

026/5/4

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

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CO-PROSECUTORS' RESPONSE TO KHIEU SAMPHAN'S EXTREMELY URGENT
SUPPLEMENTAL APPLICATION FOR RELEASE DATED 4 DECEMBER 2008

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I. INTRODUCTION

1. The Co-Prosecutors respond to the Extremely Urgent Supplemental Application for Release¹ (the “Urgent Application”) filed on 4 December 2008 by the Defence of KHIEU Samphan (the “Charged Person”) before the Pre-Trial Chamber (the “PTC”) and/or President. The Defence application is not filed pursuant to any ECCC Internal Rule but to Article 283 of the Criminal Procedure Code (the “CPC”). The Defence request the President of the PTC to order KHIEU Samphan’s provisional release as a precautionary and preventative measure, pending the decisions on the merits of the appeals filed by the Defence. Pursuant to the PTC “Directions to the Parties” dated 12 December 2008², the present response is filed on 16 December 2008 and is thus admissible.
2. The Co-Prosecutors submit that the Defence Urgent Application should be dismissed in its entirety for the following reasons :
 - (a) The ECCC Internal Rules, which supersede the CPC, do not allow such application before the PTC or PTC President and the Urgent Application is therefore inadmissible;
 - (b) Alternatively, Article 283 of the CPC on which this Application is based is misinterpreted by the Defence as it does not allow the parties to seize the President of the Investigation Chamber (and *a fortiori* the PTC) of such Urgent Application nor grant the President the power to order any provisional release.
 - (c) Furthermore, the Urgent Application lacks proper motives and is abusive.

¹ *Case of KHIEU Samphan*, Defence Extremely Urgent Supplemental Application for Release, 4 December 2008, C26/5/2, ERN 00250603-07 (ENG), 00249810-14 (FRE) and 00249815-20 (KHM).

² *Case of KHIEU Samphan*, Directions to the Parties concerning KHIEU Samphan’s Preliminary Request for Release, President of the PTC, 12 December 2008, C26/5/3, ERN 00250389-90 (ENG) and 00250391-92 (KHM).

II. RELEVANT PROCEDURAL BACKGROUND

3. On 8 October 2008, the Defence notified the PTC that they sought to withdraw their appeal against the Provisional Detention Order dated 19 November 2007, which was granted by the PTC on 15 October 2008.³ Meanwhile, the Defence filed a first application for provisional release on 13 June 2008, refused by the CIJ on 23 June 2008. A Notice of Appeal was filed by the Defence on 30 June 2008⁴ but the appeal was subsequently dropped. On 22 July 2008, the Defence also filed an appeal before the PTC against the CIJ Order on Translation Rights and Obligations of the Parties.⁵ A public hearing was held on this issue on 4 December 2008 and the decision is awaited. Another application for provisional release was filed with the CIJ by the Defence on 8 October 2008, was responded to by the Co-Prosecutors on 24 October 2008 and then rejected by a CIJ order dated 28 October 2008.⁶ On 27 November 2008, the Defence filed an appeal before the PTC against that Order.⁷ On 4 December 2008, the Defence filed another appeal against the CIJ Order on Extension of Provisional Detention dated 18 November 2008.⁸ On the same day, this Urgent Application for Release was filed by the Defence before the PTC.

³ *Case of KHIEU Samphan*, Defence Notice of Withdrawal of Appeal, 8 October 2008, **C26/I/30**, ERN 00228787-93 (FRE), 00231936-42 (ENG); *Case of KHIEU Samphan*, PTC Decision Relating to Notice of Withdrawal of Appeal, 15 October 2008, **C26/I/31**, ERN 00231971-74 (ENG).

⁴ *Case of KHIEU Samphan*, Defence Request for an Order for M. Khieu Samphan's Provisional Release for Health Reasons, 13 June 2008, **C36**, ERN 00195934-35 (ENG), 00195936-37 (FRE); Co-Prosecutors' Observations on Defence Request to Release Khieu Samphan from Provisional Detention, 19 June 2008, **C36/II**, ERN 00196966-69 (ENG); Order refusing the Request for Release, CIJ, 23 June 2008, **C36/III**, ERN 00197169-73 (FRE) and 00198508-12 (ENG); Records of Appeals and Notice of Appeal, 30 June 2008, **C36/III/1**, ERN 00198209-12 (ENG).

⁵ *Case of KHIEU Samphan*, Defence Appeal against the Decision to Deny the Request for Translation of Khieu Samphan's Case File, 22 July 2008, **A 190/I/1**, ERN 00212334-52 (ENG) and 00207411-29 (FRE). This appeal contains a provisional release request; Order on Translation Rights and Obligations of the Parties, CIJ, 19 June 2008, **A190**, ERN 00196923-30 (ENG).

⁶ *Case of KHIEU Samphan*, Defence Application for Provisional Release of Khieu Samphan, 8 October 2008, **C40**, ERN 00228906-18 (FRE), 00233119-30 (ENG); Co-Prosecutors' Response to the Co-Investigating Judges Forwarding Order regarding Khieu Samphan's Urgent Application for Release, **C40/3**, ERN 00234631-45 (ENG); CIJ Order Refusing the Request for Release, 28 October 2008, **C40/4**, ERN 00235033-44 (FRE), 00236261-71(ENG).

⁷ *Case of KHIEU Samphan*, Defence Appeal against the CIJ Order Refusing the Request for Release dated 28 October 2008, 27 November 2008, **C40/5/1** and Annex **C40/5/1.1**, ERN 00242949-68 and Annex ERN 00242995-98 (FRE) – No English translation available to date.

⁸ *Case of KHIEU Samphan*, Defence Appeal against the CIJ Order on Extension of Provisional detention, 4 December 2008, **C26/5/1**, ERN 00249732-48 (FRE) – No English translation available to date; CIJ Order on Extension of Provisional Detention, 18 November 2008, **C26/4**, ERN 00239460-69 (FRE).

III. LEGAL ARGUMENTS

The Defence Urgent Application is Inadmissible

4. The Defence application is not filed pursuant to the ECCC Internal Rules but solely pursuant to Article 283 of the Criminal Procedure Code (“CPC”) which is not applicable to ECCC.
5. The PTC recently ruled that the Internal Rules prevail over the CPC provisions. On 26 August 2008, the PTC stated in its Decision on NUON Chea’s Appeal against the order refusing request for annulment, paragraph 14, that:

*“The Internal Rules (...) form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Cambodian Criminal Procedure Code (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC”.*⁹

This principle has been confirmed by the PTC in its decision on application by the co-lawyer for the civil parties concerning oral submissions at the hearing of 4 December 2008.¹⁰

6. The ECCC Internal Rules do not allow the Defence to seize the PTC or its President with such “Extremely Urgent Supplemental Application for Release”. Firstly, the Internal Rule 73 explicitly limits the additional jurisdiction of the PTC to appeals, mainly against decisions of the CIJ as provided in Rule 74, and to applications to annul investigative action as provided in Rule 76.¹¹ No supplemental application for release is permitted before the PTC under the Rules. Applications for provisional release should only be addressed to the CIJ in the conditions set out in Rule 64. Secondly, the Defence is precluded under the Internal Rules from addressing such application for release to the President of the PTC

⁹ *Case of NUON Chea*, PTC Decision on NUON Chea’s Appeal against Order Refusing Request for Annulment, 26 August 2008, **D55/I/8**, ERN 00219334-49 (KHM) and 00219322-33 (ENG), paragraph 14.

¹⁰ *Case of KHIEU Samphan*, PTC Written version of oral decision on application by the co-lawyer for the civil parties concerning oral submissions, 4 December 2008, **A190/I/16**, ERN 00244305-07 (ENG), paragraph 2.

¹¹ Rule 76.2 provides that the parties considering that any part of the proceedings is null and void have to submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with a view to annulment.

himself.¹² Finally, the President of the PTC has no power to order on his own the provisional release of a Charged Person as a precautionary and preventative measure. Apart from presiding the debates during PTC hearings, the only special powers granted to the President of the PTC by the Internal Rules can be found in Rules 50(3), 77(3) a) and 77(15).¹³ Therefore, the application should be declared inadmissible as it is based on Article 283 CPC which is not applicable before the PTC. The Defence should be reminded that the only way to modify the Internal Rules is to suggest amendments to the judges' plenary sessions, in their case through the Defence Support Section.

Alternatively, the Defence Interpretation of Article 283 CPC is Erroneous

7. As mentioned above, the Internal Rules prevail over the CPC regarding the criminal procedure applicable before the ECCC. Article 283 referred to in the Urgent Application is not applicable, nor Article 278. Moreover, Article 283 does not give the President of the Investigating Chamber the power to release a Charged Person on his own; the President should merely ensure, as part of his sole administrative powers as Chief of jurisdiction, that the department of investigating judges function properly.¹⁴ This interpretation is confirmed by the fact that all the following articles of the CPC relate to administrative matters.¹⁵

¹² The Urgent Application is voluntarily ambiguous on this point. It is filed before the Pre-Trial Chamber but actually seeks a decision from the sole President of the Pre-Trial Chamber as the Defence state that he would have special statutory powers in that effect. The application is based on Article 283 CPC, which concern special powers of the President, but also mentions other articles of the CPC concerning the entire Investigating Chamber (Articles 261 and 278). Paragraph 13 of the application, in its original French version, adds to this confusion as the Defence pray the President of the Pre-Trial Chamber to order the provisional release "subject to the conditions that they may deem appropriate" (The English translation notified on 12 December does not appropriately reflect this). This ambiguity reflects the Defence lawyers' awareness that they were not entitled to file such request with the President of the Pre-Trial Chamber. The Internal Rules provide that the Defence can only address requests, submissions or appeals to the CIJ, the PTC, the Trial Chamber or the Supreme Court Chamber but not to the President of the Trial Chamber as individual judicial authority. Such extraordinary powers of the PTC President, if they existed, would also jeopardize the balance between national and international judges within the PTC as set forth by the Agreement between the United Nations and the Royal Government of Cambodia and the Law on the Establishment of the ECCC.

¹³ Rule 50(3) concerns the power of the PTC President to authorise a search against the will of the owner or occupant or during his (her) absence. Rule 77(3) a) stipulates that once the PTC seized of an appeal, the President, has to verify that the case file is up to date and set a hearing date. Rule 77(15) deals with the power of the PTC President to grant, at the request of the Co-Prosecutors, a stay of a CIJ's release or dismissal order regarding a Charged Person in provisional detention. This prerogative is the exact contrary of the right to order a release that the Defence sought to allocate to the President in their application.

¹⁴ Article 283 provides that « *The president of the Investigation Chambers shall be in charge of the functioning of the department of investigating judges. The president shall check the conditions for implementing the provisions concerning temporary detention, court warrants, and rogatory letters.*

8. No jurisdictional power is attributed by the CPC to the President of the Investigating Chamber by Article 283 and subsequent Articles 284-286. The role of the President is only restricted to exercising a certain control over the functioning of the department of the investigating judges. Furthermore, the parties have clearly no right to request the President to take decisions regarding the release of Charged Persons.
9. Therefore the Defence misinterpreted the nature and scope of the powers of the President of the Investigating Chamber as set in the CPC.¹⁶ Should the Article 283 CPC be considered as applicable before the PTC, it is submitted that it does not allow what the Defence seeks from the President of the PTC.

The Urgent Application lacks proper motivation and is abusive

10. The Urgent Application not only lacks any legal ground, which constitutes an abuse in itself, but also lacks proper motives justifying the emergency of the request and the alleged defence rights violated.
11. It is recalled that the defence appeals have no suspending effects and that the Internal Rules do not provide any possibility of benefiting from precautionary and preventative measures prior to the PTC decisions. In any case, should the PTC consider in its future decisions regarding both the translation rights or the appeals against the CIJ order refusing the request for immediate release and the order extending the provisional detention for one year, that the rights of the Charged Person were violated in any way, the CIJ would have to implement immediately any decision to release him, which constitute an appropriate remedy. Meanwhile, the alleged violations of the defence rights, repeated in every Defence

The president of the Investigation Board Council shall guarantee that no unreasonable delay in the implantation of procedures would occur.

The president of the Investigation Board may inspect the investigation department ».

¹⁵ Article 284 states that each investigating judge has to report every trimester about the progress made in each criminal investigation. Article 285 concerns the inspections carried out by the President of the Investigating Chamber which have to be reported to the President of the Appellate Chamber. Article 286 states that the President of the Investigating Board may request an investigating judge to take a decision regarding the extension of provisional detention if he/she failed to do so within a month of the accused' request. The President is not entitled to take any decision regarding the detention itself.

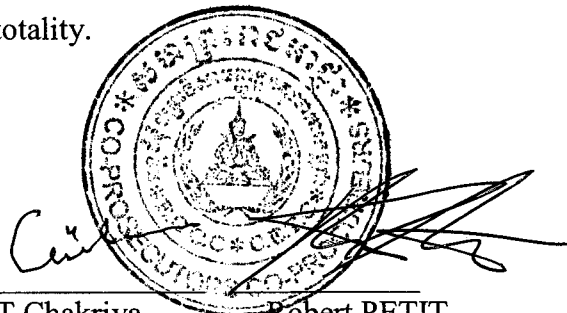
¹⁶ This misinterpretation may derive from the possibility for the president, in the French criminal procedure, to seize the investigating chamber in view of deciding over the extension of the detention of a charged person in provisional detention (Article 223 of the French Criminal Procedure Code). The Defence cannot ignore the fact that since 1953 Cambodia is no longer a French colony and that French criminal law is not applicable in Cambodia nor before the ECCC.

submission since April 2008, remain vague and purely hypothetical. The CIJ rejected the Defence arguments and, on the contrary, considered in their orders dated respectively 28 October and 18 November 2008 that the release of the Charged Person would pose serious risks or threats to the victims, the preservation of evidence, the Charged Person's personal safety and the public order. Those decisions are applicable under the Internal Rules until reviewed by the PTC five judges on appeal. Any examination of those appeals' grounds by the PTC President prior to the five judges would force him to prejudge.

12. In reality, the recent multiplication of provisional applications filed by the Defence with the CIJ and the PTC clearly demonstrates a will to circumvent the requirements of Rule 64 (2) and 64 (3). The current application for release is the fourth such request in less than six months, a situation which violates Rule 64 (3) and may constitute an abuse of process.

IV. CONCLUSION

13. The Co-Prosecutors, therefore, request the Pre-Trial Chamber to DISMISS the Defence Extremely Urgent Application for Release in totality.



The seal of the Co-Prosecutors is circular, featuring a central emblem and text in Khmer and English. The English text includes 'CO-PROSECUTORS' and 'PTC'. A handwritten signature in black ink is written across the seal.

YET Chakriya Robert PETIT
Deputy Co-Prosecutor Co-Prosecutor

Signed in Phnom Penh, Kingdom of Cambodia on this 16th day of December, 2008.