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ជាតិ សាសនា ព្រះមហាក្សត្រ

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

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

អង្គជំនុំជម្រះតុលាការកំពូល  
Supreme Court Chamber  
Chambre de la Cour suprême

សំណុំរឿងលេខ: ០០២/១៩-០៩-២០០៧-អ.វ.ត.ក/អ.ជ.ត.ក(០១/០២)  
Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(01/02)

<b>ឯកសារដើម</b>	
ORIGINAL DOCUMENT/DOCUMENT ORIGINAL	
ថ្ងៃ ខែ ឆ្នាំ ទទួល (Date of receipt/date de reception):	.....03/06/2011.....
ម៉ោង (Time/Heure) :	.....17:30.....
មន្ត្រីទទួលបន្ទុកសំណុំរឿង /Case File Officer/L'agent chargé du dossier:	.....SAMRADA.....

**Before:** Judge KONG Srim, President  
Judge Motoo NOGUCHI  
Judge SOM Sereyvuth  
Judge Agnieszka KLONOWIECKA-MILART  
Judge SIN Rith  
Judge Chandra Nihal JAYASINGHE  
Judge YA Narin

**Date:** 3 June 2011  
**Original Language(s):** Khmer/English  
**Classification:** PUBLIC

**DECISION ON IMMEDIATE APPEALS BY NUON CHEA AND IENG THIRITH ON URGENT APPLICATIONS FOR IMMEDIATE RELEASE**

**Accused**  
NUON Chea  
IENG Thirith

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**THE SUPREME COURT CHAMBER** of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seised of the immediate appeals filed by NUON Chea and IENG Thirith (together “the Accused”), against the decision of the Trial Chamber on the Accused’s urgent applications for immediate release:

## 1. PROCEDURAL HISTORY

1. On 15 September 2010, the Co-Investigating Judges issued their Closing Order in Case No. 002/19-09-2007/ECCC (“Case 002”), in which they ordered that the Accused remain in provisional detention until they are brought before the Trial Chamber.<sup>1</sup> The Pre-Trial Chamber was seised following notices of appeal<sup>2</sup> and appeal submissions<sup>3</sup> against the Closing Order filed by the Accused (the latter being referred to together as the “Accused’s Appeals Against the Closing Order”).
2. On 13 January 2011, the Pre-Trial Chamber filed its decision without reasoning on the Accused’s Appeals Against the Closing Order (“Final Disposition”), indicating that reasons would follow in due course.<sup>4</sup> The Final Disposition confirmed the Closing Order in part and amended it in part. The Final Disposition ordered the continuance of the provisional detention of the Accused until they are brought before the Trial Chamber.<sup>5</sup> On 21 January 2011, the Pre-Trial Chamber filed reasons for its detention order in the Final Disposition,<sup>6</sup> and on 15 February 2011 the Pre-Trial Chamber filed its reasons for the remainder of the Final Disposition.<sup>7</sup>
3. On 18 and 21 January 2011 respectively, NUON Chea and IENG Thirith filed urgent requests for immediate release to the Trial Chamber.<sup>8</sup> On 16 February 2011, the Trial Chamber filed its decision refusing the Accused’s requests for release (“Trial Chamber’s Decision”).<sup>9</sup> On 1 and 2 March 2011 respectively, NUON Chea and IENG Thirith filed notices of appeal to the Supreme

<sup>1</sup> D427, paras. 1622-1624 and p. 402 (“Closing Order”). The Closing Order was filed and notified to the parties on 16 September 2010.

<sup>2</sup> Notice of Appeal Against the Closing Order (NUON Chea), D427/3, 21 September 2010; IENG Thirith Defence Notice of Appeal Against the Closing Order, D427/2, 20 September 2010.

<sup>3</sup> Appeal Against the Closing Order (NUON Chea), D427/3/1, 18 October 2010; IENG Thirith Defence Appeal from the Closing Order, D427/2/1, 18 October 2010.

<sup>4</sup> Decision on IENG Thirith’s and NUON Chea’s Appeals Against the Closing Order, D427/3/12, 13 January 2011.

<sup>5</sup> Final Disposition, p. 7 of 7.

<sup>6</sup> Decision on IENG Thirith’s and NUON Chea’s Appeals Against the Closing Order: Reasons for Continuance of Provisional Detention, D427/2/13, 21 January 2011.

<sup>7</sup> Decision on Appeals by NUON Chea and IENG Thirith Against the Closing Order, D427/2/15, 16 January 2011.

<sup>8</sup> Urgent Application for Immediate Release of NUON Chea, E19, 18 January 2011; Urgent Request for Immediate Release of Madame IENG Thirith, E21, 21 January 2011.

<sup>9</sup> Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, E50, 16 February 2011.



Court Chamber against the Trial Chamber's Decision.<sup>10</sup> The Accused subsequently filed appeal submissions on 3 March 2011 (together the "Accused's Appeal Submissions", respectively "NUON Chea's Appeal Submissions" and "IENG Thirith's Appeal Submissions").<sup>11</sup> The Co-Prosecutors filed their response to IENG Thirith's Appeal Submissions on 21 March 2011,<sup>12</sup> and to NUON Chea's Appeal Submissions on 25 March 2011<sup>13</sup> (together the "Responses", respectively "Response to IENG Thirith" and "Response to NUON Chea"). NUON Chea and IENG Thirith filed their respective replies on 4 and 5 April 2011 ("NUON Chea's Reply" and "IENG Thirith's Reply").<sup>14</sup>

4. Pursuant to Internal Rule 108(4) (Rev. 7), the Supreme Court Chamber shall decide the Accused's immediate appeals as soon as possible and in any event no later than 6 June 2011, being three months after the date of notification of the Accused's Appeal Submissions.<sup>15</sup>

## 2. SUBMISSIONS

### 2.1. IENG Thirith's Appeal Submissions

#### 2.1.1. IENG Thirith's Grounds of Appeal

5. IENG Thirith requests the Supreme Court Chamber to quash the findings of the Trial Chamber's Decision, and to find instead:

<sup>10</sup> Notice of Appeal Against TC's Decision on the Urgent Application for the Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith (NUON Chea), E50/1, 1 March 2011; IENG Thirith Defence Notice of Appeal Against TC's Decision on the Urgent Application for the Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith, E50/2, 2 March 2011.

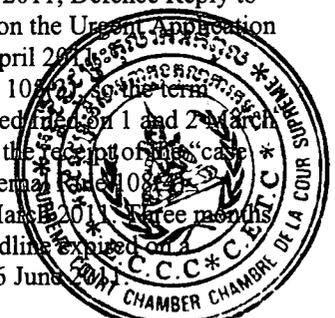
<sup>11</sup> Appeal Against Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan, and IENG Thirith (NUON Chea), E50/1/1/1, 3 March 2011; Appeal Against Trial Chamber's 'Decision on the Urgent Applications for Immediate Release of NUON Chea, KHIEU Samphan and IENG Thirith' filed on behalf of the Appellant Madame IENG Thirith, E50/2/1/1, 3 March 2011.

<sup>12</sup> 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", E50/2/1/2, 21 March 2011.

<sup>13</sup> 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, E50/1/1/2, 25 March 2011.

<sup>14</sup> Reply to 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, E50/1/1/3, 4 April 2011; Defence Reply to 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', E50/2/1/3, 5 April 2011.

<sup>15</sup> Internal Rule 105(2) clearly does not require a notice of appeal, in contrast to Internal Rule 108(4) which requires a "notice of appeal" in Internal Rule 108(4) cannot refer to the notices of appeal that the Accused filed on 1 and 2 March 2011. In the Khmer version of Internal Rule 108(4), the three month deadline commences on the receipt of the case file." The Supreme Court Chamber has therefore decided that the three month deadline in Internal Rule 108(4) commenced on the date of notification of the Accused's Appeal Submissions, which was 4 March 2011. Three months after 4 March 2011 was Saturday, 4 June 2011. Pursuant to Internal Rule 39(3), since the deadline expired on a Saturday, the deadline is automatically extended to the next working day, which is Monday, 6 June 2011.



- a. That the Trial Chamber's Decision was insufficiently reasoned;
  - b. That the following statement by the Trial Chamber in its Decision should be deleted: "The [Co-Investigating Judges] have noted that [IENG Thirith] 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";
  - c. That she was illegally detained between 21 January 2011 and 15 February 2011; and
  - d. That such illegal detention must be compensated at the sentencing stage.<sup>16</sup>
6. In support of these requests, IENG Thirith advances the following three grounds of appeal in her Appeal Submissions.

#### **2.1.1.1. Error of Law – Failure to Address IENG Thirith's Argument**

7. IENG Thirith submits that the Trial Chamber did not consider her "main argument" to the Trial Chamber, which was that the Final Disposition, due to the absence of reasons, did not qualify as a "decision" pursuant to Internal Rule 77(14). Consequently, at the expiration of the four month time limit provided for in Internal Rule 68(2)-(3), the legal basis for her continued detention fell away as an automatic result of the Pre-Trial Chamber's failure to issue a valid decision within the deadline. The Trial Chamber's failure to address this argument amounts to a violation of her right to a fair trial as guaranteed by Internal Rule 21.<sup>17</sup>

#### **2.1.1.2. Error of Law – Erroneous Interpretation of Internal Rule 68(2) and (3)**

8. IENG Thirith argues that the Trial Chamber committed an error of law in interpreting Internal Rule 68. IENG Thirith submits that there was no legal basis for her detention from "at the latest"<sup>18</sup> 21 January 2011 (that is, four months plus one day after the filing and notification date of her notice of appeal to the Pre-Trial Chamber against the Closing Order) until 15 February 2011 (that is, the filing date of the Pre-Trial Chamber's reasons for the non-detention portion of its Final Disposition).<sup>19</sup> While the Trial Chamber acknowledged a procedural defect in the Pre-Trial Chamber's failure to issue reasons within the four month time limit prescribed by Internal Rule 68(2), IENG Thirith submits that the Trial Chamber failed to recognize

<sup>16</sup> IENG Thirith's Appeal Submissions, para. 31.

<sup>17</sup> IENG Thirith's Appeal Submissions, paras. 12-18.

<sup>18</sup> IENG Thirith's Appeal Submissions, paras. 5 and 13.

<sup>19</sup> IENG Thirith's Appeal Submissions, paras. 19-25.



consequence of such defect is that her detention between 21 January and 15 February 2011 was illegal.<sup>20</sup>

### **2.1.1.3. Error of Fact – Incorrect Reflection of Co-Investigating Judges’ Order**

9. The error of fact alleged by IENG Thirith relates to the grounds for detention as established by the Trial Chamber. In discussing the applicability of the requirements of Internal Rule 63(3), IENG Thirith submits that the following statement by the Trial Chamber in its Decision is factually incorrect and violates her right to a fair trial: “The CIJs have noted that [IENG Thirith] 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.”<sup>21</sup> According to IENG Thirith, the Order<sup>22</sup> cited by the Trial Chamber does not contain such a statement, and the information on the Case File indicates that she is indigent.<sup>23</sup>

### **2.1.2. Co-Prosecutors’ Response to IENG Thirith**

10. In their Response to IENG Thirith, the Co-Prosecutors request the Supreme Court Chamber to deny her appeal in its entirety. They submit that IENG Thirith failed to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion in addressing her arguments, in drawing conclusions as to appropriate remedies, and in representing the findings of the Closing Order. The Co-Prosecutors advance the following arguments.

#### **2.1.2.1. The Trial Chamber Adequately Addressed IENG Thirith’s Arguments**

11. The Co-Prosecutors submit that IENG Thirith fails to explain how her argument about the interpretation of Internal Rule 68 is distinct from the arguments addressed in detail by the Trial Chamber in its Decision.<sup>24</sup> The Trial Chamber adequately discharged its burden of providing reasons for its legal findings. In particular, it relied on international jurisprudence in support of its conclusion that while there had been a procedural defect committed by the Pre-Trial

<sup>20</sup> IENG Thirith’s Appeal Submissions, para. 25.

<sup>21</sup> Trial Chamber’s Decision, para. 41; IENG Thirith’s Appeal Submissions, paras. 26-28.

<sup>22</sup> Order on Extension of Provisional Detention, C20/8, 10 November 2009.

<sup>23</sup> IENG Thirith’s Appeal Submissions, paras. 26-28.

<sup>24</sup> Response to IENG Thirith, para. 6, referring to paras. 23-36 and 43 of the Trial Chamber’s Decision.



Chamber, that nevertheless did not serve to invalidate the detention ordered by the Pre-Trial Chamber and did not call for a remedy in the form of immediate release.<sup>25</sup>

**2.1.2.2. The Trial Chamber's Conclusion on Remedies Was Reasonable and Within the Scope of Its Discretion**

12. The Co-Prosecutors submit that the Trial Chamber's affirmation of the validity of the Pre-Trial Chamber's Final Disposition is firmly supported by the jurisprudence cited within the Trial Chamber's Decision as well as the jurisprudence cited by the Co-Prosecutors at the hearing on 31 January 2011, including the case of *Prosecutor v. Popović*.<sup>26</sup> Furthermore, IENG Thirith is not alleging any present prejudice as a result of the procedural defect by the Pre-Trial Chamber, 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 and as is consistent with international jurisprudence.<sup>27</sup>

**2.1.2.3. The Trial Chamber Accurately Represented the Findings of the Co-Investigating Judges with Respect to IENG Thirith's Access to Material Resources**

13. The Co-Prosecutors assert that the Co-Investigating Judges' Order relied on by the Trial Chamber supports the Trial Chamber's statement relating to IENG Thirith's material resources. In particular, the Order, by finding no change in circumstances, in effect affirmed the Co-Investigating Judges' prior findings that relied on evidence relating to IENG Thirith's access to material resources and how that might increase a risk of flight.<sup>28</sup> If additional support for the impugned statement by the Trial Chamber is needed, the Co-Prosecutors request the Supreme Court Chamber to add a reference to these previous Orders of the Co-Investigating Judges.<sup>29</sup>

<sup>25</sup> Response to IENG Thirith, para. 7.

<sup>26</sup> Response to IENG Thirith, paras. 9-10, citing *Prosecutor v. Popović*, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, IT-05-88-AR65.3, ICTY Trial Chamber II, 17 March 2007.

<sup>27</sup> Response to IENG Thirith, paras. 10-11.

<sup>28</sup> Response to IENG Thirith, paras. 13-15, referring to Doc. C20/8, paras. 23-24, and relying on Doc. C20/4, para. 28.

<sup>29</sup> Response to IENG Thirith, para. 16.



### 2.1.3. IENG Thirith's Reply to Co-Prosecutors' Response

14. In her Reply, IENG Thirith submits that her Appeal Submissions were based on errors of law and an error of fact, which, under Internal Rules 104 and 105, are grounds autonomous from a discernible error in the exercise of the Trial Chamber's discretion.<sup>30</sup> She also submits that illegal detention causes prejudice *per se*.<sup>31</sup>

## 2.2. NUON Chea's Appeal Submissions

### 2.2.1. NUON Chea's Grounds of Appeal

15. NUON Chea contests the Trial Chamber's Decision on the following three bases:

- a. The Trial Chamber erred in law in the interpretation and application of Internal Rule 68;
- b. The Trial Chamber disregarded the principle of *ultimum remedium*; and
- c. Immediate release was the only appropriate remedy.

16. NUON Chea requests the Chamber to:

- a. Annul the Trial Chamber's Decision;
- b. Order the immediate release of NUON Chea (or amend the Trial Chamber's Decision with the same result); and
- c. Hold a hearing on the appeal as soon as possible.<sup>32</sup>

#### 2.2.1.1. Trial Chamber Erred in Law in its Interpretation and Application of Internal Rule 68

17. NUON Chea argues that, by engaging in a balancing of interests exercise, the Trial Chamber disregarded the clear wording of Internal Rule 68, which provides for immediate release as the only remedy.<sup>33</sup> Because no reasoned decision was provided within four months from the issuance of the Closing Order, this means that no decision existed under Internal Rule 68. The detention portion of the Closing Order therefore ceased to have any effect, and NUON Chea

<sup>30</sup> IENG Thirith's Reply, para. 2.

<sup>31</sup> IENG Thirith's Reply, paras. 3-5.

<sup>32</sup> NUON Chea's Appeal Submissions, para. 37.

<sup>33</sup> NUON Chea's Appeal Submissions, paras. 14-15.



should have been released.<sup>34</sup> NUON Chea submits that the wording of Internal Rule 68 is very clear, and the Plenary could have chosen to adopt alternative wording; for example, that a decision had to be provided within four months, with reasons to follow “in due course”.<sup>35</sup>

### **2.2.1.2. Trial Chamber Disregarded the Principle of *Ultimum Remedium***

18. NUON Chea submits that the Trial Chamber has sanctioned the Pre-Trial Chamber’s disregard for the principle of *ultimum remedium*, in that the Pre-Trial Chamber deliberately issued a decision without reasons, despite knowing of the requirement to provide reasons.<sup>36</sup> The Pre-Trial Chamber issued an unreasoned decision solely in an attempt to avoid NUON Chea’s automatic release, as there was no legal requirement for the Pre-Trial Chamber to issue its decision on 13 January 2011; that deadline was, in fact, self-imposed.<sup>37</sup>
19. NUON Chea argues that if the Pre-Trial Chamber had properly and thoroughly assessed all the issues raised in his Appeal Against the Closing Order so that adequate reasoning could be provided, it is clear this would have come after the expiration of the four month period. The fact that the Pre-Trial Chamber communicated the outcome of its deliberations (that is, dismissal of the appeal) so soon could leave a reasonable outside observer with the impression that the outcome was preordained, and that the Pre-Trial Chamber satisfied itself with subsequently buttressing this preordained outcome with arguments, thus inverting the required order of legal reasoning.<sup>38</sup>

### **2.2.1.3. Immediate Release Was the Only Appropriate Remedy**

20. While maintaining that Internal Rule 68 does not envision a balancing of interests, but rather provides for automatic release, NUON Chea argues that even if a balancing of interests were undertaken, the Trial Chamber should have taken into account the exceptional nature of the actual harm in the form of the fact that the Pre-Trial Chamber engaged in conduct which was unfair and deliberately broke an Internal Rule directly aimed at protecting him.<sup>39</sup> This should have led to the conclusion that immediate release was the only applicable remedy.

<sup>34</sup> NUON Chea’s Appeal Submissions, paras. 16-17.

<sup>35</sup> NUON Chea’s Appeal Submissions, para. 19, fn. 42.

<sup>36</sup> NUON Chea’s Appeal Submissions, para. 22.

<sup>37</sup> NUON Chea’s Appeal Submissions, paras. 23 and 26.

<sup>38</sup> NUON Chea’s Appeal Submissions, para. 28, including fn. 51.

<sup>39</sup> NUON Chea’s Appeal Submissions, paras. 31-33.



21. NUON Chea submits that Internal Rule 68 is the *lex specialis* which should apply when considering the effects of the Closing Order and the appeals against the Closing Order on provisional detention. Internal Rule 68 is distinct from the general provisions on provisional detention in Internal Rule 63. It should therefore only be Internal Rule 68 which applies, and the only remedy this Internal Rule acknowledges is immediate release.<sup>40</sup>

### **2.2.2. Co-Prosecutors' Response to NUON Chea**

22. The Co-Prosecutors respond to NUON Chea's submissions on three bases:

- a. The Trial Chamber's conclusion on remedies was reasonable and within the scope of its discretion;
- b. The Trial Chamber did not err in exercising its independent authority to continue NUON Chea's detention; and
- c. NUON Chea fails to explain how his interests have been prejudiced by the purported errors in the Trial Chamber's Decision.

#### **2.2.2.1. The Trial Chamber's Conclusion on Remedies was Reasonable and Within the Scope of Its Discretion**

23. The Co-Prosecutors submit that the Trial Chamber acted within the scope of its discretion in finding that the Final Disposition was not nullified by the lack of immediate reasoning, and that the Trial Chamber can consider the appropriate remedy at the conclusion of the trial.<sup>41</sup>

#### **2.2.2.2. The Trial Chamber Did Not Err in Exercising Its Independent Authority to Continue NUON Chea's Detention**

24. According to the Co-Prosecutors, NUON Chea's arguments regarding Internal Rules 68 and 77(14) that the Trial Chamber did not have an adequate legal basis for his continued detention is unfounded, because its decision was based on Internal Rule 82. Nothing in the Internal Rules supports the proposition that the prior existence of any form of procedural defect in a Pre-Trial Chamber decision negates an accused person's detention or the Trial Chamber's power to order detention pursuant to its own independent authority.<sup>42</sup>

<sup>40</sup> NUON Chea's Appeal Submissions, para. 34.

<sup>41</sup> Response to NUON Chea, paras. 4-5.

<sup>42</sup> Response to NUON Chea, paras. 6-9.



**2.2.2.3. NUON Chea Fails to Explain How His Interests Have Been Prejudiced by  
the Purported Errors in the Trial Chamber's Decision**

25. It is the Co-Prosecutors' contention that Internal Rule 104 indicates that an immediate appeal must establish both a discernible error by the Trial Chamber and prejudice to the appellant as a result of that error. NUON Chea fails to explain how the Trial Chamber's Decision resulted in prejudice to him. The issue on appeal here is not whether the Pre-Trial Chamber should have acted differently, but rather whether the Trial Chamber erred in the exercise of its discretion in a way that caused prejudice to NUON Chea.<sup>43</sup>

**2.2.3. NUON Chea's Reply to Co-Prosecutors' Response**

26. In his Reply, NUON Chea:

- a. Notes that the Co-Prosecutors' Response is largely inapposite as it is based on the incorrect assumption that an immediate appeal can be based only on an error in the exercise of discretion by the Trial Chamber, whereas Internal Rules 104(1) and 105(2) make clear that an appeal can also be based on errors of fact or law by the Trial Chamber;
- b. Argues that release was (and still is) the only remedy available, given the wording of Internal Rule 68; and
- c. Contends that the principle of *ultimum remedium* should apply to the present appeal.

**3. STANDARD OF APPELLATE REVIEW FOR IMMEDIATE APPEALS**

27. Pursuant to Internal Rules 104(1) and 105(2), an immediate appeal may be based on one or more of the following three grounds:

- An error on a question of law invalidating the decision;
- An error of fact which has occasioned a miscarriage of justice; or
- A discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to the appellant.

28. In response to the Co-Prosecutors' contention as to the standard of review, the Supreme Court Chamber clarifies that the grounds for appeal listed under Internal Rule 105(2) are:



<sup>43</sup> Response to NUON Chea, paras. 10-15.

immediate appeals are to be read as disjunctive. Accordingly, in order to invoke either the first or second of these grounds of appeal (error of law or error of fact) an appellant is not required to additionally demonstrate a discernible error in the exercise of the Trial Chamber's discretion which resulted in prejudice to him or her. Internal Rule 104(1) states, "[a]dditionally, 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." This expression establishes an additional ground for immediate appeals that is not available for appeals against judgments. It does not, however, create an exclusive ground for immediate appeals.

#### 4. FINDINGS

##### 4.1. Admissibility of IENG Thirith's Third Ground of Appeal

29. IENG Thirith's third ground of appeal alleges that the Trial Chamber committed an error of fact by misrepresenting the content of an Order by the Co-Investigating Judges, but she fails to set out arguments demonstrating how the alleged error of fact has occasioned a miscarriage of justice, as required by Internal Rules 104(1)(b) and 105(2)(c). This burden of proof is not satisfied by IENG Thirith's unreasoned assertion that the alleged error of fact "violates [her] right to a fair trial."<sup>44</sup> Furthermore, IENG Thirith acknowledges that this third ground of appeal "covers an issue that is irrelevant to the substance of the [first and second] appeal grounds [in her Appeal Submissions]."<sup>45</sup> The Chamber notes that IENG Thirith did not appeal against the detention portion of the Closing Order, and she is neither requesting the Supreme Court Chamber to release her<sup>46</sup> nor contesting the legal basis of her current detention. The Supreme Court Chamber considers that for an appeal to be admissible, it is necessary that the impugned decision must, as a minimum, affect a legal interest of the appellant (*gravamen*). In contrast, requesting the Supreme Court Chamber to correct first instance rulings on a purely lexical basis is not allowed under the ECCC appellate system.

30. Accordingly, the Supreme Court Chamber decides that the third ground of appeal in IENG Thirith's Appeal Submissions is not admissible and consequently declines to review in this decision the veracity of the Trial Chamber's finding as to the status of her appeal to

<sup>44</sup> IENG Thirith's Appeal Submissions, para. 28.

<sup>45</sup> IENG Thirith's Appeal Submissions, para. 26.

<sup>46</sup> IENG Thirith's Appeal Submissions, para. 29.



material resources. The Supreme Court Chamber notes that the appropriate context to consider this factual issue would be in a subsequent decision by the Trial Chamber on a fresh application by IENG Thirith for release.<sup>47</sup>

#### 4.2. Commencement of Four Month Time Limit in Internal Rule 68(2)

31. In order to determine whether a decision of the Pre-Trial Chamber concerning the continued provisional detention of an accused has been issued within the time period allowed under the Internal Rules, it is first necessary to determine when the operative period begins and ends. The Supreme Court Chamber notes that the Trial Chamber's Decision fails to make findings in this respect and focuses instead on the question whether the Pre-Trial Chamber's decision to issue its unreasoned Final Disposition first, and to reserve its reasons to a later date, constituted a procedural violation which infringed the rights of the Accused. The Supreme Court Chamber observes that this question would only need to be considered if it has been established that the relevant decision, including the reasons for that decision, had been delivered by the Pre-Trial Chamber outside the time period allowed under the Internal Rules. If, on a proper construction of the Internal Rules, both the Final Disposition and the reasons were delivered within the time allowed, then the question of their separation becomes moot. It is thus necessary first to decide whether the reasons by the Pre-Trial Chamber in the present case were delivered within the overall time period allowed for a decision by the Pre-Trial Chamber on the Accused's Appeals Against the Closing Order.

32. In order to dispose of the requests before it, the Trial Chamber should have begun with the determination of the expiration of the four month deadline in Internal Rule 68(2), in particular, by interpreting the silence of this Internal Rule as to the starting point for the running of the deadline. This issue called for clarification, as it may have been among the reasons behind the Pre-Trial Chamber's particular choice to separate the Final Disposition and the reasoning. The Supreme Court Chamber notes that the actual time limit remains a point of difference between the Accused. IENG Thirith submits that the four months in Internal Rule 68(2) expired "at the latest" on 21 January 2011.<sup>48</sup> In contrast, NUON Chea argues that Internal Rule 68 should be

<sup>47</sup> See Trial Chamber's Decision, para. 42 ("the Defence shall not be required to establish a change of circumstances under Rule 82(4) should a fresh application for release be subsequently made before the Chamber").

<sup>48</sup> IENG Thirith's Appeals Submissions, paras. 5 and 13. *See also* IENG Thirith's Appeal Submissions, para. 22. "Internal Rule 68(2) is unambiguous in that it requires the Pre-Trial Chamber to decide upon the merits within four months of the lodging of the appeal. The defence filed its [notice of] appeal on 18 October 2010 [18 September 2010], and the four month time period thus expired on 21 January 2011. After that date and until the Chamber's Reasoned Decision on 15 February 2011, the Appellant's detention was illegal." The Supreme Court Chamber's Instructions to the



interpreted so that the four month time limit commences on the date of the issuance of the Closing Order.<sup>49</sup> The Co-Prosecutors do not make a specific submission on this point.

33. For the reasons following in the subsequent paragraphs, the Supreme Court Chamber holds that the four month time limit in Internal Rule 68(2) commences from the filing of the appeal submissions against the Co-Investigating Judges' Closing Order. The matter is controlled by Internal Rule 68(1)-(3), which states:

1. The issuance of a Closing Order puts an end to Provisional Detention and Bail Orders once any time limit 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.

34. In the absence of explicit language in Internal Rule 68(2), the commencement date of the four month time limit must be determined through analyses of its systemic context and the purposes of the time limit. Regarding the first contextual element, the opening clause of the provision ("Where an appeal is lodged against the Indictment") readily signals that the activation of the time limit under this paragraph attaches to the lodging or filing of an appeal, as opposed to the fact of the issuance of the Closing Order. Therefore, the starting time for the time limit under Internal Rule 68(2) cannot attach to the moment of the issuance of the Closing Order, an event which necessarily precedes the lodging of an appeal. With regard to the purpose of the four month time limit under Internal Rule 68(2), it is to prevent excessive detention of the Accused. Hence, where the Pre-Trial Chamber decides to maintain the detention, it must file its decision within this period of time. At the same time, however, the deadline is meant to give the Pre-Trial Chamber a reasonable amount of time sufficient to examine the case and complete its decision. It would be unreasonable to interpret the "4 months" in Internal Rule 68(2) to include

paragraph in IENG Thirith's Appeals Submissions were confirmed in correspondence with IENG Thirith's legal team on 19 April 2011.

<sup>49</sup> NUON Chea's Appeal Submissions, paras. 17, 28, 36.



the period of time during which the Pre-Trial Chamber is not in a position to consider the appeal for reasons beyond its control, such as the lack of knowledge of the lodging of an appeal, or the lack of knowledge of the scope of an appeal.

35. There are procedures and formalities foreseen by the Internal Rules that effectively condition the Pre-Trial Chamber's ability to commence work on appeals before it. Internal Rule 77(2) provides that, upon receipt of notice of appeal, the Greffier of the Co-Investigating Judges shall forward the case-file, or a safeguard copy, to the Pre-Trial Chamber within 5 days. Internal Rule 75(1) and (3) provide that appellants have 10 days to file a notice of appeal and 30 days to file appeal submissions from the date that notice of the impugned decision or order was received. Consistent with the rationale for the time limit as stated above, it would be unreasonable to tie the commencement of the "4 months" in Internal Rule 68(2) to the filing date of an appellant's notice of appeal. Unlike a notice of appeal to the Supreme Court Chamber against a judgment of the Trial Chamber,<sup>50</sup> a notice of appeal to the Pre-Trial Chamber is a bare indication of an appellant's intention to appeal a decision or order of the Co-Investigating Judges.<sup>51</sup> In contrast, the appeal submissions to the Pre-Trial Chamber "shall contain the reasons of fact and law upon which the appeal is based together with all supporting documents."<sup>52</sup> Therefore, only upon receipt of appeal submissions from an appellant and the case file from the Co-Investigating Judges can the Pre-Trial Chamber determine the scope of review that it must undertake on the appeal.

36. The same rationale for the calculation of the time limit is demonstrated by the necessity to ensure a reasonable time for the appellant to appeal, without impacting on the time allotted for the Pre-Trial Chamber to decide. The appeal submissions must be filed by the appellant within 30 days of being notified of the impugned decision or order. In the event an appellant files his or her notice of appeal on the first day of the 10 day time limit under Internal Rule 75(1), the Pre-Trial Chamber could wait up to 29 days for "the reasons of fact and law upon which the appeal is based." The Pre-Trial Chamber could wait even longer if it grants an extension of time to file the appeal submissions due to exceptional circumstances. Other provisions in the Internal Rules support the interpretation that the commencement date for the "4 months" in Internal Rule 68(2) is no earlier than the filing date of the appellant's appeal submissions to the Pre-Trial Chamber.

<sup>50</sup> Internal Rule 105(3).

<sup>51</sup> Internal Rule 75. The Supreme Court Chamber recalls that the Plenary specifically introduced the requirement for a notice of appeal to be filed before the Pre-Trial Chamber with a view to the impermanence of that Chamber in Cambodia.

<sup>52</sup> Internal Rule 75(3)-(4).



In particular, the three months within which the Supreme Court Chamber must decide an immediate appeal on detention commences on the date of notification of the appellant's appeal submissions.<sup>53</sup>

37. The Supreme Court Chamber notes that its finding on the commencement of the deadline in Internal Rule 68(2) has no equivalent in the relevant provisions in the Code of Criminal Procedure of the Kingdom of Cambodia ("CCP"), and therefore the reliance by the Accused on Article 249 of the CCP<sup>54</sup> has no merits. Even if the "four months" in Article 249<sup>55</sup> of the CCP commences on the date of the closing order, the relevance of this provision, as well as other CCP provisions that control appeals against the closing order,<sup>56</sup> must be evaluated against their systemic background. In this respect, significant differences must be noted between the approaches in the CCP and the Internal Rules to appeals against closing orders, reflecting the particularities of ECCC proceedings due to the gravity of the crimes and complexity of investigations, the need for greater pre-trial scrutiny over the charges and the need to broaden recourse available to the defence. Thus, the CCP does not foresee an appeal against the closing order by the charged person as broadly as is foreseen within the Internal Rules. In the Internal Rules, a challenge against a closing order may be brought independently on jurisdictional grounds, and/or on grounds related to continuing detention.<sup>57</sup> Furthermore, consistent with the narrow authorisation for appeals, appellate deadlines in the CCP are far shorter for the parties, being five days only.<sup>58</sup> In contrast, deadlines for appeals against closing orders in the Internal Rules are extended in accordance with the presumed complexity of ECCC cases. Finally, an appeal against a closing order under the CCP is a request for a *de novo* review, whereas the Internal Rules require an appeal to focus on demonstrated legal and factual grounds. In conclusion, the CCP does not provide guidance for the matter at hand, as its provisions in the

<sup>53</sup> See explanation in footnote 15 above.

<sup>54</sup> See NUON Chea's Appeal Submissions, para. 10; IENG Thirith's Appeal Submissions, para. 9.

<sup>55</sup> Article 249, CCP states:

The closing order terminates provisional detention. Article 276 (Release of a Detained Charged Person) of this Code shall apply.

However, by a separate decision issued together with the closing order, the investigating judge may order to keep the charged person in provisional detention until the time he is called to appear before the trial court. In his order, the investigating judge shall refer to the conditions defined in Article 205 (Reasons of Provisional Detention) of this Code.

The decision to keep the charged person in provisional detention ceases to be effective after four months. If the charged person is not called to appear before the trial court within these four months, the charged person shall be automatically released.

<sup>56</sup> See, for example, Articles 266-268.

<sup>57</sup> Internal Rule 74(3)(a) and (f). See the Pre-Trial Chamber's reasoning in Decision on Appeals by IENG Thirith Against the Closing Order, D427/2/15, 15 February 2011, paras. 57-68.

<sup>58</sup> Article 270. The only exception is that the General Prosecutor has one month to appeal.



related area are not adequate for appeals designed for indictments in international crimes. The calculation of the deadline in Internal Rule 68(2) from the filing of the appeal submissions against the closing order, on the other hand, follows as a logical consequence from the adoption of other ECCC-specific arrangements in the Internal Rules.

38. In the present case, the Closing Order was notified on 16 September 2010, IENG Thirith's and NUON Chea's notices of appeal against the Closing Order were filed on 20 and 21 September 2010, respectively, and the Accused's Appeals Against the Closing Order were filed on 18 October 2010. The Supreme Court Chamber therefore finds that, in the circumstances of the Accused, the four month time limit prescribed by Internal Rule 68(2) commenced on 18 October 2010. The final day to comply with the four month time limit was 18 February 2011. On 15 February 2011, the Pre-Trial Chamber filed the remaining reasons for its decision in the Final Disposition. The Supreme Court Chamber finds accordingly that the Pre-Trial Chamber's decision consisting of the Final Disposition and the reasoning was issued within the prescribed time limit.

39. The Accused rely on Internal Rule 21(1).<sup>59</sup> The Supreme Court Chamber holds that the calculation of the commencement date of the deadline from the filing of the appellate submission is consistent with the principle expressed by Internal Rule 21(1) that the Internal Rules shall be interpreted so as to always safeguard the interests of the Accused. In order to demonstrate this consistency, first the principle expressed in Rule 21(1) needs to be interpreted as such. In this respect the Supreme Court Chamber holds that Internal Rule 21(1) is to be read to mean that the interpretation of the Internal Rules must not lead to infringement of any interests of the Accused that emanate from fundamental rights guaranteed under statutes and applicable international legal instruments, such as the presumption of innocence, the right to fair trial, the right to silence, and the right to defence. Therefore, in establishing the normative sense of an Internal Rule, the interpreting entity should proceed according to the rules of interpretation, in consideration of general systemic principles which, among other principles, safeguard the rights of the Accused, and with the end result tested through a prism of these rights. The interpretative direction of Rule 21(1) does not, on the other hand, mean that Internal Rules are to be construed so as to automatically grant the Accused an advantage in every concrete situation arising on the interpretation of the Internal Rules.

<sup>59</sup> IENG Thirith's Appeal Submissions, para. 18; NUON Chea's Appeal Submissions, para. 9.



40. Turning back to the calculation of the deadline in Internal Rule 68(2), the Supreme Court Chamber notes that the question is not, in itself, a matter of the fundamental rights of the Accused. This is rather a technical issue of statutory interpretation from which no exercise of fundamental rights arises. Thus it is a technical question, calling for a technical response, which should follow as a result of balancing different interests in proceedings. The interest on the part of the Accused is in being afforded sufficient time for the preparation of an appeal and in having the court afforded sufficient time for the consideration of the appeal, thus strengthening the guarantee that insufficiently supported charges will not be forwarded for trial. The choice as to the filing of an appeal, and how to use the time limits allotted for it is an autonomous decision of the appellants. This interest is satisfied at the expense of the lengthening of the proceedings, including detention where ordered, and runs contrary to the interest of those parties who do not appeal the Closing Order and benefit of a right to be tried within a reasonable time. However, a legislative or, as in this case, interpretative decision on establishing the starting point of the deadline one month earlier or later in Internal Rule 68 does not disable any of the fundamental rights of the Accused, in particular the right to be tried within a reasonable time.

41. For the foregoing reasons, the holding on the commencement of time limit in Internal Rule 68(2) from the filing of the appellate submissions does not contravene Internal Rule 21(1).

#### **4.3. IENG Thirith's First Ground of Appeal – Failure to Address Her Argument**

42. The Supreme Court Chamber finds that the Trial Chamber did not fail to address IENG Thirith's main argument. At paragraph 23 of its Decision, the Trial Chamber explicitly states that it is "considering 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." After finding that the Pre-Trial Chamber's failure to comply with the four month time limit in Internal Rule 68(2) constituted a procedural defect, the Trial Chamber set out to "assess whether the validity of [the Final Disposition] was affected in consequence."<sup>60</sup> In the subsequent seven paragraphs (30-36), the Trial Chamber provides reasoning for both of its findings that the Final Disposition is a valid decision within the meaning of Internal Rule 68(2)-(3)<sup>61</sup> and that the particular circumstances of the case did not warrant immediate release.<sup>62</sup> IENG Thirith may disagree with the reasoning of the Trial Chamber, or justifiably feel that the Trial Chamber's reasoning does

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<sup>60</sup> Trial Chamber's Decision, para. 29.

<sup>61</sup> The explicit finding is in the Trial Chamber's Decision, para. 37, fn. 58.

<sup>62</sup> Trial Chamber's Decision, para. 35.

not discuss in depth the different aspects of the putative illegality of the Pre-Trial Chamber's decision. However, the Trial Chamber did respond, implicitly, within the meaning of Article 9 of the International Covenant on Civil and Political Rights, to IENG Thirith's main contention about the lack of a valid basis for her deprivation of liberty. The Supreme Court Chamber accordingly rejects IENG Thirith's first ground of appeal.

#### **4.4. IENG Thirith's Second Ground of Appeal and NUON Chea's First Ground of Appeal – Erroneous Interpretation of Internal Rule 68**

43. The Supreme Court Chamber notes that these grounds of appeal are premised on the four month time limit prescribed by Internal Rule 68(2) expiring on 16 or 21 January 2011 (as argued by NUON Chea and IENG Thirith, respectively). For the reasons stated above, the Supreme Court Chamber has found that the four months expired on 18 February 2011, and that the Pre-Trial Chamber filed its full reasoning by this date. Accordingly, these grounds of appeal are rejected.

#### **4.5. NUON Chea's Second Ground of Appeal – Trial Chamber's Disregard of Principle of *Ultimum Remedium***

44. Given that the Pre-Trial Chamber's full reasoning for its Final Disposition was given within the four month time limit, it is not necessary for the Supreme Court Chamber to review NUON Chea's second ground of appeal relating to *ultimum remedium*. This ground of appeal is therefore rejected.

#### **4.6. NUON Chea's Third Ground of Appeal – Immediate Release Was the Only Appropriate Remedy**

45. Again, given the Supreme Court Chamber's finding that the Pre-Trial Chamber's full reasoning for its Final Disposition fell within the four month time limit, this Chamber need not consider whether immediate release was the only appropriate remedy. The Chamber therefore rejects this ground of appeal.



**4.7. No Procedural Defect or Violation of the Accused's Rights**

46. The Trial Chamber found 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.”<sup>63</sup>
47. The Supreme Court Chamber recalls that by 18 February 2011, being the expiration of the four month time limit in Internal Rule 68(2), the Pre-Trial Chamber filed the full reasons for all portions of its Final Disposition for the Accused. By doing so, the Pre-Trial Chamber complied with the procedural requirement in Internal Rules 68(2) and 77(14) to issue its decision on the Accused’s Appeals Against the Closing Order within four months. The Supreme Court Chamber has therefore found that the Pre-Trial Chamber did not commit a procedural defect by having acted beyond the deadline. With this element eliminated, there is no basis to maintain the Trial Chamber’s finding that in the process of the issuance of the Pre-Trial Chamber’s decision, there was a breach of the rights of the Accused. In the judgment of the Supreme Court Chamber, there was no breach of the Accused's rights under the Internal Rules, and the question of remedy does not therefore arise. Consequently, the Supreme Court Chamber amends the Trial Chamber’s Decision by deleting the second and third paragraphs of the Disposition.<sup>64</sup>

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<sup>63</sup> Trial Chamber’s Decision, para. 29.

<sup>64</sup> Trial Chamber’s Decision, p. 15:

“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;”



**5. DISPOSITION****FOR THE FOREGOING REASONS, THE SUPREME COURT CHAMBER:****REJECTS** the Accused's immediate appeals;**REJECTS** the request for an oral hearing; and**AMENDS** the Trial Chamber's Decision in accordance with paragraph 47 above.**Phnom Penh, 3 June 2011****President of the Supreme Court Chamber**