



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា
 Extraordinary Chambers in the Courts of Cambodia
 Chambres Extraordinaires au sein des Tribunaux Cambodgiens

ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

Kingdom of Cambodia
 Nation Religion King
 Royaume du Cambodge
 Nation Religion Roi

អង្គជំនុំជម្រះសាលាដំបូង
 Trial Chamber
 Chambre de première instance

សំណុំរឿងលេខ: ០០២/១៩ កញ្ញា ២០០៧/អវតក/អជសដ
 Case File/Dossier No. 002/19-09-2007/ECCC/TC

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 Judge Silvia CARTWRIGHT
 Judge YA Sokhan
 Judge Jean-Marc LAVERGNE
 Judge THOU Mony

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**DECISION ON THE URGENT APPLICATIONS FOR IMMEDIATE RELEASE OF
 NUON CHEA, KHIEU SAMPHAN AND IENG THIRITH**

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1. INTRODUCTION

1. On 18 and 21 January 2011, the present requests for release by NUON Chea, KHIEU Samphan and IENG Thirith respectively were filed.¹ These requests allege, amongst other things, that the absence of reasons in the Pre-Trial Chamber's decisions of 13 January 2011 on the appeals against the Closing Order invalidates these decisions, requiring the immediate release of the Accused.²

2. PROCEDURAL HISTORY

2. On 15 September 2010, the Co-Investigating Judges ("CIJs") issued their Closing Order in Case No. 002/19-09-2007/ECCC ("Case 002") and ordered the continued provisional detention of all four accused until they are brought before the Trial Chamber.³ The Pre-Trial Chamber ("PTC") was seised of the case file following appeals of the Closing Order filed by the four Defence teams.⁴ None of the Accused to whom the present requests relate specifically appealed the detention order contained in the Closing Order to the PTC.⁵

3. On 13 January 2011, the PTC issued decisions without reasoning on the appeals against the Closing Order (the "Decisions on the Closing Order"), in addition to IENG Sary's separate appeal on detention, indicating that reasons would follow.⁶ These Decisions on the Closing Order contained an order to continue the provisional detention of each of the accused until they are brought before the Trial Chamber.

¹ "Urgent Application for Immediate Release of Nuon Chea", E19, 18 January 2011; "Application for Release Pursuant to Rule 82(3) of the Internal Rules", E18, 18 January 2011; "Request for Immediate Release of Madame Ieng Thirith", E21, 21 January 2011.

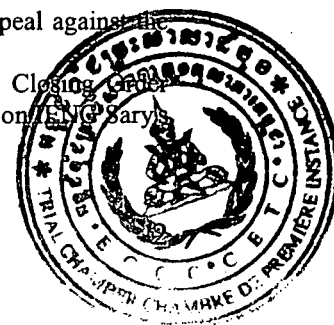
² "Decision on Khieu Samphan's Appeal against the Closing Order", D427/4/14, 13 January 2011 ("Decision on KHIEU Samphan Closing Order Appeal"); "Decision on Ieng Sary's Appeal against the Closing Order", D427/1/26, 13 January 2011 ("Decision on IENG Sary Closing Order Appeal"); "Decision on Ieng Thirith and Nuon Chea's Appeal against the Closing Order", D427/3/12, 13 January 2011 ("Decision on IENG Thirith and NUON Chea Closing Order Appeal"); "Decision on Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention", D427/5/9, 13 January 2011 ("Decision on IENG Sary's Provisional Detention Appeal").

³ Closing Order, D427, 15 September 2010, "Part Six: Maintenance in Detention".

⁴ "Appeal against the Closing Order," D427/3/1, 18 October 2010; "Ieng Thirith Defence Appeal from the Closing Order," D427/2/1, 18 October 2010; "Ieng Sary's Appeal against the Closing Order", D427/1/6, 25 October 2010; "Appeal against the Closing Order", D427/4/3, 18 October 2010.

⁵ The IENG Sary Defence team, however, did appeal the detention order; see "Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention", D427/5/1, 22 October 2010.

⁶ Decision on KHIEU Samphan's Closing Order Appeal, para. 3; Decision on IENG Sary's Closing Order Appeal, p. 4; Decision on IENG Thirith and NUON Chea's Closing Order Appeal, p. 5; Decision on IENG Sary's Provisional Detention Appeal, p. 3.



4. On 21 January 2011, the PTC issued its reasons in relation to IENG Sary's separate detention appeal, as well as the reasons for the detention portion of the Decisions on the Closing Order in respect of NUON Chea and IENG Thirith.⁷ On the same day, the PTC issued the reasons for its Decision on the Closing Order in respect of KHIEU Samphan, including its detention portion.⁸ On 24 January, the PTC issued reasons for the detention portion of its Decision on the Closing Order with respect to IENG Sary.⁹

5. On 31 January 2011, the Trial Chamber heard the oral arguments of the three Defence teams and the Co-Prosecutors.¹⁰ The Chamber specifically requested the parties to address two questions:

1. What prejudice to the Accused do you say has occurred because no reasons were given in the Pre-Trial Chamber's Order dated 13 January 2011?

2. Why do you say that immediate release is the only remedy for addressing this alleged prejudice?¹¹

6. During this hearing, the Chamber invited the three defence teams and Co-Prosecutors also to indicate whether they considered the pre-conditions for the maintenance of provisional detention in Rule 63(3) of the Internal Rules ("Rules") to exist, and whether any material change in circumstances had occurred in relation to any of the three Accused.¹²

7. In an Interoffice Memorandum filed on 4 February 2011, the Trial Chamber invited the Pre-Trial Chamber to explain why it had not delivered reasons for its decisions on the Closing Order at the time they were issued and by what date it intended to give full reasons for its decision concerning NUON Chea and IENG Thirith.¹³



⁷ "Decision on Ieng Sary's Appeal against the Closing Order's Extension of his Provisional Detention", D427/5/10, 21 January 2011; "Decision on Ieng Thirith's and Nuon Chea's Appeal against the Closing Order: Reasons for Continuation of Provisional Detention", D427/3/13, 21 January 2011.

⁸ "Decision on Khieu Samphan's Appeal against the Closing Order", D427/4/15, 21 January 2011.

⁹ "Decision on Ieng Sary's Appeal against the Closing Order: Reasons for Continuation of Provisional Detention", D427/1/27, 24 January 2011.

¹⁰ Transcript ("T."), 31 January 2011.

¹¹ "Consolidated Scheduling Order - Application for Release", E26, 27 January 2011, p. 2; T., 31 January 2011, pp. 8-9.

¹² T., 31 January 2011, p. 36.

¹³ "Request for information concerning reasons for decisions on the appeal against the Closing Order and detention decisions in trial 002", E32, 3 February 2011.

8. In response, the Pre-Trial Chamber indicated that it would file its full reasons in English “by early next week”.¹⁴ On 15 February 2011, the PTC filed its reasons for the Decisions on the Closing Order with respect to NUON Chea and IENG Thirith.¹⁵

3. SUBMISSIONS

3.1. Defence applications

3.1.1. Lack of legal basis for provisional detention

9. All three Accused claim that their detention lacks any legal basis and consequently seek immediate release. The NUON Chea and IENG Thirith Defence teams submit that the Decisions on the Closing Order are not reasoned as required by Rule 77(14) and therefore cannot qualify as decisions under Rule 68(2) and (3). Further, the CIJs’ Detention Order, issued at the same time as the Closing Order on 15 September 2010, expired after four months and could only have been extended by a proper decision of the PTC under Rule 68(3). In the absence of a PTC decision qualifying as such, there is accordingly no legal basis to retain the Accused in custody.¹⁶ Further, the failure to reason the detention portion of the Decisions on the Closing Order results in the absence of any legal basis for detention from 13 January onwards.

10. The NUON Chea Defence cite international fair trial standards and the principle of legality in support of its contention that reasoning is an integral component of decisions within the ECCC legal framework.¹⁷ Finally, the NUON Chea Defence allege a breach of the principle of *ultimum remedium*, on grounds that the CIJs and the PTC have consistently treated detention as a goal in itself rather than an exceptional measure.¹⁸

11. The KHIEU Samphan Defence contends that Rule 68(3), in conjunction with Articles 305 and 249 of the CCP, create an absolute requirement that an accused held in provisional

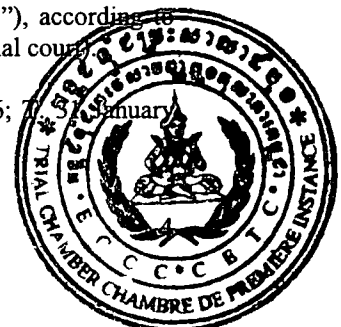
¹⁴ “Response to the Interoffice Memorandum from the Trial Chamber dated 4 February 2011”, D427/3/14, 9 February 2011 (“PTC Response”).

¹⁵ *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, D427/2/15, 15 February 2011.

¹⁶ “Urgent Application for Immediate Release of Nuon Chea” E19, 18 January 2011, paras. 12-15; “Request for Immediate Release of Madame Ieng Thirith”, E21, 21 January 2011, paras. 11-12; T., 31 January 2011, pp. 13-16, 23, 35-36 (also citing Article 249 of the Cambodian Code of Criminal Procedure (“CCP”), according to which the Accused must be released after four months if he or she has not appeared before the trial court).

¹⁷ T., 31 January 2011, pp. 23-24, 27.

¹⁸ “Urgent application for Immediate Release of Nuon Chea”, E19, 18 January 2011, para. 6; T., 31 January 2011, p.78.



detention must be brought before the Trial Chamber within four months of the issuance of the Closing Order.¹⁹ The Co-Prosecutors counter that following an appeal against the Closing Order, this four-month period starts to run from the date upon which the appeal is decided and the Closing Order becomes final. In the present context, this time-limit continues to run.²⁰

3.1.2. Prejudice and remedy

12. With respect to the questions posed by the Chamber, the NUON Chea team alleges specific prejudice in relation to its ability to prepare its preliminary objections in the absence of the PTC's reasoning. This is particularly the case with respect to jurisdictional challenges, which may be relevant to preliminary objections and for which reasons were at the time still pending. It further contends that the Court's failure to uphold its own law in itself amounts to prejudice, which may only be cured by immediate release.²¹

3.1.3. Conditions under Rule 63(3)

13. The Defence teams rely on a combination of the following factors in alleging that the pre-conditions for detention listed in Rule 63(3) are not met. They submit that continued detention is unnecessary to ensure the Accused's presence at trial, and that release poses no threat either to the Accused or to public order. Additionally, there is no indication that the Accused have ever tried to exert pressure on witnesses or victims, most of whom have in any event already been heard during the judicial investigation.²² International jurisprudence is further alleged to show that the justification for continuing detention generally diminishes over time. Accordingly its maintenance over the long term must be justified only with reference to compelling reasons.²³ Finally, adequate security could be secured through alternatives such as house arrest.²⁴

¹⁹ "Application for Release Pursuant to Rule 82(3) of the Internal Rules", E18, 18 January 2011, paras 19, 21 and 24; T., 31 January 2011, pp. 32-33.

²⁰ T., 31 January 2011, pp. 60-63 (citing Internal Rule 68(3) and Articles 247 to 250 and 282 of the CCP).

²¹ T., 31 January 2011, pp. 16-21. The other Defence teams did not directly address the above two questions posed by the Chamber (*see* T., 31 January 2011, p. 31-32).

²² T., 31 January 2011, pp. 36-40 (NUON Chea Defence), pp. 41-42 (KHIEU Samphan Defence) (noting that release poses no risk to the Accused's security, in view of the absence of violence during a visit of ECCC officials to Pailin); T., 31 January 2011, pp. 43-44 (IENG Thirith) (risks to witnesses are negligible given that the judicial investigation has concluded, and the Accused is unlikely to pose a disruption to public order in view of her age and frail health).

²³ T., 31 January 2011, p. 38 (NUON Chea Defence)

²⁴ T., 31 January 2011, p. 44 (IENG Thirith); T., 31 January 2011, pp. 79-82 (KHIEU Samphan).



3.2. Co-Prosecutors' submissions

14. The Co-Prosecutors oppose the applications for release.

3.2.1. Inadmissibility of the applications (NUON Chea)

15. The Co-Prosecutors contend that NUON Chea's application is inadmissible as it seeks to review of the validity of the Decisions on the Closing Order. However, the Trial Chamber is not an appellate body, and Rule 77(13) stipulates that PTC decisions are not subject to review.²⁵ NUON Chea contests this characterisation of his application for release, noting that it is instead made pursuant to Rule 82(3).²⁶

3.2.2. Merits and prejudice (NUON Chea)

16. The Co-Prosecutors dispute that NUON Chea has suffered prejudice from the PTC's failure to issue reasons in its 13 January 2011 decisions. The degree of reasoning required in a judicial decision depends on the totality of circumstances, including the nature and quantity of reasons put forward by the parties. In this instance, NUON Chea made no submissions before the PTC in respect of detention, with the result that the PTC simply continued the previous detention order of the CIJs. The reasons for maintaining the Accused in detention are therefore manifestly obvious, and the Accused was in practice in no doubt as to its basis.²⁷

17. In contrast to the *ultimum remedium* principle, the Co-Prosecutors contend that Rule 82(1) and jurisprudence of the ICTY instead establish a presumption that where an individual charged with serious international crimes has been detained prior to trial, he will remain in custody until the conclusion of the trial unless he can satisfy the Chamber that there has been a material change in circumstances since his last application for release.²⁸

3.2.3. Remedy (NUON Chea and IENG Thirith)

18. The Co-Prosecutors dispute that release constitutes the only available or appropriate remedy should the Trial Chamber find the PTC Decisions of 13 January 2011 to lack

²⁵ T., 31 January 2011, pp. 47-48.

²⁶ T., 31 January 2011, p. 76.

²⁷ T., 31 January 2011, pp. 49-50.

²⁸ T., 31 January 2011, pp. 51-52; *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of the Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, ICTY Appeals Chamber (IT-05-88-AR65.3), 1 March 2007, paras 11-12.



adequate reasons. In relation to an ICTY Trial Chamber decision found to lack adequate reasons, the ICTY Appeals Chamber did not order the release the Accused, but instead provided its own reasons to justify continued detention.²⁹ An additional remedy in the present context would be for the Accused to make a fresh application for provisional release pursuant to Rules 82(3) and 63.³⁰ Further, procedural defects relating to detention in the Decisions on the Closing Order ultimately may be remedied either through a reduction of sentence in the case of conviction, or financial compensation in the case of acquittal.³¹

3.2.4. Conditions for detention under Rule 63(3)

19. The Co-Prosecutors submit that in order to succeed, an application for release must demonstrate a material change in circumstances. They contend that this has not been demonstrated; to the contrary, access by the Accused to the case file and witness details increases the risk of pressure on witnesses. Security risks to the Accused, and consequences for public order, also stem from the increased public interest in the work of the ECCC.³²

20. The Co-Prosecutors further contend that confirmation of the indictment establishes a well-founded belief, pursuant to Rule 63(3)(a), that the Accused may have committed the alleged crimes.³³ As the charges pertain to extremely serious international crimes which attract a heavy sentence in case of conviction, the Accused further have an incentive to flee.³⁴

4. FINDINGS

4.1. Admissibility

21. The Trial Chamber has no competence to review decisions of the Pre-Trial Chamber. Nonetheless, the Trial Chamber has a duty to evaluate whether or not it has been validly seized of the case file by the Pre-Trial Chamber Decisions on the Closing Order confirming

²⁹ T., 31 January 2011, pp. 52-53; *Prosecutor v. Popović et al.*, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, ICTY Appeals Chamber (IT-05-88-AR65.3), 1 March 2007, para. 13.

³⁰ T., 31 January 2011, p. 53.

³¹ T., 31 January 2011, p. 65.

³² T., 31 January 2011, pp. 54, 57-59, 66-67.

³³ T., 31 January 2011, pp. 55-57 (NUON Chea) (alleging that NUON Chea placed Duch under pressure to change S-21 confessions during the Democratic Kampuchea regime and to destroy evidence demonstrates that there is a risk of him exerting pressure on witnesses or interfering with evidence). NUON Chea counters that there is no evidence of any inappropriate contact with witnesses or any concrete facts of public order justifying his detention (T., 31 January 2011, pp. 37-40, 71-74).

³⁴ T., 31 January 2011, p. 57.



the indictment against the Accused, and whether these decisions contain procedural defects which may affect the lawfulness of the Accuseds' detention pursuant to the detention portion of these decisions. The Chamber further notes that pursuant to Rule 82(2), the Trial Chamber 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".

22. The Chamber notes that some of the applications raise similar issues and has therefore addressed those jointly.

4.2. Obligation to reason judicial decisions

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 the domestic and international legal framework concerning the obligation to reason judicial decisions.

4.2.1. Applicable law

4.2.1.1. Cambodian law and ECCC Internal Rules

24. The obligation to provide reasons is mentioned in numerous provisions of Cambodian law.³⁵ While the Internal Rules do not contain a general requirement to reason judicial decisions, Rule 77(14) obliges the PTC to reason decisions issued under that Rule.³⁶ It is therefore apparent that reasoning is a key feature of decisions under both Cambodian law and the Internal Rules. The CCP and the Internal Rules, in addition, clearly establish a duty to reason decisions ordering or prolonging detention.³⁷ The ECCC legal framework is generally silent as to the consequence of delays in issuing reasons.

³⁵ See Code of Criminal Procedure of the Kingdom of Cambodia ("CCP"), Articles 206 (detention orders), 247 (closing orders), 357 (judgements) and 419 (listing lack of reasons as a ground to request cassation before the Supreme Court).

³⁶ Rule 77(14) states that "[a]ll decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors." This obligation applies to decisions by the Pre-Trial Chamber pursuant to Rule 74(3)(a) (jurisdictional appeals).

³⁷ In relation to detention decisions, the CCP and Rules indicate that the reasons should be stated at the same time as the detention is ordered: see Internal Rules 44(2) (arrest/detention order in case of flight), 51(1) and (3) (police custody and extension), 63(1)(b) (CIJ order for temporary detention), 63(7) (CIJ extension of provisional detention), 64(2) (CIJ decision on application for release), 68(1) (CIJ detention order in Closing Order) (SCC detention order). See further CCP, Articles 206 (detention order by the investigating judge), 207 (extension of provisional detention by the Investigating judge in case of crimes against humanity, genocide or war crimes), 211 (extension of provisional detention by the investigating judge) and 278 (detention order of the



4.2.1.2. International standards

25. The Chamber has also examined international standards in order to identify the purposes which underlie the requirement that judicial decisions be reasoned. The reasoning of judicial decisions is considered to be a critical component of the right to a fair trial as protected by Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”). This provision, which has been specifically referred to in Article 12 of the Agreement between the Royal Government of Cambodia and the United Nations,³⁸ is echoed in Article 6(1) of the European Convention on Human Rights (“Convention”).³⁹

26. In interpreting these provisions, the jurisprudence of the European Court of Human Rights (“ECHR”) has consistently emphasised that courts are required to reason their judicial decisions.⁴⁰ This obligation is motivated by the following objectives:

- a) to protect parties from arbitrariness and to safeguard legal certainty;⁴¹
- b) to ensure that the accused and the public understand the decision and to demonstrate to the parties that they have been heard;⁴²
- c) to permit public scrutiny of the administration of justice and to ensure that courts display special diligence in the conduct of proceedings;⁴³
- d) to reinforce the obligation on judges to base their reasoning on objective arguments;⁴⁴ and
- e) to guarantee appeal mechanisms by affording the parties a possibility to appeal, and by allowing review by higher or appellate courts.⁴⁵

investigation chamber) (“When the Investigation Chamber orders provisional detention, the order shall state reasons with reference to the provisions of Article 205 (Reasons for Provisional Detention) of this Code).

³⁸ International Covenant on Civil and Political Rights, 999 UNTS 171 (“ICCPR”), Article 14(1) (stipulating that “[i]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”); “Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodia Law of Crimes Committed During the Period of Democratic Kampuchea”, signed 6 June 2003 and entered into force on 29 April 2005, Article 12.

³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5/213 UNTS 222, 4 November 1950).

⁴⁰ *Ruiz Torija v. Spain*, Judgement, ECHR (no. 18390/91), 9 December 1994, para. 29; *Suominen v. Finland*, Judgement, ECHR (no. 37801/97), 1 July 2003, para. 34.

⁴¹ *Khudoyorov v. Russia*, Judgement, ECHR (no. 6847/02), 8 November 2005, paras 125, 131, 135-136, 146; *Stasaitis v. Lithuania*, Judgement, ECHR (no. 47679/99), 21 March 2002, para. 67.

⁴² *Taxquet v. Belgium*, Judgement, ECHR (no. 926/05), 16 November 2010, paras 90- 93; *Suominen v. Finland*, Judgement, ECHR (no. 37801/97), 1 July 2003, para. 37.

⁴³ *Suominen v. Finland*, Judgement, ECHR (no. 37801/97), 1 July 2003, para. 37; *Khudoyorov v. Russia*, Judgement, ECHR (no. 6847/02), 8 November 2005, para. 174. See also *Abdeel Keerem Hassan Aboushanif v. Norway*, Views, Human Rights Committee, Comm. 1542/2007 (CCPR/C/93/D/1542/2007), para. 7.2 concerning the lack of reasons in an appeal judgement.

⁴⁴ *Taxquet v. Belgium*, Judgement, ECHR (no. 926/05), 16 November 2010, para. 91.

⁴⁵ *Taxquet v. Belgium*, Judgement, ECHR (no. 926/05), 16 November 2010, para. 92; *Suominen v. Finland*, Judgement, ECHR (no. 37801/97), 1 July 2003, paras. 37-38; *Khudoyorov v. Russia*, Judgement, ECHR (no. 6847/02), 8 November 2005, para. 174.



27. Although these objectives are obviously satisfied where reasons are issued in a decision, the extent of the obligation to reason judicial decisions varies according to the nature of the decision in question and must be assessed in the light of the circumstances of each particular case.⁴⁶ Compliance with the requirements of a fair trial is also assessed in light of the proceedings as a whole and the specific context of the legal system in question.⁴⁷

4.2.2. Findings

28. Despite the above considerations, the Decisions on the Closing Order were issued on 13 January 2011 initially without reasons. In its justification for this delay, the Pre-Trial Chamber noted practical constraints, the volume and complexity of proceedings, and its determination that the rights of the parties would be “most egregiously affected by failing to properly thoroughly assess and address all issues raised in the appeals”.⁴⁸ These reasons followed 32 days later.⁴⁹

29. 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. The Chamber has, however, to assess whether the validity of these decisions was affected in consequence.

(no. 6847/02), 8 November 2005, para. 172; *Hadjianastassiou v. Greece*, Judgement, ECHR (no. 12945/87), 16 December 1992, para. 33.

⁴⁶ *Ruiz Torija v. Spain*, Judgement, ECHR (no. 18390/91), 9 December 1994, para. 29; *Suominen v. Finland*, Judgement, ECHR (no. 37801/97), 1 July 2003, para. 34; *Taxquet v. Belgium*, Judgement, ECHR (no. 926/05), 16 November 2010, paras. 91, 93 (“Article 6 § 1 obliges courts to give reasons for their judgments, but cannot be understood as requiring a detailed answer to every argument. The extent to which this duty to give reasons applies may vary according to the nature of the decision. It is moreover necessary to take into account, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the Contracting States with regard to statutory provisions, customary rules, legal opinion and the presentation and drafting of judgments. That is why the question whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 of the Convention, can only be determined in the light of the circumstances of the case.”)

⁴⁷ The European Commission on Human Rights (EComHR) has found, for example, that the absence of reasons in a judgement, owing to the fact that the applicant’s guilt had been determined by a lay jury, was not in itself contrary to the Convention: *R. v. Belgium*, Decision on admissibility, EComHR (no. 15957/90), 30 March 1992; *Saric v. Denmark*, Decision on admissibility (no. 31913/96), 2 February 1999, pp. 14-15; *Taxquet v. Belgium*, Judgement, ECHR (no. 926/05), 16 November 2010, paras. 90, 93.

⁴⁸ With respect to its initial failure to reason the detention orders, see further PTC Response, p. 3. The reasons in support of this portion of the Closing Order Decisions were nonetheless issued eight days later (“Decision on Ieng Thirith’s and Nuon Chea’s Appeal against the Closing Order: Reasons for Continuation of Provisional Detention”, D427/3/13, 21 January 2011; “Decision on Khieu Samphan’s Appeal against the Closing Order”, D427/4/15, 21 January 2011.)

⁴⁹ *Decision on Appeals by Nuon Chea and Ieng Thirith against the Closing Order*, D427/2/15, 15 February 2011.



30. Although this initial failure to provide reasons amounts to a breach of the Accuseds' fundamental rights, the Trial Chamber nonetheless considers a number of specific circumstances to be relevant to the present case.

31. Firstly, and although the deferred reasoning relates ostensibly to decisions relating to the indictment against the Accused, the reasoning in question in fact stems from what appear to be jurisdictional appeals before the Pre-Trial Chamber pursuant to Rule 74(3)(a).⁵⁰ In this regard, neither Cambodian Law nor the Internal Rules provide a right of appeal against the Closing Order by the Defence. The PTC has nonetheless permitted limited appeals on matters considered to be jurisdictional in nature. These PTC Decisions are not subject to appeal and these arguments, if related to jurisdictional issues, may still be raised before the Trial Chamber. The Trial Chamber has previously acknowledged potential prejudice to the Accused in relation to their ability to formulate preliminary objections, indicating that these delayed reasons may provide the basis for the filing of supplementary submissions in due course.⁵¹

32. The Chamber further notes that the PTC issued reasons for its Decision on the Closing Order with respect to KHIEU Samphan eight days after the Decision, and in relation to NUON Chea and IENG Thirith after 32 days, whereas the failure to reason the detention portions of the Closing Order Decisions was remedied on 21 January 2011.⁵² At this stage, the Accused accordingly cannot allege that they have been prevented from effectively preparing their Defence, and in practice there was no doubt as to the nature of the crimes for which they were charged, and the nature of the factual allegation against them.

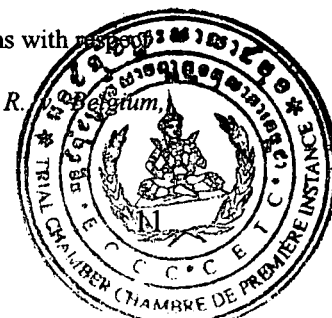
33. Concerning the detention portions of the Pre-Trial Chamber's Decisions on the Closing Order, and whilst acknowledging the particular importance of reasoning in relation to decisions of this type, the above-mentioned case law establishes that automatic nullity does not follow from a failure to give reasons.⁵³ Concerning the impact of this breach, the Chamber

⁵⁰ The parts of the Defence appeals which are successful are in fact jurisdictional appeals on two specific and narrow points of law: *see* Decision on Ieng Thirith's and Nuon Chea's Closing Order Appeals, para. 11 of the Disposition (these points of law are: 1. Existence of a chapeau requirement for Crimes against Humanity requiring a nexus between the underlying acts and an armed conflict, and 2. Non-existence of rape as a crime against humanity in its own right in 1975-1979 and re-characterisation of this crime as "other inhumane act".)

⁵¹ "Advance notification of Chamber's disposition of Motions E14, E15, E9/2, E9/3, E24, E27", E35, 3 February 2011, p. 2.

⁵² The Chamber has taken note of the Pre-Trial Chamber's indication that it would issue its reasons with respect to its Decision on the Closing Order with respect to IENG Sary this week (PTC Response).

⁵³ *Taxquet v. Belgium*, Judgement, ECHR (no. 926/05), 16 November 2010, paras. 90, 93; *R. v. Belgium*, Decision on admissibility, ECHR (no. 15957/90), 30 March 1992.



further notes that the basis of the Accuseds' provisional detention has been reviewed periodically and frequently before the Co-Investigating Judges and PTC, ensuring that the Accused are in practice aware of the basis of their continuing detention.⁵⁴ Further, and while the detention portions of the Decisions on the Closing Order are not appealable, applications for release may be raised immediately before the Trial Chamber.⁵⁵

34. The Trial Chamber finds that the above factors cumulatively limit the impact of these defects on the Accused's fundamental fair trial rights. Accordingly, the initial procedural defect, namely the failure to provide reasons for the decision on the Closing Order, has been remedied by the subsequent issuance of the full reasoning, and the Chamber has been validly seised of the case file.

4.2.3. *Applicable remedies*

35. A review of the relevant international jurisprudence shows that defects in a decision do not in all cases automatically result in nullity.⁵⁶ Although finding that the Decisions on the Closing Order were defective as a result of their lack of immediate reasoning, the Chamber finds this to be insufficient on its own to invalidate the Decisions on the Closing Order and their detention portions. For the above reasons, the Chamber finds that the particular circumstances of this case do not warrant the extreme remedy of immediate release.⁵⁷ The Chamber accordingly disagrees with the Defence that immediate release of the Accused is the only available and appropriate remedy in the present circumstances, and finds that release would not amount to a proportionate remedy in response to these violations of either the initial defects in the Decisions on the Closing Order or its detention portions.

36. The Chamber may, however, consider the appropriateness of other remedies in relation to the detention portion of the Decisions on the Closing Order at the conclusion of the trial, after hearing the parties' submissions.

⁵⁴ As noted above, none of the Accused to whom the present requests relate specifically appealed the detention order contained in the Closing Order to the PTC (*supra*, para. 2).

⁵⁵ Rule 82.

⁵⁶ See e.g. *Khudoyorov v. Russia*, Judgement, ECHR (no. 6847/02), 8 November 2005, paras. 128-129, 132 ("A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention." "The fact that certain flaws in the procedure were found on appeal does not in itself mean that the detention was unlawful.").

⁵⁷ An ICTR Appeals Chamber Decision has also previously rejected the remedy of release in consequence of acknowledged and serious breaches of an Accused's fair trial rights pertaining to detention (*Barayagwiza v. Prosecutor*, Decision (Prosecutor's Request for Review or Reconsideration), ICTR Appeals Chamber (19-AR72), 31 March 2000, paras 71, 75).



4.3. Legal basis for the Accuseds' detention

37. Having upheld the validity of the Decisions on the Closing Order, including their detention portions,⁵⁸ the Chamber has considered the legal basis for its detention of the Accused.

4.3.1. Conditions for detention under Rule 63(3)

38. The Parties were requested, during the hearing of 31 January 2011, to address whether they considered the preconditions for continued detention pursuant to Rule 63(3) to be met. The Chamber has also considered whether the grounds on which the Accused were detained in the Closing Order and the PTC Decisions on the Closing Order are still satisfied. It finds that following the issuance of the Closing Order and confirmation of the indictment by the PTC Decisions on the Closing Order, there are well-founded reasons to believe that all three Accused have committed the charged crimes pursuant to Rule 63(3)(a). It has further evaluated the situation of each individual Accused as follows:

4.3.1.1. NUON Chea

39. The Co-Prosecutors contend that NUON Chea must remain in detention to ensure his presence at trial, to avert the risk of him exerting pressure on witnesses or victims or destroying evidence, to protect his security and to preserve public order.⁵⁹ The Chamber agrees that detention is necessary to ensure the Accused's presence at trial. Further, the seriousness of the offences for which he is charged, and their applicable penalties in the event of conviction, create a considerable risk that NUON Chea would abscond if released. In the absence of detailed information regarding viable alternatives presented at the hearing, the Chamber concludes that detention is the only means to guard against this flight risk and to ensure the Accused's presence at trial. It accordingly orders the continuation of NUON Chea's detention pursuant to Rule 63(3)(b)(iii). It rejects the remainder of the Co-Prosecutor's submissions in support of continued detention on grounds of lack of substantiation.

⁵⁸ The Decisions on the Closing Order and detention portions consequently qualify as decisions for the purposes of Rule 68(3). It follows that the CIJ detention order of 15 September 2010 was extended as a result of these decisions, pursuant to Rule 68(3).

⁵⁹ T., 31 January 2011 (NUON Chea), pp. 70-71. See also Closing Order, D427, 15 September 2010, para. 8624. "Decision on Ieng Thirith's and Nuon Chea's Appeal against the Closing Order: Reasons for Continuation of Provisional Detention", D427/3/13, 21 January 2011, para. 5.



4.3.1.2. KHIEU Samphan

40. The CIJs and the PTC found that KHIEU Samphan must remain in detention in order to ensure his presence at trial, to 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.⁶⁰ The Chamber finds 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. It accordingly orders the continuation of KHIEU Samphan's detention pursuant to Rule 63(3)(b)(iii). For the above reasons, it rejects the remainder of the Co-Prosecutor's submissions in support of continued detention.

4.3.1.3. IENG Thirith

41. The CIJ and the PTC found that IENG Thirith must remain in provisional detention in order to ensure her presence at trial, to preserve public order and to avert the risk of the Accused exerting pressure on witnesses or victims or destroying evidence if released.⁶¹ The 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.⁶² In the absence of detailed information regarding viable alternatives presented at the hearing, the Chamber finds that detention is necessary to ensure the presence of IENG Thirith during trial proceedings. It accordingly orders the continuation of IENG Thirith's detention pursuant to Rule 63(3)(b)(iii). For the above reasons, it rejects the remainder of the Co-Prosecutor's submissions in support of continued detention.

42. In view of the lack of advance notice afforded to the parties to adequately prepare their submissions in relation to Rule 63(3), the Defence shall not be required to establish a change in circumstances under Rule 82(4) should a fresh application for release be subsequently made before the Chamber.

⁶⁰ Closing Order, D427, 15 September 2010, para. 1624; "Decision on Khieu Samphan's Appeal against the Closing Order", D427/4/15, 21 January 2011, para. 29.

⁶¹ Closing Order, D427, 15 September 2010, para. 1624; "Decision on Ieng Thirith's and Nuon Chea's Appeal against the Closing Order: Reasons for Continuation of Provisional Detention", D427/3/13, 21 January 2011, para. 5.

⁶² "Order on Extension of Provisional Detention", C20/8, 10 November 2009.



4.4. Interpretation of Rule 68(3)

43. The KHIEU Samphan Defence have alleged that Rule 68(3), read together with Articles 305 and 249 of the CCP, establishes an absolute limit of four months on provisional detention following the issuance of the Closing Order by the CIJ, unless the Accused is brought before the Trial Chamber within that time. The Chamber finds that this interpretation is based on a misreading of Rule 68(3). Reference to the provisions of the CCP is unnecessary given that Rule 68(3) plainly states that provisional detention may extend for up to four months following “the decision of the Co-Investigating Judges *or the Pre-Trial Chamber* to continue to hold the Accused” (emphasis added). The applicable four month period of provisional detention accordingly commenced on 14 January 2011, the date upon which the Trial Chamber received notification of the Decisions on the Closing Order and was thus seized of the case file. It had not expired by the time KHIEU Samphan was brought before the Chamber on 31 January 2011 pursuant to Rule 82(1).

FOR THE FOREGOING REASONS, THE TRIAL CHAMBER:

FINDS that the Trial Chamber has been validly seized of the case file;

FINDS that the delay in issuing reasoning of the detention portions of the Decisions on the Closing Order has resulted in a breach of the Accuseds’ rights;

DECLARES that the nature of the remedy in consequence of this breach may be assessed at the end of the trial, after hearing the parties on this issue;

REJECTS the Applications for release of Nuon Chea, Khieu Samphan and Ieng Thirith;

NOTES that Nuon Chea, Khieu Samphan and Ieng Thirith have been brought before the Chamber under Rule 82(1) and that they shall remain in detention until the Chamber’s judgement is handed down, subject to fresh applications for release pursuant to Rule 82. *NUN 98*

Phnom Penh, 16 February 2011
President of the Trial Chamber

