



ព្រះរាជាណាចក្រកម្ពុជា
ជាតិ សាសនា ព្រះមហាក្សត្រ

អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

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Chambres Extraordinaires au sein des Tribunaux Cambodgiens

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អង្គជំនុំជម្រះតុលាការកំពូល

Supreme Court Chamber
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Case File/Dossier N°. 002/19-09-2007-ECCC-TC/SC(04)

Before: **Judge KONG Srim, President**
Judge Motoo NOGUCHI
Judge SOM Sereyvuth
Judge Agnieszka KLONOWIECKA-MILART
Judge SIN Rith
Judge Chandra Nihal JAYASINGHE
Judge YA Narin

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PARTIALLY DISSENTING OPINION OF JUDGE NOGUCHI
DECISION ON IMMEDIATE APPEAL BY KHIEU SAMPHAN ON APPLICATION FOR
RELEASE

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1. My dissenting opinion concerns the second ground of appeal (Internal Rule 63(3)). My interpretation of the relevant provisions of the Internal Rules is different from that of the majority. In my view, Internal Rule 63(3) does not apply to the Accused's continuous detention at the trial stage, and in the present case the Trial Chamber should have continued the Accused's detention on the basis of Internal Rule 82(1) alone. This is the same view of the Co-Prosecutors in their Response.¹ My reasons are as follows.
2. Internal Rule 63, entitled "Provisional Detention," concerns provisional detention ordered by the Co-Investigating Judges against a Charged Person at the judicial investigation stage. This is clear from the content of the provision as well as its location in the Internal Rules (Part III Procedure, C – Judicial Investigations). Internal Rule 82, entitled "Provisional Detention of an Accused and Bail," concerns provisional detention of an Accused at the trial stage. This is clear from the provision's content as well as its location in the Internal Rules (Part III Procedure, E – Proceedings Before the Trial Chamber).
3. I am of the opinion that Internal Rule 63(3) does not apply to the Accused's continuous provisional detention at the trial stage. It is clear, as stated above, that Internal Rule 63 concerns provisional detention of a Charged Person at the judicial investigation stage, and Internal Rule 82 concerns provisional detention of an Accused at the trial stage. Under the structure of the Internal Rules, procedural provisions common to more than one part of proceedings or judicial organ are located under the section entitled "III Procedure, A – General Provisions". Procedural provisions concerning only one part of the proceedings or judicial organ are located under the special section for that part of the proceedings or judicial organ, such as "C – Judicial Investigations" and "E – Proceedings Before the Trial Chamber". When there is a need to, *mutatis mutandis*, apply provisions concerning one part of the proceedings or judicial organ to another part of the proceedings or judicial organ, a provision or reference to that effect is put in the section for the latter.² There is no provision in the Internal Rules which indicates that Internal Rule 63 applies also to the trial stage; the sole exception of Internal Rule 81(2) is explained below.
4. Internal Rule 81(2) concerns an Accused who is not in detention at the time of a trial hearing. In its last sentence the provision states, "The Accused shall be brought to the ECCC detention facility until he or she is brought before the Chamber, which will decide on detention in

¹ Co-Prosecutors' Response, paras. 11-14.

² E.g., Internal Rule 104 *bis*.



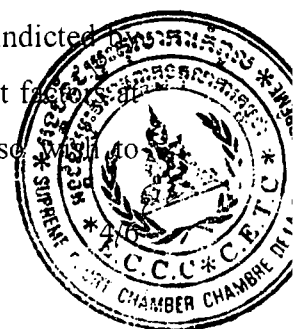
accordance with Rule 63” (emphasis added). By an explicit reference, it is made clear that Internal Rule 63, a provision located in “C – Judicial Investigations,” applies to the situation envisaged by Internal Rule 81(2), which is a provision located in “E – Proceedings Before the Trial Chamber”. Similarly, Article 306 of the Code of Criminal Procedure of Cambodia provides, “At any time the court may order the release of a detained accused or order that a detention be continued for the accused according to Article 205 (Reasons for Provisional Detention) of this Code” (emphasis added). By an explicit reference, it is made clear that Article 205, a provision in “BOOK FOUR, JUDICIAL INVESTIGATIONS,” applies to the situation under Article 306 which is a provision in “BOOK FIVE, JUDGMENTS”.

5. In contrast, the first sentence of Internal Rule 82(2) provides, “The Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these Internal Rules” (emphasis added). In the absence of a special reference to Internal Rule 63, it is reasonable to interpret this phrase (“in accordance with these Internal Rules”) as referring to relevant provisions either in section “A – General Provisions” or “E – Proceedings Before the Trial Chamber”.
6. The majority is of the view that Internal Rule 82 should be read together with Article 306 of the Code of Criminal Procedure. I do not support this approach. Many provisions of the Internal Rules originated from provisions of the Code of Criminal Procedure, which was still a draft tabled to the Cambodian legislative body at the time of the initial adoption of the Internal Rules in 2007. However, the Internal Rules are an independent and distinct legal document adopted by the ECCC for the purposes of consolidating applicable Cambodian procedure for proceedings before the ECCC and adopting additional rules for certain circumstances.³ Due to the special mandate, jurisdiction, and structure of the ECCC, there are many provisions in the Internal Rules which do not exist in or differ from the procedures for ordinary domestic cases to be tried before ordinary domestic courts. Therefore, the context within which to interpret the Internal Rules is first and foremost the Internal Rules themselves. Otherwise, it will be difficult for readers of the Internal Rules to know precisely what the procedural rules are before the ECCC. Guidance from similar provisions of the Code of Criminal Procedure may be useful depending on the circumstances. When the meaning of a particular provision of the Internal Rules is sufficiently clear in its own context, recourse to the Code of Criminal Procedure is not necessary.

³ Internal Rules, Preamble, para. 5.



7. Next I will examine the structure of detention at the trial stage as provided by Internal Rule 82(1)-(3). The first sentence of Internal Rule 82(1) makes liberty a general rule by providing, “The Accused shall remain at liberty whilst appearing before the Chamber unless provisional detention has been ordered in accordance with these Internal Rules” (emphasis added). The second sentence of Internal Rule 82(1) provides, “Where the Accused is in detention at the initial appearance before the Chamber, he or she shall remain in detention until the Chamber’s judgment is handed down, subject to sub-rule 2” (emphasis added). Where it is met, this second sentence is an exception to the general rule of liberty in the first sentence of Internal Rule 82(1). Where the Accused is in detention at the initial appearance before the Chamber, the Accused shall remain in detention, meaning that continuous detention is automatic and mandatory unless the Accused is released pursuant to Internal Rule 82(2). This is clearly different from the provisional detention at the investigation stage for which an order by the Co-Investigating Judges is necessary and the conditions of Internal Rule 63(3) need to be met. This is also different from the detention governed by Internal Rule 81(2) where an Accused not in detention does not attend a hearing and the Trial Chamber decides on the detention of the Accused in accordance with Internal Rule 63.
8. Internal Rule 82(2) provides, “The Chamber may, at any time during the proceedings, order the release of an Accused, or where necessary release on bail, or detain an Accused in accordance with these IRs” (emphasis added). The word “may” means that this release is subject to the Trial Chamber’s discretion. In other words, unless the Trial Chamber exercises its discretion to release the Accused, the detention shall continue pursuant to Internal Rule 82(1). Internal Rule 82(3) further provides that the Accused may request the Trial Chamber to release him or her, on which request the Trial Chamber shall decide within 30 days unless circumstances justify a greater period.
9. In contrast to the provisional detention at the investigation stage for which the conditions to justify detention are specified in Internal Rule 63(3), the Internal Rules remain silent as to what factors the Trial Chamber should consider in the context of Internal Rule 82(2) and (3). It is thus left to the Trial Chamber’s discretion as to what factors it should consider. The condition of Internal Rule 63(3)(a), namely, a well founded reason to believe that the person may have committed the crime or crimes specified in the Introductory or Supplementary Submission, usually is far less relevant at the trial stage because the Accused has already been indicted in the Closing Order. The five conditions listed in 63(3)(b) may continue to be relevant factors at the trial stage, but the Trial Chamber is not bound by these factors and may also



consider other factors that are not listed in 63(3)(b). At the ICTY, for example, even where the minimum conditions for release have been satisfied,⁴ the Trial Chamber retains discretion not to grant provisional release, if so warranted by the circumstances of the case.⁵

10. This does not, however, mean that detention at the trial stage may be continued in an arbitrary manner in violation of ICCPR Article 9(1).⁶ First, as previously stated, the exception in the second sentence of Internal Rule 82(1) requires that the Accused is in detention at the initial appearance before the Trial Chamber. Second, as is always the case, the Trial Chamber's discretion must be exercised in a reasonable manner, and its decision must be reasoned.⁷ In particular, Internal Rule 21(2) provides, "Any coercive measures to which such a person may be subjected shall be taken by or under the effective control of the competent ECCC judicial authorities. Such measures shall be strictly limited to the needs of the proceedings, proportionate to the gravity of the offence charged and fully respect human dignity" (emphasis added). This applies to decisions of the Trial Chamber pursuant to Internal Rule 82(2) and (3). Moreover, decisions by the Trial Chamber on detention and bail are appealable to the Supreme Court Chamber.

11. Nor do I see a conflict between Internal Rule 82(1) and ICCPR Article 9(3), second sentence.⁸ As explained earlier, Internal Rule 82 provides the general principle of liberty and detention as an exception. It also provides avenues for release, either by the Trial Chamber's own initiative or upon the request of the Accused. The Trial Chamber's discretion must be exercised in a reasonable manner and its decision must be reasoned. Detention is clearly not the general rule under this structure.

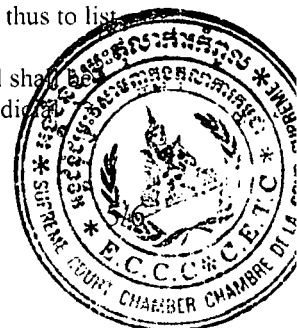
⁴ Rule 65(B) of the Rules of Procedure and Evidence of the ICTY provides, "Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person" (emphasis added). Rule 65(B) does not specify conditions for detention, although it specifies minimum requirements for release.

⁵ *E.g.*, Prosecutor v Gotovina et al, Case No IT-06-90-T, Decision on Motion for Provisional Release of Ivan Cermak, T. Ch. I, 14 March 2008, paras. 5 and 11.

⁶ ICCPR Article 9(1) provides, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law".

⁷ *See, e.g.*, Prosecutor v. Nikola Sainovic and Dragoljub Ojdanic, IT-99-37-AR65, Decision on Provisional Release, App. Ch., 30 October 2002, para. 6: "A Trial Chamber is not obliged to deal with all possible factors which a Trial Chamber can take into account when deciding whether it is satisfied that, if released, an accused will appear for trial. It must, however, render a reasoned opinion. This obliges it to indicate all those relevant factors which a reasonable Trial Chamber would have been expected to take into account before coming to a decision. In relation to the present application for provisional release, a reasonable Trial Chamber would have been expected to consider, and thus to list *inter alia*, the following factors..." (footnotes omitted).

⁸ ICCPR Article 9(3), second sentence, provides, "It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".



12. With respect to the concrete circumstances of the case at hand, the Accused was in lawful detention at the initial appearance before the Trial Chamber on 31 January 2011. This obliged the Trial Chamber to detain the Accused pursuant to Internal Rule 82(1) unless it decided to release the Accused pursuant to Internal Rule 82(2). The request of the Accused to the Trial Chamber to release him was based on the claim that the four month time limit in Internal Rule 68(2)-(3) elapsed on 16 January 2011 and that there was no legal basis for his detention thereafter (First ground of appeal). The Accused's argument that the conditions in Internal Rule 63(3)(b) are not met was made only peripherally⁹ to his main argument concerning Internal Rule 68(2)-(3).¹⁰ Under these circumstances, I am of the opinion that the Trial Chamber committed an error of law by ordering the continuation of the Accused's detention pursuant to Internal Rule 63(3)(b)(iii).¹¹ The Trial Chamber should have founded the basis for continuous detention solely on Internal Rule 82(1).
13. However, this error did not affect the Trial Chamber's disposition in the impugned decision that the Accused shall remain in detention until the Chamber's judgment. This error does not therefore constitute an error of law invalidating the Trial Chamber's Decision. The appeal on this ground is consequently rejected.
14. For these reasons, I respectfully dissent.

Phnom Penh, 23 June 2011



Judge Motoo NOGUCHI

⁹ The Accused did not raise Internal Rule 63(3) in his request for release to the Trial Chamber (Doc. E18). At the hearing before the Trial Chamber on 31 January 2011, the Co-Lawyers of the Accused made only brief oral submissions on Internal Rule 63(3) (see Transcript of Hearing, 31 January 2011, Doc. E1/1.1, p. 31, line 5 – p. 34, line 12; p. 41, line 3 – p. 42, line 25; and p. 79, line 20 – p. 83, line 2).

¹⁰ Appeal Submissions, para. 25: "The Judges [of the Trial Chamber] invited the parties to state their position re the conditions set out in Rule 63(3) of the Internal Rules 'during the hearing', even though the Defence application for release was not based on this legal premise."

¹¹ Trial Chamber's Decision, para. 40.

