



អង្គជំនុំជម្រះវិសាមញ្ញក្នុងតុលាការកម្ពុជា

Extraordinary Chambers in the Courts of Cambodia
Chambres Extraordinaires au sein des Tribunaux Cambodgiens

DCC/I/8

អង្គបុរេជំនុំជម្រះ

PRE-TRIAL CHAMBER
CHAMBRE PRELIMINAIRE

In the name of the Cambodian people and the United Nations and pursuant to the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea.

Criminal Case File N° 002/19-09-2007-ECCC/OCIJ (PTC06)

Before: Judge PRAK Kimsan, President
Judge Rowan DOWNING
Judge NEY Thol
Judge Katinka LAHUIS
Judge HUOT Vuthy

Date: 26 August 2008

**PUBLIC
DECISION ON NUON CHEA'S APPEAL AGAINST ORDER REFUSING
REQUEST FOR ANNULMENT**

Co-Prosecutors

CHEA Leang
Robert PETIT
YET Chakriya
William SMITH
TAN Senarong
Anees AHMED

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Charged Person

NUON Chea

Lawyers for the Civil Parties

HONG Kim Suon
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ឯកសារបានថតចម្លងត្រឹមត្រូវតាមច្បាប់ដើម
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Co-Lawyers for the Defence

SON Arun
Michiel PESTMAN
Victor KOPPE



THE PRE-TRIAL CHAMBER of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”) is seized of the Appeal against Order Refusing Request for Annulment (“Appeal”) of Nuon Chea (“the Charged Person”).

I. INTRODUCTION

1. On 21 December 2007, the Charged Person’s Co-Lawyers filed their Application to Seize the Pre-Trial Chamber with a Request to Declare Proceedings Null and Void (“Application for Annulment”) to the Co-Investigating Judges.
2. On 24 January 2008, the Co-Investigating Judges refused this request and issued an Order Refusing a Request for Annulment (“Order”) which was filed on 25 January 2008.
3. On 25 February 2008, the Co-Lawyers filed, in English, their pleadings in the Appeal. On 21 April 2008, after translation, the Khmer version of the appeal brief was notified.
4. On 24 April 2008, the Co-Prosecutors submitted their Response to Nuon Chea’s Appeal against Order Refusing Annulment of Investigative Actions (“Response”).
5. The Lawyers for the Civil Parties did not file a response.
6. On 24 April 2008, the Pre-Trial Chamber issued a Scheduling Order in which a hearing date was set for 20 May 2008. On 30 April 2008, the President of the Pre-Trial Chamber received a letter from Mr. Son Arun, Co-Lawyer of the Charged Person, informing him that international counsel would not be available to attend the hearing on that date. On the basis of the information contained in the letter, the Pre-Trial Chamber decided on 6 May 2008 to proceed on the basis of written submissions and to cancel the hearing.
7. In accordance with the Pre-Trial Chamber’s invitation to file a reply to the Response, on 8 May 2008 the Co-Lawyers indicated that they had no further submissions to make in reply.

II. ADMISSIBILITY OF THE APPEAL

8. The Co-Lawyers filed their appeal brief directly with the Pre-Trial Chamber on 25 February 2008, contrary to Rule 75 which provides that Notice of Appeal should be made to the Greffier



of the Co-Investigating Judges. However, since the appeal brief was accepted by the Greffier of the Pre-Trial Chamber at the time, the Pre-Trial Chamber finds that this technical defect should not result in the Appeal being declared inadmissible.

III. THE APPEAL

9. In their Appeal, the Co-Lawyers request the Pre-Trial Chamber to seize itself of the Application for Annulment, assess its merits *de novo*, declare the contested investigative actions null and void and consequently expunge the related statements from the record. The Co-Lawyers submit in this regard that the Application for Annulment is reasoned, facially valid and well-founded.¹
10. The Co-Lawyers furthermore request the Pre-Trial Chamber to give clarification on two procedural issues:
 - (i) The compliance with Cambodian law of the procedure currently in place for seeking annulment of investigative action in the Internal Rules;
 - (ii) Assuming the validity of the procedure in the Internal Rules, the proper role of the Co-Investigating Judges.
11. The Co-Prosecutors submit in their Response that these arguments as to procedural issues should be rejected.

1. THE ANNULMENT PROCEDURE AT THE ECCC

12. The Pre-Trial Chamber observes that the procedures applicable at the ECCC were agreed upon by the United Nations and the Royal Government of Cambodia on 6 June 2003. Article 12 of the Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea (“Agreement”) provides:

1. The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

¹ Appeal against Order Refusing Request for Annulment, 25 February 2008, D55/I/1, para. 3.



2. The Extraordinary Chambers shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights, to which Cambodia is a party. [...]
13. On 12 June 2007, the Plenary Session of national and international judicial officers adopted the Internal Rules of the ECCC. These Rules came into force on 20 June 2007. The Preamble reads:
- NOW THEREFORE** the ECCC have adopted the following Internal Rules, the purpose of which is to consolidate applicable Cambodian procedure for proceedings before the ECCC and, pursuant to Articles 20 new, 23 new, and 33 new of the ECCC Law and Article 12(1) of the Agreement, to adopt additional rules where these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application, or if there is a question regarding their consistency with international standards.
14. The Internal Rules therefore form a self-contained regime of procedural law related to the unique circumstances of the ECCC, made and agreed upon by the plenary of the ECCC. They do not stand in opposition to the Cambodian Criminal Procedure Code (“CPC”) but the focus of the ECCC differs substantially enough from the normal operation of Cambodian criminal courts to warrant a specialized system. Therefore, the Internal Rules constitute the primary instrument to which reference should be made in determining procedures before the ECCC where there is a difference between the procedures in the Internal Rules and the CPC.
15. Provisions of the CPC should only be applied where a question arises which is not addressed by the Internal Rules.
16. The Pre-Trial Chamber finds that the Internal Rules address sufficiently the annulment procedure and are therefore applicable. Parties considering that any part of the proceedings is null and void will have to submit a reasoned application to the Co-Investigating Judges first, requesting them to seize the Pre-Trial Chamber.
17. For these reasons, the Pre-Trial Chamber does not need to discuss further the submissions of the Co-Lawyers on this point.



2. THE ROLE OF THE CO-INVESTIGATING JUDGES IN THE ANNULMENT PROCEDURE

18. Internal Rule 76(2) provides:

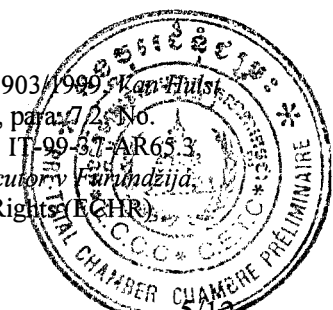
Where, at any time during the judicial investigation, the parties consider that any part of the proceedings is null and void, they may submit a reasoned application to the Co-Investigating Judges requesting them to seize the Chamber with view to annulment. The Co-Investigating Judges shall issue an order accepting or refusing the request as soon as possible and, in any case, before the Closing Order. Such orders shall be subject to appeal in accordance with these IRs.

19. The Co-Lawyers submit that the Co-Investigating Judges' role provided for in Internal Rule 76(2) is unclear in this respect. "[T]he criteria for acceptance or refusal by the OCIJ [Office of the Co-Investigating Judges] of such applications are nowhere contained in the Rules. [...] In this regard it appears that the OCIJ is meant to serve as a kind of "gate-keeper", whose role is to conduct a *prima facie* assessment, but not to reach the substance of facially valid applications".

20. In response, the Co-Prosecutors submit that "when the framers of the Rules assigned the function of *issuing an order* to a judicial authority like the CIJs [Co-Investigating Judges], it is expected that they envisaged that that judicial authority would do so by a judicial application of mind by giving reasons. [...] For an appellate authority (like the PTC [Pre-Trial Chamber]) to exercise its appellate review properly it is essential that the impugned order gives reasons – especially when it is an exercise of judicial discretion [...]. A combined reading of Rule 76(1) and (2) also leads to the conclusion that the framers expected the CIJs to give reasons while dealing with applications for annulment. The CIJs are required to make a reasoned application under Rule 76(1) when they, on their own motion, send a request for annulment. By analogy, an order referring a party's application to the PTC should also be reasoned to apprise the PTC of the assessment of the CIJs in respect of impugned investigative action".

21. The Pre-Trial Chamber finds that all decisions of judicial bodies are required to be reasoned as this is an international standard.² A Co-Investigating Judges' order on a request to seize the Pre-Trial Chamber must therefore state the reasons for accepting or rejecting such request.

² Human Rights Committee, General Observations Article 14, para. 49. See Communications No. 903/1999, *Kan Huis v. The Netherlands*, 15 November 2004, para. 6.4; No. 709/1996, *Bailey v. Jamaica*, 21 July 1999, para. 7.2; No. 663/1995, *Morrison v. Jamaica*, 3 November 1998, para. 8.5; *Prosecutor v. Milutinović*, Case No. IT-99-37-AR65-3 Decision Refusing Milutinovic Leave to Appeal, 3 July 2003, Appeals Chamber, para. 22; *Prosecutor v. Furundžija*, IT-95-17/1-A, Appeals Chamber, Judgement, 21 July 2000, para. 69; European Court of Human Rights (ECtHR), *Suominen v. Finland*, 1 July 2003, para. 36.



22. Internal Rule 48 provides the grounds for rejecting or accepting an application for annulment and reads:

Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application.

23. The Co-Investigating Judges have to examine a request on the following two grounds: i) the presence of a procedural defect; and ii) where there is such procedural defect, the defect must cause an infringement of the rights of the party making the application. The Pre-Trial Chamber has to review this examination in the appeal currently before it.

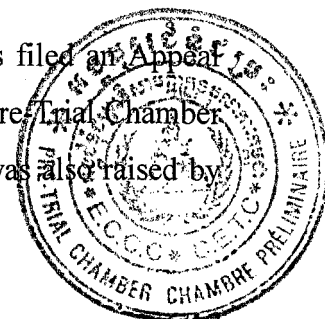
IV. THE APPLICATION FOR ANNULMENT

1. ADMISSIBILITY

24. Internal Rule 76(4) provides:

The Chamber may declare an application for annulment inadmissible where the application; does not set out sufficient reasons; relates to an order that is open to appeal; or is manifestly unfounded. The decision of the Chamber is not open to appeal. When the decision is made not to admit an application, the case file shall immediately be returned to the Co-Investigating Judges.

25. This means that the Pre-Trial Chamber may declare an application for annulment inadmissible where the application: i) does not set out sufficient reasons; ii) relates to an order that is open to appeal; or iii) is manifestly unfounded.
26. The Co-Lawyers' Application for Annulment raises questions in relation to the validity of the Charged Person's waiver of the right to a lawyer during his Initial Appearance and Adversarial Hearing and the alleged violation of certain rights during his Interview by the Co-Investigating Judges on 26 September 2007 ("Interview").
27. At an earlier stage of the proceedings, on 17 October 2007, the Co-Lawyers filed an Appeal against the Provisional Detention Order of the Co-Investigating Judges. The Pre-Trial Chamber notes that in this Appeal, the validity of the waiver of the right to a lawyer was also raised by the Co-Lawyers.



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28. In accordance with its previous findings in the Appeal against Provisional Detention Order of Duch³, in particular in the light of article 261 of the CPC⁴, the Pre-Trial Chamber examined the regularity of the proceedings prior to the order.⁵
29. In its decision on the Appeal against Provisional Detention Order in the case of the Charged Person of 20 March 2008, after an examination of the circumstances of the Initial Appearance and the Adversarial Hearing, the Pre-Trial Chamber concluded that “when taking the requirements of the waiver and the circumstances of this case into account, the Charged Person’s waiver was unequivocal and voluntary, and therefore valid”.⁶
30. Since the Co-Lawyers have presented no new arguments in this regard, the Pre-Trial Chamber considers the Application for Annulment, insofar as it concerns the Initial Appearance and Adversarial Hearing, has already been decided in the Appeal against Provisional Detention. The Application for Annulment, insofar as it covers these matters, is therefore inadmissible.
31. This leaves only the application related to the annulment of investigative or judicial action occurring during the course of the Interview of 26 September 2007 as admissible before this Chamber.

2. GROUNDS FOR ANNULMENT

32. The Pre-Trial Chamber will proceed to examine the grounds for annulment as provided for in the Internal Rules. The Pre-Trial Chamber has, in addition to the law cited below, taken into account the CPC, international jurisprudence and, in the light of the specifics of the annulment system, the French criminal procedure.
33. The grounds for annulment are provided for in Rule 48:

³ Decision on Appeal against Provisional Detention Order of Kaing Guek Eav alias “DUCH”, 3 December 2007, C5/45, paras. 7 and 8.

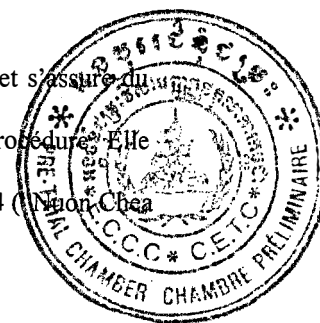
⁴ Article 261. (examen de la régularité de la procédure)

Chaque fois qu’elle est saisie, la chambre d’instruction examine la régularité de la procédure et s’assure du bon déroulement de celle-ci.

Elle peut, d’office, lorsqu’elle constate des causes de nullité, annuler tout ou partie de la procédure. Elle procède ainsi qu’il est dit à l’article 280 (effet de l’annulation) de ce code.

⁵ Decision on Appeal against Provisional Detention Order NUON Chea, 20 March 2008, C11/54 (Nuon Chea Provisional Detention Decision”), para. 9.

⁶ Nuon Chea Provisional Detention Decision, para. 39.



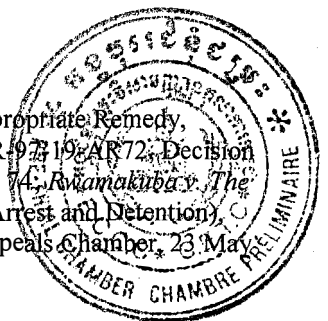
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Investigative or judicial action may be annulled for procedural defect only where the defect infringes the rights of the party making the application

34. Thus, as referred to in paragraph 23 above, there must be: i) the presence of a procedural defect; and ii) where there is such procedural defect, the defect must cause an infringement of the rights of the party making the application.
35. Internal Rule 76(2), as set out in paragraph 19 above, provides that an applicant for annulment is obliged to state which part of the proceedings is null and void and provide grounds for making such assertion. There is no provision in the Internal Rules stating that the Pre-Trial Chamber can declare investigative action null and void on its own initiative. The Pre-Trial Chamber is therefore bound by the application made by the party.
36. The Pre-Trial Chamber observes that the French version of Internal Rule 48, as well as the equivalent of this Rule in the Khmer, French and English versions of the CPC (article 252), do not refer to an infringement of rights, but rather to a harmed interest. Seeking guidance in the CPC, the Pre-Trial Chamber will interpret ‘an infringement of rights’ as ‘a harmed interest’.
37. For certain procedural defects, annulment is prescribed in the text of the relevant provisions. In this regard Internal Rule 53(3) provides that “the absence of the formalities provided in sub rule 1 shall render the submission void”. Internal Rule 67 on the Closing Order provides that “the Indictment shall be void for procedural defect unless it sets out the identity of the Accused, a description of the material facts and their legal characterization by the Co-Investigating Judges, including the relevant criminal provisions and the nature of the criminal responsibility”.
38. The Pre-Trial Chamber notes that the Appeals Chamber of the International Criminal Tribunal for Rwanda has consistently held that “there is a right in international law to an effective remedy for violations of the rights of an accused, as reflected in article 2(3)(a) ICCPR”.⁷
39. Article 2(3)(a) of the International Covenant on Civil and Political Rights (“ICCPR”) provides:

3. Each State Party to the present Covenant undertakes:

⁷ *Rwamakuba v. The Prosecutor*, ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, Appeals Chamber, 13 September 2007, para. 25. See also *Barayagwiza v. The Prosecutor*, ICTR-97-19-AR-72, Decision (Prosecutor’s Request for Review or Reconsideration), Appeals Chamber, 31 March 2000, para. 14. *Rwamakuba v. The Prosecutor*, ICTR-98-44-A, Decision (Appeal against Dismissal of Motion Concerning Illegal Arrest and Detention), Appeals Chamber, 11 June 2001; *Kajelijeli v. The Prosecutor*, ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005, para. 255.



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(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.

40. The Pre-Trial Chamber finds that a proven violation of a right of the Charged Person, recognized in the ICCPR, would qualify as a procedural defect and would harm the interests of a Charged Person. In such cases, the investigative or judicial action may be annulled.
41. Where a right was violated in obtaining evidence, such evidence, in national and international law, is not considered inadmissible automatically. “[R]ather [...] the manner and surrounding circumstances in which evidence is obtained, as well as its reliability and effect on the integrity of the proceedings, will determine its admissibility”.⁸ The Pre-Trial Chamber finds it has to take these factors into account when deciding on annulment as an effective remedy for a violation.
42. Finally, where a procedural defect would not be prescribed void in the text of the relevant provision, and where there has been no violation of a right recognized in the ICCPR, the party making the application will have to demonstrate that its interests were harmed by the procedural defect.

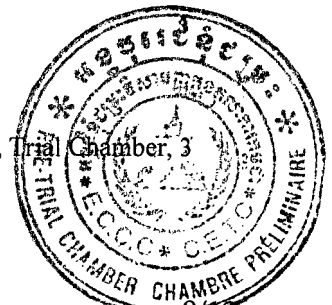
3. THE GROUNDS ON WHICH ANNULMENT IS REQUESTED

43. First, the Pre-Trial Chamber will examine the ground that the interview could not be properly prepared.
44. On 20 September 2007, the Co-Investigating Judges notified the Co-Prosecutors that they were organizing an interview of the Charged Person and summoned the national Co-Lawyer, Mr. SON Arun, to attend this interview. The Pre-Trial Chamber notes that the Charged Person, at that moment, was represented only by his national Co-Lawyer since a foreign lawyer was not selected by the Charged Person before 18 October 2007.
45. On 25 September 2007, the national Co-Lawyer requested postponement of the interview on the ground that the Defence had not had adequate time to prepare.⁹ This request was denied by the Co-Investigating Judges.¹⁰

⁸ *Prosecutor v. Brdjanin*, IT-99-36-T, Decision on the Defence “Objection to Intercept Evidence”, Trial Chamber, 3 October 2003, para. 55.

⁹ Application to Postpone Hearing, 25 September 2007, A37.

¹⁰ Written Record of Interview of Charged Person, 26 September 2007, D23, p. 2.



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46. The right to have adequate time for the preparation of a defence is provided for in Article 35 (new) of the ECCC Law, with reference to, and in accordance with, Article 14 of the ICCPR.
47. The Pre-Trial Chamber notes that this fundamental right is a 'fair trial' right, aimed at providing a Charged Person with adequate time to prepare for trial. The purpose of an interview is to put questions to the Charged Person about what he knows himself and not for the Charged Person to respond to the accusations against him. The Charged Person can use his right to remain silent and by using this avoid providing evidence against himself. The right to have adequate time to prepare for trial does therefore not apply to the preparation for an interview.
48. Internal Rule 58(1) provides:
- When a Charged Person has a lawyer, the Co-Investigating Judges shall summon the lawyer at least 5 (five) days before the interview takes place. During that period, the lawyer may consult the case file.
49. The Pre-Trial Chamber finds that this provision means that the Co-Lawyers have at least a period of five days to prepare for an interview. The Pre-Trial Chamber notes that the national Co-lawyer was summoned in accordance with this provision and therefore had the time provided in the Internal Rules to prepare for the interview.
50. The Pre-Trial Chamber finds no procedural defect in the Interview as to the preparation for it by the Defence.
51. Secondly, the Pre-Trial Chamber will examine whether the Charged Person, "by signalling that he was not in a position to participate effectively in the proceedings"¹¹, actually invoked his right to remain silent.
52. The Written Record of Interview of Charged Person states that the interview commenced as follows:

The Interview

Question-Answer

Son Arun, lawyer (SA): I would like to request the adjournment of this interview and I have lodged a request to this end. However, I will respect the decision of the Co-Investigating Judges on this matter.

¹¹ Application to Seize the Pre-Trial Chamber with a Request to Declare Proceedings Null and Void, D 55, para. 11.



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Co-Investigating Judges: The time period set out in Rule 58(1) of the Internal Rules has been observed; therefore today's interview shall continue.

Question by YBL and ML: Before the attack and fall of Phnom Penh on 17 April 1975, what were your political responsibilities? What were your roles and activities?

Answer: I would like to tell the judges that my health is not good and I could not sleep last night and my blood pressure went up [...]. Therefore my brain is not normal. So, [I] request the judges to consider this matter.

Q by ML: What were your political responsibilities, your role and activities after 17 April 1975?

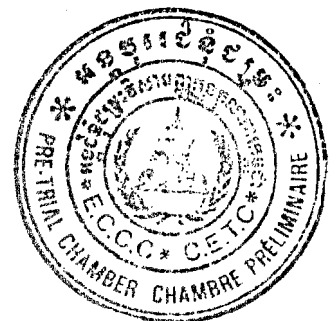
Answer: I was the President of the People's Assembly.

ML: From what date?

Answer: I do not remember the date. If the judges allow me to rest I can enlighten the court later".¹²

53. The Written Record of Interview thereafter describes a further discussion of the medical condition of the Charged Person.
54. It is clear from the Written Record of Interview that both the lawyer for the Charged Person and the Charged Person himself requested a postponement of the interview. Such a request cannot be seen as an attempt to invoke the right to remain silent.
55. The Pre-Trial Chamber, therefore, finds no procedural defect.

¹² Written Record of Interview of Charged Person, 26 September 2007, D23, pp. 2 and 3.



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THEREFORE, THE PRE-TRIAL CHAMBER HEREBY DECIDES UNANIMOUSLY:

- 1) The Appeal is admissible in its form;
- 2) The Application for Annulment is declared inadmissible as it concerns the Initial Appearance and Adversarial Hearing;
- 3) As far as the appeal is admissible, the Appeal is dismissed.

In accordance with Rule 77(13) of the Internal Rules, this decision is not subject to appeal. *mf*

Phnom Penh, 26 August 2008

Pre-Trial Chamber



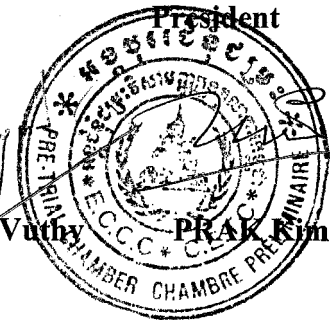

Rowan DOWNING NEY Thol



Katinka LAHUIS



HUOT Vuthy



President

PRAK Kimsan