



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

TRANSCRIPT OF HEARING - APPLICATION FOR IMMEDIATE RELEASE

NUON CHEA, KHIEU SAMPHAN, IENG THIRITH

PUBLIC

Case File N° 002/19-09-2007-ECCC/TC

31 January 2011, 0932H

Before the Judges:

The Accused:

NIL Nonn, Presiding
Silvia CARTWRIGHT
YA Sokhan
Jean-Marc LAVERGNE
THOU Mony
YOU Ottara (Reserve)
Claudia FENZ (Reserve)

NUON Chea
IENG Thirith
KHIEU Samphan

For the Accused:

SON Arun
Jasper PAUW
PHAT Pouy Seang
KHAN Sereyvuthy
SA Sovan

Trial Chamber Greffiers:

DUCH Phary
LIM Suy Hong
SE Kolvuthy
Natacha WEXELS-RISER

For Court Management Section:

For the Office of the Co-Prosecutors:

UCH Arun

CHEA Leang
Andrew CAYLEY
SENG Bunkheang
Colleen GILG

For the Civil Parties:

PICH Ang
Elizabeth SIMONNEAU FORT

List of Speakers:

Language used unless specified otherwise in the transcript

Speaker	Language
MR. CAYLEY	English
MS. CHEA LEANG	Khmer
MS. IENG THIRITH	Khmer
MR. KHIEU SAMPHAN	Khmer
MR. PAUW	English
MR. PHAT POUV SEANG	Khmer
MR. SA SOVAN	Khmer
MS. SE KOLVUTHY	Khmer
MR. SON ARUN	Khmer
THE PRESIDENT (NIL NONN, Presiding)	Khmer

1

1 P R O C E E D I N G S

2 (Judges enter courtroom)

3 MR. PRESIDENT:

4 Please be seated.

5 Today is the 31st of January 2011. The Trial Chamber of the
6 Extraordinary Chambers in the Courts of Cambodia, composed of,
7 first, myself, the President of the Trial Chamber, second, Judge
8 Silvia Cartwright, third, Judge Ya Sokan, fourth, Judge Jean-Marc
9 Lavergne, fifth, Judge Thou Mony, and two reserve Judges, Judge
10 You Ottara and Judge Claudia Fenz, declares the public hearing
11 open for the discussion of three requests.

12 First, the application of the defence lawyers of Nuon Chea of 18
13 January 2011 requesting the Trial Chamber to release Nuon Chea
14 immediately. Second, the application of the defence lawyers of
15 Khieu Samphan of 18 January 2011 requesting the Trial Chamber to
16 release Khieu Samphan according to Internal Rule 80.3 [sic] of
17 the Internal Rules. Third, the application of the defence
18 lawyers of Ieng Thirith of 21st January 2011 requesting the Trial
19 Chamber to release Ieng Thirith immediately.

20 Based on the case file 002/19-09-2007/ECCC, the accused are
21 charged with crimes against humanity. He was detained at the
22 ECCC detention centre on 19 September 2007, that is the accused
23 Nuon Chea, and the accused Khieu Samphan has been detained in the
24 detention centre of the ECCC as of 19 November 2007, and the
25 accused Ieng Thirith, female, born on 10th March 1932, has been

2

1 detained in the detention centre of the ECCC as of 14 November
2 2007.

3 [9.35.45]

4 The three accused are charged with crimes against humanity,
5 genocide on Cham and Vietnamese, grave breaches of the Geneva
6 Conventions, and specific crimes under the 1956 penal code.
7 Greffier, Mrs. Se Kolvuthy, could you report on the presence and
8 absence of the parties attending the hearing?

9 [9.36.30]

10 GREFFIER:

11 Mr. President, all parties are as follows. The Prosecution is
12 fully present. The accused Nuon Chea, Khieu Samphan and Ieng
13 Thirith. The defence for Nuon Chea is present by Mr. Son Arun,
14 and his international counterpart is absent. The defence for
15 Khieu Samphan will be presented by Mr. Sa Sovan at a later stage,
16 and his international counterpart, Mr. Jacques Vergès is absent.
17 The defence for the accused Ieng Thirith is presented by Mr. Phat
18 Pouy Seang, the national lawyer, and his international
19 counterpart is absent.

20 MR. PRESIDENT:

21 Thank you, Mrs. Greffier. The presence and absence of the
22 parties must be recorded in the record of the proceedings. In
23 the hearing of this morning, the Trial Chamber will hear the
24 submissions of the parties with respect of the three requests.

25 [9.38.18]

3

1 The defence lawyers of each accused will be permitted a maximum
2 of thirty minutes to present the applications. The
3 Co-Prosecutors will be allowed sixty minutes to respond to all
4 applications. Further, the defence lawyers of each accused will
5 then be permitted ten minutes to reply.

6 Before starting the hearing, the Chamber reminds the parties that
7 they should follow the recommendations of the interpretation
8 unit, in order to ensure a smooth hearing and an accurate record
9 of the hearing which are the following.

10 [9.39.05]

11 The parties should be reminded that three languages are used
12 before the Trial Chamber, due to the hybrid structure of this
13 Court, and therefore the party making a submission or a response
14 thereto should speak slowly and clearly. The parties should read
15 out numbers and dates slowly, clearly and, as a rule, they should
16 read them twice.

17 The parties should spell out names with many vowels which are
18 difficult to write. The parties should press the button on the
19 microphone before starting to speak, and speak into the
20 microphone. In case that a party already started to speak, and
21 realises that the microphone was not on, the party should turn on
22 the microphone and start from the beginning. The interpreters
23 cannot start the interpretation from the middle of a phrase.

24 [9.40.26]

25 Where there is a mutual communication or response among parties

4

1 speaking the same language, a party must wait until the other
2 party has completely finished, including the interpretation,
3 before he can start.

4 Before starting the hearing, the Chamber invites the national
5 lawyers for each accused to proceed with the request for the
6 recognition of the foreign lawyers, if present, in accordance
7 with the provisions of Internal Rule 22(2)(a). Mr Son Arun, you
8 may proceed.

9 [9.41.30]

10 MR. SON ARUN:

11 Thank you, Mr. President. Good morning, Your Honours. My name
12 is Son Arun, the defence lawyer for Mr. Nuon Chea, the charged
13 person. Mr. Jasper Pauw is my co-international lawyer, on behalf
14 of Mr. Michiel Pestman, as he is not present here. Mr. Pauw
15 please stand up.

16 MR. PAUW:

17 Good morning Mr. President, good morning Your Honours. As Mr.
18 Son Arun has indicated, my name is Jasper Pauw, and I would ask
19 your leave to perform the duties of Mr. Michiel Pestman today as
20 international counsel for Mr. Nuon Chea.

21 MR. PRESIDENT:

22 Mr. Jasper Pauw, you are now recognised by this Trial Chamber
23 under the Internal Rule 22(2)(a) for the purposes of this
24 hearing. Pursuant to this recognition, you enjoy the same rights
25 and privileges as a national lawyer.

5

1 [9.43.30]

2 For other defence teams, for Khieu Samphan, and Ieng Thirith, the
3 international lawyers are absent. Therefore, the national
4 lawyers cannot request the recognition of their counterpart this
5 morning. I notice that Mr. Phat Pouv Seang would like to take
6 the floor. You can take the floor if you wish.

7 MR. PHAT POUV SEANG:

8 In order to abide by the Internal Rule as set out by the Trial
9 Chamber, let me first present myself. My name is Phat Pouv
10 Seang, the national defence lawyer for Mrs. Ieng Thirith. My
11 international counterpart is on a mission, so cannot avail
12 himself to be present here this morning. However, before the
13 commencement of today's substance, I'd like to submit to the
14 Trial Chamber regarding the decision E26, which states that the
15 lead co-lawyers are not required to present during this
16 particular hearing.

17 [9.45.37]

18 In this E26 decision, as I just read out, for the proceeding to
19 continue, I submit to the Bench that the lead co-lawyers
20 representing the civil parties leave the hearing room.

21 MR. PRESIDENT:

22 Thank you, Mr. Phat Pouv Seang. It is, in fact, true that in
23 that decision the Trial Chamber recognised that the presence of
24 the lead co-lawyers for the civil parties is not required during
25 this particular hearing. The wording "is not required" does not

6

1 mean that they are not prohibited [sic] to attend the hearing.

2 In fact, it means that they are not actively participated in the
3 proceedings under discussion.

4 However, this morning, we received with a request, and we had a
5 request, and we held a discussion amongst the Judges of the Bench
6 that they are allowed to attend the hearing as an audience just
7 to listen to the proceedings without any active interaction with
8 the hearing itself. And they have to abide by this direction
9 that they cannot express their opinions or make any submission to
10 the Chamber. And we unanimously agreed on this decision.

11 [9.47.45]

12 MR. SON ARUN:

13 According to the same order, E26, as indicated by counsel Phat
14 Pouv Seang, the co-lead lawyers that are representing the civil
15 parties are not required to be present during the proceedings,
16 and the civil parties are not required to also attend the same
17 proceeding. Another order, E16, also echoes these requirements.

18 If the Court does not require a party to the proceedings, then
19 the party shall not be envisaged to be seated in the main
20 courtroom. They can remain seated at the public gallery as the
21 general public, and the defence counsels have not received the
22 latest update up the order to allow the lead co-lawyers to be
23 present in this courtroom today.

24 We therefore would request that the Chamber allow the lead
25 co-lawyers to participate in the public gallery instead of coming

7

1 here in the courtroom.

2 [9.49.15]

3 (Deliberation between Judges)

4 MR. PRESIDENT:

5 Thank you, counsel Son Arun, for your comments concerning the
6 presence of the lead co-lawyers, both national and international,
7 in today courtroom and hearing. We would like to inform you that
8 after the Trial Chamber was seized of the request, we thoroughly
9 considered it, and already made our decision, and the proceedings
10 before us here does not envisage any comments or submissions by
11 the lead co-lawyers. They are here only to participate in the
12 proceeding as observers of the proceedings.

13 For that reason, the Trial Chamber preserves its right to
14 maintain its decision, and that their presence before this
15 Chamber is sustained. And that of course they shall not make any
16 submissions.

17 [9.50.45]

18 Before giving the floor to the accused and their lawyers, the
19 Chamber wishes to summarise the procedural background to these
20 motions and today's hearing.

21 On the 15th of September 2010, the Co-Investigating Judges issued
22 their Closing Order in case 002 and ordered the continued
23 provisional detention of all four accused until they are brought
24 before the Trial Chamber.

25 The Pre-Trial Chamber was seized of the case file following

8

1 appeals of the Closing Order filed by the four defence teams.

2 Only the Ieng Sary defence team specifically appealed the
3 detention order to the Pre-Trial Chamber.

4 [9.51.55]

5 On the 13th of January 2011 the Pre-Trial Chamber issued its
6 decisions on these appeals without reasoning, indicating that
7 reasons would follow. These decisions contain an order to
8 continue the provisional detention of each of the accused until
9 they are brought before the Trial Chamber.

10 On the 18th and 21st of January the present requests for release
11 by Nuon Chea, Khieu Samphan, and Ieng Thirith respectively were
12 filed. On the 21st of January, the Pre-Trial Chamber issued the
13 reasons for the decision on Ieng Sary's earlier detention appeal
14 before the Pre-Trial Chamber. At the same day, the Pre-Trial
15 Chamber issued the reasons for the decisions that Nuon Chea,
16 Khieu Samphan, and Ieng Thirith should remain in detention. On
17 the 24th of January, the Pre-Trial Chamber issued reasons for the
18 decision that Ieng Sary should stay in detention.

19 As the Chamber is already familiar with the applications, the
20 Chamber invites the defence teams specifically to address the
21 following questions.

22 Number one: what prejudice to the accused to you say has
23 occurred because no reasons were given in the Pre-Trial
24 Chamber's order dated the 13th of January 2011. Two: why do you
25 say that immediate release is the only remedy for addressing this

9

1 alleged prejudice?

2 [9.54.35]

3 Before we proceed, we note that Mr. Sa Sovan, representing Mr.

4 Khieu Samphan, is present now.

5 MR. SA SOVAN:

6 I am rather tired because I had to rush to the courtroom. Could

7 you please repeat your statement?

8 MR. PRESIDENT:

9 We just indicated that at the beginning of the proceedings the

10 Greffier indicated that you would be coming rather late, and that

11 now you are already present. That's why the Chamber would like

12 to confirm your presence, and that counsel Sa Sovan representing

13 Mr. Khieu Samphan is present.

14 MR. SA SOVAN:

15 Thank you, Mr. President. I'm very happy that we have today

16 hearing, and I was afraid that it would be delayed again. I'm

17 very grateful to that.

18 MR. PRESIDENT:

19 Next we would like to invite counsel Son Arun to make his

20 submissions in relation to the reasons for their request for

21 release of their client, Nuon Chea. The floor is yours.

22 MR. SON ARUN:

23 May I seek permission from the Trial Chamber to allow my

24 co-counsel to address the Court before I take the floor.

25 [9.56.40]

10

1 MR. PRESIDENT:

2 Before we proceed, and since the Trial Chamber has been seized of
3 request by Mrs. Ieng Thirith asking the Trial Chamber --
4 indicating that she has waived her rights to attend today
5 hearing. Since the format of the letter itself is not very
6 clear, the Trial Chamber has ordered her to appear before the
7 Chamber this morning.

8 Before we proceed we would like to inquire, Mrs. Ieng Thirith and
9 her counsel, whether she still maintains her position that she
10 would waive her right to be in this hearing, or would she change
11 her mind already that this morning, so that we can really address
12 this motion before we can proceed with the remaining of the
13 proceedings.

14 [9.58.10]

15 Mrs. Ieng Thirith, the floor is yours now.

16 MR. PHAT POUV SEANG:

17 May I request the Trial Chamber to allow my client to remain
18 seated while addressing the Court, because she can't remain
19 standing.

20 MR. PRESIDENT:

21 She is allowed to remain seated while addressing the Court should
22 she wish.

23 MRS. IENG THIRITH:

24 (No interpretation)

25 I, Mrs. Ieng Thirith, would like to waive my right to appear in

11

1 this hearing, and I will resort to the written submission that my
2 co-counsel has already submitted officially before the Trial
3 Chamber as the ground for my arguments.

4 (Deliberation between judges)

5 [10.00.30]

6 MR. PRESIDENT:

7 Mrs. Ieng Thirith, you have already indicated your position that
8 you waived your right, and that you allow your counsel to act on
9 your behalf while you resorted to the written submission filed
10 before the Chamber officially, and the Chamber recognised your
11 motion and your position and the Security personnel are now
12 instructed to take Ieng Thirith back to the detention facility.

13 (Ieng Thirith exits the courtroom)

14 [10.02.20]

15 MR. PRESIDENT:

16 I would like to invite the defence counsel, Mr. Son Arun, for Mr.
17 Nuon Chea, to present his statement and arguments regarding the
18 request to release his client.

19 MR. SON ARUN:

20 My name is Son Arun, the national lawyer for Mr. Nuon Chea. I
21 would like to submit a request to Your Honour that my client
22 shall be allowed to wear dark glasses, because of the affect of
23 his eyes.

24 MR. PRESIDENT:

25 He is allowed for this appropriate request.

12

1 MR. SON ARUN:

2 I would like to give the floor to my international counsel, Mr.
3 Jasper Pauw, and then I will make my submission. Thank you.

4 MR. PRESIDENT:

5 Mr. Jasper Pauw, you may now take the floor.

6 [10.03.35]

7 MR. PAUW:

8 Thank you, Mr. President, members of the Trial Chamber, members
9 of the Prosecution, greffiers. Thank you very much for letting
10 me appear today before you, it is an honour. I would also
11 specifically would like to thank Mr. Son Arun, my colleague, for
12 introducing me to this Court.

13 I would like to start with a short disclaimer. English is not my
14 native language, and I accordingly make mistakes while speaking
15 in English. I think it will be okay, but I apologise in advance
16 to your Chamber and to the translators for any errors in my
17 language. And I will speak slowly on the special request of the
18 translators.

19 [10.04.15]

20 Your Chamber has asked me, or has asked the defence, to address
21 two specific questions today. First, the question what prejudice
22 has the accused suffered because of the failure to provide
23 reasons, and why immediate release would be the only remedy, and
24 I will address these questions today.

25 But I would like to start with submitting that the defence thinks

13

1 that these questions have already been answered, and in fact they
2 have been answered by the drafters of the rules, and more
3 specifically they have been answered by the participants of the
4 plenary session of February 1st, 2008. And that means, among
5 others, you, honourable members of the Trial Chamber. You have
6 already answered the questions that you've posed to the defence.
7 Because the defence truly believes that the answer lies in
8 article 68, as amended by that plenary. In the course of my
9 pleadings I will submit that the only question your Chamber
10 really needs to answer is whether the PTC decision of January 13
11 is a decision according to the Internal Rules of this Court. And
12 I will submit that the answer to that question should be no. But
13 I will get to that issue later.

14 [10.05.30]

15 First, I will discuss why the defence feels that the answers to
16 your questions are already contained in rule 68. As you know,
17 at first rule 68 did not provide for an extended deadline in case
18 of appeals against the Closing Order. The rule was amended by
19 the plenary to allow both the PTC and the TC more practical time
20 both to rule on the appeals and to prepare for the actual trial.
21 And after we can only assume thorough discussion, rule 68(new)
22 was adopted the way it now reads. This is an important first
23 observation, and it shows that this rule 68 and its new time
24 limits were carefully contemplated by the plenary session. And
25 again, that includes you, members of the Trial Chamber, but it

14

1 also includes the members of the PTC. This end result is the
2 result of extensive deliberation and consideration.

3 [10.06.40]

4 And this rule, 68, now considers the exact answers to the two
5 questions your Chamber has posed. It now provides that if there
6 is no decision by the PTC after four months, the interests of the
7 accused, Mr. Nuon Chea, by definition, and automatically, trump
8 all other interests. That means there is no balancing of
9 interests required. There is no need to, for example, consider
10 the grounds of detention or the harm to the accused, anything
11 like that.

12 No, it was the clear vision of the plenary that after those four
13 months there are no conceivable reasons to keep Nuon Chea in
14 custody.

15 [10.7.25]

16 His interest in being free trumps all other interests according
17 to the rules. And this means that today we would not -- we do
18 not need to consider or debate the actual prejudice to the
19 accused, because the plenary has already undertaken that
20 assessment for us way back in 2008. And this assessment has
21 resulted in the clear wording of rule 68: if there is no
22 decision by the PTC after four months, the interests of the
23 accused trump all other interests.

24 It's important to note that this system is perfectly in line with
25 the Cambodian system and the ideas underlying that system.

15

1 Article 249 of the CCP clearly embraces the same thought: four
2 months after the Closing Order, the accused must be brought
3 before the Trial Chamber and otherwise the Order ceases to have
4 any effect, and the accused must be automatically released.

5 In other words, also in the Cambodian system, after four months,
6 the interests of the accused, by definition, trump any other
7 interests.

8 [10.08.45]

9 And therefore, I submit that the only question that needs to be
10 answered by the Trial Chamber today is: does the PTC's decision
11 count as a decision under the Internal Rules. And the defence
12 thinks that the simple and short answer to this question should
13 be no.

14 To qualify as a PTC decision under the rules, it must be a
15 reasoned decision. This follows plainly from rule 77 section 14,
16 but it also flows from the entire system underlying the ECCC.

17 All parties need to provide reasons for pretty much everything
18 they do, and in fact it has been the PTC in the past that has
19 kept all the parties to this requirement.

20 The PTC has declared appeals by the defence inadmissible, it has
21 declared appeals by the OCP inadmissible, for the lack of
22 adequate reasoning, and additionally it has struck down orders by
23 OCIJ because they did not provide reasons.

24 [10.09.50]

25 Simply put, within the ECCC system, entities need to provide

16

1 reasons, and that also applies to the PTC. If reasons are
2 lacking, such a decision cannot qualify as a decision under the
3 Internal Rules, it cannot provide an adequate legal basis for
4 detention.

5 Accordingly, as the PTC has not issued a decision as required by
6 the rules, the order to keep Nuon Chea in detention has ceased to
7 have any effect on or after January 16, and Nuon Chea must be
8 released today. Again, this is what the Internal Rules
9 stipulate, and I believe, the defence believes that the
10 discussion should stop here. I think the case is as simple as
11 this.

12 [10.10.45]

13 But, from the wording of your questions, the defence understands
14 that you would like to hear a bit more about the actual prejudice
15 to our clients. The defence wishes to make two points with
16 regard to the actual prejudice.

17 First of all, because of the failure to provide reasons, his
18 preparations for the preliminary objections are seriously
19 effected. The defence simply cannot anticipate or guess as to
20 the reasoning of the Pre-Trial Chamber in its rejection of the
21 appeals.

22 [10.11.25]

23 True, the Trial Chamber will not be bound by the views of the
24 PTC, but clearly the decision by the PTC will have some
25 persuasive authority. It is simply inconceivable that the

17

1 defence cannot take these considerations into account when
2 preparing its own submissions. The views of the PTC are
3 important. If they're not important, why would we even require
4 them to provide reasons. The views of the PTC must be taken into
5 account by the defence and the defence simply cannot do so.
6 The prosecution, in other submissions that were issued last week,
7 seemed to indicate that the defence does not really need the
8 views of the PTC in order to file their preliminary objections.
9 I can only speak from practice: the absence of reasons has
10 actually hampered the defence teams. It has been a topic of
11 discussion, and we are really hindered in formulating our
12 preliminary objections.
13 Especially because one of the possible preliminary objections, as
14 you know, is on jurisdiction, which is one of the main topics of
15 the appeals against the Closing Order. This was the first
16 prejudice, the actual prejudice to the client.
17 [10.12.45]
18 Second point, and more importantly I feel, there lies prejudice
19 in the simple fact that the Court is not upholding its own law,
20 and it's not upholding specifically a rule aimed at protecting
21 Nuon Chea's interests, and a rule that is aimed at controlling
22 the length of his pre-trial detention.
23 Rule 68(3) simply reflects a right Nuon Chea has, and that right
24 has been violated by the actions of the PTC. And this would
25 already be bad if the PTC had acted inadvertently. But this is

18

1 not the case. The PTC deliberately decided to issue an
2 unreasoned decision in violation of the requirement of the
3 Internal Rules, with the sole purpose of keeping Nuon Chea in
4 provisional detention.
5 And this, Your Honours, is already the second time the PTC has
6 acted this year. Last year, surrounding the issuance of the
7 Closing Order, the PTC decided to issue unreasoned decisions only
8 to allow the OCIJ to issue the Closing Order in time, and in time
9 meant in time to avoid the release of my client.

10 [10.14.00]

11 And I think we can just -- because it's already the second time
12 that this happens -- we can speak of a premeditated act of
13 violating the rights of the accused by the PTC. So the harm for
14 the accused, to answer your question, lies in the PTC not
15 respecting his unequivocal right to be released if the PTC has
16 not reached a reasoned decision within four months. And the
17 violation of this protection that's offered by rule 68(3) is a
18 harm prejudice in and of itself.

19 To conclude, your second question about remedies -- I think the
20 answer flows from what I have said before. I will add a little
21 bit. If your Chamber agrees with the defence that this decision
22 is not a decision according to the rules, or that his provisional
23 detention is otherwise lacking an adequate legal basis, it is
24 clear that we then need to look at the express provisions of rule
25 68.

19

1 [10.15.00]

2 And Rule 68 clearly prescribes the only possible remedy in this
3 case as freedom. The same conclusion will follow if we consider
4 the principle of ultimum remedium. As mentioned in our filing,
5 provisional detention should be ultimum remedium, and this means
6 that the PTC should have acted so as to, if possible, limit our
7 client's provisional detention. And this would have entailed --

8 MR. SON ARUN:

9 I apologise for my interference. My client is dizzy and I would
10 like to seek medical practitioner to examine him.

11 MR. PRESIDENT:

12 Yes, your request is granted. Security officer, can you please
13 bring Mr. Nuon Chea to the room for the medical practitioner to
14 examine him.

15 MR. PAUW:

16 Your Honour, with your permission, I wait with continuing until
17 Mr. Nuon Chea has left the room.

18 (Nuon Chea exits courtroom)

19 [10.17.30]

20 MR. PRESIDENT:

21 As a principle the proceedings should be conducted in the
22 presence of the accused, unless the accused waives his or her
23 right to participate in the proceedings, as in the case of Mrs.
24 Ieng Thirith this morning. However, now, the Chamber would like
25 to inquire whether the proceedings shall be continued, and we

20

1 would like to ask the defence team for Mr. Nuon Chea whether your
2 client waives his right, and ask you to act on his behalf to
3 attend these proceedings without his presence.

4 MR. SON ARUN:

5 Before I requested my request to the President that my client is
6 unwell, my client already asked me to submit to the Chamber that
7 his defence team should act on his behalf during his absence.

8 MR. PRESIDENT:

9 If that is the case, then Mr. Jasper Pauw you may resume your
10 submission.

11 [10.19.15]

12 MR. PAUW:

13 Thank you, Mr. President. I have not much more to add, but I
14 will finish what I have to say. I was discussing, when we were
15 interrupted, the principle of *ultimum remedium*, to which also
16 this Court is bound. And the PTC, if it had respected the
17 principle of *ultimum remedium*, what it should have done was -- it
18 should not have attempted to issue a flawed decision on January
19 13, but it should rather have let the OCIJ's order cease to have
20 any effect, and issue its reasoned decision later.

21 And these considerations, I believe, only gain in force, gain in
22 strength, if one considers that even today, the provisional
23 detention of Nuon Chea lacks an adequate legal basis. Even today
24 there is no reasoned decision on the appeals. This is an ongoing
25 wrong, and the only adequate remedy at this point can be

21

1 immediate release.

2 [10.20.18]

3 Importantly, Nuon Chea's release would demonstrate to the
4 Cambodian society that this Court in fact upholds the rule of
5 law. We should not allow the bending or breaking of Internal
6 Rules just because they are inconvenient. The ECCC would be
7 setting a very poor example for the Cambodian society. Nuon
8 Chea's release, simply because this flows from the letter and the
9 spirit of the Internal Rules, will demonstrate to this country
10 that this Court takes its own laws, and the interests of the
11 accused, seriously.

12 Thank you very much, and I look at Mr. Son Arun to conclude our
13 submissions.

14 MR. PRESIDENT:

15 Counsel Son Arun, you may now proceed.

16 MR. SON ARUN:

17 Good morning Mr. President, and Judges of the Bench, and parties
18 to the proceedings.

19 [10.21.25]

20 First of all, in accordance with rule 82(2) and 68(3) of the
21 Internal Rules, the co-counsel of Nuon Chea, the accused person
22 before the Extraordinary Chambers in the Courts of Cambodia would
23 like to challenge the continued provisional detention pursued in
24 the order by the Pre-Trial Chamber and that its decision order
25 was not reasoned, after the Co-Investigating Judges forwarded the

22

1 case file to the Pre-Trial Chamber.

2 My client has been detained before the Co-Investigating Judges
3 for one year, starting from the 19th of September 2007. During
4 such a detention, Nuon Chea was -- provisional detention was
5 extended to another year, and later on, another one year until
6 the 15th of September 2009. And by 15 of September 2010 the
7 Co-Investigating Judges issued an order to continue such a
8 provisional detention until he is brought before the Trial
9 Chamber.

10 [10.23.05]

11 Later, the Pre-Trial Chamber issued an order to continue the same
12 detention until he is brought before the Trial Chamber.

13 Currently, Nuon Chea is being detained under the supervision of
14 the Ministry of Interior although the detention facility is here
15 at the ECCC.

16 The issuance of the Closing Order concerning the provisional
17 detention of the accused person shall lapse during the time when
18 the appeal was lodged, but the Co-Investigating Judges noted that
19 the conditions for provisional detention are still satisfied the
20 Judges to continue such a detention until he is brought before
21 the Trial Chamber.

22 [10.24.25]

23 Such a decision by the Co-Investigating Judges or the decisions
24 by the Pre-Trial Chamber to continue further detention of the
25 accused person shall be invalid after four months, unless the

1 accused person has been brought before the Trial Chamber during
2 such period.

3 Rule 77(14) states that any decision concerning the provisional
4 detention must be reasoned, but the decision on the 13th of
5 January 2011 shall also be reasoned.

6 [10.25.20]

7 When it comes to the requirement that decision must be reasoned,
8 it has to be interpreted in reference with these given Internal
9 Rules, and that the parties to the proceedings must be abided by
10 the rules and all the decisions must always be reasoned.

11 The reasoned decisions really reflect international standards of
12 practice, for example like the European Court for Human Rights
13 which states that reasons that are given in a decision has a very
14 clear connection to ensure that the court has been conducting the
15 proceedings properly. And such reasonings are very important for
16 equality of justice, and also that it also provides safeguard for
17 any improper or misconduct of the court. Any provisional
18 detention of a person must be abided by such rule and orders.

19 [10.26.50]

20 The agreement, and other legal instruments, including the CCPR
21 also, and the Constitution of Cambodia also recognise the
22 principle of legality, and that the ECCC has to also be abided by
23 such rule of laws. So it is clear that the procedures have had
24 to be done in accordance with such rules, and any provisional
25 detention of an accused person shall be in line with such

1 provisions.

2 And for the interests of justice, the accused person shall be
3 released and that provisional detention should only be regarded
4 as an exception. Or for example the accused person shall also be
5 released on bail, which is also a practice, and it can also be
6 applied here at the ECCC as it is envisaged in article 9(3) of
7 the ICC statute.

8 [10.28.20]

9 This provision is supported by the criminal code of procedure of
10 Cambodia and the Internal Rules, for example rule 68 which states
11 the limit period for the provisional detention, and also the
12 criminal procedural code states the provisional release -- the
13 automatic provisional release of the accused person after the
14 four months period lapse.

15 And that the accused person shall be released in case, or after
16 the indictment has been forwarded by the Pre-Trial Chamber on the
17 13th of January 2009 (sic), forwarded to the Trial Chamber.

18 [10.29.20]

19 And the Trial Chamber is currently seized of the case file. To
20 that effect it can review, at any time, the provisional release
21 of the accused person should the defence counsel request so. And
22 such a request can be filed at any moment, and for that reason it
23 is inadmissible. According to rule 68(3) the final decision by
24 the Co-Investigating Judges concerning the provisional detention
25 of the accused person is valid only during the period of four

25

1 months, and that during such period if the accused has not been
2 brought before the Trial Chamber, then he or she shall be
3 automatically released.

4 It is therefore the decision of the Co-Investigating Judges is no
5 longer valid since the accused person has not been brought before
6 the Chamber during the given period. Since the Closing Order is
7 appealed, such provisional detention can only be extended by a
8 decision by the Pre-Trial Chamber on that particular -- a
9 decision on particular appeal.

10 [10.31.05]

11 The Pre-Trial Chamber has issued such order on the 13th of
12 January 2011, but this decision cannot be regarded as the
13 decision itself, and it cannot be admissible. The decisions by
14 the Pre-Trial Chamber shall always be reasoned, however, such
15 decisions on the appeal lack such reasonings.

16 Although in such order the Pre-Trial Chamber indicated that the
17 decisions will follow, but to the defence counsel such decisions
18 were not reasoned. Therefore the Pre-Trial Chamber's decision
19 shall not be considered as having decisions on the appeals
20 against the Closing Order concerning the provisional detention
21 yet. In other words, the decisions by the Pre-Trial Chamber on
22 the 13th of January 2011 has not provided any clear legal grounds
23 on provisional detention -- continued provisional detention of
24 Nuon Chea.

25 [10.32.40]

26

1 The Co-Investigating Judges' order to continue the provisional
2 detention of Nuon Chea already -- the duration has already
3 lapsed. Therefore, any further provisional detention of the
4 accused person by the Pre-Trial Chamber decision is not
5 appropriate, and that the accused shall be automatically
6 released.

7 Also, since such decisions are not reasoned, according to the
8 rules, Nuon Chea shall be released, and such -- it is clearly
9 that the PTC does not abide by the rules set forth for its
10 practice, and therefore violates the rights of Mr. Nuon Chea.
11 For the administration of justice, it is undeniable that the
12 Pre-Trial Chamber shall issue a decision within four months,
13 otherwise Nuon Chea shall be released automatically.

14 [10.34.10]

15 The Trial Chamber shall therefore issue its decision based on
16 reasons and not to continue the detention of my client. The
17 continued detention is inappropriate, and does not base on any
18 legal ground, and violates the rules governing this Trial Chamber
19 itself.

20 Such a decision, in this situation, creates the abuse of power by
21 this Chamber. The Pre-Trial Chamber failed to acknowledge that
22 the limited period set forth in rule 68 is critical for the
23 protection of the rights of the accused, that such time limit is
24 for the protection of his right for a fair trial within
25 appropriate time period, as well as to abide by the principle of

27

1 the detention. And the accused shall be entitled to a decision
2 on his appeal within the four month period, because the continued
3 detention is a great burden on himself, and it is not a common
4 situation for ordinary people.

5 [10.35.45]

6 The applicable rules practiced by the Chamber is that the Chamber
7 shall issue a decision within the four month period, by taking
8 account all the laws preserving the rights of the accused.

9 Otherwise the rights of the accused is violated by such issuance
10 of decision without any reasons, and with the violations of the
11 Internal Rules in their attempts to delay -- to extend the
12 provisional detention, otherwise he shall be released
13 immediately.

14 The practice of the Pre-Trial Chamber is not appropriate, and it
15 is against the rule 68. The provisional detention is not for the
16 purpose merely of the detention, it is the practice by the Office
17 of the Co-Investigating Judges. Importantly the continuous
18 provisional detention of Nuon Chea is similarly practised within
19 the last few months until the 19th of September 2010, when a
20 decision was issued, without reasons, and that decisions will be
21 follow in due course.

22 [10.37.30]

23 Although there is no measure to allow them to issue such a
24 decision, or any reasons to indicate that, it is clear to all
25 parties that making such a decision, allowing the

1 Co-Investigating Judges to issue the Closing Order before the
2 19th of September 2010, which is the end of the three year
3 provisional detention, if no Closing Order is issued by then.
4 The big workload done by the Co-Investigating Judges within the
5 three years period before the issuance of the Closing Order is
6 the excessive attempt by the Co-Investigating Judges to conduct
7 their judicial investigations.
8 However, in fact, their investigations so have ended, and so be
9 acceptable, appropriately within the three year period as
10 planned, so that the violation of the rights of the accused can
11 be avoided.
12 The Pre-Trial Chamber, on the contrary, supported the decision by
13 this error made by the Co-Investigating Judges by issuing a
14 decision without reasons, and this is not the first time that the
15 Pre-Trial Chamber opted for such issuance of the decision with
16 the misinterpretation of the Internal Rules in order to extend
17 the continued detention of Mr. Nuon Chea. Once again, the
18 defence for Mr. Nuon Chea would like to submit that even if we
19 would like to have an expeditious trial and the proceeding and
20 the administration of justice, the sole purpose of such
21 proceeding is the right of the accused, and the respect of the
22 Internal Rules, and we have to respect all those rules and law,
23 and if the purpose of this Chamber is to gain trust for its
24 application of the law, they have to abide by its own rules, and
25 not to misinterpret the rules.

29

1 [10.40.15]

2 Another separate ground for the request to release my client is
3 that the decision is not based on any legal ground for the
4 continued detention of my client. Even if the rule is not
5 explicitly stated so, the Chamber is obligated by the Internal
6 Rules in order to apply all the rules in their decisions
7 regarding the provisional detention of my client, and their
8 decision shall be reasoned.

9 And as I have stated earlier, the Pre-Trial Chamber does not
10 abide by that, for the reasons I raised above, and that the
11 Pre-Trial Chamber not only fails to provide reasoned decision, it
12 also failed to provide any reason for the provisional detention,
13 and it also supported the continued detention of Mr. Nuon Chea
14 without any legal ground.

15 [10.41.45]

16 This continued detention is illegal, because there is no existing
17 legal ground for such a detention, and appropriately, only the
18 immediate release of Mr. Nuon Chea is the remedy.

19 Therefore, as I stated earlier, we, the defence for Mr. Nuon
20 Chea, respectfully submit to the Trial Chamber to issue an order
21 to release Mr. Nuon Chea, in order to show that the Chamber
22 applies its rules fairly, justly and honestly, and without
23 violating the rights of my client.

24 I thank you Mr. President and Your Honours.

25 [10.42.50]

30

1 MR. PRESIDENT:

2 Thank you, Mr. Son Arun. It is now appropriate for the Chamber
3 to have a 20 minute break, and we shall resume at 11. The
4 administration official please close the curtain during the
5 break, and have it opened when the Chamber resumes.

6 MR. SON ARUN:

7 Mr. President, I would like to add that my client is now in the
8 waiting room, he's been checked by the medical practitioner, and
9 he would like to request to the Chamber that my client shall be
10 returned to the detention facility, that is the advice by the
11 medical practitioner.

12 [10.43.55]

13 MR. PRESIDENT:

14 So we presume that he will not make his own statement and he will
15 have you and the international counsel to act on his behalf.

16 MR. SON ARUN:

17 Yes.

18 MR. PRESIDENT:

19 The Chamber grants this request. The Security officer please
20 bring Mr. Nuon Chea back to the detention facility due to his
21 health.

22 (Judges exit courtroom)

23 (Court adjourns from 1044 to 1107)

24 (Judges enter courtroom)

25 MR. PRESIDENT:

31

1 I would like now to give the floor to Mr. Sa Sovan to make his
2 submission and grounds for his request to release his client, Mr.
3 Khieu Samphan.

4 [11.09.15]

5 MR. SA SOVAN:

6 Thank you, Mr. President. Thank you Your Honours for allowing me
7 to stand before this Court to make my statement in defence of my
8 client. Good morning also to the prosecution and all the parties
9 to the proceedings.

10 My client has been in detention for three years, four months and
11 fourteen days. The Pre-Trial Chamber dismissed our appeal to
12 release my client, and sent my client by the order dated 13th
13 January 2011, to be tried before this Trial Chamber.

14 [11.10.30]

15 I would like to provide only two reasons for the automatic
16 release of my client. I received an order from this Trial
17 Chamber regarding the two questions asked. What prejudice to the
18 accused do you say has occurred because no reasons were given in
19 the Pre-Trial Chamber's order dated 13 January 2011.

20 Regarding my client, Mr. Khieu Samphan, he was not provided any
21 reasons in the decision by the Pre-Trial Chamber. So there were
22 no reasons here carry the connotation of procedural error as
23 raised by my other colleagues. However, it is of my opinion that
24 this question does not entitle to the dismissal of my
25 application.

32

1 [11.12.05]

2 And for the second question by the Trial Chamber, that is, why do
3 you say that immediate release is the only remedy for addressing
4 this prejudice? In my application, in both the Khmer or the
5 French version, I never asked for any remedy. And now my client
6 has been detained in excess of four months and fourteen days, and
7 you can tell whether this is legal or illegal. My client never
8 request for any remedy or compensation of this excessive
9 detention for his release.

10 In the order, to dismiss my appeal, in French it says
11 "motivation", or it contains no reason. In our Internal Rules
12 the decisions shall be reasoned, otherwise it contains procedural
13 error, and become invalid. Here invalidity is a miscellaneous
14 matter. What is important here is that the Co-Investigating
15 Judges have detained my client for three years and four months.

16 [11.14.15]

17 He was detained on the 11th of November -- I believe it's 2007.
18 And now it has been extended for another four months, and yes,
19 the Co-Investigating Judges have the power to extend this four
20 month detention from the 16th of September 2010 to the 16th of
21 January 2011.

22 In the Internal Rules 68(2), and 68(3), it clearly states that
23 the Co-Investigating Judges can extend the four month detention
24 if my client is not summonsed to appear, therefore, the four
25 month period has already expired, and he shall be released from

33

1 the 16th January 2011. And starting from the 17th of January
2 until today, which is the 31st, that is fourteen days.

3 [11.16.30]

4 So based on the Internal Rule that I just stated, my client has
5 been detained in excess of two weeks already, and I strongly
6 believe, Your Honours, in particular Mr. President, would gain
7 nothing by continued detaining to my client if you consider all
8 the law governing the lawyers, the Judges, and every legal
9 practitioner, for the sake of justice.

10 In our relevant rules and provisions, in particular in Article
11 249 of the Code of Criminal Procedure, that the accused shall be
12 released if, within the four month period, my client was not
13 summonsed to appear before the Chamber, the Trial Chamber or the
14 Pre-Trial Chamber. Then he shall be released. And the Internal
15 Rules governing this very Chamber, in addition to all the
16 relevant laws, stipulate to the same effect.

17 [11.18.15]

18 And I respectfully submit to Your Honours to consider all these
19 relevant provisions, and that my client shall be released at this
20 time, because there is no law, there is no ground to continue his
21 detention any longer. We abide by the law, and if the
22 interpretation of the law leads to different opinions, we can
23 discuss right here, right now, but you need to keep in mind that
24 my client has been detained in excess of fourteen days as of
25 today.

34

1 If Your Honours decide to release my client now, it means due
2 practice, the law and the rules that govern this Chamber -- this
3 does not mean to let my client go free without being tried later
4 on, unless he commits another crime outside. If he does, then he
5 can be arrested.

6 [11.19.30]

7 At present, my client is not a convicted person yet, otherwise he
8 would be sitting in the dock. So I would like all the legal
9 practitioners here to consider the interpretation of the law
10 governing this Chamber, this Court, so that my client and his
11 rights can be respected, because any detention will surely
12 violate his right.

13 MR. PRESIDENT:

14 Thank you Mr. Sa Sovan. And I would like now to invite Mr. Phat
15 Pouv Seang to make his statements regarding the request and the
16 grounds for the release of his client.

17 [11.20.35]

18 MR. PHAT POUV SEANG:

19 Good morning, Your Honours. Good morning ladies and gentlemen.
20 My name is Phat Pouv Seang. I'm the defence lawyer for Mrs. Ieng
21 Thirith, and I would like to make a statement to defend my
22 client, and to respond to the decision E26 issued by the Trial
23 Chamber itself.

24 For my client, Ieng Thirith, I would like to remind the Chamber
25 that my client was arrested on the 12th of November 2007, and on

1 the 14th of November 2007 the Co-Investigating Judges of the ECCC
2 decided to detain her, based on the law and the Internal Rules of
3 the ECCC. And by that rule, the Co-Investigating Judges have the
4 authority to detain my client for a period of one year, then the
5 period was extended twice, for a total period of three years.

6 [11.22.40]

7 Then the Co-Investigating Judges made a decision in the Closing
8 Order to continue extending the detention for another four month
9 period before she was sent to the Trial Chamber for trial.

10 However, during this four month extension period, my client was
11 not appeared for trial, to be tried before the Chamber yet. And
12 on the 13th of January 2011, the Pre-Trial Chamber issued its
13 decision, deciding to continue the provisional detention of my
14 client for another four month period. And that decision - that
15 decision is not reasoned.

16 Based on the Internal Rule 77(14), it clearly states that any
17 decision without reasons is invalid. Therefore, as I observe,
18 the Pre-Trial Chamber's decision is not reasoned cannot be
19 accepted, and the detention of my client is the violation of her
20 right. It's a clear violation of her right.

21 [11.24.30]

22 Also if we look at Internal Rule 68(3) and the criminal code of
23 procedure of the Kingdom of Cambodia, the detention of the four
24 month period within that period, my client shall be sent for
25 trial before the Trial Chamber, but in this case she is not.

36

1 So if the detention, the continued detention based on the
2 decision by the Pre-Trial Chamber, with no reasons, cannot be
3 accepted, and it is illegal, and based on that we request the
4 Trial Chamber to consider the release of my client. Because
5 there is no ground to continue her detention. Because there's no
6 reasoned decision by the Pre-Trial Chamber it's invalid, and any
7 continuation of the detention is illegal.

8 So I repeat again, please release my client. Thank you.

9 MR. PRESIDENT:

10 Thank you, Mr. Phat Pouv Seang. The Chamber would like to
11 inquire from the three defence teams, for Mr. Nuon Chea, Khieu
12 Samphan and Ieng Thirith, if you would like to make any further
13 submissions regarding the substance of rule 68(3) [sic] of the
14 Internal Rules of these Extraordinary Chambers in the Courts of
15 Cambodia. If you would like to provide any further submissions
16 you take the floor now.

17 [11.27.05]

18 MR. PAUW:

19 Mr. President, thank you. I will say only very few things about,
20 I assume, 63(3) -- in the translation it was translated as 68(3),
21 but -- am I correct in assuming that I should address 63(3)?

22 Okay. Yes, why I will be short about the grounds, it's because
23 it is not necessary to consider the grounds when ruling on our
24 request for immediate release.

25 As I explained, I think the way rule 68 should be read, it means

37

1 that the actual grounds do not matter. The release of Nuon Chea
2 after four months is automatic, regardless of whether grounds
3 exist or not.

4 [11.27.50]

5 For the record, we will state that the Nuon Chea team believes
6 that the grounds do not exist. In order to ensure his presence at
7 trial, it's not necessary to keep Nuon Chea detained, because
8 Nuon Chea wants to appear before your Court, and he wants to be
9 explaining his side of things.

10 In order to protect the security, it's not a grounds that is
11 invoked by the Pre-Trial Chamber. Many people knew, for many
12 years, where Nuon Chea was living, and if they had wanted to harm
13 him, they could have done so. We think that Mr. Nuon Chea can
14 return home without any problems for his security.

15 [11.28.30]

16 Third grounds invoked by the PTC -- to preserve public order.
17 Sure, some people will be upset if Mr. Nuon Chea is released
18 today. There will be, maybe, some outrage even, here and there,
19 but we do not believe that this outrage will be widespread.
20 We think, in fact, that the Court can do a very good job
21 explaining why Nuon Chea should be released, simply because that
22 follows from the rule of law. And we have an amazing Public
23 Affairs Section that would surely take up that responsibility to
24 explain why Nuon Chea is released awaiting trial. So also the
25 public order grounds would not apply.

38

1 [11.29.15]

2 And then the last ground, averting the risk of exerting pressure
3 on witnesses, or the victims, or destroying evidence -- it's, in
4 our view, simply baseless. There's no indication that Nuon Chea
5 has ever tried to do so, or ever will do so. Moreover, the
6 investigation has ended, most witnesses have been heard by the
7 OCIJ, so that ground has surely diminished in importance, if it
8 even was a ground to begin with.

9 And then lastly, last consideration, as your Court knows,
10 international standards dictate that as long -- when time
11 progresses, and people are held in pre-trial detention for a
12 longer time, the reasons to keep him in pre-trial detention must
13 be stronger every day. We are now looking at a pre-trial
14 detention of more than three years, and if the grounds ever
15 existed the Nuon Chea team submits that today they do not.
16 So also for that reason, Nuon Chea should be released today. And
17 I'm looking at my co-counsel Mr. Son Arun, do you have anything
18 to add?

19 MR. SON ARUN:

20 Good morning, Mr. President, again, and Your Honours. Regarding
21 the provisional detention of my client for a period of three
22 years and four month, and the charges are the same. The
23 allegations are the same. In the first year, the defence counsel
24 for Nuon Chea already presented our arguments during the hearing,
25 and making it clear the grounds for our arguments, appropriate

1 grounds. The second year followed and we wrote in our submission
2 explaining the details of the ground, and the third year we did
3 the same through written submissions, and the allegations are the
4 same during the remaining of the years.

5 [11.31.45]

6 And we are convinced that Nuon Chea is -- now, Nuon Chea is 85
7 years of age, and he can barely walk alone without any assistance
8 from someone, and he is under great medical attention of doctors,
9 for example like in this Courtroom, and a moment ago that he
10 would not be able to remain seated here, and his blood pressure
11 is fluctuating, and it is really difficult for him to remain
12 seated in the Courtroom for a long period of time.

13 And the allegation in relation to his flee if he released, or if
14 he would be released, he would be free from being prosecuted, I
15 do not think it is the case. A person who is very senior in his
16 age, 85 years old, and can barely walk, how could he escape?
17 And he is in ill health as well.

18 [11.33.05]

19 And it goes without saying that Nuon Chea can never exert any
20 pressure on any witnesses, because he, after the integration
21 stage, he had been living peacefully, in harmony with the
22 villagers in his community. He went to pagodas and held Buddhist
23 ceremonies with other people in the villages without any problem.
24 And Mr. Nuon Chea has not been holding any passport, which for
25 that reason he cannot escape Cambodia, cannot leave Cambodia for

40

1 any other foreign country. And regarding pressure on witnesses,
2 we can see that eighty to ninety per cent of the people in Pailin
3 really like his family and him.

4 [11.34.25]

5 Since he is a good person, it is not the case that he can really
6 disrupt the public order, or cause any public order disruption.
7 He has been a good person, and he remains innocent until the
8 Court has found that he is guilty of the charges, so he remains a
9 good person and he has no ability to cause any disturbance to the
10 public order. I can assure you that Nuon Chea is not really the
11 person who can really cause such disruption to the public order.
12 And I already indicated during the first year, and the second and
13 third, that we are sure that if the accused, if Nuon Chea was
14 released, then he would be able to live in harmony again with his
15 grandchildren and wife, and that his mental health, both,
16 physical health will be much better than he remain detain in the
17 detention facility. We met him on a regular basis and we know
18 his state of health. That's why we really request, time and
19 again, that the Chamber allows him to live in a place where there
20 is a good environment so that he can live long enough to
21 participate in the proceedings. Otherwise you would not get a
22 lot of health from him if he continued to be detained. Thank
23 you.

24 [11.36.35]

25 MR. PRESIDENT:

41

1 Thank you, counsel Son Arun. Now the floor is yours, counsel Sa
2 Sovan.

3 MR. SA SOVAN:

4 Good morning again, Mr. President, and the Judges of the Bench,
5 and for allowing me to elaborate on Internal Rule 63(3).

6 According to this Internal Rule, 63(3) the Co-Investigating
7 Judges have placed my client under provisional detention for the
8 purpose of searching for the truth, and the Pre-Trial Chamber has
9 acknowledged the three conditions that my client will never flee
10 or destroy evidence or exert pressure on witnesses or victims.

11 But he cannot be released because the Pre-Trial Chamber indicated
12 that they did not want to risk the same situation as he was when
13 attacked when he was attacked by the public.

14 And I think I would not really like to touch upon this again,
15 because we don't want to waste more time on this, and I really am
16 very grateful to the Court for paying great attention to my
17 client's personal security.

18 [11.38.20]

19 But personally, I know that I have been quite famous already in
20 the Court, and I have been representing the person who used to be
21 the important person during the Khmer Rouge regime, but I have
22 never been attacked or threatened. And I can really say here
23 right before the Co-Prosecutors that my client will never be
24 beaten when he is released, because the royal government has been
25 doing its best to restore public order, and people have been well

42

1 informed and educated about the role of the lawyer for defending
2 their client.

3 Because the lawyer, I already indicated that I am representing my
4 client to find the truth, and that if he is committing a crime
5 that he will be found guilty, then of course, up to the Court.

6 [11.39.20]

7 I would like to request, respectfully, that he is released now,
8 at this moment, because there is no risk at all having him
9 released, and the Court should not be afraid that the public
10 order will be disrupted by such a release, and as the
11 prosecutor's one already indicated that, look, even at Pailin it
12 is safe for the prosecutors, for example, like the former
13 Co-Prosecutor, Mr. Robert Petit, and Judge You Bunleng, who went
14 to Pailin.

15 And they even went to Pailin to encourage further complaints or
16 filed against Khieu Samphan, but they did not receive any stones
17 thrown at them at that time. So I can see that there is no risk
18 at all.

19 [11.40.25]

20 And now the accused person is right before the Trial Chamber and
21 witnesses have already been located and indicated to give
22 testimony before the Chamber. I believe that my client has no
23 interest of exerting any pressure on those witnesses and victim
24 and I once again humbly request that the Chamber release my
25 client now.

1 MR. PRESIDENT:

2 Thank you, Mr. Sa Sovan. Before proceeding to Mr. Phat Pouv
3 Seang, we would like to ask Mr. Khieu Samphan whether he would
4 like to make any of his own oral statement before the Chamber.
5 So you may proceed.

6 MR. KHIEU SAMPHAN:

7 Thank you, Mr. President. I do not have any further
8 clarification on top of this. I only have one suggestion.
9 Please be abided by the law. That's all. Thank you, Your
10 Honours.

11 [11.41.35]

12 MR. PRESIDENT:

13 Thank you, please be seated. Now we may proceed to counsel Phat
14 Pouv Seang, the defence counsel for Mrs. Ieng Thirith, to make
15 his statement in relation to his position regarding 63(3) of the
16 Internal Rules.

17 MR. PHAT POUV SEANG:

18 Thank you, Mr. President for allowing me the opportunity for me
19 to address the Court regarding 63(3). In my own opinion, I have
20 observed that rule 63(3) is no longer needed, because the period
21 that my client has been detained for more than three years is
22 enough, and that witnesses have been called to be questioned,
23 evidence has already been well collected.
24 I think there is nothing left. And if the Co-Investigating
25 Judges felt that there are shortcoming in this investigation,

44

1 they should have not issued a Closing Order in the first place
2 anyway.

3 [11.43.05]

4 And the allegation that my client would exert pressures on
5 witnesses is groundless, because witnesses have already been
6 called to give testimonies before the Chamber, and testimonies
7 have already been collected.

8 When it comes to the public order disruption, I do not believe
9 that my client can cause any disturbance to the public order,
10 because she is now 78 years of age, and you already been familiar
11 with her frail health condition. She barely walk, let alone
12 causing any disturbance to the public order.

13 [11.43.50]

14 And regarding the insurance of the -- the prevention of the
15 evidence, I already indicated that evidence has already been
16 collected. Pursuant to the personal security of the accused
17 person provision, I believe that the Chamber should no longer be
18 worried, because if my client is released, she could be detained
19 in her house, and that there would not be any further security
20 risk, because after the integration into the society, there has
21 never been any risk in relation to her personal security.

22 And to ensure the appearance, that my client would appear before
23 the Chamber, she has already made it clear that whenever the
24 Court issues a summons, an order to call her to be brought before
25 the Chamber, then she will ultimately or always be appearing

45

1 before the Chamber.

2 [11.45.10]

3 So finally, may I respectfully submit a request that the Trial

4 Chamber release my client as of now, because she has been

5 detained more than three years. Thank you very much, Your

6 Honours.

7 MR. PRESIDENT:

8 Thank you, counsel. We have noted that time is almost up, and we

9 deserve to take the adjournment for lunch, and the afternoon

10 session will be resumed at 1.30.

11 The parties to the proceeding who wish to attend the proceeding

12 are advised to appear in the Courtroom by 1.30. The morning

13 session is now adjourned and the Court Officer and Security

14 personnel are now advised to draw the curtain closed and that the

15 accused person be relocated to the waiting rooms downstairs. And

16 that they shall be returned to the Courtroom by the time as

17 indicated.

18 (Judges exit courtroom)

19 (Court adjourns from 1147 to 1334)

20 (Judges enter courtroom)

21 MR. PRESIDENT:

22 Please be seated. The Court is now back in session. This

23 morning we heard the statements and request by the defence teams

24 of the accused for the immediate release of their clients, and

25 their additional statement to the clarification of rule 63(3).

46

1 Now it is time for the Co-Prosecutors to respond to those
2 statements and requests made by the three defence groups. Also
3 the Chamber would like to remind that the Co-Prosecutors are
4 entitled to submit further clarifications regarding rule 63(3) if
5 they wish to do so.

6 The floor is now open for the Co-Prosecutors. Madam Chea Leang,
7 you may now proceed.

8 [13.36.40]

9 MS. CHEA LEANG:

10 Thank you, Mr. President. Good afternoon Your Honours, good
11 afternoon everyone.

12 This morning we heard the three defence teams' response and
13 request. Therefore on the prosecution side we will allocate the
14 time to respond to each group. I will take some of the time and
15 my international colleague will provide further response.

16 I would like now to give the floor to my international colleague.

17 MR. PRESIDENT:

18 The international Co-Prosecutor, you may proceed.

19 [13.37.35]

20 MR CAYLEY:

21 Thank you, Madam Chea Leang. May it please the Court, Your
22 Honours, I will be addressing the application made by Nuon Chea,
23 and as my national colleague has explained, she will address the
24 arguments put forward on behalf of Ieng Thirith and Khieu
25 Samphan.

47

1 In respect of my response to the application made by Nuon Chea,
2 there are three parts. The first part of my response will
3 address the issue of the admissibility of that application, of
4 the 18th of January 2011. The second part will address the
5 merits of that application, and specifically the first question
6 contained in your Scheduling Order, and the third part of my
7 response will address the second question that you put in your
8 Scheduling Order.

9 And then lastly, not of course anticipating that a formal
10 application for provisional release would be made under rule 63,
11 I will address and oppose that application for provisional
12 release.

13 [13.39.00]

14 So turning to the first part of my submissions. It is the
15 submissions of the Co-Prosecutors that this application by Nuon
16 Chea, of the 18th of January 2011, is inadmissible before this
17 Court. It is inadmissible because it seeks this Trial Chamber to
18 review a decision of the Pre-Trial Chamber. In effect, it seeks
19 for you to determine the validity of that decision of the 13th of
20 January 2011.

21 And the rules of this Court are very clear. Rule 77(13), that
22 Pre-Trial Chambers are not subject to review. And indeed I
23 hardly need point out, and I do so most respectfully, that the
24 Trial Chamber was not established under the rules as an appellate
25 body.

1 [13.39.57]
2 So our submission is this: even if you find merit in the
3 arguments of Nuon Chea, simply put, this decision of the
4 Pre-Trial Chamber cannot be reviewed by you, and you have no
5 authority to review it. And I want to add here, and I will
6 emphasise throughout, and I think from what happened this
7 morning, the Trial Chamber has already recognised this, it does
8 not leave Nuon Chea without a remedy. His remedy is to apply for
9 provisional release under the rules and demonstrate a material
10 change in circumstances.
11 So that is my first argument, that this application is
12 inadmissible before the Trial Chamber.
13 Lastly, I would point out, and this is actually linked to both my
14 first argument and my later arguments, there is a fundamental
15 flaw in Nuon Chea's reasoning. He states, at paragraph 11 of his
16 application, that this Trial Chamber is now seized of the
17 indictment by virtue of the Pre-Trial Chamber's decision of the
18 13th of January 2011, and you will find that, Your Honours, at
19 paragraph 11 on the first line.
20 At the same time, he argues before this Court that the Pre-Trial
21 Chamber's decision is not properly or adequately reasoned, and
22 that this does not constitute a valid decision. Our submission
23 is you cannot have it both ways. You cannot argue that
24 implicitly the determination of the Pre-Trial Chamber of the 13th
25 of January was a decision which seized this Chamber of the

1 indictment, but then argue on another basis that this decision
2 was not properly reasoned and thus cannot extend detention.

3 [13.41.55]

4 In any event, as I've said already, the remedy available to all
5 of the accused is to make application under 82(3) and 63(3) of
6 the rules for provisional release based on a material change in
7 circumstances.

8 Let me now turn to the merits of this particular application, and
9 allow me to address you on the issue of prejudice. It is our
10 position, it is the Co-Prosecutors' position that no prejudice
11 has been suffered by Nuon Chea. Why is that the case?

12 Well, let me specifically address you on the sufficiency of
13 reasoning within judicial decisions. And I say this most
14 respectfully because I am addressing a bench of judges, but at
15 least my understanding of the law on an international basis is
16 this.

17 [13.43.00]

18 The level of reasoning within a judicial decision depends upon
19 the circumstances of the case and the circumstances of the
20 particular decision. One of the circumstances that will
21 influence the reasoning that's contained in a decision is the
22 nature and quantity of the arguments put forward by the parties
23 in assisting the judges in making a determination.

24 It's worthy of note that in this instance, Nuon Chea, in his
25 appeal against the Closing Order, did not submit any arguments

50

1 whatsoever in respect of continued detention. None for the
2 Judges to consider at all. Indeed, in the Order of the 13th of
3 January 2011, the Pre-Trial Chamber ordered that the detention of
4 Nuon Chea was to continue. Logically, since no arguments had
5 been presented by Nuon Chea in respect of the issue of
6 provisional release, that order was simply continuing the order
7 of provisional detention contained in the OCIJ's order of the
8 17th of September 2010 which at paragraph 1624 gives the
9 reasoning of why Nuon Chea should remain in detention.
10 What I'm saying, Your Honours, is simply this: whether the
11 Pre-Trial Chamber's decision of the 13th of January was properly
12 reasoned or insufficiently reasoned, the fact is is that it was
13 manifestly obvious from the decision of the 17th of September of
14 2010 why Nuon Chea was being detained.
15 [13.44.45]
16 And indeed, if you look at paragraph 5 of the later pre-trial
17 decision of the 21st of January 2011 you will find that largely
18 they simply repeat the foundations provided for continued
19 detention in the OCIJ decision of the 17th of September 2010.
20 Simply put, Your Honours, Nuon Chea knew the basis of his
21 detention on the 13th of January 2011, as he knew it on the 17th
22 of September 2007, and at that time was in a perfectly reasonable
23 position to make an application under rule 82(3) and rule 63 as
24 to a change of circumstances.
25 It's also worthy, I think, as a side note -- and this is very

51

1 clear from Nuon Chea's application, because he lists a long
2 shopping list of all of the Pre-Trial Chamber's decisions that he
3 says are not properly reasoned, that's in footnote 22 -- he's
4 never complained before about the lack of reasoning in a
5 Pre-Trial Chamber decision, where the Chamber has adopted this
6 practice that I'm used to, in my own country, of a judge giving
7 an immediate decision from the Bench and then giving reasons,
8 more detailed reasons, later.

9 [13.46.00]

10 So this is the first time that he raises this, having been
11 confronted with many of these abbreviated decisions before.
12 I want to say a few words about the ultimum remedium principle
13 which is referred to in the application. In essence the argument
14 here, and this is something I know that is quite a strong concept
15 in Dutch law, and it's in essence saying that a certain type of
16 determination by a Chamber is a determination of last resort, and
17 the argument here is being made that detention is a last resort
18 measure.

19 Well, my submission before the Court is that there is in fact a
20 fairly strong presumption in international criminal law that
21 where an individual has been detained prior to trial, that he
22 will remain in custody until the conclusion of the trial unless
23 he can satisfy the Chamber that there have been material change
24 in circumstances that materially affects the measures taken by
25 the earlier Chamber, in other words that would satisfy the

52

1 Chamber in releasing him into provisional release.

2 [13.47.20]

3 And you'll find that in a decision of the Yugoslav war crimes
4 tribunal, and it's *The Prosecutor v Popovi?*, it's a March 2007
5 decision at paragraph 11, and I can certainly provide that
6 reference to the Court later if required. And you will find,
7 Your Honours, that in fact that particular principle is reflected
8 in our own rules if you read rule 82(1), which says that:

9 "the accused shall remain at liberty whilst appearing before the
10 Chamber unless provisional detention has been ordered in
11 accordance with these internal regulations. Where the accused is
12 in detention at the initial appearance before the Chamber, he or
13 she shall remain in detention until the Chamber's judgment is
14 handed down, subject to subrule (2)."

15 [13.48.15]

16 Now, if I can turn to the second question that you raised,
17 concerning immediate release, if you find that there is
18 prejudice, which, you can understand, my submission is that there
19 is no prejudice.

20 There is, in fact, very helpful international jurisprudence, and
21 again it is the case of *Prosecutor v Popovi?* of the 1st of March
22 of 2007, where an accused had applied for provisional release to
23 the Trial Chamber. His application was rejected, and he appealed
24 to the Appeals Chamber of the ICTY, submitting that the Trial
25 Chamber had failed to provide sufficient reasons in their

1 decision.

2 [13.49.15]

3 Now, the Appeals Chamber in that case found that the Trial
4 Chamber had committed an error by not providing sufficient
5 reasoning, but stated that that error was not sufficient in and
6 of itself to overturn the Trial Chamber's decision on detention.
7 So they did find that there was inadequate reasoning, but they
8 didn't find that that was sufficient to overturn the decision,
9 and the accused remained in custody.

10 And indeed what in fact happened in that case is that the Appeals
11 Chamber provided the reasoning for the continued detention which
12 the Trial Chamber should have done but failed to do.

13 So in conclusion, Your Honours, in the substance of this
14 particular application, I respectfully submit to you that it's
15 not admissible before you. If you do find that it's admissible,
16 it's my submission that Nuon Chea has not suffered any prejudice
17 as a result of the decision of the 13th of January 2011.

18 Immediate release is certainly not an option when you rely on the
19 international jurisprudence that is available and can guide this
20 Court under the law that established it.

21 [13.50.25]

22 And lastly, and I think this is a given already, and something
23 which you've recognised this morning, the remedy -- the proper
24 remedy here is under rules 82(3) and rule 63 making a submission
25 that there has been a material change of circumstances since the

1 last order.

2 If I may, Mr. President, now move to that particular application
3 under rule 63(3), the application that has just been made today
4 for provisional release by the accused Nuon Chea, we oppose that
5 application. We say that Nuon Chea must remain in detention, and
6 there are very good reasons for that.

7 I would, first of all, point out that in an application for
8 provisional release, as was made this morning, actual evidence
9 has to be put forward of a material change in circumstances.

10 It's not good enough simply to gainsay, and say, well, he's not a
11 public security risk, he's not going to flee. Actually, there
12 has to be some kind of support for that application.

13 [13.51.40]

14 Now, if I can turn to rule 63, and I will go down through the
15 various requirements of that rule. The first ground is, is there
16 a well-founded reason to believe that the person may have
17 committed the crime or crimes specified in the introductory or
18 supplementary submission. There are now, in January 2011, many
19 many documents on the case file that verify Nuon Chea's role
20 within Democratic Kampuchea, and implicate him in the crimes with
21 which he has been charged.

22 And probably we have never been at a time where there is a
23 greater sufficiency of evidence to justify that particular
24 requirement of rule 63, and indeed you will find -- I'm not going
25 to go through them in detail -- that the Pre-Trial Chamber has

55

1 consistently relied on this as a factor.

2 [13.52.42]

3 And indeed, in its most recent decision, on the 13th of January
4 2011, the Pre-Trial Chamber stated -- I'm sorry, the decision of
5 the 21st of January 2011 -- the confirmation of the indictment
6 reinforces the view that the accused has committed the crimes
7 charged in the indictment, so we submit that that first
8 requirement is met.

9 The next requirement, which is 3(b)(i), is to prevent the charged
10 person from exerting pressure on any witness or victims, or to
11 prevent any collusion between the charged person and accomplices
12 of crimes falling within the jurisdiction of the ECCC.

13 [13.53.30]

14 The passage of time, Your Honours, in this time, has not
15 eliminated this risk. And indeed, I would submit to you that it
16 has increased, and the reason that I give you for that is because
17 the case files are now available to the accused, and his
18 knowledge of the witnesses in this case will clearly have
19 expanded rather than diminished, and that particular reasoning
20 has been relied upon by the Pre-Trial Chamber in its decision of
21 the 21st of January 2011 and also in the OCIJ's order of the 15th
22 of September 2009 you'll find that in decision C9/6 at paragraph
23 17.

24 Your Honours, given the accused's position within the Democratic
25 Kampuchea, he could put pressure on witnesses, especially those

56

1 under his authority, and indeed there has been some evidence of
2 that already. The decision of the Pre-Trial Chamber of the 4th
3 of May 2009, C9/4/6 contains evidence that Nuon Chea had placed
4 Duch under pressure in respect of changing a number of
5 confessions that Duch had gathered for Nuon Chea.

6 I accept it's not directly pertinent to the point of witness
7 intimidation, but it certainly demonstrates that the man has the
8 capacity to interfere with people within the hierarchical
9 structure and ask them to change evidence.

10 [13.55.15]

11 I would also argue before you, Your Honour, that witnesses do
12 fear intimidation. That was found by both OCIJ and the Pre-Trial
13 Chamber in 2009, and nothing suggests that that position has
14 changed, apart from the simple gainsaying of my colleagues
15 opposite, saying that he's not a threat to witnesses.

16 The accused has sought to destroy evidence, and now I'm referring
17 to 3(b)(ii), and that you will find, Your Honours, contrary to
18 what my learned friends said opposite, that there's absolutely
19 evidence at all to suggest that Nuon Chea's ever tried to destroy
20 evidence, and I'd refer you to the decision on appeal against
21 provisional detention order of Nuon Chea of the 20th of March
22 2008, paragraph 61, where it recalls a piece of evidence by Duch
23 in which he stated, in interview, that Nuon Chea had essentially
24 blamed him for not destroying evidence.

25 [13.56.25]

57

1 I won't read it, in order to save time, but it's quite clear that
2 Duch was criticised, in a fairly strong manner, by Nuon Chea.
3 Nuon Chea stating that he basically destroyed all of his own
4 evidence, but that Duch had left heaps of his own evidence, in
5 essence incriminating Nuon Chea. So that is 3(b) (ii).
6 3(b) (iii), ensuring the accused's presence at trial. I confess,
7 I see the man, he is fairly frail. There's no doubt about that.
8 But, Your Honours, let's remind ourselves that he's charged with
9 very serious crimes indeed, and if he is convicted, he will spend
10 anywhere between five years to life imprisonment. He does
11 actually have an incentive to flee from the jurisdiction of this
12 Court, and anybody that says otherwise really is not, I think,
13 living in a realistic world. And nothing that's been said today
14 changes that position that has been relied on previously by
15 Courts within these Extraordinary Chambers.
16 [13.57.35]
17 Moving now to 3(b) (iv), to protect the security of the charged
18 person. The accused claims that he's been re-integrated into
19 society, and that nobody has wanted to carry out any vengeful
20 acts against him, but Your Honours, this has got to be placed in
21 the context of thirty years of impunity. Interest in this Court
22 and its work, and the evidence that's being put before it has
23 increased, rather than lessened, security problems.
24 It's telling that prior evidence showed that the accused's house,
25 prior to his arrest by this Court, was guarded. Now that must

58

1 demonstrate that either he, or somebody else, thought that he was
2 in danger from somebody. I would say to this Court, my
3 submission is nothing that's been said by his counsel has changed
4 that particular circumstance.

5 [13.58.40]

6 3(b)(v), the preservation of public order. This I readily admit
7 before the Court is quite a difficult ground for me to address,
8 but what I would say it this. The passage of time has not
9 diminished the impact of these crimes. If anything, I think it
10 has increased the impact of these crimes. There are many members
11 of the Khmer population who are suffering from psychiatric
12 disorders as a result of their experiences during this appalling
13 time.

14 This Court's legitimate interest is to, essentially, protect the
15 accused. Guaranteeing his security in the current circumstances,
16 I think, is frankly absolutely impossible. I'm not suggesting
17 that there is going to be widespread public disorder, but
18 protecting this man from every single person who might wish to
19 take action against him I think is something that cannot be done
20 unless he is maintained in detention in this Court, where there
21 is no risk whatsoever to public order.

22 [13.59.55]

23 So in conclusion, Your Honours, I would submit that nothing,
24 nothing has been stated today by Nuon Chea's counsel that
25 demonstrates a material change of circumstance permitting

59

1 provisional release, and indeed the transmission, the simple
2 transmission of the case file from the Pre-Trial Chamber to the
3 Trial Chamber cannot possibly be regarded as a material change in
4 circumstance.

5 We oppose the provisional release of Nuon Chea, and we request
6 that he be maintained in detention pending the commencement of
7 this trial.

8 Mr. President, I thank you very much indeed for your attention,
9 and now I hand the floor to my colleague Madam Chea Leang.

10 [14.00.45]

11 MR. PRESIDENT:

12 Madam Chea Leang, you may now proceed.

13 MS. CHEA LEANG:

14 Good afternoon, Mr. President, Your Honours, and everyone. I
15 would like to provide my reply to the defence team of Khieu
16 Samphan and Ieng Thirith, regarding the applications to the Trial
17 Chamber on the decisions made by the Pre-Trial Chamber dated 13
18 January 2011, deciding to continue the provisional detention of
19 the accused.

20 To start with, I would like to provide brief backgrounds and
21 reasons in the lead up to this hearing. On the 15th of September
22 2010, the Co-Investigating Judges issued the Closing Order,
23 indicting the accused to be tried by the Trial Chamber, and to
24 continue the provisional detention of the accused.

25 [14.02.05]

60

1 Khieu Samphan and Ieng Thirith are two of the accused in that
2 decision. Subsequently, the co-lawyers of the two accused
3 appealed the Closing Order of the Co-Investigating Judges to the
4 Pre-Trial Chamber. After careful examinations, the Pre-Trial
5 Chamber issued its decision on 13th January 2011, deciding to
6 hold Khieu Samphan and Ieng Thirith in provisional detention.
7 Unsatisfied with this decision, and due to a misunderstanding,
8 the co-lawyers of Khieu Samphan and Ieng Thirith made an
9 application to the Trial Chamber requesting the release of their
10 clients, by providing the grounds that first, in relation to
11 Khieu Samphan, that the interpretation of rule 68(3) of the
12 Internal Rules and Article 305 of the code of criminal procedure
13 of Cambodia, which require the accused to be brought before the
14 Trial Chamber within four months from the day the
15 Co-Investigating Judges issue the Closing Order. Therefore the
16 decision to continue provisional detention of Khieu Samphan by
17 the Co-Investigating Judges ceased to be effective, thus
18 requiring the Pre-Trial Chamber to release Khieu Samphan.

19 [14.04.10]

20 In this instance, the prosecution submits that the grounds raised
21 by the co-lawyers for the accused is not acceptable. The rule
22 68(3) of the Internal Rules clearly states that the decision of
23 then Co-Investigating Judges or the Pre-Trial Chamber to continue
24 to hold the accused in provisional detention shall cease to have
25 any effect after four months.

61

1 The decision by the Co-Investigating Judges to continue
2 provisional detention is replaced by the decision by the
3 Pre-Trial Chamber, due to the fact that the accused made an
4 appeal against that Closing Order to the Pre-Trial Chamber.
5 Subsequently the Pre-Trial Chamber examined the case, per
6 procedures, and in this case issued its decision on 13 January
7 2011, ordering the provisional detention of the accused until
8 such time the accused is brought before the Trial Chamber.

9 [14.05.40]

10 In addition, their decision is not subject to appeal. Hence,
11 pursuant to this rule 68(3), it is clearly stated that the
12 position of the Co-Investigating Judges or the decision of the
13 Pre-Trial Chamber shall cease to be effective after a period of
14 four months. The wording "the Co-Investigating Judges or the
15 Pre-Trial Chamber" is sufficient to mean that the decision is
16 made within their respective jurisdiction, and in this case it
17 was made during the jurisdiction of the Pre-Trial Chamber.

18 For this purpose, we can say that article 68(3), in any case,
19 regarding the decision to continue the provisional detention of
20 the accused, shall cease to be effective after a period of four
21 months. Therefore the commencement of the four month period is
22 from the date of the decision of the Pre-Trial Chamber. That is,
23 on the day the decision by the Pre-Trial Chamber, until today,
24 the four month period has not yet elapsed.

25 [14.07.15]

1 As aforementioned, the argument raised by the co-lawyers for the
2 defence is not acceptable. In addition, the co-lawyers for Khieu
3 Samphan, without proper grounds, raised the interpretation of
4 rule 68(3) which is contradictory to the foundation of the
5 interpretation of the law. It is an elementary rule of
6 interpretation that one should not construe a provision, or part
7 of a provision, if it were superfluous or hence pointless.
8 The presumption is warranted that lawmakers enact or agree upon
9 rules that are well thought-out and meaningful in all their
10 elements.

11 Notably, at least one other accused accepts that the Pre-Trial
12 Chamber has the power to extend provisional detention beyond the
13 four month period ordered by the Co-Investigating Judges in the
14 Closing Order. Rule 68 of the Internal Rules is consistent with
15 the Code of Criminal Procedure as the investigation chamber is
16 independent in ordering the provisional detention. In addition,
17 article 282 of the Code of Criminal Procedure of Cambodia states
18 that the investigation chamber shall close the investigation by a
19 Closing Order.

20 [14.09.20]

21 And article 247 on the Closing Order, up to article 250,
22 forwarding case file for trial, shall apply. That is the law
23 applicable in the Kingdom of Cambodia. Within that context, the
24 investigation chamber, which is similar to the Pre-Trial Chamber
25 here in the ECCC, has the authority to hold the accused for an

63

1 additional four month period after the issuance of the decision
2 of the Pre-Trial Chamber.
3 We can then raise the question when shall the Closing Order
4 become final? There are two. One, if there is no appeal against
5 the Closing Order of the Co-Investigating Judges, the Closing
6 Order to hold the accused in provisional detention until such
7 time he or she is brought before the Trial Chamber is four
8 months.

9 However, in case of an appeal, as in this case today, the
10 investigation chamber has the authority to hold the accused in
11 provisional detention until such time he or she is brought before
12 the Trial Chamber within a four month period after the issuance
13 of the decision by the Pre-Trial Chamber on the Closing Order.

14 [14.11.20]

15 So the Closing Order becomes final on the day the investigating
16 chamber, or the Pre-Trial Chamber, issues its decision.

17 And now I would like to provide our response to the application
18 by Ieng Thirith. It is also related to rule 68 of the Internal
19 Rules. And our response is as I just read out regarding our
20 response to Khieu Samphan. However, in Ieng Thirith's case,
21 there is an additional point, regarding the decision by the
22 Pre-Trial Chamber dated 13th January 2011, which, it's claimed,
23 is not a proper decision, as it's not a reasoned decision. That
24 is one of the grounds in the application by the co-lawyers.

25 [14.12.35]

64

1 The prosecution submits that the grounds raised by the co-lawyers
2 cannot be accepted. If we look at the Internal Rule 77(13) it
3 states that the decision or order by the Pre-Trial Chamber are
4 not subject to appeal. The Trial Chamber is also not an
5 appellate body and has no jurisdiction to assess the sufficiency
6 of a Pre-Trial Chamber decision. Accordingly, the Pre-Trial
7 Chamber's decision of 13 January 2011 cannot be amended.
8 In response to Khieu Samphan's case, if the Trial Chamber has the
9 competence to judge the decision of the Pre-Trial Chamber, and
10 also to conduct a trial or a review of the issues, then the
11 Internal Rule 77 of the Internal Rules of the ECCC does not make
12 sense. So this cannot be the case. And even if the Trial
13 Chamber has the jurisdiction to consider the validity of the
14 Pre-Trial Chamber's decision, and even if the Pre-Trial Chamber's
15 decision is insufficiently reasoned, the proper remedy is not
16 invalidation of the decision.
17 According to the international jurisprudence, as raised by my
18 colleague, which clearly provides an example of the Popovi?, made
19 by the ICTY Appeals Chamber, so I do not need to mention this
20 decision again.
21 [14.15.05]
22 And if we look at the request and the application by the
23 co-lawyers for the accused, it is an appeal against a decision to
24 continue the provisional detention of the accused issued by the
25 Pre-Trial Chamber. If we look at the definition of the word "the

65

1 appeal", the appeal means the application is made to the upper
2 court to review the decision of the other, lower court.
3 In this instance, the request or the application by the
4 co-lawyers to the Trial Chamber to review the validity of the
5 decision or order by the Pre-Trial Chamber, and, as stated
6 clearly in the Internal Rules, the decision or order by the
7 Pre-Trial Chamber is not subject to appeal. Therefore the proper
8 mechanism by which the accused can challenge his detention is to
9 bring a standing application to the Trial Chamber pursuant to
10 rule 82(3).

11 So with the application of this rule, the co-lawyers can submit
12 the application to the Trial Chamber for the release of their
13 client.

14 [14.16.50]

15 Another point that I would like to state is that even if there is
16 a procedural defect in the detention in the Closing Order, the
17 release of the accused is not a remedy. If we look at the
18 international jurisprudence, the remedy for such procedural
19 defect in the provisional detention is the reduction in the
20 sentence if found guilty, and financial compensation if the
21 accused is not found guilty.

22 We also would like to provide another observation regarding
23 Internal Rule 63(3) as well as Article 205 of the Code of
24 Criminal Procedure regarding grounds for the provisional
25 detention. The three different teams raised this morning, in

66

1 their final statements regarding this point, and my colleague
2 already raised certain issues regarding their applications, and I
3 would like to add to what has been said by my colleague.

4 [14.18.25]

5 The three defence teams raise similar points regarding rule
6 63(3), the grounds for the provisional detention. Regarding the
7 point on asserting pressure on the witness, as we all know the
8 substantive hearing has not yet started, and the Trial Chamber
9 may, out of necessity, summons those witnesses to appear and to
10 provide testimony in the upcoming trial. And we all know that the
11 accused and his lawyers have access to the case file, and have
12 access to those witnesses' names.

13 Recently the Office of the Co-Investigating Judges forwarded the
14 list of the witnesses to the Trial Chamber, and those witnesses
15 who request the protective measure. Therefore there risk on
16 asserting pressure on the witnesses by the accused, therefore
17 they dare not come to provide testimony before this Trial Chamber
18 -- is critical.

19 [14.19.45]

20 Another point is on the safety of the accused. As we all know,
21 all the accused were not officially charged. But now, with the
22 establishment of this Chamber, the victims now know the accused
23 through the media, either the radio broadcasting or the TV
24 broadcasting, so they know the faces of the accused, their names.
25 Another point is on the health of the accused. All the accused

67

1 here, as we all now, are elderly peoples, and the medical
2 services here are much better, and the detention facility it just
3 adjacent to the Chamber, which is easily accessible during the
4 proceeding. Although this is not a part of the requirement of
5 rule 63(3) this can facilitate the proceedings much better.
6 Therefore all the conditions in 63(3) are still satisfied with
7 the detention of the accused, as all the accused do not show any
8 new evidence in addition to the assisting evidence in the case
9 file.

10 Therefore, what has been raised by the co-lawyers should be
11 dismissed by Your Honours. Thank you.

12 [14.21.45]

13 MR. PRESIDENT:

14 Thank you, the prosecutors for your response. The Chamber has so
15 far heard the response to the request by the defence team. We
16 would like now to put the questions to the defence team and the
17 accused if they have any replies to the response of the
18 prosecutors.

19 Lawyers for Mr. Nuon Chea can start first, and then Khieu Samphan
20 and the defence team of Ieng Thirith. If you have a reply to the
21 response you can take the floor.

22 MR. PAUW:

23 Thank you, Mr. President. Could we ask for a ten minute recess,
24 because I think the quality of our response could benefit from
25 ten minutes to organise our answers. Also because this is the

68

1 first time that we have heard the OCP's submissions, and I --

2 MR. PRESIDENT:

3 I think there is an issue with the interpretation equipment, I

4 cannot hear the sound. Can you hear the sound? I hear the

5 crackle in my headphones.

6 (Deliberation between judges)

7 [14.23.45]

8 MR. PRESIDENT:

9 Mr. Pauw, you may now repeat what you said. My headset was out
10 of battery.

11 MR. PAUW:

12 Mr. President, thank you. The defence would like to request a
13 ten minute recess, no more, just so we can organise our answers
14 to the comments that the prosecution made. This is the first
15 time that we actually hear the OCP's prosecution, and I think the
16 quality of our submissions to your Court would benefit from this
17 ten minute recess.

18 MR. PRESIDENT:

19 Thank you, counsel. Your request is appropriate, therefore we
20 grant you, and the Court will adjourn for twenty minute and we
21 will resume at a quarter to three.

22 Security -- the administration officer please draw the curtain
23 during the break and have it open when the Court resumes.

24 (Judges exit courtroom)

25 (Court adjourns from 1425 to 1451)

69

1 (Judges enter courtroom)

2 MR. PRESIDENT:

3 Please be seated. The Chamber is now back in session to hear
4 submissions from the parties. Now the Chamber invites the
5 defence counsels from all three teams to reply to the response of
6 the Co-Prosecutors. The Chamber would like to remind the defence
7 counsel that each team has ten minutes for their reply. The
8 floor now goes to defence counsel Nuon Chea's team.

9 MR. SON ARUN:

10 Thank you. Good afternoon once again. Regards to the response
11 from the Co-Prosecutor with regard to rule 63(3) I would like to
12 make the following submission. There are no further arguments to
13 justify further provisional detention pursuant to the
14 international criminal law. The Co-Investigating Judges decided
15 to continue the provisional detention based on their concerns
16 that the accused may intimidate witnesses and of those suspected
17 of the supervision of the accused, as well as the risk to the
18 safety of the accused.

19 [14.54.35]

20 Second argument is abstract, it is not the legal argument. I
21 would like to analyse Internal Rule 63(3). There is no real
22 reason as to whether the accused may risk the flight. In the
23 introductory submission issued by the Co-Prosecutors in this
24 regard, Mr. Nuon Chea held a passport and was living on the
25 border next to Thailand. If Mr. Nuon Chea intended to fly to the

70

1 other country, he would have done it before, even before he was
2 brought to this Court.

3 Even though the accused has had a lot of chance to fly to another
4 country, the Co-Investigating Judges decided otherwise to detain
5 the accused, fearing that Nuon Chea would flight, or would run
6 away to the other country.

7 The local people in Pailin, ninety [sic] of those people know
8 Nuon Chea. They never hate Nuon Chea. And what we have
9 recently, there is a testimony that is the Court wishes to have
10 presented in a court, that's the testimony from the film called
11 The Enemy of the People, in which Nuon Chea gave his interviews
12 to a film maker.

13 [14.57.05]

14 In the movie, Nuon Chea has told the film producer that he wants
15 to cooperate with the Court, to clarify to the people of Cambodia
16 and the world about what he had done. What has been mentioned by
17 the Co-Prosecutors may not be real, or is it only mentioned, or
18 created by journalists or the media and be used by the
19 Co-Prosecutors to allege, to accuse my client.

20 Now we are talking about the legal matter, that the procedure
21 before the Pre-Trial Chamber is wrong, that my client is
22 maintained in provisional detention with the decision that is not
23 reasoned. Based on the reasons raised by the Co-Investigating
24 Judges that Nuon Chea may risk the flight is not acceptable.
25 Nuon Chea has indicated again and again that he wishes to

71

1 participate and cooperate with the Court. He would like to live
2 with his family, and he does not intend to run away from his
3 family members.

4 [14.59.00]

5 And Nuon Chea also indicated that he will not escape from his
6 home town. He was already aware before he was arrested in 2007.
7 He did not escape. He stayed at his home, because he wanted to
8 cooperate with the Court. It is true, because there is broadcast
9 in the media, he had been waiting for his cooperation with the
10 Court.

11 Nuon Chea agrees to follow the summons from the Court, to follow
12 the arrest warrants issued by the Court. There was issue in
13 2007. I would like to take this opportunity to tell the Court
14 that in 2007 Nuon Chea was not shown the arrest warrant when he
15 was arrested. This is an error of law committed by the
16 authority.

17 I would like to submit that if Nuon Chea wishes to escape he
18 would not be able to live in other country, due to the fact that
19 he lacks financial resources. There was no attempt from Nuon
20 Chea himself, and there is no reference mentioned in the
21 provisional detention order on any actual facts to support or to
22 dismiss the flight risk from the proceedings.

23 [15.01.45]

24 Nuon Chea poses no risk in exerting pressure on the witnesses.
25 To support this ground, the prosecution raise that Nuon Chea used

72

1 to blame his subordinates not destroying the evidence. In fact,
2 Nuon Chea said he had no ability to destroy any evidence. This
3 indicates that, according to the rank of Nuon Chea, if he is
4 freed, that he will exert pressure on the witnesses or victims,
5 especially those under his subordinate at the time, does not
6 exist.

7 So flight risk, and exerting pressure on witnesses or the
8 destruction of evidence should be supported by actual firm
9 evidence of facts. The allegations raised by the prosecution are
10 groundless besides the commentaries.

11 Likewise, the order for the provisional detention lacked
12 appropriate grounds, and instead only resumed commentaries were
13 made the it's possible that he's a flight risk, or that he would
14 exert pressure on witnesses or victims. This is an inappropriate
15 presumption, and cannot be legally applicable, and shall be
16 dismissed. As aforementioned, even if Nuon Chea has certain
17 influence, it does not mean he would exercise such influence
18 illegally.

19 [15.04.00]

20 In the case file there is no record indicating that Nuon Chea has
21 any illegal contact with the potential people, so even if Nuon
22 Chea is likely to have a limited or certain influence, it does
23 not necessarily mean that he would exercise it illegally. Also
24 in the case file there is no evidence stating to the fact that
25 Nuon Chea has any inappropriate contact with any witness or

1 victim or a third party, or that he persuade them or encourage
2 them to destroy any evidence related to the charges against him.
3 Regarding his personal safety, or the public disorder, I would
4 make the following statements. The prosecution does not have any
5 ground to support their argument regarding these points, and Nuon
6 Chea provided his objection previously that he integrated into
7 the Cambodian society peacefully already, and if anyone wishes to
8 harm him, they could do so. However, the point raised by the
9 prosecution that due to the seriousness of the crimes alleged
10 against Nuon Chea required his provisional detention.
11 That stance cannot be legally applicable, based on their
12 arguments. We cannot just rely simply on the gravity of the
13 crimes alleged to justify the ground, which is exactly what the
14 prosecution did. In regard to this point, the order of the
15 provisional detention was issued with the explication of the long
16 detention of my client, and that the Office of the
17 Co-Investigating Judges is likely to prejudge the guilt of Mr.
18 Nuon Chea.
19 [15.06.40]
20 And based on the known international jurisprudence, provisional
21 detention to avoid the public disorder can only be justified
22 based on concrete fact of any disturbance or disorder. Nuon Chea
23 lived, or was living openly in Pailin for several years before
24 his arrest, and that was a period of non-violence against his
25 freedom, or there was not any attempt to harm him.

74

1 And the ECCC was aware that Nuon Chea was living in Cambodia, and
2 that he did not disrupt any public order. The argument that the
3 Cambodian society will be in chaos if Nuon Chea is provisional
4 released, that is a groundless argument, and it shall be
5 dismissed.

6 [15.08.05]

7 As Nuon Chea stated in this hearing previously during the
8 provisional detention, that he understood the political line of
9 the government led by Hun Sen regarding the reconciliation
10 policy, which is a popular policy, commented in 1994 for the
11 integration of the former Khmer Rouge into the society. Nuon
12 Chea integrated himself in the society officially based on the
13 request to the government, to Hun Sen, in December '98, including
14 Khieu Samphan, they were welcomed by the government for their
15 integration, by the Prime Minister.

16 The provisional detention of Nuon Chea in order to preserve the
17 non-interference is just a view. If the freedom of expression
18 cannot be made before the ECCC so that a message can be conveyed
19 to the public is, accordingly, not appropriate, and inappropriate
20 assessment should not be conducted in the Court. Otherwise, it
21 will be considered it is an inappropriate court by the public.

22 [15.10.35]

23 Your Honour, on behalf of the defence counsel for Nuon Chea, the
24 grounds and the arguments that we raise so far are for your
25 consideration, and if the Chamber has the view that the arguments

75

1 are appropriate, we would respectfully request Your Honours in
2 the Chamber to release my client provisionally. Thank you.

3 MR. PRESIDENT:

4 Thank you, counsel.

5 MR. SON ARUN:

6 Your Honour, I apologise for the interruption. I would like my
7 international counsel to provide further clarification.

8 MR. PRESIDENT:

9 I believe you have taken more than twenty minutes and in fact you
10 are allowed only ten minutes.

11 (Deliberation between Judges)

12 [15.12.15]

13 MR. PRESIDENT:

14 The Chamber would like to give the floor to Mr. Pauw to make
15 further replies on the points that has not stated by your
16 national counterpart. Please make it brief, otherwise you will
17 not have time to provide your additional statement.

18 MR. PAUW:

19 Thank you, Mr. President, for this opportunity. Yes, Mr. Son
20 Arun has spoken extensively about the grounds, I will not speak
21 about those. I will limit myself to a response to a few of the
22 points that the prosecution has raised as to admissibility, as to
23 the merits, and to the principle of ultimum remedium.

24 I will be brief. I understand time is short. At the same time,

25 I realise that I speak too fast for the translators, so I will

76

1 try to slow down my comments.

2 [15.13.25]

3 The first point that the prosecution made is that our application
4 is not admissible because it would be an appeal against the
5 decision by the PTC. Simply put, our application is not an
6 appeal against anything. It is a request for the release of Nuon
7 Chea because at this moment there is no legal basis for his
8 detention.

9 This application is not barred by rule 77(13), it is rather
10 allowed pursuant to rule 82(3). That's all I'm going to say
11 about that.

12 But the fact that we have, in submissions, admitted that the
13 Trial Chamber is now seized. According to the prosecution, this
14 would bar us from raising the argument that the PTC's decision is
15 not actually a decision. I think there's two considerations that
16 must be made here: a practical one and a legal one.

17 The practical one is who else would we turn to if not to the
18 Trial Chamber? Pre-Trial Chamber would certainly declare a
19 request as the one we filed inadmissible. How do I know this?
20 For example, the request we filed on the detention conditions,
21 you may remember that we filed a request to resume detention
22 interviews. The PTC has actually deferred that decision to the
23 Trial Chamber, and for sure anything we would have filed to the
24 PTC regarding this issue would have been deferred by the PTC.

25 [15.15.00]

77

1 Also, for example, in our request to extend the time limits, in
2 the de facto extension of the time limits, where we asked for the
3 time limits to start as soon as reasoning was provided, clearly
4 we could not have addressed that to the PTC, you were the proper
5 forum to address that to. So for practical purposes, the defence
6 has had to assume that the Trial Chamber is seized.

7 A legal argument: we have never claimed that the PTC's decision
8 was void of any legal effect, we have only claimed that the PTC
9 cannot be an adequate legal basis for Nuon Chea's continued
10 detention. We do agree that the decision by the PTC has resulted
11 in the Trial Chamber being seized, and that's why we are now
12 before you.

13 As to the merits, the OCP has pointed out that we have not raised
14 any arguments on the continued detention when the Closing Order
15 was issued, and the prosecution has claimed that Nuon Chea now
16 knows why he is detained. I think with raising these points, the
17 OCP demonstrates that it has missed the main point of our
18 submission. It has missed the elephant in the room, so to speak.

19 [15.16.18]

20 The fact that the detention decision -- that the detention
21 component of the decision was not reasoned was not the main
22 argument we made, in fact it is merely an afterthought in our
23 application. It is one paragraph. The rest of our submission is
24 all about another issue, a different issue, and that is that the
25 appeal decision -- that the decision on the actual substantive

78

1 appeals is not reasoned. And that is what we are complaining
2 about today, and that is where the harm lies for the accused.
3 I also know that the prosecution has totally ignored the comments
4 we have made about the actual prejudice to our client, which lies
5 in the fact that our preliminary objections, the preparation of
6 the preliminary objections is being hampered by the lack of
7 reasoning. And the fact that we never complained about the
8 practice of issuing unreasoned decisions by the PTC before --
9 many reasons can be provided for that course of action. Either
10 way, the fact that we didn't complain before does not make it
11 right, and in fact, it is not right.

12 [15.17.25]

13 To end, something about the principle of *ultimum remedium*. The
14 prosecutor submits that this is almost reverse in international
15 criminal law, and I will take no position on that viewpoint, but
16 I would like to point out that, lucky for the defence, it's not
17 just a principle of Dutch law, it is also a principle of
18 Cambodian law, and we are dealing with Cambodian law here.

19 As I pointed out in our submissions, rule 249 of the Cambodian
20 code provides that detainees are automatically released after
21 this four month period reveals a bias for a detainee that is
22 free. ICCPR, which is applicable before your Court, recognises
23 the principle of *ultimum remedium*. And, importantly, and it's
24 the basis of our submission, and the main point of our
25 submission, it's rule 68(3), and rule 68(3) clearly establishes

79

1 that detainees should be released if there is no decision.

2 [15.18.30]

3 And I would like to end my talk today by quoting a submission by
4 the prosecutor in document E15/1. It is the Co-Prosecutor's
5 response to Ieng Sary's expedited request for the postponement of
6 the time period, etcetera. And there, in paragraph 3, the
7 prosecutor writes:

8 "The accused should not be allowed to depart from the explicit
9 requirement of the rules. The ECCC Internal Rules reflect a
10 careful balancing between interests of judicial economy and
11 efficiency and the fair trial rights of the accused."

12 I think if the prosecution truly believes that, they can only
13 agree with the fact that the accused should not be allowed to
14 depart from the explicit requirements of the rules, the Judges
15 shouldn't be allowed to do so either.

16 MR. PRESIDENT:

17 Thank you, Mr. Pauw. To continue, the Chamber gives the floor to
18 counsel Sa Sovan.

19 [15.19.55]

20 MR. SA SOVAN:

21 Thank you Mr. President for giving me the floor. Good afternoon
22 Judges on the Bench, and good afternoon ladies and gentlemen.

23 I will not take long, because we are here at the stage of
24 interpreting law. Please forgive me if I am mistaken, I am not
25 saying that the national Co-Prosecutor is wrong, but in regards

80

1 to the interpretation of the law that governs the provisional
2 detention of my client, as valid -- before I go into the
3 fundamental issue of this issue, (indistinct) the form of our
4 application, we are not considering the Trial Chamber as the
5 appellate body.

6 [15.21.20]

7 We are not considering it as an appellate body, but we are
8 concerned with the transmission of our clients to the Trial
9 Chamber without a reasoned decision. We have additional four
10 months -- a four month period in addition to the already three
11 years detention. I can say that the four months period is
12 special, that the accused is detained because it is a special
13 case, but not I am requesting that my client be released
14 provisionally.

15 I would like to clarify that my client is no longer a suspect, he
16 is an accused now. Now, my client is now an accused, but we need
17 to debate further whether he is guilty. I insist the my client
18 can be released on bail. Wherever he goes he needs to inform the
19 Court. We have other measures besides the detention. Forgive
20 me, my learned friend, I am not saying that you are taking
21 revenge on my client, but what I'm saying is that detention is
22 not the only measure to be put in place.

23 [15.23.30]

24 I can say that my client, the former head of state, Mr. Khieu
25 Samphan, is known worldwide now. He is known not because he is a

81

1 robber, but what he did is for the country. I assure you that he
2 will not flee, he will not intimidate witnesses. I'm happy that
3 you are concerned that my client can be beaten if he is released,
4 but with regards to Internal Rules 63(3), and the Co-Prosecutor
5 also interprets the meaning of the phrase "the four month period"
6 -- I'm submitting that my client has been detained more than
7 three years plus an additional four month period.
8 Within this four month period, if the Trial Chamber does not
9 order the appearance of my client, he shall be released. It's
10 not released for ever, but he is released provisionally. But as
11 I heard from the Co-Prosecutor that the four month period starts
12 from January 13th 2011. As I observed that the Co-Prosecutor
13 changed the way she interprets the rule. She responds to Nuon
14 Chea's team, she refers to the four month period as starting from
15 September 16 2010.
16 I'm not saying that my learned friend is having bad intention,
17 but I'm comparing the way she interprets the rules when she
18 address to Nuon Chea's team and when she address the issues to my
19 team.

20 [15.26.35]

21 I would like to continue with the second point. I'm not saying
22 that I'm an all-knowing person in interpreting the law, but we
23 are here debating the law, and as my client has indicated, we
24 need to abide by the law. With regard to Internal Rule 68(3) --
25 but I would like to read Internal Rule 21. I'm reading in French

82

1 but I'm translating into Khmer. "At the ECCC law, the practice
2 direction and other provisions shall be interpreted to safeguard
3 the suspects, the charged person, the accused and the victims, in
4 order to ensure impartiality in law." So I'm suggesting that if
5 we have doubts with regard to the interpretation of the law, we
6 should refer to Internal Rule 21.

7 And I would like to request that we should not take this place as
8 a revenge place. You can detain my client at a later stage as
9 long as you find him guilty. The Co-Prosecutors accuse that Mr.
10 Khieu Samphan had bad intentions, because he had his Ph.D
11 dissertation in economics. May I request scholars from all over
12 the world, they read his dissertation and see whether he had any
13 bad intentions.

14 And now I would like to come to the interpretation of Internal
15 Rule 68(3). If we read the Internal Rule, it refers to the
16 authority of the Co-Investigating Judges. And here we have five
17 provisions, two of which have been acknowledged by the Chamber.
18 It is not, however, our job to show the Chamber evidence with
19 regards to these provisions. It is the Co-Prosecutor's job to
20 show why my client should be detained. It is no use if we take
21 this Court as a revenge place. You have witnesses, I have mine.
22 But I will be brief.

23 [15.30.30]

24 You say that if he is released, there will be outrage. At least
25 my client should be released on bail. This is stipulated in the

83

1 Internal Rules, but it's not good if we take this as a revenge.

2 Thank you very much.

3 MR. PRESIDENT:

4 Thank you, counsel Sa Sovan. And now I would like to ask for Mr.

5 Khieu Samphan to make any additional submission in addition to

6 what has been mentioned by your counsel.

7 MR. KHIEU SAMPHAN:

8 Thank you, Mr. President, I have no further comments.

9 MR. PRESIDENT:

10 Please be seated then. Next, the floor is given to counsel Phat

11 Pouv Seang, defence counsel for Ieng Thirith, to reply to the

12 Co-Prosecutors' response.

13 [15.31.40]

14 MR. PHAT POUV SEANG:

15 Thank you, Your Honours. Once again, good afternoon Judges on

16 the Bench and ladies and gentlemen.

17 I would like to reply to the response by the Co-Prosecutor

18 regarding the points that the Trial Chamber is not an appellate

19 body. I agree with this. I totally agree with this. But my

20 application is not an appeal. It is an application for immediate

21 release. It is not an appeal, so let me make this clear.

22 It is not an appeal submitted before the Trial Chamber for it to

23 decide on the Pre-Trial Chamber decision. I mentioned this

24 morning that my client has been detained since 2007. It has been

25 three years already now. And the Co-Investigating Judges

84

1 continued to detain my client through the Closing Order, and we
2 have a Pre-Trial Chamber decision on the 13th January 2011.
3 So I would like to submit we examine further the January 13th
4 2011 decision. A valid decision? I submit that the decision is
5 not reasoned. If so, can we rely on an unreasoned decision. And
6 so if we cannot rely on an unreasoned decision, I don't think my
7 client should be detained, because the time limit already lapsed.

8 [15.34.30]

9 The national Co-Prosecutor said that here at the detention
10 facility of the ECCC we have adequate medical services provided
11 to my client. I agree with this. But people need freedom. They
12 only need medical services. I understand that the Court provides
13 adequate medical services, but my client needs to be reunited
14 with her family members. So I once again request the Trial
15 Chamber release my client as determined by the law that is -- my
16 client has been detained three years already so I again insist
17 that my client be released. Thank you.

18 MR. PRESIDENT:

19 Thank you, counsels for Ieng Thirith.

20 [15.35.45]

21 The Trial Chamber would like to thank all parties for their
22 submissions with regard to the application for immediate release,
23 and as well as other responses and replies before the Trial
24 Chamber. With regard to this application for immediate release
25 by the three defence counsel -- Mr. Sa Sovan, I can see that you

85

1 --

2 MR. SA SOVAN:

3 Thank you, Mr. President. I am showing you the code number of
4 the document C65/2 -- to the Co-Prosecutor. There, in that
5 document, the Co-Prosecutor made an interpretation with regards
6 to the four month period. I just want to give the reference
7 number to the Co-Prosecutor.

8 MR. PRESIDENT:

9 The proceeding on application for immediate release by the three
10 defence teams now comes to an end. The Trial Chamber will now
11 adjourn the hearing. According to Internal Rule 82(3), the
12 Chamber has thirty days to decide on application for release.
13 The earliest of these applications was filed on the 18th of
14 January 2011. A written decision of the Trial Chamber will
15 follow as soon as possible, which will consider in detail the
16 arguments raised by the parties today and provide in depth
17 analysis of the complex legal issues involved.

18 The hearing is now adjourned. The accused persons shall be
19 returned to the ECCC detention facility. The administrative
20 officers is ordered to close the curtains when the Judges leave
21 the Courtroom.

22 (Judges exit courtroom)

23 (Court adjourns at 1539)

24

25