: the Appellant cannot be maintained in detention without any legal basis.

II – ERRONEOUS JUSTIFICATION FOR THE CONTINUED DETENTION

17. After reviewing the Appellant’s circumstances, the Trial Chamber considers that “the potentially severe penalty faced by Khieu Samphan if convicted creates an incentive to abscond and that continuation of detention is necessary to ensure his presence during trial proceedings.”⁹ Overlooking the reasons for continued detention which were adopted earlier by the Co-Investigating Judges and the Pre-Trial Chamber, and rejecting the other arguments raised by the Co-Prosecutors, the Chamber thus ordered the Appellant’s continued detention **solely** on the basis of Rule 63(3)(b)(iii) of the Rules.

18. As such, the Trial Chamber committed an **error of law**, in that it manifestly misdirected itself as to the applicable legal principles in the exercise of its discretion.

⁹ Decision, para. 40, p. 14.

19. In fact, notably having regard to the presumption of innocence, the potentially severe penalty **alone** cannot justify denial of provisional release or extended pre-trial detention.¹⁰ International jurisprudence is constant on this principle.

20. Indeed, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) has recalled that “it is reasonable for a Trial Chamber to take into account the gravity of the offences charged in order to determine whether facing the possibility of a lengthy sentence would constitute an incentive for an accused to flee,” but that “the seriousness of the charges against an accused cannot be the sole factor determining the outcome of an application for provisional release.” It has emphasized that “a Trial Chamber must take into account the seriousness of the charges in addition to several other factors” (emphasis supplied).¹¹

21. Relying directly on the case-law of the European Court of Human Rights, the ICTY has held that “the expectation of a lengthy sentence cannot be held against an accused *in abstracto* because all accused before this Tribunal, if convicted, are likely to face heavy sentences.”¹²

22. **All** the accused persons before the ECCC “if convicted, are likely to face heavy sentences.”

23. In basing the decision to continue holding Mr KHIEU Samphan in detention solely on the potentially heavy penalty he faces, the Chamber clearly misdirected itself as to the applicable legal principles. Its error invalidates the Decision; the Appellant ought to be released since his detention is justified by **no other** criterion than the one set out in Rule 63(3)(b)(iii) of the Rules.

III - VIOLATION OF THE RIGHT TO A FAIR TRIAL

¹⁰ See for example ICTY: *The Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005, 12 October 2005, p. 6.

¹¹ ICTY: *The Prosecutor v. Cermak and Markac*, IT-03-73-AR65.1, Decision on Interlocutory Appeal against Trial Chamber’s Decision Denying Provisional Release, 2 December 2004, paras. 25-26 (footnotes omitted); see also, *inter alia*: *The Prosecutor v. Tolimir et al.*, IT-04-80-AR65.1, Decision on Interlocutory Appeal Against Trial Chamber’s Decision Granting Provisional Release, 19 October 2005, para. 25 ; *The Prosecutor v. Popovic et al.*, IT-05-88-AR65.1, Decision on Interlocutory Appeal of Trial Chamber Decision Denying Drago Nikolic’s Motion for Provisional Release, 24 January 2006, p. 5.

¹² ICTY: *The Prosecutor v. Haradinaj et al.*, IT-04-84-PT, Decision on Ramush Haradinaj’s Motion for Provisional Release, 6 June 2005, para. 24, and footnotes 47, 48 and 49.

24. In rendering its Decision, the Trial Chamber committed serious errors that irretrievably affect the fairness of the trial.

A – Violation of the right to have adequate time for the preparation of his defence

25. The Judges invited the parties to state their position regarding the conditions set out in Rule 63(3) of the Internal Rules “during the hearing”, even though the Defence application for release was not based on this legal premise.¹³ In so doing, the Trial Chamber committed a discernable error in the exercise of its discretion, which resulted in serious prejudice to the Appellant.

26. Indeed, the Appellant did not have adequate time for the preparation of his defence, one of his most fundamental rights.¹⁴ Had the Chamber at least given the Defence advance notice that the matter would be addressed during the hearing, the Defence could have expanded and consolidated the arguments raised during the hearing.

27. The Chamber acknowledges that the parties did not have adequate time to prepare their arguments. However, the possible “remedy” for the prejudice offered by the Chamber is not sufficient.¹⁵ The Chamber will not require the Defence to establish a change in circumstances should the Defence wish to make a fresh application for release before the Chamber. This hypothetical relaxing of Rule 82(4) is, needless to say, no substitute for the Appellant’s immediate release.

28. The prejudice suffered by Mr KHIEU Samphan is all the more serious considering that neither the arguments advanced late in the hearing nor the ones raised in previous applications were taken into consideration by the Chamber.

B – Failure to consider Defence arguments and to provide reasons

29. The Chamber did not reason its Decision with regard to the Appellant’s arguments on the specific issue of bail, and it did not address this point in general, even though it was required to do so. The Chamber thereby committed two errors of law.

¹³ Decision, para. 6, p. 3

¹⁴ Article 14.3(b) of the International Covenant on Civil and Political Rights, Article 31 of the Constitution of the Kingdom of Cambodia, Article 13(1) of the Agreement, Article 35 (new) of the Law on the Establishment of the ECCC, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁵ Decision, para. 42, p. 14.

30. On the one hand, the Chamber admonished the Accused on “the absence of detailed information regarding viable alternatives presented at the hearing”.¹⁶ This admonition was entirely unwarranted, insofar as the Chamber had already noted the Appellant’s submission that “adequate security could be secured through alternatives.”¹⁷

31. Furthermore, the Appellant **repeatedly** raised these arguments **at several instances** both during the hearing and in his earlier applications for release,¹⁸ but the Judges did not bother to explain their reasoning on this point.

32. The Trial Chamber therefore erred by failing to give enough weight to Mr KHIEU Samphan’s essential arguments, and thereby failing to reason its Decision.

33. On the other hand, the Chamber recognises its jurisdiction under Rule 82(2) of the Rules, which provides that it “may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these IRs.”¹⁹

34. Now, this Rule rightly requires the Chamber to decide on the question of bail, detention being the exception (especially after many years of deprivation of liberty). In this instance, it clearly emerges that the Judges completely overlooked the possibility of granting bail.

35. Like the French *Cour de Cassation*,²⁰ the Supreme Court Chamber ought to reverse the Decision by which the Judges extended the provisional detention without explaining why the guarantees offered by bail are insufficient, and thereby failed to give reasons for their Decision.

36. As noted by the ICTY Appeals Chamber, a Trial Chamber must not only consider **all** the relevant factors that a reasonable Chamber would have considered before issuing a decision on provisional release of an accused, but it must also issue a reasoned opinion indicating its point of view on such relevant factors and the weight attached to them.²¹

¹⁶ Decision, paras. 39 to 41, pp. 13 to 14.

¹⁷ Decision, para. 13, p. 5.

¹⁸ Transcript of Proceedings of 31 January 2011 - Application for Immediate Release NUON Chea, KHIEU Samphan, IENG Thirith PUBLIC, E1/1.1, 00642848, page 80, lines 17 and 18 and 00642850 and 00642851 p. 82, line 24 and 25. See, for example: Defence Objections to the Extension of Provisional Detention, 14 November 2008, C26/3, para. 43.

¹⁹ Decision, para. 21, pp. 7-8 (emphasis added).

²⁰ *Cour de Cassation*, Criminal Chamber, No. 97-83.014, 19 August 1997.

²¹ ICTY: *The Prosecutor v. Popovic et al.*, IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial APPEAL AGAINST THE DECISION ON THE APPLICATION FOR IMMEDIATE RELEASE

37. Indeed, quality international justice can determine in exacting fashion the legal conditions for possible release without affecting the certainty of the commencement of a trial of this nature.

38. The Trial Chamber's Decision is therefore invalidated by the errors of law committed by the Chamber: maintaining the Appellant in detention is not justified by the insufficiency of bail conditions, given that, in any case, **bail ensures the presence of the Accused during proceedings** (Rule 63(3)(b)(iii)).

39. In conclusion, the errors committed by the Chamber, together and separately, amount to a miscarriage of justice, and invalidate the Decision. Mr KHIEU Samphan must therefore be released immediately.

FOR THESE REASONS

40. The Appellant respectfully requests the Supreme Court Chamber:

- TO REVERSE the Decision with respect to the impugned dispositions;
- TO ORDER that Mr KHIEU Samphan shall be released immediately;
- TO FIND that Mr KHIEU Samphan's right to a fair trial has been violated and that he has suffered serious prejudice.

WITHOUT PREJUDICE AND IT WILL BE JUSTICE

	SA Sovan	Phnom Penh	
	Jacques VERGÈS	Paris	
	Philippe GRÉCIANO	Paris	
Date	Name	Place	Signature