

## The ECCC's Three-Year Limit on Provisional Detention

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Four former senior leaders of the Khmer Rouge (Nuon Chea, Ieng Sary, Ieng Thirith, and Khieu Samphan) are being held in provisional detention by the Extraordinary Chambers in the Courts of Cambodia (ECCC) on charges of genocide, crimes against humanity, and war crimes. They are expected to be tried together in the Court's second case (Case 002).

### Time Limits for Pre-Trial Detention

The ECCC Internal Rules state that provisional detention may be ordered "for genocide, war crimes, and crimes against humanity, for a period not exceeding 1 (one) year. However, the Co-Investigating Judges may extend the provisional detention for further 1(one) year periods."<sup>1</sup> A subsequent rule states that "No more than 2 (two) such extensions may be ordered."<sup>2</sup> Thus, there is a maximum of three years for provisional detention.<sup>3</sup>

Nuon Chea's third year of pre-trial detention expires on September 19, 2010. The other three Charged Persons' provisional detention periods expire in November 2010.<sup>4</sup> If no indictment is issued before September 19, 2010, Nuon Chea will have to be released at that time.<sup>5</sup> Likewise, in November 2010, the other three Charged Persons would have to be released

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<sup>1</sup> ECCC Internal Rules R. 63(6)(a).

<sup>2</sup> ECCC Internal Rules R. 63(7).

<sup>3</sup> ECCC Internal Rules R. 63(6)(a), (7).

<sup>4</sup> Ieng Sary and Ieng Therith were detained on November 14, 2007, and Khieu Samphan was detained on November 19, 2007.

<sup>5</sup> ECCC Internal Rules R. 63(6)(a), (7).

if there is no indictment against them.<sup>6</sup> If the Charged Persons are released, there may be no legal basis for their re-detention if they are indicted at a later date unless they fail to attend trial.<sup>7</sup>

In Case 001 (*Duch/S-21*), the trial took place before the expiration of Kaing Guek Eav *alias* Duch's three years of provisional detention. Because of this, the Court has yet to decide if there are circumstances under which the Internal Rules allow detention of Charged Persons for more than three years.

#### Detention after Issuance of the Closing Order<sup>8</sup>

When a closing order is issued, if there are no appeals it ends the period of provisional detention: "The Closing Order puts an end to Provisional Detention and Bail Orders once any time limit for appeals against the Closing Order have expired."<sup>9</sup> However, a new detention period may begin if so ordered in the closing order:

Where the Co-Investigating Judges consider that the conditions for ordering Provisional Detention or bail ... are still met, they may, in a specific, reasoned decision included in the Closing Order, decide to maintain the Accused in Provisional Detention, or maintain the bail conditions of the Accused, until he or she is brought before the Trial Chamber.<sup>10</sup>

The period of detention or bail ordered in the closing order "shall cease to have any effect after 4 (four) months unless the Accused is brought before the Trial Chamber within that time."<sup>11</sup> Or, "where an appeal is lodged against the Indictment, the effect of the detention or bail order [from

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<sup>6</sup> ECCC Internal Rules R. 63(6)(a), (7).

<sup>7</sup> *Id.* R. 81(2) ("If the Accused, when not in detention, does not attend a hearing set by the Chamber, the Chamber may issue...an Arrest Warrant or an Arrest and Detention Order[.]").

<sup>8</sup> *See* ECCC Internal Rules R. 74(2) (a "closing order" is the formal conclusion to the investigation and either indicts the accused on some or all charges or dismisses the case in full; it may be appealed by the Co-Prosecutors to the Pre-Trial Chamber).

<sup>9</sup> *Id.* R. 68(1).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* R. 68(3).

the closing 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.”<sup>12</sup>

It is arguable that this new period of pre-trial provisional detention is not subject to Internal Rule 63’s three-year time limit; the Internal Rules simply refer to a period in which the Co-Investigating Judges or the Pre-Trial Chamber may “continue to hold the Accused in Provisional Detention, or to maintain bail conditions.”<sup>13</sup> In an April 2010 press release, the ECCC appeared interpret the rules to allows for three years of provisional detention plus an additional four months of detention following the closing order, saying,

If the Co-Investigating Judges issue a Closing Order prior to the end date for the respective detention periods referred to above, it will bring the current detention periods to an end. If the Closing Order includes an indictment against the Charged Persons, and the Co-Investigating Judges consider that the conditions for ordering Provisional Detention under ECCC Internal Rule 63 still are met, they may order the indicted persons to remain in Provisional Detention until they are brought before the Trial Chamber. In such a case, unless the indicted persons are brought before the Trial Chamber within four months from the date of the Closing Order, the Provisional Detention will cease to have any effect.<sup>14</sup>

Significantly, “In any case, the decisions 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.”<sup>15</sup> This language appears to have been interpreted by the Court to allow a single four- month period of detention to be ordered by both the Co-Investigating Judge and the Pre-Trial Chamber. In Case 001, the Closing Order issued on August 8, 2008, said that

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<sup>12</sup> *Id.* R. 68(2).

<sup>13</sup> *Id.* R. 68(3).

<sup>14</sup> ECCC Press Release, 30 April 2010, *at*

[http://www.eccc.gov.kh/english/cabinet/press/153/ECCC\\_Press\\_Release\\_30\\_Apr\\_2010\\_\(Eng\).pdf](http://www.eccc.gov.kh/english/cabinet/press/153/ECCC_Press_Release_30_Apr_2010_(Eng).pdf)

<sup>15</sup> ECCC Internal Rules R. 68(3).

Duch should be held until he is brought before the Trial Chamber.<sup>16</sup> However, Duch was not brought before the Trial Chamber within 4 (four) months. Instead, just under 4 (four) months from the issuance of the Closing Order, on December 5, 2008, the Pre-Trial Chamber issued a ruling that included another order to detain Duch until he was brought before the Trial Chamber.<sup>17</sup> Duch did not have his first hearing before the Trial Chamber until February 2009, well after the Co-Investigating Judges' order of up to 4 (four) months expired.<sup>18</sup>

Thus, although Duch's provisional detention did not exceed the three-year maximum in Rule 63, the Court's interpretation of the rules appears to allow a maximum of three years and eight months detention before an accused is "brought before" the Trial Chamber.

Textual analysis follows a well established international law principle called "effective interpretation."<sup>19</sup> "Effective interpretation" means that the parties have written a document to have a certain effect, and that a provision should not be given an interpretation that leaves it meaningless or without effect.<sup>20</sup> In criminal statutes this principle is of particular importance because a court's interpretation "give[s] effect to rights or regulate[s] the fairness of the

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<sup>16</sup> Kaing Guek Eav alias Duch, Case No: 001/18-07-2007-ECCC/OCIJ, Closing Order indicting Kaing Guek Eav alias Duch, Office of the Co-Investigating Judges, p. 45 (Aug. 8, 2008).

<sup>17</sup> Kaing Guek Eav alias Duch, Case No: 001/18-07-2007-ECCC/OCIJ, Decision on Appeal Against Closing Order indicting Kaing Guek Eav alias Duch, Pre-Trial Chamber, ¶ 147 (Dec. 5, 2008). While the PTC apparently interpreted the rules to allow an order for a further period of provisional detention, they did do so within an overall pre-trial provisional detention period that had not exceeded three years of total provisional detention. Therefore, the PTC may have considered the detention legal because it was within 3 years of the original pre-trial provisional detention period allowed by law.

<sup>18</sup> Potentially, in the Duch trial the Trial Chamber considered itself seized of the case immediately following the ruling of the PTC on the closing order and did not consider the PTC to be ordering a second four month period of detention. See the discussion of "brought before" below.

<sup>19</sup> *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, ¶ 46 (3 November 1999).

<sup>20</sup> OPCD appeal brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", ICC-01/04, Appeals Chamber (Feb. 4, 2008) (See *The Corfu Channel Case (merits)* ICJ Reports (1949) at p. 24 (and cases cited therein); Jennings and Watts (eds.), *Oppenheim's International Law* vol. I, ¶ 633(9) (9th ed. 1992).

proceedings.”<sup>21</sup> “The principle of effective interpretation mandates that ... Rules be read together and that they be restrictively interpreted.”<sup>22</sup> In an appeals judgment of the International Criminal Tribunal for Rwanda, the *Kajelijeli* Chamber ruled that two rules related to provisional detention “be read together’ and restrictively interpreted.”<sup>23</sup> The prosecutor had read the two rules separately; in doing so the prosecutor allowed a suspected person to be held in detention in state detention being notified of the charges against him or being brought in front of a judge.<sup>24</sup> The Appeals Chamber admonished the prosecution for reading one provision in isolation to avoid the overall intention of the rules to protect the rights of suspects during provisional detention.<sup>25</sup> The prosecutor should have charged the suspect and extradited him as quickly as possible, which was required by the statutory rules if read together.<sup>26</sup> Therefore, the Chamber held that that the period of detention during which *Kajelijeli* was held out of the country was in violation of the ICTR’s pre-indictment detention limits.<sup>27</sup>

In interpreting its Internal Rules, the ECCC should likewise read all pre-trial detention provisions together. This approach would suggest that all pre-trial provisional detention, including periods ordered by the CIJs and PTC must be limited to a maximum of three years. However, a plain reading of Rule 68(1), which the end of one period of detention with the

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<sup>21</sup>OPCD appeal brief on the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor", ICC-01/04, Appeals Chamber (Feb. 4, 2008) (See dissenting opinion of Judge Hunt in 21 October 2003, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statement, at ¶ 18, 19: <http://www.un.org/icty/milosevic/appeal/decision-e/031021diss.htm>; See also *Liversidge v Anderson* [1942] AC 206 at 245, <http://uniset.ca/other/cs5/1942AC206.html>).

<sup>22</sup> *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, ¶ 46.

<sup>23</sup> *Juvenal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgment, ¶ 233 (Appeals Chamber, May 23, 2005) (citing *Barayagwiza*, Decision on Prosecutor’s Request for Review or Reconsideration, ¶¶ 46, 53 (November 3, 1999).)

<sup>24</sup> *Id.* at ¶ 231.

<sup>25</sup> *Id.* at ¶ 233.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

issuance of the closing order and allowing for a second period of provisional detention, suggests that the plain reading of the statute considers the new order a separate and new period of detention. Thus the Court can find that its ability to “decide to maintain the Accused in Provisional Detention...until he or she is brought before the Trial Chamber”<sup>28</sup> for a period not to exceed four months<sup>29</sup> may be reasonably read to indicate that it can do so regardless of the length of preceding provisional detention. However, it is much less clear that the rules may fairly be read to allow both the Co-Investigating Judges and the Pre-Trial Chamber to both impose separate four-month periods of detention merely because both have the authority to do so. Instead, Rule 68(3) suggests that four months is the maximum period of post-closing order detention that may be authorized by these bodies, either singly or together.

Therefore even if the Co-Investigating Judges submit the Closing Order for Case 002 in September before the expiration of Nuon Chea’s three-year provisional detention,<sup>30</sup> they may need to bring the Accused before the Trial Chamber within four months of its issuance.

#### “Brought Before” Trial Chamber

Rule 68(3) provides that detention “shall cease to have any effect after 4 (four) months unless the Accused is *brought before* the Trial Chamber within that time.”<sup>31</sup> In the Case 001 closing order, the Co-Investigating Judges, “Order[ed] that [Duch] remain in Provisional Detention until he is brought before the Trial Chamber.”<sup>32</sup> This order did not specify any time limits or define “brought before.” Then in the Pre-Trial Chamber’s ruling on the appeals to the

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<sup>28</sup> ECCC Internal Rules R. 68(1).

<sup>29</sup> *Id.* R. 68(3).

<sup>30</sup> Office of the Co-Investigating Judge, Press Release, 14 Jan. 2010, at [http://www.eccc.gov.kh/english/cabinet/press/141/ECCC\\_OCIJ\\_PR14Jan2010-Eng.pdf](http://www.eccc.gov.kh/english/cabinet/press/141/ECCC_OCIJ_PR14Jan2010-Eng.pdf) (saying that they will “endeavor” to issue a closing order in Case 002 in September 2010).

<sup>31</sup> ECCC Internal Rules R. 68(1) (emphasis added).

<sup>32</sup> Kaing Guek Eav alias Duch, Case No: 001/18-07-2007-ECCC/OCIJ, Closing Order indicting Kaing Guek Eav alias Duch, Office of the Co-Investigating Judges, p. 45 (Aug. 8, 2008).

closing order, the Pre-Trial Chamber ordered “that the Provisional Detention of the Charged Person shall continue until he *appears*<sup>33</sup> before the Trial Chamber.”<sup>34</sup> This second ruling, agrees with the plain language reading that “brought before” has the same meaning as “appears before” the Trial Chamber. Both expressions indicate that the Charged Person must actually be present in front of the Trial Chamber prior to the expiration of the four-month maximum for post-closing order detention.<sup>35</sup>

In the ICTR Rules, the use of “brought before” in the rules likewise emphasizes physical presence: “After his transfer to the seat of the Tribunal, the suspect, assisted by his counsel, shall be brought, without delay, before the Judge who made the initial order, or another Judge of the same Trial Chamber...”<sup>36</sup> The ICCPR further supports this interpretation, providing that: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power...”<sup>37</sup> In the ECCC, that would mean that the Trial Chamber may not merely seize itself of the case for the accused to be considered “brought before” it.<sup>38</sup>

However, the question remains under what circumstances an accused person is first brought before the Trial Chamber. The ECCC Internal Rules provide for both *in camera* hearings, *in camera* meetings and public hearings.<sup>39</sup> The Trial Chamber may, “[i]n order to

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<sup>33</sup> This analysis does not include either the Khmer or French translations of the PTC’s judgment to analyze if a mistranslation that substituted appear as a synonym for brought in the English version of the document is the explanation for the difference between the two orders.

<sup>34</sup> Kaing Guek Eav alias Duch, Case No: 001/18-07-2007-ECCC/OCIJ, Decision on Appeal Against Closing Order indicting Kaing Guek Eav alias Duch, Pre-Trial Chamber, ¶ 147 (Dec. 5, 2008) (emphasis added).

<sup>35</sup> ECCC Internal Rules R. 68(3).

<sup>36</sup> ICTY Rules of Procedure and Evidence (Rev. 19), 1 Oct. 2009, R. 40*bis*(J).

<sup>37</sup> ICCPR, 23 Mar. 1976, Art. 9(3).

<sup>38</sup> If the ECCC did interpret the Trial Chamber being seized with the case as being “brought before” the Trial Chamber, than the analysis of the Duch’s PTC’s “additional” 4 (four) months of provisional pre-trial detention would change.

<sup>39</sup> See ECCC Internal Rules (Rev. 5), 9 Feb. 2010, R. 79 (6-7).

facilitate the fair and expeditious conduct of proceedings[,]...confer with the parties or their representatives...by holding a trial management meeting. Such meeting shall be held in camera, unless the Trial Chamber decides otherwise.”<sup>40</sup> This meeting would include the physical presence of the accused.

The ECCC Internal Rules say that “The trial begins with an initial hearing.”<sup>41</sup> It appears that the initial hearing is the first public hearing held by the Trial Chamber. In the other general provisions, the Internal Rules state that except in a number of exceptional circumstances<sup>42</sup> that “Hearings of the Chamber shall be conducted in public.”<sup>43</sup> The question then becomes if and in camera hearing that includes the presence of the Accused Persons fits the criteria of the rules in the same way that a public initial hearing that includes the Accused Persons clearly meets the criteria of the rules.

Using a plain reading of the language, being “brought before” would require physical presence in front of the Trial Chamber prior to the expiration of the 4 (four) month detention period that is allowed to be ordered by the Co-Investigating Judges or the Pre-Trial Chamber.<sup>44</sup> Since it is not specified whether or not being “brought before” the Trial Chamber requires a public hearing, it seems that an in camera hearing could reasonably satisfy the requirement and enable the ECCC Trial Chamber to issue an order to detain the Charged Persons for the duration of the trial.

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<sup>40</sup> ECCC Internal Rules (Rev. 5), 9 Feb. 2010, R. 79 (7).

<sup>41</sup> ECCC Internal Rules (Rev. 5), 9 Feb. 2010, R. 80*bis*(1).

<sup>42</sup> ECCC Internal Rules (Rev. 5), 9 Feb. 2010, R. 79(6)(b).

<sup>43</sup> ECCC Internal Rules (Rev. 5), 9 Feb. 2010, R. 79(6).

<sup>44</sup> ECCC Internal Rules (Rev. 5), 9 Feb. 2010, R. 68(3).