

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

FILING DETAILS

Case File No.: 002/19-09-2007-ECCC/SC (04)

Party Filing: Mr Khieu Samphan

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REPLY

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Before:

The Supreme Court Chamber
Judge KONG Srim
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge SIN Rith
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

Co-Prosecutors

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MAY IT PLEASE THE SUPREME COURT CHAMBER

I - INTRODUCTION

1. On 3 March 2011, Mr Khieu SAMPHAN filed an appeal against the Decision on the Application for Immediate Release, dated 16 February 2011.¹
2. On 29 March 2011, Mr Khieu SAMPHAN received notification of the Co-Prosecutors' Response, in English and Khmer only.² On 7 April 2011, the Supreme Court Chamber decided that Mr Khieu SAMPHAN had to file his reply within five calendar days following the notification of the French translation of the Response dated 4 April 2011.³
3. In their Response, the Co-Prosecutors attempt to convince the Supreme Court Chamber that Mr Khieu Samphan's Appeal ought to be dismissed. However, they failed to show that the Trial Chamber did not commit any errors invalidating its decision.

II- DISCUSSION

4. The Supreme Court Chamber will not be misled by the Co-Prosecutors' arguments regarding the interpretation of Rule 68(3)⁴ and the infringement of fair trial rights.⁵ Accordingly, the Appellant will not discuss them further, and strongly reiterates the arguments he raised in his previous filings.
5. However, he cannot but highlight the specious legal arguments on which the Co-Prosecutors rely in a bid to mislead the Supreme Court Chamber regarding the appellate standard of review and their claim that Rules 82 and 63(3) of the Rules are independent of each other.

¹ Appeal Against the Decision of the Application for Immediate Release, 3 March 2011, Document No. E50/3 (the "Appeal"); Decision on the Urgent Applications for Immediate release of Nuon Chea, Khieu Samphan and Ieng Thirith, 16 February 2011, E/50.

² Co-Prosecutors' Response to the KHIEU Samphan's Appeal against the Decision on the Application for Immediate Release, 28 mars 2011, E50/3/1/1.

³ Cp-Prosecutors' Response to Khieu Samphan's Appeal against the Decision on the Application for Immediate Release, 28 March 2011, E50/3/1.

⁴ Response, paras. 7 to 10.

⁵ Response, paras. 29 to 31.

1) Standard of review and Supreme Court Chamber's power

6. According to the Co-Prosecutors, Rule 104 of the Internal Rules establishes only one test for immediate appeals against Trial Chamber decisions: that there has been a discernable error in the exercise of the Trial Chamber's discretion and that that error has been prejudicial to the appellant.⁶

7. The fact of the matter is that Rule 104 of the Rules sets out two other tests for immediate appeals: the existence of an error on a question of law invalidating the judgment or decision; or an error of fact which has occasioned a miscarriage of justice. One only has to read Rule 105(2) which lists the grounds of appeal and arguments that may be set out in an appeal in support of immediate release.

8. By highlighting only the discernible error in the exercise of the Trial Chamber's discretion with possibility for the appellate judges to substitute their own reasoning for that given in the Decision,⁷ the Co-Prosecutors are in fact attempting to mislead the Supreme Court Chamber and to seise it of errors of fact that may have been committed by the Trial Chamber.

9. This is evidenced by the fact that they enumerate and discuss the conditions set out in Subrules 63(3)(b)(iv) and (v) after stating that it is open to the Supreme Court Chamber to consider afresh the facts.⁸

10. It is noteworthy that the Co-Prosecutors had already invoked the justification for maintaining the Appellant in detention pursuant to Subrule [63(3)(b)(v)], and that they invoke Subrule [63(3)(b)(iv)] for the first time in their Response.⁹ Yet, according to Rule 110 of the Rules:

1. The scope of the appeal shall be **limited** to the issues raised in the notice, and the status of the appellant.

⁶ Response, paras. 7-10.

⁷ Response, paras. 4-6 (Section II).

⁸ Response, paras. 19-28 (Section VI).

⁹ Response, paras. 19-20.

2. In all cases, the Chamber may change the legal **characterisation** of the crime adopted by the Trial Chamber. However, it **shall not** introduce **new** constitutive elements that were not submitted to the Trial Chamber.¹⁰

11. Further, in the event of an error of fact, the Supreme Court Chamber may intervene only in rare circumstances, as it must exercise caution not to lightly overturn findings of fact made by the Trial Chamber, and must defer to the Trial Chamber which received the evidence at trial.¹¹

12. In this instance, by requesting the Supreme Court Chamber to substitute its own reasons for those set out in the Decision, the Co-Prosecutors are in effect attempting to request it to substitute its own **findings of fact** for those of the Trial Chamber.

13. In their Response, the Co-Prosecutors refer to the Pre-Trial Chamber.¹² However, while the Pre-Trial Chamber may substitute its own reasons for those of the Co-Investigating Judges, it is in fact cautious not to substitute its own “opinion” for theirs on the basis that “the review of the Order is limited to the extent of determining whether the Co-Investigating Judges properly exercised their discretion.”¹³

14. In any event, the Appellant recalls that he seised the Supreme Court Chamber on the ground that the Trial Chamber committed four errors of law and one discernable error in the exercise of its discretion.

2) Subrules 82 and 63(3) of the Rules

15. The Co-Prosecutors are clearly attempting to mask the errors committed by the Trial Chamber by claiming that Rules 82 and 63(3) are independent of each other. According to them, the Appellant’s detention automatically continues pursuant to Rule 82(1), “irrespective of the Chamber’s consideration of the factors in Subrule 63(3)”, since this rule “does not require a consideration of Subrule 63(3) factors.”¹⁴

16. However, according to Subrules 82(1) and (2), which, incidentally, are cited by the

¹⁰ Emphasis added

¹¹ *Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Appeal Judgement, 16 November 2009, para. 11.

¹² Response, paras. 4-6.

¹³ See for example, Decision on the Appeal from the Order on the Request to Seek Exculpatory Evidence in the Shared Materials Drive, 12 November 2009, D164/3/6, paras. 25 and 26 (quoted in footnote 9 of the Response).

¹⁴ Response, paras. 11-14, and 17(c).

Co-Prosecutors:

1. The Accused shall remain at liberty whilst appearing before the Chamber unless provisional Detention has been ordered in **accordance with these IRs**. Where the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber's judgment is handed down, subject to sub-rule 2.
2. The Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detaining an Accused in **accordance with these IRs**. The Chamber shall so decide after hearing the Co-Prosecutors, the Accused and his or her lawyers.¹⁵

17. In both Subrules, there is no doubt that the phrase "in accordance with these IRs" refers to Rule 63(3)(b)(iii) of the Internal Rules. Continuing detention **must not** be ordered "automatically" in the absence of precise criteria that are defined in law.

18. In fact, the Trial Chamber was fully cognizant of this when it ordered the "continuation of KHIEU Samphan's detention pursuant to Rule 63(3)(b)(iii)".¹⁶ It thereby committed only one error by relying **solely** on the severe penalty test for its decision, as recognized by the Co-Prosecutors themselves.¹⁷ Further, this error does invalidate the Decision, and the Decision ought to be reversed, because the Appellant's detention is unlawful; moreover, liberty is the rule.¹⁸

¹⁵ Emphasis added.

¹⁶ Decision, para. 40.

¹⁷ Response, para. 15.

¹⁸ Appeal, paras. 17-23.

FOR THESE REASONS

19. The Appellant respectfully requests the Supreme Court Chamber:

- TO DISMISS all the Co-Prosecutors' arguments;
- TO RULE in favour of Appellant with respect to all his previous filings;
- TO ORDER the immediate release of Mr KHIEU Samphan.

**WITHOUT PREJUDICE,
AND JUSTICE SHALL BE DONE**

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|------|-------------------|------------|-----------|
| | SA Sovan | Phnom Penh | [signed] |
| for | Jacques VERGÈS | Paris | [signed] |
| for | Philippe GRÉCIANO | | [signed] |
| Date | Name | Place | Signature |