

**OBSERVING THE EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA (ECCC)
PROCEDURAL HEARING ON URGENT RELEASE: 31 JANUARY 2011**

TERITH CHY OF THE DOCUMENTATION CENTER OF CAMBODIA
AND THE CAMBODIAN LAW STUDENTS OF THE ROYAL PHNOM PENH UNIVERSITY
A PROJECT SUPPORTED BY MACARTHUR FOUNDATION, USA

I. Background

1. Background to Case 002

On 10 July 2006, the Co-Prosecutors initiated their preliminary investigation into the alleged crimes committed during the period of Democratic Kampuchea from 17 April 1975 to 6 January 1979.¹ And on 18 July 2007, an Introductory Submission was filed containing preliminary criminal allegations against five suspects namely, Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan and Kaing Guek Eav alias Duch, transferring the case file to Office of the Co-Investigating Judges (OCIJ). Accordingly, the five suspects were arrested and charged:

Nuon Chea: On 19 September 2007, Nuon Chea was arrested and placed in detention of the ECCC. He has been charged with both international and domestic crimes - crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1945, genocide and crimes stipulated in the 1956 penal code.²

Ieng Sary and Ieng Thirith: On 14 November 2007, Ieng Sary and Ieng Thirith were arrested and put in detention of the ECCC. The couple, spouses and former ministers during the period of Democratic Kampuchea, have been charged with crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, genocide and violation of the 1956 penal code.³

Khieu Samphan: On 19 November 2007, Khieu Samphan was arrested and detained at the detention facility of the ECCC. He has been charged with the same set of crimes, crimes against humanity, grave breaches of the Geneva Conventions of 12 August 1949, genocide and violations of the 1956 penal code.⁴

2. Background to Urgent Requests for Immediate Release

According to ECCC's Internal Rules, the ECCC can place suspects in pre-indictment detention for a maximum period of three years.⁵ Since their arrests, CIJ ordered them to be place in detention and rejected all their appeals for bail awaiting trial. On 15 September 2010, four days before the three-year detention period of Nuon Chea expired, the ECCC issued its Closing Order, indicting the four accused – Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan – for crimes against humanity,

¹ Closing Order, 15 September 2010, para. 3.

² Closing Order, 15 September 2010, para. 6.

³ Closing Order, 15 September 2010, para. 7-8.

⁴ Closing Order, 15 September 2010, para. 9.

genocide, grave breaches of the Geneva Conventions of 12 August 1949 and violation of the 1956 Penal Code.⁶ The Closing Order sent the four accused to trial and ordered that the accused remain in provisional detention until they are brought before the Trial Chamber.⁷ In their findings, CIJs continued to place all the accused in detention for such reasons as "to ensure the presence of the Accused at trial, protect the security of the Accused, preserve public order and avert the risk of the Accused exerting pressure on witnesses or victims or destroying evidence if released."⁸

All of the Accused appealed the Closing Order to the Pre-Trial Chamber (PTC). On 13 January 2011, the Pre-Trial Chamber issued separate decisions for these appeals. The PTC upheld CIJs' decision to indict the accused and continue to place the accused in detention until they are "brought before" the Trial Chamber.⁹ However, the PTC failed to provide an explanation in its decision as to why the decision was so reached and only provided its full reasoning on 21 January 2011, by which date four months had already passed. Moreover, Rule 68 (3) provides:

"In any case, the decision of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in Provisional Detention, or to maintain bail conditions, shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time."

Due to the fact that the full reasoning was issued only after the four month period and the accused have not been "brought before" the Trial Chamber, the Defense is arguing for the release of their clients for reasons that the PTC has violated the said Rule. The lawyers for Nuon Chea and Khieu Samphan on 18 January and Ieng Thirith on 21 January have lodged their applications for immediate release of their clients.

II. Submissions by Defense

On 31 January 2011, hearings on applications for immediate release were held in public. Trial Chamber's first proceedings in Case 002 on applications for immediate release by the three accused – Nuon Chea, Khieu Samphan and Ieng Thirith – began very interestingly. All international counsel for the three accused were absent.

- The bench was informed that international lead counsels for Nuon Chea, Michiel Pestman and Victor Koppe, were unable to attend and Jasper Pauw was appointed to defend Nuon Chea on their behalf.
- For Khieu Samphan, his international counsel Jacques Verges was not present. His national counsel Sa Sovan informed the bench that he would be late between half and one hour.
- For Ieng Thirith, international defense lawyer Diana Ellis was absent.

⁵ ECCC Internal Rules (Rev. 6), Rule 63.

⁶ Closing Order, 15 September 2010, para. 1613.

⁷ Closing Order, 15 September 2010, para. 1622-1624.

⁸ Closing Order, 15 September 2010, para. 1624.

⁹ ECCC Press Release, 13 January 2011, "Case 002 Sent for Trial."

1. Nuon Chea

On 13 January 2011, the PTC issued its decision on the appeal against Closing Order, indicting Nuon Chea and ordering his continued provisional detention.¹⁰ The PTC decision, however, did not provide reasons leading to continued detention. On 18 January 2011, the Lawyers for Nuon Chea lodged an urgent application for the immediate release of Nuon Chea. The lawyers argued in their application that decisions must be reasoned. In their argument, they referred to Rule 77 (14) which states in part that: "All decisions under this Rule, including any dissenting opinions, shall be reasoned and signed by their authors." They argued further that Rule 68 required that PTC issued its decision within four months and this period has expired.¹¹ There lacks, they argued in their application, the legal basis for the continued detention of their client since the PTC had failed to provide reasons for such continued detention. Therefore, Nuon Chea should, the lawyers requested, be released pending his trial.

Jasper Pauw, in his oral submission, began by stating that Internal Rule 68 is clear and by itself already answered the questions posed by the Chamber. He pointed out that the real question to be asked is whether or not the decision of the PTC on 13 January 2011 is a valid decision.

According to him, Rule 68 as amended on 1 February 2008 provides a period of four months for both the PTC and TC in deciding the appeal against the Closing Order and bringing the accused before the TC. The PTC has four months to issue its decision and, after this four-month period, there are, the lawyer argued, no "conceivable reasons" to keep Nuon Chea in custody. He further argued that this practice is in line with the domestic



Nuon Chea, now 85 years old

practice of Cambodia, which requires that the accused must be brought before TC within four months after the issuance of the Closing Order.

As for the prejudice suffered by the accused Nuon Chea, he said, first, due to the lack of reasons in PTC decision, Nuon Chea's preparation for the preliminary objection is "seriously affected" and second the court does not honor its own Rules. He accused that PTC has violated Nuon Chea's rights to provisional release, by deliberately issuing an unreasoned decision for the purpose of solely keeping Nuon Chea in detention. He viewed PTC's issuance of "flawed decision" to keep Nuon Chea in detention as the last resort measure or *ultimum remedium*. Instead of issuing such decision, he believes the right course of action for the PTC to take was to allow OCIJ's detention order to cease effect and issue its reasoned decision later. The immediate release of Nuon Chea, he argued, could only be the sole remedy for the prejudice occurred. The defense continued that the ECCC is supposedly a role model for the Cambodian national court and it should abide by its Rules, which it should release Nuon Chea immediately.

¹⁰ Pre-Trial Chamber, Decision on Ieng Thirith's and Nuon Chea's Appeals against the Closing Order, 13 January 2011.

¹¹ Nuon Chea Defense Team, Urgent Application for Immediate Release of Nuon Chea, 18 January 2011.

In his oral submission, **Son Arun**, the national defense lawyer for Nuon Chea, read the entire Urgent Application for Immediate Release of Nuon Chea his team put forward to the TC on 18 January 2011 with the exception of paragraph 25 and 26.¹²

2. Khieu Samphan



Khieu Samphan, now 80 years old

Similar to Nuon Chea's defense, the lawyers for Khieu Samphan filed an application for release pursuant to Rule 82 (3) of the Internal Rules on 18 January 2011.¹³ In their application, they argued that the period of four months during which Khieu Samphan has to be "brought before" the Trial Chamber has expired and therefore Khieu Samphan must be released.

Sa Sovan was short and straightforward in his oral submission. He mainly argued that Rule 68 (1) and (3) clearly provided that his client could only be detained for the period of four months after the issuance of the Closing Order. He said Article 249 of the Cambodian Code of Criminal Procedure stated similarly that an accused only be detained for four months after the issuance of the Closing Order. His client must be brought to trial within four months after the issuance of the Closing Order and, since this did not occur, his client must to be released "automatically." He added that there is no legal ground to continue his detention and, therefore, continued detention of Khieu Samphan is illegal. He requested that the Internal

Rules be interpreted in a manner that does not prejudice against his client.

3. Ieng Thirith

On 21 January 2011, the lawyers for Ieng Thirith filed an application for the immediate release of their client. Like Khieu Samphan, they argued that both Article 249 of the Cambodian Code of Criminal Procedure and Rule 68 of the Internal Rules provide for a provisional detention to be extended for the period of 4 months only after the issuance of the Closing Order. Within this period, the accused must be brought before the TC and, as a matter of fact, the accused has not been brought before the TC. Accordingly, the accused must be released immediately.

Phat Pov Seang argued in his oral submission that the PTC decision dated 13 January 2011 prolonged the detention of his client contained no reason and Rule 77 (14) makes an unreasoned decision unacceptable. The detention of his client by an invalid



Ieng Thirith, now 79 years old

¹² Chea Defense Team, Urgent Application for Immediate Release of Nuon Chea, 18 January 2011.

¹³ Lawyers for Khieu Samphan, "Application for Release Pursuant to Rule 82 (3) of the Internal Rules," 18 January 2011.

decision is a violation of his client's rights. Rule 68 (3) and Cambodian Code of Criminal Procedure require that his client be brought to TC within four months after the issuance of Closing Order. His client has not been brought to TC although the four-month period has expired and she is being placed in continued decision based on an unreasoned decision by PTC.

III. Condition for Provisional Release

In addition The Trial Chamber asked the defense to provide explanation, if any, as to the conditions for provisional release. Rule 63 (3) provides:

"The Co-Investigating Judges may order the Provisional Detention of the Charged Person only where the following conditions are met:

- a) There is well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission; and
- b) The Co-Investigating Judges consider Provisional Detention to be a necessary measure to:
 - i) prevent the Charged Person from exerting pressure on any witnesses or Victims, or prevent any collusion between the Charged Person and accomplices of crimes falling within the jurisdiction of the ECCC;
 - ii) preserve evidence or prevent the destruction of any evidence;
 - iii) ensure the presence of the Charged Person during the proceedings;
 - iv) protect the security of the Charged Person; or
 - v) preserve public order."

Nuon Chea

Jasper Pauw said that in fact the showing of a change of conditions is not necessary in the Case of Nuon Chea. According to him, Rule 68 is very clear that Nuon Chea could only be kept in detention for four months, after which Nuon Chea must be released automatically regardless of any change of conditions.

In relation to Rule 63 (3), Mr. Pauw believes it is not necessary to keep his client in detention only to ensure his presence at trial because in fact Nuon Chea wants to appear in the court and tell his side of the story. As for Nuon Chea's security, he said that there should not be any worry as he had lived in his place in Pailin for long before his arrest and, if anyone had wanted to harm him, they would have done it long time ago. Concerning the public order, his lawyer agreed that the release of Nuon Chea would upset some people and may cause some outrage, but this would not be to the point of widespread. In relation to the grounds of exerting pressure on witnesses or destroying evidence, the lawyers indicated that Nuon Chea has never tried and never will do so. According to Mr. Pauw, international precedent dictates that grounds for keeping accused in provisional detention would have to grow stronger if the accused are to be kept in continued detention. Nuon Chea, the lawyer argued, has been detained for longer than three years and grounds for keeping him in detention no longer exist. Mr. Pauw asked that he, therefore, must be released.

Son Arun began by giving a history of Nuon Chea's detention appeals. He said, grounds provided for keeping Nuon Chea in detention was the same every year and the appeals were rejected in the same manner. Nuon Chea is now 85, very frail, and, in relation to the risk that he flees, he can't flee as he can now hardly walk without the assistance, the lawyer argued. Mr. Arun said furthered that Nuon Chea holds no passport and therefore he can't flee. He lived a peaceful life in Pailin for a very long time before his arrest without any problem, the lawyer added. According to Mr. Arun, between 70 and

90% of the people in Pailin approve of Nuon Chea and he is not capable of causing public disorder, if he is released.

Khieu Samphan

Sa Sovan said that Khieu Samphan has been detained for more than 3 years and his arguments in previous provisional detention appeals were not all rejected. The PTC agreed, according to Mr. Sovan, that Mr. Samphan would not flee, destroy evidence and exert pressure on witnesses. However, his requests have been rejected for two other grounds – risk of his personal security and public disorder. The lawyer, however, offered no change of circumstance to the bench as a justification for his release.

Khieu Samphan was given a chance to add anything in addition to what his lawyer had given to the bench. He stood up and said he had only one request, "please apply the law." The request appears to refer to his argument that his period of detention had expired and that applicable law dictates his release.

Ieng Thirith

Phat Pouy Seang provided similar argument to that of Mr. Jasper. He argued that Rule 63 (3) is no longer relevant as the period allowed for his client's provisional detention has expired. He said investigation and collection of witness statements and of evidence have all been concluded. Therefore, he said, witness pressure is no longer a problem. His client, 78 years old, is not capable of disturbing public order, he continued. For worries in relation to her security, he said there should not be any worry as she had lived for a long time in the same place and, if anything, it should have occurred a long time ago. As for her presence at trial, he promised that she would turn up for trial.

IV. Arguments by the Prosecution

The Prosecution team led by the national co-prosecutor Chea Leang and international co-prosecutor Andrew Cayley were given one hour to respond to submissions made by the three defense teams.

The international co-prosecutor submitted his oral arguments countering the arguments put forward by Nuon Chea's defense Jasper Pauw, in three parts: 1) admissibility of the defense's application for immediate release, 2) merits of the applications, and 3) condition in relation to provisional detention in Rule 63 (3). Below are his counter-arguments to that of Nuon Chea's international defense.

First, in his argument, the co-prosecutor argued that the application for immediate release of Nuon Chea is inadmissible. He argued that the defense sought the Trial Chamber (TC) to review decision handed down by the PTC and that decisions by the PTC are not subjected to review, according to Rule 70 (13). Therefore, he argued, the application is inadmissible. Even if the application is found admissible, the prosecutor argued, the TC is not an appellate body and, therefore, does not have the authority to review the decision by the PTC. According to the international co-prosecutor Andrew Cayley, this does not leave the defense without any remedy. He said the defense could still argue for provisional release by proving that there is a material change in circumstances in accordance with Rule 82 (3) and Rule 63.

Second, the prosecutor argued that the defense's arguments are flawed in its reasoning. He referred to paragraph 11 of Nuon Chea's application for immediate release, in which the defense stated that the PTC decision of 13 January 2011 has in effect transferred the authority to TC and that, on a different

basis, the same decision is not valid because it contained no adequate reasons. The international co-prosecutor is of the view that the application is not logic and is therefore flawed in its reasoning.

According to the prosecutor, there is no prejudice suffered by Nuon Chea as a result of the decision of PTC on 13 January 2011. He said that the level of reasoning of a particular decision depends on the particular situation of the case and one of the situations that influence the reasoning of decision is the quantity of arguments put forward by the parties in relation to the matter in question. He added that Nuon Chea in his appeal against the Closing Order, which extended his provisional detention, provided no arguments in relation to his continued detention. The prosecutor said that Nuon Chea's application provided a list of PTC decisions insufficient of reasons and that, however, this was the first time Nuon Chea complained of the lack of reasoning in PTC decision.

As for the principle of *ultimum remedium*, according to Mr. Cayley, the defense accused that the PTC decision to continue to detain Nuon Chea on 13 January 2011 is the desperate measure. He counter-argued that in international law it has been the presumption that if an accused is detained prior to trial, he would remain in detention throughout the trial if there is no change of circumstance. In his support, he referred to Internal Rule 82 (1) and also an ICTY (International Criminal Tribunal for the Former Yugoslavia) case, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.3, Decision on Interlocutory Appeal of Trial Chamber's Decision Denying Ljubomir Borovčanin Provisional Release, 1 March 2007. In this case, according to the co-prosecutor, the accused in that case had applied for provisional release to Trial Chamber and was rejected. He appealed to the Appeals Chamber reasoning that the ICTY TC failed to provide adequate reasons in its decision. According to the co-prosecutor, the Appeals Chamber did find errors in the TC decision, but stated that the errors are not adequate to overturn the TC decision. Therefore the international co-prosecutor in conclusion argued that the application for immediate release is not admissible and, even if admissible, Nuon Chea has not suffered any prejudice as a result of PTC decision of 13 January 2011.

Third and last, the prosecution in response to the TC's request provided an explanation as to the condition for provisional detention as set out in Rule 63 (3). The prosecution argued that Nuon Chea has to be placed in continued detention as there has been no change of circumstance in the condition of the accused which would otherwise prompted provisional release. He argued that condition for his provisional detention remains the same and the passage of time has not decreased, but in fact increased, the risks that he would exert pressure on victims or witnesses, destroy evidence and flee and that his personal security and public order could be affected.

The national co-prosecutor Chea Leang provided her responses to arguments and submissions made by the three national lawyers of the three defense teams. The national co-prosecutor provided arguments similar to that of her counterpart, the international co-prosecutor. In addition to the argument put forward by her international colleague, she argued that the requests for immediate release are not acceptable. Referring to Rule 68 (3), the national co-prosecutor argued that the Closing Order, which ordered the accused to be placed in continued detention, was replaced by PTC's decision of 13 January 2011, which rejected the accused's appeals against the Closing Order. The co-prosecutor said that the four month period as set out in Rule 68 (3) only began to run on 13 January 2011 because it was only then that the Closing Order took its effect. She further argued that international jurisprudence has provided guidance that, even if the provisional detention is not in line with procedure in place, the remedy is not to release the accused but rather reduce sentence, if found guilty, and provide financial compensation, if found not guilty. In regards to Rule 63 (3), the national co-prosecutor believes that, given the age of the accused, keeping them in detention would be more appropriate as medical service is easily accessible and also ensure their appearance for trial.

V. Rebuttal Arguments

1. Nuon Chea

Son Arun said that Nuon Chea told a film maker that he would like to cooperate with the court and tell his side of the story and, therefore, he would not run away. The lawyer continued that he was aware of the attempt to arrest him before his arrest, but he chose to stay and submit himself to the arrest. He added that when he was arrested, he was not shown the arrest warrant by the authority; this was illegal. His age, ill health and the lack of resources, the lawyer argued, would not allow him to flee anywhere and the ECCC is well capable of monitoring his movement. Mr. Arun claimed that his client is not capable of destroying evidence. All the risks assumed by the prosecution possess no real effect aside from assumption itself, according to the lawyer. In addition, his client is currently placed in detention by a PTC decision that provided no reasons and this is not in line with Internal Rule 82 (3) and 63 (3).

On a side notice, the TC is apparently less strict in terms of time limit as allocated for each party to present their views. Despite the fact that the chamber only allowed 10 minutes for each team to present their rebuttal arguments, Mr. Son Arun alone spent more than 20 minutes. Still, the Chamber allowed 5 minutes for his co-counsel, Jasper Pauw, to present his side of the rebuttal views different from Mr. Arun's.

Jasper Pauw argued that his application for immediate release of Nuon Chea is not an appeal of PTC decision and it is simply a request for Nuon Chea to be released because there is no longer any legal basis to put him in detention. The application, he argued, is not barred by Rule 77 (13)¹⁴ but is rather allowed pursuant to Rule 82 (3).¹⁵ According to Jasper, TC is the only place he could turn to as a practical matter because, if his request was lodged with PTC, it would have been found inadmissible and PTC would refer their request to TC the same way as before. As for the legal basis, the defense argued that the PTC decision is not void due to the lack of reasons, but not adequate for Nuon Chea's continued detention and, as a result of PTC's decision, TC is seized of the case. That's why the request for immediate release is now before TC, he argued.

¹⁴ Rule 77 (13) states:

"A decision of the Chamber requires the affirmative vote of at least 4 (four) judges. This decision is not subject to appeal. If the required majority is not attained, the default decision of the Chamber shall be as follows:

- a) As regards an appeal against or an application for annulment of an order or investigative action other than an indictment, that such order or investigative action shall stand.
- b) As regards appeals against indictments issued by the Co-Investigating Judges, that the Trial Chamber be seized on the basis of the Closing Order of the Co-Investigating Judges."

¹⁵ Rule 82 (3) states:

The Accused, or his or her lawyers, may request the Chamber to release him or her either orally during a hearing, or by written application submitted to the Greffier of the Chamber. If the request for release is made orally, the Greffier of the Chamber shall note it on the record of the proceedings. If the request is made in writing, the Greffier shall note the date of receipt on the application, and forward it immediately to the President of the Chamber. The Chamber shall decide after hearing the Co-Prosecutors, the Accused and his or her lawyers. It shall decide as soon as possible and in any event no later than 30 (thirty) days after receiving the oral request or application, unless circumstances justify a greater period.

2. Khieu Samphan

Sa Sovan said that the parties were discussing the interpretation of the law. He said he did not consider the TC to be an appellate body and his application for release is not an appeal. He added that there are other measures available for Mr. Khieu Samphan and that he can be provisionally released with some restrictions as to his movement. In contrast to the views of the national co-prosecutor, the four month period, according to him, runs from 16 September 2010 when the Closing Order was issued. And within four months, his client must be brought before TC and, if not, automatic release was warranted. When the ECCC legal documents are interpreted, they should, according to Mr. Sovan, be read in favor of the Accused. He referred to Rule 21 of the IRs, which states in part:

"1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings, in light of the inherent specificity of the ECCC, as set out in the ECCC Law and the Agreement."

He said that when there is uncertainty in regards to the interpretation of the law, Rule 21 shall apply and, thus, ECCC legal documents shall not be interpreted in a way that is prejudicial to his client. He argued that it is the duty of the prosecution to prove that the conditions of provisional detention of his client remain unchanged. The lawyer accused that, if Khieu Samphan is not released, it is clear that the court is vengeful towards his client. Mr. Sovan added that in a filing by the Prosecutor dated 13 September 2008 and numbered C65/2 the co-prosecutors was of the view that the period of four months shall begin from the date of the issuance of the Closing Order.

The author of this report could not find the said document on the website.

3. Ieng Thirith

Phat Pouy Seang responded specifically to arguments raised by the national co-prosecutor. He agreed that the TC is not an appellate body, but said his application was not an appeal. He repeated his earlier argument that the PTC decision of 13 January 2011 is an invalid decision for the lack of reasoning, which leads to an illegal detention of his client. He also agreed that the medical service at the ECCC detention facility was more accessible. However, in addition to medical service, his client needs freedom.

VI. Observation of the Proceedings

1. The Accused

On 28 January 2011, Trial Chamber president judge Nil Nonn issued an order, asking the detention facility officer to bring the three accused – Nuon Chea, Khieu Samphan and Ieng Thirith – to the courtroom on 31 January 2011. On the same day, Ieng Thirith wrote a letter to the TC, informing the Chamber that she would like to waive her right to be present during the trial without providing further explanation as to why. Despite her letter, she briefly turned up during the proceedings on applications for immediate release of the three accused. She came only to inform the bench of her intention to waive her rights to sit during hearing. She left the courtroom as soon as she informed her wish to the judges.

Forty-five minutes into the hearing, the national lawyer for Nuon Chea informed the bench that his client was having severe headache and dizziness. The lawyers asked that his client be examined

immediately by medical practitioner and informed the judges that the proceedings could continue, with the permission by the accused, without the presence of Nuon Chea. Thirty minutes after Nuon Chea left the room, his lawyer informed the bench that Nuon Chea was now alright and requested that he be returned to his cell, while the hearing would continue without his presence. The lawyer also informed the Chamber that his client was suffering from high blood pressure.

After Nuon Chea had left the room, Khieu Samphan was the only accused present in the courtroom. He sat throughout the whole hearing.

It is evident that all the accused in Case 002 are old and ill and the co-prosecutors have acknowledged this fact during their arguments. It is a general concern that they could pass away even before any verdict could be reached. The international co-prosecutor told the Phnom Penh Post on 1 February 2011 that he expects Case 002, which is seemingly the most complex case ever tried in international law arena, to take at least two years. If any appeals against judgment in Case 002 after verdict either by any party, this could add up to at least three or more years. Duch trial began in February 2009 and, two years later, a final verdict has not yet been delivered. The concern is concrete.

2. Procedure

TC judges in Case 001 were quite strict in terms of time allocation for each party to present their views. In the proceedings on 31 January 2011, however, the same TC judges were less strict in terms of time management. In the instruction, TC gave 30 minutes to each defense team to present their arguments, and then the prosecution had one hour to present its counter-arguments. Next, each defense team was given 10 minutes to present their views against those put forward by the Prosecution. However, Nuon Chea's defense had on both occasions spent far more than the time limit given by the instruction. While the other two teams did not exhaust the time limit provided. The Prosecution was not given any more opportunity to respond to the rebuttal arguments made by the defense. This was perhaps due to the fact that the Prosecution already had the time to review arguments contained in the applications for immediate release filed in advance by the three defense teams.

One thing to note about the proceedings on 31 January 2011 was the line-up: "national defense lawyers v. national co-prosecutor and international defense lawyer v. international co-prosecutor". It appears that the national defense lawyers were dealing with only arguments put forward by the national co-prosecutor and the international co-prosecutor only dealt with the arguments presented by the international defense counsel. It was not clear whether it was because of the gap of capacity and knowledge, gap of languages or problem in the translation.

3. Consideration of Arguments

Internal Rule 68 on Effects on Provisional Detention and Bail Orders is ambiguous in both English and Khmer version of the Internal Rules and can be interpreted both ways as argued by both the defense and national co-prosecutor. Rule 68 provides in part:

"2. Where an appeal is lodged against the Indictment, the effect of the detention or bail order of the Co-Investigating Judges shall continue until there is a decision from the Pre-Trial Chamber. The Pre-Trial Chamber shall decide within 4 months.

3. In any case, the decision of the Co-Investigating Judges or the Pre-Trial Chamber to continue to hold the Accused in Provisional Detention, or to maintain bail

conditions, shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time."

There are two questions here: 1) Did the Pre-Trial Chamber decide within 4 months? and 2) When did the "four month period" begin to run?

It is true that the PTC issued its decision on the appeals of Indictment on 13 January 2011. However, the PTC did not provide reasons in their decision until 21 January 2011. This is one of the main questions the Trial Chamber would have to answer as to whether a decision without reasons counts as a decision by the spirit of the Internal Rules of the ECCC. The Defense for Ieng Thirith argued that a decision without reasons does not count as a decision by way of Rule 77 (14) which requires all decisions to provide reasons for their findings. The Defense for Nuon Chea argued in their response to the Prosecution's submission that the PTC decision without reasons was inadequate for Nuon Chea's continued detention.

As for the issue of the "four month" period, the defense of all teams argued that the "four month period" begins to run after the issuance of the indictment and their clients must be brought before Trial Chamber within this period. The prosecution, however, argued that, in case of appeal, the four month period only begins to run after the PTC decision on such appeal. By just reading the Rules, it is unclear and both sides can make their own arguments. Khieu Samphan lawyer argued that, according to Rule 21, ECCC Internal Rules should be interpreted in favor of the accused. Even Rule 21 is also not clear in its wordings. Rule 21 provides in part:

"1. The applicable ECCC Law, Internal Rules, Practice Directions and Administrative Regulations shall be interpreted so as to always safeguard the interests of Suspects, Charged Persons, Accused and Victims and so as to ensure legal certainty and transparency of proceedings [...]."

By the wording of this Rule, it is also uncertain that the Rules should be interpreted in favor of the Accused when there is uncertainty as to the meaning of a certain Rule. Anne Heindel at the Documentation Center of Cambodia (DC-Cam) is of the view that Rule 68 (3) is a "confusing Rule." Good arguments can be made by both sides, according to her. When a rule is ambiguous, it should be read in favor of the accused in accordance with international law and, therefore, arguments by the defense carries more weight, in her opinion simply because of the ambiguity of the Rules. She said that had the accused been brought before the Trial Chamber at a special hearing held before 15 January 2011, they would not have had to worry about falling within "the four month period" in question. Ms. Heindel added that this appears to be a result driven process, given that the indictment was issued on 15 September 2010 – just a few days before Nuon Chea's pre-trial detention expired – and now a PTC decision on 13 January 2011. She has little expectation that anyone will be released.

The issue discussed at the proceedings on 31 January 2011 was about something that evolves from the domestic practice of civil law system. Therefore, guidance can be sought from the domestic practices. However, the Cambodian Code of Criminal Procedure (CCP) also does not address what happens when a closing order is appealed. Article 249 provides in part:

"The closing order terminates provisional detention [...]. However, by a separate decision issued together with the closing order, the investigating judge may order to keep the charged person in provisional detention until the time he is called to appear before the trial court [...]. The decision to keep the charged person in provisional detention ceases to be effective after four months. If the charged person is not called to appear before the trial court within these four months, the charged person shall be automatically released."

Article 24 of the Agreement between Cambodia and United Nations on the establishment of the ECCC provides that when there is uncertainty regarding the application of law, ECCC shall seek guidance from international practice. Guidance established at the international level is difficult to find. According to Anne Heindel of the Documentation Center of Cambodia, this is because of the unique nature of the civil law system of the ECCC. At other international tribunals, the indictments and arrest warrants are issued around the same time, according to her, whereas in ECCC case indictment was issued long after the arrest warrant. The French Code of Criminal Procedure, from which CCP has come, is clearer when it says, "an accused person who is detained for offences [...] is immediately set free if he has not appeared before the court ... when which his **indictment order became final** [...]."¹⁶ Both the ECCC Internal Rules and the CCP would have been made clear had it included on when closing order becomes final or a statement that says four months regardless of whether there was an appeal of the closing order. In conclusion, judges of the Trial Chamber, who were also the drafters of the Internal Rules, shall have to refer back to their discussion when this particular Rule was drafted in deciding on this issue.

VII. Other Matters

1. Application for Disqualification of Trial Chamber Judges

On 14 January 2011, Ieng Sary defense team filed an application seeking to disqualify the president of the Trial Chamber, Judge Nil Nonn.¹⁷

According to the application, Judge Nil Nonn told a documentary film maker in 2002 that he "had accepted cash gratuities from grateful litigants."

The defense believes that the contested judge would not be seen as impartial and independent in Case 002. The application was rejected on 28 January 2011, three days before the hearings on

applications for immediate release by the three accused. The Trial Chamber found that responsibility to take disciplinary action against judges lies with the Supreme Counsel of

Magistracy and that, as the defense agreed, his presence in the present case has not yet given rise to prejudice against the accused. The dismissal of the application by Ieng Sary defense was just in time for Judge Nil Nonn to preside over the hearings on applications for immediate release by Nuon Chea, Khieu Samphan and Ieng Thirith.



Students read court-published materials during the break from hearings on applications for immediate release.

On 1 February 2011, just a day after the first appearance of the TC judges deciding on applications for immediate release, Lawyers for Ieng Thirith filed an application for disqualification of the five judges sitting on the Duch case.¹⁸ The five judges contested were Judge Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony. These were trial judges in Duch's case. The Ieng Thirith lawyers note that the judges have found in the Duch judgment a number of facts (such as the

¹⁶ Translation of French Code of Criminal Procedure, Article 181, at http://195.83.177.9/upl/pdf/code_34.pdf (4 February 2011).

¹⁷ Ieng Sary Defense, "Ieng Sary's Application to Disqualify Judge Nil Nonn due to His Purported Admission that He Has Accepted Bribes & Request for a Public Hearing or in the Alternative for Leave to Reply to Any Submissions Presented by Judge Nil Nonn in Response to This Application," 14 January 2011.

¹⁸ Ieng Thirith Defense, "Ieng Thirith Defense Application for Disqualification of Judges Nil Nonn, Sylvia Cartwright, Ya Sokhan, Jean-Marc Lavergne and Thou Mony," 1 February 2011.

existence of international armed conflict) and statements of witnesses to be real and reliable. These same facts and statements would be contested by the defense in Case 002 when it gets to trial. They argue the five judges, due to their previous findings in Case 001, would carry biased opinions in deciding the case of their client.

2. Civil Parties

The presence of the Civil Parties was not warmly welcomed. Aside from multiple amendments of the Internal Rules streamlining the participation rights of the civil party, their mere presence in the courtroom was contested even without their making submission. At the hearing on 31 January 2011, two defense teams of Nuon Chea and Ieng Thirith started the proceedings by requesting the bench to send the civil party co-lead lawyers out of the courtroom. They referred to an earlier instruction issued by the Chamber which stated that the civil party co-lead lawyers are not allowed to take part in the present hearing. President Nil Nonn of the Trial Chamber acknowledged that the instruction did say so, but said according to the instruction the civil party co-lead lawyers were not "required" to attend the hearing. In fact, he clarified that what the instruction meant was that they were not prohibited from participating and they could attend as long as did not actively make any submissions in the proceeding. The Chamber explained that the civil party co-lead lawyers made a request to the Chamber earlier in the morning requesting that they be allowed to be present but saying they would not make any submissions, and the Chamber had unanimously agreed to the request.

Also on the issue of civil parties, Ieng Sary's defense team filed a motion on 24 January 2011 seeking guidelines as to the role of civil party. They claimed that, albeit civil parties play an important part in Cambodian judicial system, without a clear guideline, their client's "fundamental rights to equality of arms and to be tried within a reasonable time" would be in danger. In the motion, they argued, without a restricted interpretation of the Rule, the civil party co-lead lawyers could still be "second prosecutors" which would affect the balance between the parties. The followings are the suggestions made in their motion to Trial Chamber:

- "Limit Civil Party intervention to matters which contribute to the truth;
- Limit Civil Party interventions to matters which relate to both the charges and the Civil Party's civil interest and are exclusively for the purpose Of establishing harm suffered;
- Limit Civil Party interventions to interventions which are not inconsistent with the Accuseds' right to a fair and impartial trial;
- Limit Civil Party interventions to matters which will not have an undue negative impact on expeditiousness of the proceedings;
- Restrict Civil Parties from making submissions on sentencing; and
- Restrict Civil Parties from questioning witnesses, experts, or the Accused to enquire into the character of the Accused for the purpose of sentencing."

The requests by Ieng Sary's team appear to be vague. It remains to be seen how the judges would deal with the motion. It is true that a clear guideline on the role of civil parties is in fact necessary to ensure expediency of the proceedings and to ensure that their rights are respected by the parties. Nonetheless, the participation rights of the civil party before the ECCC, previously applauded to provide the broadest set of rights to victims, have been squeezed by multiple amendments of the Internal Rules, almost to an extent that their participation is symbolic in nature. A recent comparison study between the rights granted to victims before the ICC and ECCC found that before the ICC

victims at times are given broader rights to participation than those before the ECCC.¹⁹ Judges, instead of squeezing even more, should consider the meaningful participation of victims in the proceeding in light of the fact that their rights to claim reparation have already been fundamentally restricted to "collective and moral" reparation.

VIII. Conclusion

The TC, according to the presiding judge Nil Non, has 30 days to deliberate on the issues presented and deliver a decision on the matter in accordance with Internal Rule 82 (3). Only then will it be known whether the accused will be released pending their trial. Should the accused be released, according to the Internal Rules they shall remain at liberty until conviction unless they failed to appear for the hearings or violate the terms of their bail.

END.

¹⁹ Charlyne Yim, "Scope of Victim Participation before the ICC and the ECCC," Documentation Center of Cambodia at http://www.dccam.org/Tribunal/Analysis/pdf/ECCC_ICC_Victim_Participation_C_Yim.pdf (9 February 2011).